Government Senators' Majority Report

Reference

1.1 The Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 was introduced into the House of Representatives on 13 February 2008. The Senate referred the provisions of the bill to the Senate Education, Employment and Workplace Relations Committee on 14 February 2008 for inquiry and report by 28 April 2008. The committee is reporting earlier.

1.2 The committee was asked to report with particular reference to:

(a) economic and social impacts from the abolition of individual statutory agreements;

(b) impact on employment;

(c) potential for a wages breakout and increased inflationary pressures;

(d) potential for increased industrial disputation;

(e) impact on sectors heavily reliant on individual statutory agreements; and

(f) impact on productivity.

Conduct of the inquiry

1.3 Notice of the inquiry was posted on the committee's website and advertised in *The Australian* newspaper on 20 February 2008, calling for submissions by Friday 29 February 2008. The committee also directly contacted a number of relevant organisations and individuals to notify them of the inquiry and to invite submissions. 55 submissions were received as listed in Appendix 1.

1.4 The committee conducted public hearings in Perth on 4 March 2008, Sydney on 6 March 2008, Melbourne on 7 March 2008, Brisbane on 10 March 2008 and Canberra on 11 March 2008. Witnesses who appeared before the committee are listed at Appendix 2.

1.5 Copies of the Hansard transcript from the hearings are tabled for the information of the Senate. They can be accessed on the internet at http://aph/gov.au/hansard.

Acknowledgments

1.6 The committee thanks those who assisted with the inquiry.

Purpose of the bill

1.7 The purpose of the bill is to give effect to a major election commitment of the Government to establish a new fair and flexible workplace relations system and to have sensible transitional arrangements to that system. The short title of the bill derives from the workplace relations policies released in 2007, *Forward with Fairness*[1] and *Forward with Fairness – Policy Implementation Plan*.[2]

1.8 The Workplace Relations Amendment Bill 2008 would amend the principal act, the *Workplace Relations Act 1996* (WRA), to make a number of changes to the framework for workplace agreements and to enable the process of award modernisation to commence. The bill begins the implementation process and is the first step of a larger industrial relations agenda which will involve further legislation.

1.9 This chapter will discuss the terms of reference, the specific provisions and issues raised during the committee's consideration of the bill.

The terms of reference

1.10 There is an implication in the terms of reference that the Opposition persists in regarding industrial relations on the basis of an understanding of economic growth which completely overlooks the relationship between productivity and fairness. It is possible to achieve both. An exploited workforce is not a productive workforce. Yet the insistence of the former government in regarding industrial relations solely for the purpose of driving down wages to increase productivity was ultimately damaging to economic progress. It also resulted in the most complex and highly regulated industrial system of any OECD country.

1.11 Government senators regard the bill as a measure which takes the regulatory burden from both employers and employees: a new set of agreement-making arrangements to drive productivity.

Economic and social effects arising from the abolition of individual statutory agreements – brief notes on the terms of reference

General observations

1.12 Formally registered individual statutory agreements currently apply to a small proportion of the workforce estimated at between three and seven per cent.[3] The

1 *Forward with Fairness - Labor's plan for fairer and more productive Australian workplaces,* Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, April 2007.

2 *Forward with Fairness - Policy Implementation Plan,* Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, August 2007.

3 Professor Alison Preston, *Submission 4*6, p. 23; and Sharan Burrow, ACTU, *Committee Hansard,* Melbourne, 7 March 2008, p. 41.

proportion of the workforce on AWAs is too small for their abolition to have the significant effect on the economy alleged by some. Professor Alison Preston expressed the view that the abolition of AWAs in the low paid sectors of the economy will most likely have a positive economic and social effect, particularly since many low-wage workers are women.[4]

1.13 As discussed later in the report, AWAs have contributed to an increased gender pay gap which their demise should start to address.

1.14 Another positive consequence of the removal of AWAs was highlighted by the Australian Workers Union, which noted:

> On balance, AWAs are less likely than collectively negotiated agreements to adequately address issues associated with occupational health and safety, consultative mechanisms and employee training, with up to 25 per cent of sampled AWAs only providing the most cursory references to these important industrial issues.[5]

1.15 Numerous personal submissions made to the committee pointed to unfavourable working hours and loss of control of working hours resulting in disadvantage to family and community life. Studies have also found health complaints as a result of changes in workplace arrangements such as depression, emotional stress and powerlessness.[6]

1.16 The committee believes that the abolition of AWAs will go a long way to addressing these social effects for those vulnerable employees who have lost pay and conditions under the AWAs imposed upon them.

Effect on employment

1.17 Witnesses saw no significant effect on employment growth resulting from the abolition of AWAs due to strong employment growth over the last fifteen years. [7] Employers admitted that they were facing difficulties in recruiting labour.

1.18 The Australian Workers Union noted that:

> …the oft-repeated catch cry of the former federal government was that the WRA scheme, particularly the use of AWAs delivered higher real wages for employees subject to the operation of those agreements. …the overwhelming majority of credible academic analysis of AWAs demonstrates the minimalistic and cost-reduction nature of those arrangements, as opposed to improving productivity.[8]

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4 Professor Alison Preston, *Submission 4*6, p. 23.

5 The Australian Workers Union, *Submission, 42*, p. 6.

6 DEEWR, *Submission 27*, p. 17.

7 Professor Alison Preston, *Submission 4*6, p. 23.

8 The Australian Workers Union, *Submission 42*, p. 7.

Potential for a wages breakout and increased inflationary pressures

1.19 This was not mentioned as a problem by employers. Labour shortages are currently driving the market, rather than industrial pressures. The Government's focus on collective enterprise level bargaining will act as an incentive for fair and productive outcomes at the enterprise and to limit inflationary wage pressures.

Potential for increased industrial dispute

1.20 The Opposition apparently believes that industrial unrest is a potential problem arising from the abolition of AWAs, occurring presumably with the resumption of collective bargaining. Following some prodding from Opposition questioning, notably in Perth, there was some indication of a tentative response to this possibility from business interests. However no witnesses were prepared to regard increased industrial disputation as more than an outside possibility. None of the industry peak bodies or academics mentioned this possibility.

1.21 The committee notes the ABS figures released on 14 March 2008 which indicate that the number of industrial disputes in the year to December 2007 dropped by 67 to 135; from 202 in the year to December 2006. The Minister for Employment and Workplace Relation's media release indicates that the greatest decline in days lost due to industrial action remains the period after the Labor government de-centralised the labour market in 1993. [9]

1.22 The Australian Workers Union notes that the proposed changes 'do not fundamentally alter the core regulatory mechanisms that presently exist with respect to agreement making.' The committee majority agrees with the AWU observation that industrial parties will continue to be prevented from undertaking unprotected industrial action; an enforcement regime will still exist with regard to unprotected industrial action; and formal applications and processes will still be required to be complied with prior to the institution of protected industrial action.[10]

Impact on sectors heavily reliant on individual statutory agreements

1.23 The committee spoke with several sectors heavily reliant on individual statutory agreements and their evidence to the committee emphasised the workability of the transitional arrangements. Given this evidence the committee majority notes that industry appears to be coping well with the preparation for moving to the new system.

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9 The Hon Julia Gillard MP, Media Release 'Labour Force February 2008; Strong Labour Market Continues', 14 March 2008.

10 The Australian Workers Union, *Submission 42*, p. 8.

Impact on productivity

1.24 As noted earlier, the available evidence does not indicate that the use of AWAs has led to productivity gains. The Coalition has argued for years that AWAs and its Work Choices legislation are justified on the basis of a contribution to gains in productivity. However, the nexus between the Coalition's workplace changes and improvements in productivity has proved elusive as shown below in 1.28.

1.25 For instance, the Economics Committee's (Coalition Senators) report on the Workplace Relations and Other Legislation Amendment Bill 1996, argued the case for the changes ushered in by that bill, partly by reference to its likely economic effects. It quoted with approval the Business Council of Australia's concerns about improving competitiveness and productivity.[11]

1.26 The need for improved productivity was also used by the former Coalition Government to justify the 2005 Work Choices legislation. It was said that the economy had to be prepared for future challenges. It was said that there was need for a leap in productivity. The report by the Coalition senators noted 'the clear correlation between productivity growth and the use of workplace agreements', as confirmed by the Productivity Commission. In pursuit of this, it was proposed to do away with what the Coalition senators described as 'complex, legalistic and adversarial processes of reaching agreements.' [12] This referred to the 'difficulties' posed by the no-disadvantage test (NDT). So the NDT was done away with. It proved to be the step too far.

1.27 In evidence to this inquiry the Department of Education, Employment and Workplace Relations (DEEWR) has examined the effects of the Workplace Relations Act on productivity:

> …AWAs have been in the Australian workplace relations system since 1997, yet productivity growth has been disappointing, with growth over the last completed productivity cycle below the long term trend. In addition, productivity growth did not increase with Work Choices changes.[13]

1.28 Specifically, DEEWR notes that the most reliable estimates of productivity growth are those based on productivity growth cycles.

> …during the most recent growth cycle of 1998-99 to 2003-04, annual growth in labour productivity averaged 2.1 per cent. This is 1.2 percentage points below the record average growth of 3.3 per cent recorded over 1993-94 to 1998-99, and 0.3 percentage points below the long term average growth rate of 2.4 per cent. While there is no completed productivity cycle since 2003-04, average annual growth since June 2004 has been just 0.7 per

11 Senate Economic References committee, *Report on Consideration of the Workplace Relations and other Legislation Amendment Bill 1996*, August 1996, p. 296.

12 Senate EWRE Legislation Committee, *Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005*, November 2005, pp. 6-7.

13 DEEWR, *Submission 27*, p. 18.

cent, with growth of 0.5 per cent over the year to the September quarter 2007. [14]

1.29 The overwhelming view of the evidence provided to the committee on the bill supported its workability and balanced approach to transitional arrangements. There were a number of issues raised of a technical nature or where there may be unintended consequences. Some of these are highlighted below and further developed later in the report for the consideration of the government, particularly in developing the substantive legislation later in the year.

Provisions of the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

1.30 The key provisions in the bill will:

- Prevent the making of new Australian Workplace Agreements (AWAs);
- Create new Individual Transitional Employment Agreement (ITEAs) to be available only for limited use during the transitional period until 31 December 2009;
- Put in place a new no-disadvantage test for future workplace agreements to provide better protection for employees; and
- Enable the Australian Industrial Relations Commission (AIRC) to undertake the process of modernising industrial awards.[15]

Terminating Australian Workplace Agreements

1.31 Item 1 of the bill repeals and replaces current section 326 which provides for the making of Australian Workplace Agreements (AWAs). The proposed legislation provides that, from its commencement date, Australian Workplace Agreements cannot be made.[16]

The comprehensive failure of Australian Workplace Agreements

1.32 The committee majority notes the strong reluctance of the Opposition to accept the inevitable demise of AWAs. This is a consequence of them having invested so much political energy (and so many millions of taxpayer dollars) over 10 years into building support for a form of workplace agreement that has failed to achieve widespread acceptance while allowing for hard-working Australians to be stripped of the safety-net.

1.33 Whether measured in terms of fairness, simplicity or economic benefit, AWAs have been a failure on all counts.

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14 ibid.

15 Explanatory Memorandum, p. 6.

16 Ibid., p. 1.

Limited coverage of AWAs

1.34 It is important to note that AWAs simply never gained as much acceptance as the Coalition hoped. The latest Australian Bureau of Statistics (ABS) data, May 2006, shows that, at the time, 3.1 per cent of employees were covered by registered individual agreements, of which the vast majority were AWAs. This represents about 258 000 employees. This was a small increase from the 2.4 per cent recorded in 2004.[17]

1.35 This ABS data shows a far lower level of AWA coverage than claimed at various times by the Coalition and the Employment Advocate. This committee was advised by the Employment Advocate at the budget estimates in May 2006 that, as at March 2006, it was estimated by the Employment Advocate that over 350 000 AWAs were in operation, double the figure estimated by the ABS.

1.36 Professor Peetz notes that it is impossible to explain this discrepancy as being the result of an ABS sampling error. His submission makes the observation that:

> The reason for the over-estimation is that the methodology of the OEA/Workplace Authority nonsensically assumed that every AWA signed in the preceding three years is still in force – that is, no employee who has signed an AWA in the past three years has resigned, or been promoted, dismissed or replaced. This problem increases, the higher the rate of labour turnover in an industry. …The more people change jobs in an industry, the more double counting of AWAs occurs. Nearly 60 per cent of the variance in the gap between OEA/Workplace Authority and ABS estimates of AWA coverage can be explained simply by variations in the level of labour turnover.
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> The inadequacies of the former government's -methodology, based on administrative data, increased over time, with the extent of over-estimation increasing from 60 percent in 2004 to 109 per cent in 2006.[18]

1.37 Peetz estimates that, by the end of September 2007, there would have been between 425 000 and 457 000 individual agreements in force, around 84 per cent of those being Work Choices AWAs. This gives an AWA coverage of between 4.7 and 5.0 per cent, well short of the 840 000 claimed by the Workplace Authority and the 'almost a million today' claimed several months earlier by the then Prime Minister.[19]

1.38 The former Government's aims for workplace relations appeared to include a goal of obtaining AWA coverage of 20 per cent as evidenced by its request to economic consultant Econtech to model this scenario on its behalf.[20]

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17 *Submission 51*, Professor David Peetz, p. 10.

18 ibid., p. 19.

19 ibid., p. 20.

20 Julia Gillard MP, Deputy Labor Leader, 'Howard Government Secret Industrial Relations Plans Revealed', 12 June 2007.

1.39 However, enterprise bargaining continues in most sectors of the workforce, either through union or non-union negotiation and this clearly demonstrates that many employers were unconvinced of the need to experiment with AWAs to enhance the productivity of their business.

Documenting Work Choices disadvantage

1.40 The committee received a great many brief submissions from those with direct and indirect experience of injustice at the hands of employers exercising arbitrary and capricious powers over employees in regard to AWAs. It appeared not to concern the Coalition government that AWAs were being used to legitimise the practice of employers 'stripping' entitlements from workers.

1.41 These included: AWAs being offered on a take it or leave it basis; reduced pay and conditions; inequality in bargaining power; financial loss; no control over work hours; and feelings of insecurity and helplessness. Just a few of these stories are reproduced below:

> *Personal story 1* - I attended an employment interview with a prospective employer; I spent about 45 minutes talking with him about the workplace and the details of the job requirements. When the topic of conditions and wages was broached the employer presented me with the site AWA; it was explained to me that where the shift roster crosses into saturday and sunday (2 weekends each month) all of the hours are paid at time and a half for the first 3 hours and double time for all other hours. The only paid public holiday was Christmas day if other public holidays were taken then by choice I would be opting for an unpaid day off. As well the AWA had provision for 5 sick days a year and not the standard 10 as per the previous federal award arrangements. I was given a copy of the AWA to take with me and when I was sure I wanted to take up the position I should telephone and give that advice.
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> When I went home I sat down to read the AWA to find out what the offered conditions were this took some time maybe an hour and half. In the document there was no provision for penalty rates in the weekend cross over, the only guaranteed pay rate was $24.00 an hour and the 60hour week discussed was during the interview was not mentioned and a minimum 38 hours a week was guaranteed, unpaid public holidays were mentioned, no guaranteed pay rises reviews/rises are at the discretion of the manager who conducted the interview on a yearly basis and I was required to sign the agreement to run for a 3 year period even when there has been enormous public attention about the negative aspects of AWAs and AWAs becoming unlawful workplace contracts. I did not take this position because the conditions in the AWAs offered to me seemed to put me in a position where I would be easily exploited. [21]
>
> *Personal story 2* - I watched my 17 year old son get pushed into one of these AWAs in WA. He had no rights, no input and no choices over his pay

21 Jeffrey Louie QLD, tabled documents.

> and conditions. The employers constantly shifted the goal posts, cut his shifts when and where they wanted, altered his terms and payrates and when he questioned them. They told him he was a troublemaker and under Work Choices they could sack him without a reason. He came home in tears on more than one occasion. He is a good man and tries hard. Eventually they stopped giving him any work at all and provided no reason for it. Under that legislation they did not have to. [22]
>
> *Personal story 3* - My daughter has just entered the workforce and has no experience or confidence in negotiating her employment conditions. If she is compelled to enter an individual AWA she is in a no win situation as the employer simply says sign or no job. My daughter is representative of thousands of kids entering the work force unaware of their rights and without the ability to negotiate a fair outcome. [23]
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> *Personal story 4* – In line with the Work Choices legislation, the new contract (AWA) removed our entitlement to 'site allowance' for construction sites leaving us $120/week poorer. In addition to this, the new contracts were only 5 pages long including the title page. They had no mention of overtime rates, changed our working hours from 8am-5pm to 24/7 and removing shift allowances, redundancy benefits and tool allowance – with no additional pay – and worse still told no individual negotiation with the contract as they were to be standard agreements for all employees. [24]

The case of Qantas valet parking

1.42 The committee heard evidence in Melbourne from the Australian Services Union of a current dispute between Equity Valet Parking, a company recently contracted by Qantas, and long term employees taken over by Valet from the original employer, Hertz. Former Hertz employees were covered by a collective agreement underpinned by a Victorian award. It is alleged that in this instance there was no transmission of business in the change of employers. The offer of AWAs by Equity resulted in the loss of accumulated entitlements and conditions of service.[25] The committee majority notes that this is a recent and major example of the abuse inflicted on workers by the use of AWAs. The fact that this can be done legally brings discredit on the law. Legal or not, the action was unethical. The action was taken in the week that this bill was introduced into Parliament. Such actions justify the need for the bill to be passed expeditiously. Any delaying tactics planned by the Opposition will only result in more workers like the Qantas valet staff being subjected to similar treatment.

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22 Mark Raymond Hawken, Ferndale, WA, tabled documents.

23 Jeremy Evans, NSW, tabled documents.

24 James Jarvis, QLD, tabled documents.

25 Australian Services Union, *Committee Hansard*, 7 March 2008, pp. 28-29.

AWA research

1.43 A number of studies have now looked at the effects of AWAs and Work Choices and it is beyond doubt that the operation of AWAs has resulted in many employees losing protected award conditions and being significantly worse off than they would have been had they been employed on a collective agreement.

1.44 It is noteworthy that any detailed study of AWA processes, application, and outcomes across industry sectors, and their effects on the employees with AWAs has been based on painstaking research of data gathered, often inadequately, by the ABS, supplemented by university survey research. The Employment Advocate refused, after a time, to release data held by his office as it may be 'misinterpreted'. What we know now from data since released is that it could not be used to justify Coalition claims that workers on AWAs were better off than those on collective agreements. Nor, on the basis of economic research, is there any conclusive empirical evidence to show that productivity rises could be attributed to putting workers on to AWAs.

1.45 The findings of the review conducted by the Workplace Authority of 1 748 AWAs lodged between April and October 2006 included that:

- 89 per cent removed at least one so-called protected award condition;
- 68 per cent removed annual leave loadings;
- 65 percent removed penalty rates;
- 31 per cent removed rest breaks; and
- 61 per cent removed days to be substituted for public holidays.[26]

1.46 In Table 1, Professor David Peetz notes that the rate at which conditions were being removed was substantially higher under Work Choices AWAs than under pre-Work Choices AWAs and that overtime and penalty rates were particular targets for removal.[27]

26 Media Release 'AWA data the Liberals Claimed Never Existed', The Hon Julia Gillard MP, Minister for Employment and Workplace Relations, p. 1.

27 Professor David Peetz, *Submission 51*, p. 59.

Table 1: Reductions or losses of protected award conditions under AWAs, 2002-2003 and April 2006 (%)

	2002-03	April 2006				2002-03 to April 2006
	Absorbed (abolished)	'excluded' (abolished)	'modified' (mostly reduced but not abolished)[i]	total 'modified',[i] or abolished	Un-changed	increase in rate of abolition
overtime pay	25	51	31	82	18	+104%
penalty rates	54	63	na	na	na	+ 17%
annual leave loading	41	64	na	na	na	+ 56%
shiftwork loading	18	52	na	na	na	+189%
rest breaks	na	40	29	69	31	Na
public holiday payments	na	46	27	73	27	Na
days substituted for public holidays	na	44	na	na	na	Na
declared public holidays	na	36	na	na	na	Na
incentive based payments/bonuses	na	46	na	na	na	Na
allowances (expenses; skills; disabilities)	41	48	na	na	na	+ 17%

na = not available. Sources : calculated from Department of Employment and Workplace Relations and Office of the Employment Advocate, 2004; McIlwain, May 2006; Office of the Employment Advocate, 2006 [i] It is possible that some of the provisions that 'modify' 'protected' award conditions represent an improvement on the award standard. However analysis of EGAs (see section 7) shows that this is rarely the case, and that most or all 'modifications' to 'protected' award conditions represent a lessening of the award standard.[28]

1.47 DEEWR provided further evidence at Table 2 regarding the percentage of AWAs that did not contain a provision for each protected award condition.[29]

28 Professor Peetz, *Submission 51*, p.59.

29 DEEWR, *Submission 27*, p. 14.

Table 2: Percentage of AWAs without protected award conditions – 2004 to 30 April 2007, per cent

Protected award condition	Percentage of AWAs that exclude the condition
Incentive based payments and bonuses	79
Days to be substituted for Public Holidays or a procedure for such substitution	68
Shift work loading	52
Public holiday work loading	50
Annual leave loading	47
Overtime penalty rates	44
Declared public holidays	44
Rest breaks	23

Source: DEEWR AWA Workplace Agreements Database (AWAD) – The AWAD was established in 2006. It is based on representative samples of AWAs which were received from the Workplace Authority for coding into the AWAD under delegation from the Workplace Authority Director. The AWAD currently holds data on approximately 9,000 AWAs, of which 2,500 are pre Work Choices AWAs covering the period 2004, 2005 and the March quarter 2006 and 6,500 are Work Choices AWAs up to April 2007. [30]

1.48 Research by Preston and Peetz found that AWAs paid significantly less than collective agreements. For men the earning shortfall was equal to 7.7 percent in 2006 and for women the shortfall was 11.3 per cent. They found that this contrast was even greater when median earnings were used as a basis for comparison. Their conclusions were that in high paying sectors such as mining, AWAs have been used as part of a union avoidance strategy and in low paying sectors they have been used as part of a cost minimisation strategy. [31]

30 DEEWR, *Submission 27*, p. 14.

31 Preston and Peetz, 'AWAs, Collective Agreements and Earnings: Beneath and Aggregate Data', Report to the Department of Innovation, Industry and Regional Development Victoria, March 2007, p. iv.

AWAs in Western Australia

1.49 The committee noted an almost alarmist reaction from some quarters in Western Australia at the prospect of the demise of AWAs in that state. The committee went to Perth to find out more about this, but was under-whelmed by the import of what it heard. There is no apparent need for Western Australia to have any peculiar industrial arrangements as distinct from the rest of the country, as a consequence of the economic activity that is carried out there.

1.50 Evidence given to the committee by affiliates of the Western Australian Chamber of Commerce indicates that they are bracing themselves for the transition to collective agreements, and away from the AWAs which have predominated in the mining and associated projects operating in that state. Their apprehensions arise from relative unfamiliarity with this process, and distant recollections of labour disputes. Labor senators noted that these fears continue to be stoked by Coalition members asking leading questions about the prospect of a return to those days.[32]

1.51 Contrary to the view that AWAs in the mining sector have led to significant wage improvements, Peetz and Preston found that non-managerial mining employees on AWAs earned 3.6 per cent less than non-managerial mining employees on collective agreements. By disaggregating the mining data they found that:

> Workers in metal ore mining, mainly non-union and dominated by individual contracts, work five per cent more hours but earn 21 per cent less per week than workers in largely unionised coal mining, where collective agreements dominate.[33]

1.52 The committee notes studies by Professor Peetz explaining the differences between the mining industries in Western Australia and Queensland, both of which are significant wealth producers:

> The reason for the difference between the patterns in Western Australia and Queensland is simple: in Western Australia the mining sector is dominated by metalliferous mining, in which union density in trend terms is a mere 12 per cent and collective agreements cover few employees; whereas in Queensland, the mining sector is dominated by coal, in which trend union density is 60 per cent and collective agreements cover many employees. Thus in Western Australia the mining boom is raising the wages of workers on registered individual contracts but not collective agreements, whereas in Queensland it is boosting the wages of both. As weekly earnings in mining are over double the average of other industries, this clearly has a distorting effect on the figures.[34]

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32 Chamber of Commerce and Industry WA. *Committee Hansard*, 4 March 2008, pp. 9-11

33 Professor David Peetz and Professor Alison Preston, 'AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data 'A report to the Victorian Department of Innovation, Industry and Regional Development, March 2007, p. 22.

34 *Submission 51*, op.cit., p. 24

1.53 Workers in the Pilbara and elsewhere in Western Australia may well be content with their current AWAs, which in view of labour shortages, are generous enough, but the argument that individual or pattern AWAs deliver more benefits is contestable. And it should also to be noted that the high take-up of AWAs in Western Australia results in another anomaly: the corresponding disadvantage suffered by women in the workforce of that state, as compared to the rest of the country.

AWA contribution to the gender pay gap

1.54 The committee received strong representation on the issue of the regressive influence of AWAs on female wages and conditions. Research undertaken by Preston and Peetz in the area of gender pay gaps shows that women are worse off under AWAs no matter what their employment status.

> …women's hourly pay on registered individual contracts is 9 per cent lower for permanent full timers, and 15 per cent lower on registered individual contracts for permanent part-timers. Women on registered individual contracts earn less that women on collective agreements in every state, by margins ranging from 8 per cent to 30 per cent.[35]

1.55 Peetz notes that data reveals average hourly earnings of female casual workers on registered individuals contracts averaged across industries were 7.5 per cent lower than those of female casual workers on registered collective agreements.[36]

1.56 Other groups where research has shown severe disparities between those on AWAs and CA are female labourers and related workers:

> In 2006 those on AWAs were paid an average of 26 per cent less than similar women on collective agreements. Indeed, in 2006 female labourers and related workers on AWAs were receiving 20 per cent less even then the award- reliant average for that occupation.[37]

1.57 As Peetz notes, these figures reinforce that individual bargaining through AWAs is especially detrimental for women, particularly when they lack labour market power. [38]

Individual agreements are inherently inefficient

1.58 Professor Andrew Stewart also drew the committee's attention to the inefficiency of large numbers of individual agreements. He noted that on a practical level, the AWA system '…could only really work while they were few in number. As recent experience with the fairness test as shown, the need to review substantial numbers of individual instruments places intolerable strain on government

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35 Professor David Peetz, *Submission 51*, pp. 28-29.

36 Ibid., p. 34.

37 Ibid., p. 40.

38 Professor David Peetz, *Submission 51*, p. 40.

resources'.[39] He commented that 'the removal of a statutory system of individual agreements will improve both the fairness and efficiency of workplace regulation'.[40]

1.59 The committee majority sees no reason to alter the conclusion it came to in its report on Work Choices.

1.60 The Work Choices bill, passed at the end of 2005, marked a legislative low point in the regulation of employment. It reinforced existing provisions of the Workplace Relations Act so as to deny employees the right to collective bargaining; failed to provide for a reasonable set of minimum wages and conditions; denied access to fair and effective dispute resolution; and failed to promote safe and congenial workplaces. As the bill also provided for the dismantling of state industrial systems, the intended effect was to be the comprehensive dismantling of laws protecting the working conditions of the most vulnerable sectors of the workforce; those employed under state awards, including outworkers in the textile, clothing and footwear industries and those employed in hospitality, small retail and services businesses. Much of this evidence was included in the Opposition report on the Workplace Relations Amendment (Work Choices) Bill 2005.[41]

1.61 Time and time again the public was told by the previous government that Work Choices was going to provide an opportunity for individual workers to negotiate their own employment conditions and pay with their employer. The committee noted the evidence provided to the committee by employers that genuine bargaining was the exception rather than the rule. This was known soon after the introduction of AWAs, but as recently as November 2005, the Coalition government party senators were saying:

> The ability for employees to reach a better balance between work and family life is another aim of the reforms. Current workplace arrangements too often make little or no provision for the individual needs of employees and workplace flexibility is inhibited by lack of appropriate legal and industrial mechanisms to allow workers to negotiate hours of work around their family responsibilities and other needs. [42]

1.62 The committee concluded that AWAs in the main have been formulated by the employer and then simply handed out to each employee with little or no bargaining taking place. Those most adversely disadvantaged by AWAs have been those with low bargaining power arising from low skill levels who have had remuneration and conditions cut by their employers. The committee believes the restoration of greater bargaining power and protections to these employees is vital to achieve a fairer and more balanced industrial relations system.

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39 Professor Andrew Stewart, *Submission 16*, p. 1.

40 Ibid.

41 EWRE Committee Report, November 2005, p. 47 *passim*

42 EWRE Committee Report, November 2005, pp 8-9.

Individual Transitional Employment Agreements

1.63 The proposed new section 326 introduces a new form of individual workplace agreement to be known as an Individual Transitional Employment Agreement (ITEA). This special transitional instrument will be created to provide transitional arrangements for employers that on 1 December 2007 employed at least one employee under an individual statutory agreement. ITEAs have a nominal expiry date of no later than 31 December 2009.[43]

1.64 ITEAs will be subject to a new no-disadvantage test under new Part 5A which is discussed in the paragraphs below. This means ITEAs will not be permitted to disadvantage an employee against an applicable collective agreement or award in the workplace and the existing legislated standards.[44]

New No-Disadvantage Test

1.65 Item 2 would repeal existing Division 5A of Part 8 (the fairness test) and replace it with a new Division 5A (the new no-disadvantage test) for future agreements. It will be administered by the Workplace Authority Director. To pass this test, workplace agreements, whether individual or collective, must not reduce an employee's overall terms and conditions when benchmarked against a reference instrument such as a designated award. An agreement will pass the NDT where there is no reference instrument for any of the employees, although all agreements must meet the Australian Fair Pay and Conditions Standard. [45]

1.66 Proposed subsections 346C(1) and (2) would ensure the application of the no-disadvantage test to workplace arrangements irrespective of whether they:

- Are yet to operate (in the case of ITEAs for existing employees, employee collective agreements or union collective agreements, which commence after they have been approved by the Workplace Authority Director); or
- Are in operation (in the case of ITEAs for new employees, employer greenfield agreements or union greenfield agreements, which commence when they are lodged with the Workplace Authority Director); or
- Have ceased operation (for example, because they have been terminated under Division 9 of Part 8).[46]

1.67 Evidence to the committee overwhelmingly supported this provision as a fair and reasonable step.

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43 Second Reading Speech, Hon Julia Gillard MP, Hansard (Reps), 13 February 2008, p 117..

44 Explanatory Memorandum, p. 6.

45 Professor Alison Preston, *Submission 4*6, p. 8.

46 Explanatory Memorandum, p. 11.

Modernising industrial awards

1.68 The policy directions of the Workplace Relations Act anticipated the fading away of awards. They would be allowed to expire quietly as they became out of date and employees were shifted on to instruments that bore no relationship with the award and were prevented from returning to the safety-net provided by the award if that instrument was terminated. The architects of AWAs were not anxious to preserve anything that resembled a safety-net for wages or conditions. The Government is committed to ensuring that there is a simple, fair, flexible and relevant safety-net in place for all employees and which cannot be stripped away.

1.69 The bill provides the means for an award modernisation process to commence.[47] Proposed Part 10A would set out the Australian Industrial Relations Commission's (AIRC) award modernisation function and specify certain requirements for modern awards.[48] New section 576A would set out the objects of proposed Part 10A which make clear that modern awards, in conjunction with the proposed National Employment Standards are to provide a fair minimum safety net for employees.[49]

1.70 In addition to the amendments to the Workplace Relations Act to facilitate award modernisation, the Explanatory Memorandum to the bill contains the proposed award modernisation request (set out at pages 76-81) that the Minister for Employment and Workplace Relations will make to the President of the AIRC, upon passage of the bill, to request the AIRC create new modern awards during the transition period.[50]

1.71 As part of the award modernisation process the Commission will develop a model flexibility clause for inclusion in all awards to enable employers and employees to agree on arrangements to meet the genuine individual needs of the employer and employee so long as the clause cannot be used to disadvantage the employee.[51] DEEWR notes that modern awards will allow for flexibility to address matters such as rostering, hours of work and rates of pay on an industry specific basis.[52]

Issues arising from the committee's consideration of the bill

1.72 While expressing their support, a few organisations have highlighted some areas which they believe require further attention or where there may be unintended consequences. These are raised below for the consideration of the government, particularly during the development of the substantive bill.

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47 Second Reading Speech, Hon Julia Gillard MP, Hansard (Reps), 13 February 2008, p 117.

48 Explanatory Memorandum, p. 63.

49 Ibid.

50 Second Reading Speech, Hon Julia Gillard MP, Hansard (Reps), 13 February 2008, p 117.

51 Explanatory Memorandum, p. 78.

52 DEEWR, *Submission 27*, p. 10.

Chance to simplify labour laws

1.73 Professor Andrew Stewart described this bill as a chance for the government to simplify complicated and difficult to understand provisions. He urged the government to take the opportunity to draft a new statute that could genuinely allow workers and employers to understand their rights and obligations.[53]

> I am particularly concerned about the introduction of yet more transitional provisions. These make life very difficult for those who have previously entered into workplace agreements under the WR Act. It is already necessary for parties with "pre-reform" (ie, pre-Work Choices) agreements to have to consult and apply a version of the WR Act that does not exist in any official form – that is, the Act as it stood on 26 March 2006, but with certain amendments or notional changes specified by Schedule 7 to the current Act. The Bill now proposes something similar for those with "pre-transition" agreements. The difficulty of complying with rules that have to be pieced together from amending statutes and multiple versions of the same Act should not be underestimated. [54]

1.74 However, when asked whether this bill could be made more user friendly, Professor Stewart explained that the WRA is very complicated legislation, as reflected in its drafting. Simplification was possible over time, but it could be done.

1.75 The committee supports the principle of ensuring that future workplace relations legislation is simpler and easier for both employers and employees to understand. In this respect, the committee notes and welcomes the simpler drafting style of the proposed National Employment Standards, which were released as an exposure draft on 14 February 2008 and are to be included in the Government's substantive workplace relations legislation.

How long will AWAs and ITEAs be able to continue?

1.76 The second reading speech notes that AWAs made prior to the implementation date of the proposed legislation will continue until their nominal expiry date and beyond until the parties to the AWA make a decision about how to best manage their employment arrangement. [55]

1.77 The media has similarly reported that AWAs and ITEAs could continue indefinitely unless the employee or employer terminates them after the nominal expiry date.[56] Ai Group told the committee in Sydney:

> …one very important element of the legislation is that existing agreements remain in place, and both AWAs and ITEAs continue independently after

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53 Professor Andrew Stewart, *Submission 16*, p. 3.

54 Ibid., p. 2.

55 Second Reading Speech, Hon Julia Gillard MP, Hansard (Reps), 13 February 2008, p 117.

56 Misha Schubert, *The Age*, 'AWAs not going away despite poll', 5 March 2008, p. 7.

> expiry, which we believe to be a very important part of the transitional arrangements, and one of the key reasons why we believe this is workable. It is not giving people the ability to opt out of existing agreements, and if people are happy with them they can continue on independently after expiry.[57]

1.78 The ACTU expressed concern that the bill does not immediately abolish statutory individual agreements and suggested the bill should provide a mechanism for existing AWAs to be terminated prior to their nominal expiry date where the AWA is disadvantageous to the employee.[58]

1.79 In response to this issue, DEEWR advised the committee that AWAs and ITEAs would continue to operate until terminated or replaced and that either party can terminate an individual agreement following its nominal expiry date with 90 days notice. DEEWR further advised that:

> The point is that eventually, and not too far into the future, these individual statutory agreements will be phased out. So after 2010, there are no new individual statutory agreements available and you cannot, for example, vary these instruments after that point. Those alternatives might be common-law contracts but there is also the collective agreement. Eventually these individual statutory agreements will become very out of date and you would expect the employer and the employees to not want to remain on them.[59]

1.80 The committee majority notes that the Opposition ran a defensive line on this question during the hearings. There is no doubt that an Opposition returned to government in the next few years would re-introduce a form of individual agreement, presumably backed by some kind of incentive together with impediments to collective agreements. They remain committed to AWAs, notwithstanding the evidence that these instruments have stripped the pay and conditions of hard-working Australians.

1.81 The committee believes that, in the drafting of the substantive bill, consideration should be given to allowing employees to unilaterally terminate their individual agreements as soon as a collective agreement that would cover them has been negotiated in the workplace. Employers who have entered into the new collective agreement could be considered to have consented to any employee who could be covered by the collective agreement opting out of the individual agreement.

Negotiating ITEAs

1.82 The committee majority supports the concept of ITEAs for what they are: temporary expedients for the purpose of allowing employers and employees to

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57 Mr Stephen Smith, Ai Group, *Committee Hansard*, Sydney, 6 March 2008, p. 6.

58 ACTU, *Submission 20*, p. 8.

59 Ibid., p. 13.

transition from a workplace relations system that provides for Australian Workplace Agreements to one that will not provide for any form of individual statutory agreement.

1.83 The ACTU advised the committee that they are not convinced of the need for a new form of statutory individual contract, ITEAs, stating that in its view over-award common law agreements provide sufficient flexibility for employers. However, the ACTU recognises that the rules applying to ITEAs are superior to those governing AWAs.[60] ACTU concerns regarding ITEAs were also reported in the media that ITEAs could still be offered to employees on a take it or leave it basis. [61] Government party senators will monitor any abuse of ITEAs and may recommend that any abuses be addressed in the substantive bill.

Dealing with remnants of old agreements

1.84 The committee notes that the bill makes changes that affect the operation of old IR agreements by extending their period of operation from 26 March 2009 to 31 December 2009. However, it remains the case that any such old IR agreement will cease to operate when replaced by a new collective agreement.

1.85 The committee majority understands from advice from DEEWR that this means that anything contained in an old IR agreement will need to be bargained into any new collective agreement. While the committee supports the policy to abolish old IR agreements, it is concerned that some employees may be placed into a difficult bargaining situation when negotiating a new collective agreement, particularly in circumstances where large numbers of employees are engaged on AWAs.

1.86 Government senators believe that this matter should be further considered in the development of the substantive bill.

Collective agreements and the 'overall' requirement

1.87 Professor Stewart raised proposed s.346D(2) which requires the Workplace Authority to assess whether 'on balance' a collective agreement would result in a reduction in the 'overall' terms and conditions to which the relevant employees would be entitled under a reference instrument.[62] He highlighted that:

> What neither the section nor the Explanatory Memorandum made clear is whether a collective agreement may be considered to pass the NDT if *some but not all* of the employees it covers are disadvantaged.[63]

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60 ACTU, *Submission 20*, p. 8

61 Brad Norrington, 'Tough Conditions to put pay to AWAs', *The Australian*, 14 February 2008, p. 6.

62 Explanatory Memorandum, p. 11.

63 Professor Andrew Stewart, *Submission 16*, p. 4.

1.88 He notes that previously the AIRC required employers to give undertakings that agreements would not be operated in such a way as to disadvantage particular workers. He suggested:

> If the undertaking procedure is not to be revived, the legislation should be amended to make it clear that no employee covered by a collective agreement should be disadvantaged. The onus would then be on the party or parties drafting the agreement to include some provision that avoids any such disadvantage. Such a provision might itself be couched in the form of a general undertaking as to how the agreement is to be applied.[64]

Re-engagement of previous employees

1.89 The committee notes objections put forward by the business sector regarding the re-employment of previous employees but believes this provision provides a good incentive for employers to transition to the new workplace environment.

Common law contracts

1.90 After 2010, employers and employees wanting to enter into individual arrangements will be able to turn to common law contract arrangements which will be underpinned by a modern award and the 10 legislated National Employment Standards. The committee heard evidence about the desirability of common law contracts in practice, and about the protection they offered workers. This was a matter of particular concern to Senator Andrew Murray who has long been concerned that common law contracts do not offer protection to the extent that he considers may be available in connection with statutory agreements, notwithstanding that common law contracts do not allow the safety-net to be stripped away, while statutory agreements do. This is argued elsewhere in reports of committee members.

1.91 The ACTU noted 'In our view over-award common law agreements provide sufficient flexibility for employers who wish to make individual employment arrangements with their employees. Historically, these instruments have covered almost a third of the workforce and have generally operated in a fair and flexible manner.'[65]

1.92 The dispute resolution aspect of common law contracts was raised with the committee and Professor Stewart would like to see the government provide:

> …a low-cost and speedy process of dispute resolution that is available to all employees seeking to enforce employment entitlements, whether arising under legislation, awards, workplace agreements, contracts or the common law – subject to imposing a monetary limit (say $40,000), and subject also perhaps to excluding claims for the likes of defamation, personal injury and so on. Such a process would go some way to allay concerns about the

64 ibid., p. 4.

65 ACTU, *Submission 20*, p. 8.

> impact of removing higher earning employees from the award system. It is a reform that I would in any event strongly advocate for its own sake.[66]

1.93 The committee heard of a tribunal operating in South Australia which handled disputes involving common law contracts. The committee took this matter up with DEEWR who said that these issues will be further considered in connection with the substantive bill.[67]

Earnings above $100 000

1.94 From 2010, employees earning above $100 000 per annum would be free to agree to their own pay and conditions without reference to awards.[68] The Minister for Employment and Workplace Relations noted that 'this will provide greater flexibility for common law agreements which have previously been required to comply with all award provisions, no matter how highly paid the employees'.[69]

1.95 Professor Stewart noted that there is no mention of this in the bill itself or the draft award modernisation request. While assuming that the necessary legislation will be introduced later in the year, he notes:

> …that without any clear instruction to the contrary, the AIRC will presumably be expected to continue making provision in modern awards for workers who have historically been covered by awards, but typically earn amounts that will ultimately disqualify them from gaining any entitlements from those provisions.[70]

1.96 In response to questioning about what constitutes the $100 000, DEEWR pointed out the reference in the *Forward with Fairness- Policy Implementation Plan* which states:

> The calculation of the $100,000 threshold will be the employee's guaranteed ordinary earnings. The threshold will be indexed to annual growth in ordinary time earnings for full time adult employees. This will include the pay received for ordinary hours of work, guaranteed overtime and any other monetary allowances that are a guaranteed part of an employee's normal remuneration arrangements. [71]

1.97 The committee majority notes that the definition is not currently included in the legislation and assumes the government will include the relevant definition in the substantial bill. The committee will have a continuing interest in this matter.

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66 ibid., p. 5.

67 DEEWR, *Committee Hansard*, 11 March 2008, p. 4.

68 Explanatory Memorandum, p. 8.

69 Second Reading Speech, Hon Julia Gillard MP, Hansard (Reps), 13 February 2008, p 117.

70 Professor Andrew Stewart, *Supplementary Submission 16A*, p. 4.

71 DEEWR, *Committee Hansard*, Canberra, 11 March 2008, p. 10.

The No-Disadvantage Test

1.98 The committee notes the view of the ACTU that the proposed new no-disadvantage test is simpler and fairer. The bill will '…remove the complex regime of exclusions and loopholes that currently permit agreements to operate despite having failed the required standard.'[72] There were nonetheless a number of issues raised by unions in relation to the NDT.

1.99 The Shop, Distributive and Allied Employees' Association (SDA) drew the proposed s.346(D)(7) to the committee's attention. This states 'a collective agreement would be taken to pass the no-disadvantage test if there is no reference instrument relating to any employees.'[73] SDA wrote:

> If the employer with 1000 employees has 999 employees for whom there is a reference instrument and one employee for whom there is no reference instrument then, under proposed section 346(D)(7), the collective agreement will be deemed to have passed the No Disadvantage Test simply because there is one employee for whom there is no reference instrument.[74]

1.100 SDA noted that an unscrupulous employer could add the person for whom there is no existing reference instrument to the collective agreement, put in place any terms and conditions which clearly breach the NDT and have the CA passed. [75] They suggest that it needs to be clarified that '…a Collective Agreement will be taken to pass a No Disadvantage Test in relation to an employee for whom there is no reference instrument but only in relation to that employee. Where the Collective Agreement applies to employees for whom there is a reference instrument then the No Disadvantage Test must be satisfied in relation to all of those employees'.[76]

1.101 This issue was raised with DEEWR, who provided the following reassurance:

> In relation to the issue that the SDA raised, as the section is currently drafted it is not possible for an employer to simply evade the NDT by having one employee who is not bound by the reference instrument. The intention is that, in this situation, a collective agreement where only some of the employees have a reference instrument, if that agreement is tested and it passes the NDT, as assessed against that reference instrument, it will pass for all the employees in that workplace. Conversely, if the agreement fails the NDT it will fail for all employees in that workplace. But having said that, we will take a closer look at this provision and ensure that it achieves that intention. [77]

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72 ACTU, *Submission 20*, p. 9.

73 Explanatory Memorandum, p. 12.

74 Shop, Distributive and Allied Employees' Association, *Submission 9*, p. 17.

75 ibid., pp. 17-18.

76 Shop, Distributive and Allied Employees' Association, *Submission 9*, p. 18.

77 DEEWR, *Committee Hansard*, 11 March 2008, p. 9.

Termination of agreements

1.102 Proposed s.397A(2) states that, to terminate a CA, one of the parties able to make the application is a 'majority of employees' bound by the agreement. SDA highlighted that for many workplaces it is virtually impossible for a majority of employees to make such an application as the process in getting a majority of employees together in any business can be incredibly difficult.[78]

Undertakings

1.103 A number of employer organisations raised the issue that the bill does not permit an employer to give an undertaking as a means of varying an agreement which does not pass the fairness test. [79]

1.104 The committee majority does not agree with the suggestion that agreements be varied by undertakings. Agreements require two parties to reach an agreement. That pre-condition is not satisfied where one party may vary the agreement by unilateral undertaking.

Outworkers

1.105 The Textile, Clothing and Footwear Union of Australia (TCFUA) is concerned that the bill could amend the act in a manner that will remove vital protections for outworkers. The TCFUA estimates that 70 per cent of employment across the whole textile, clothing and footwear sector is comprised of outworkers.[80] A major source of protection for outworkers in the Commonwealth system is Part 9 of the Clothing Trades Award which ensures that outworkers receive minimum entitlements and requiring employers to keep records of the outworkers. The TCFUA is concerned that proposed sections 576K and 576U(e) of the bill will have the effect of removing the protections of Part 9 of the award for a significant proportion of outworkers. This is due to the definitions of both outworker in section 576K and the definition of 'eligible entity' in section 576U(e) of the bill. The TCFUA urged the committee to recommend the amendment of the definition of outworker in section 576K to encompass the nature of outworker employment arrangements.

1.106 The TCFUA also urged amendments to ensure that outworkers who perform work for persons or entities that are not constitutional corporations will still be protected by the provisions in Part 9 of the award. Due to Victoria's referral of its power over industrial relations to the Commonwealth in 1996, the TCFUA believes there is no constitutional limitation which prevents such an amendment.[81] They suggest the following wording:

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78 Shop, Distributive and Allied Employees' Association, *Submission 9*, p. 24.

79 Ai Group, *Submission 38*, p. 13.

80 TCFUA, *Supplementary Submission 30A*, p. 1.

81 ibid., p. 4.

> a person or entity (which may be an unincorporated club) that carries on its activity (whether of a commercial, governmental or other nature) in a Territory in Australia, in connection with the activity carried out in the Territory, or in Victoria, in connection with the activity carried out in Victoria.[82]

1.107 The committee majority notes that the government does not intend to reduce protections for outworkers. DEEWR advised the committee that it considers technical amendments to the bill are necessary to ensure that outworker protections are maintained. The committee will continue to take an interest in this matter.

Award modernisation

1.108 While supporting the need to modernise awards, witnesses highlighted a few areas of caution for the committee. There were differing viewpoints on the timeline with some believing it to be overly ambitious.[83] Others believed that it could be shortened but provide sectors with a longer timeframe by an exception request. DEEWR told the committee that it believed that the award modernisation timetable was achievable.

1.109 It was also noted that the process is not intended to 'disadvantage employees' or 'increase costs for employers'.[84] Yet it was pointed out that it is not possible to standardise conditions without disadvantaging someone. Witnesses urged the government to consider the language used and clarify its intent.[85]

1.110 The committee asked Professor Andrew Stewart to further consider this matter and in a supplementary submission he provided the following information:

> I accept that it may be possible to interpret the current wording as meaning that workers and employers should not on balance de disadvantaged, while leaving it open to the AIRC, in the course of standardising conditions in a particular industry, to seek a rough balance by increasing some entitlements and reducing others. In practice, however, it is highly unlikely that such a balancing exercise could ever be undertaken with such precision that nobody was worse off. Any process of standardisation must inevitably result in some levelling up or down of entitlements – and the greater the number of existing instruments to be replaced by a modern award, the greater likelihood of that having to happen. [86]

1.111 Professor Stewart proposed that sub-paragraphs 2(b) and (c) of the draft request be replaced by the following:

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82 ibid.

83 Unions NSW, *Submission 45*, p. 1.

84 Explanatory Memorandum, p. 76.

85 Professor Andrew Stewart, *Submission 16*, p. 7.

86 Professor Andrew Stewart, *Supplementary Submission 16A*, p. 1.

> (b) *significantly* disadvantage employees, *in terms of their overall conditions of employment*;
>
> (c) *significantly* increase costs for employers;….[87]

1.112 Professor Stewart also proposed adding the following sentence at the end of paragraph four to encourage the AIRC to aim for a reasonable degree of standardisation in the relevant industry, occupation or sector:

> The Commission must also seek to avoid complicating the operation of modern awards by the extensive use of exceptions or qualifications to preserve differences in pre-modernisation entitlements. This is not intended to rule out the phasing-in of standardised conditions over a transition period. [88]

1.113 Dr John Buchanan highlighted the critical role categories will play in structuring the modernisation process and expressed concern that the categories 'industry' and 'occupation' are not self evident and the guidance as to what is meant is limited. He suggested a notion of key job or vocational families with associated 'parents' or siblings' would be a useful guiding concept. He urged the AIRC to be thoughtful about the categories used to define labour market coverage, noting this will be a continual process and there is a challenge to keep awards regularly in touch with changing labour regularities.[89] Dr Buchanan also noted the importance of providing the AIRC with appropriate resources to conduct the process and made the following specific suggestions for consideration:

> New paragraph in *positive* **Objects** at page 76
>
> (f) must be regularly reviewed to ensure that they remain relevant to the rapidly changing structures of work and the labour market.
>
> New para in *negative* **Objects** at page 77
>
> (f) create an unduly rigid set of categories around which the coverage of different part of the labour market is defined.
>
> New para in the section dealing with **Performance of functions by the Commission** at page 77
>
> (k) give due recognition to the need for a coherent set of categories for grouping together like classes of work to help ensure consistency in defining employment rights and obligations and to help provide a framework for defining common skill requirements.
>
> Additional words to opening para in **Awards modernisation process** at page 77
>
> At end of para 4 add:

87 Professor Andrew Stewart, *Supplementary Submission 16A*, p. 2

88 Professor Andrew Stewart, *Supplementary Submission 16A*, p. 2.

89 Dr John Buchanan, *Submission 53*, p. 3.

> (a)…Modernisation of award is not simply meant to result in fewer awards, it is also intended to create a set of awards which, by clustering together like classes of work, provide more consistent and relevant ways of defining the reach of employment rights and obligations. [90]

1.114 The committee majority urges the government to consider the matters raised by Professors Stewart and Buchanan.

1.115 Professor Preston noted that the aim of the process was to ensure no state-based differences in awards.[91] The ACTU expressed concern that the prohibition on awards containing any state-based differentials after 2013 constitutes an unnecessary restriction on the discretion of the AIRC to develop modern awards. While supporting the AIRC eliminating, as far as practicable, state-based differentials, they urge the recognition of state-based differences where there remains sound basis for the differential.[92]

1.116 Affiliates of Unions NSW believe that insufficient consideration is being given to the importance of the role of former state awards (NAPSAs) in setting wages and conditions for many workers. They also urge that there be scope in the legislation for the AIRC to consider state differentials.[93] They suggest that:

> …the review should involve representatives from State tribunals who have an understanding of the state awards, their history, function and utility. This should not be difficult as some of the members of the Industrial Commission of NSW also have a dual appointment to the AIRC. [94]

1.117 The committee also heard evidence on confusion that exists in local government circles over state and federal awards and industrial jurisdictions.[95] There are concerns about new legislation introduced in Queensland which 'decorporatises' local government to ensure that local councils are not classified as constitutional corporations. Similar concerns are expressed in New South Wales where the United Services Union believes that 'unless urgent action is taken NSW councils and local government employees will be left in the uncertain position of not knowing which jurisdiction applies to industrial disputes unfair dismissals and wage claims'. [96]

1.118 The committee majority notes this complex issue and urges the government to clarify this issue where possible in the substantive legislation.

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90 Ibid., p. 4.

91 Professor Alison Preston, *Submission 4*6, p. 8.

92 ACTU, *Submission 20*, pp. 11-12.

93 Unions NSW, *Submission 45*, p. 1.

94 ibid.

95 Local Government Association of Queensland, *Committee Hansard*, 10 March 2008, p. 38.

96 United Services Union, *Submission 10*, pp. 1-2.

1.119 Witnesses observed that the award modernisation request as it is currently worded, leaves all the drafting of awards up to the AIRC and witnesses would like to see industry play a lead role in the development of modern awards, for instance submitting draft flexibility clauses. The National Farmers' Federation (NFF) took this point of view further and submitted that 'it is only where parties do not have the adequate resources or have not reached an agreement where the AIRC should play a role in actually drafting the modern award'.[97] The committee is of the view that the process should involve as many interested parties as practicable. DEEWR reassured the committee that it is designed to be an inclusive rather than an exclusive process.[98]

1.120 In response to concerns raised, DEEWR, told the committee that the award modernisation process:

> …is actually a process of creating new, modern awards as opposed to merely the simplification and rationalisation of existing awards. So, in essence that implies a sort of comprehensive look at what modern awards should create. Also, the process of itself, will provide a range of benefits both for employers and for employees in terms of fair and flexible modern awards from an employee perspective. But equally, it will be less complex and simpler to apply awards, from an employer's perspective. [99]

1.121 While noting the concerns raised during the hearings regarding the award modernisation timeline and process, the committee majority took some assurance from the advice provided by the department that they 'do not believe the timeline is impossible'.[100] In response to a direct question from the chair on funding, the department advised: 'our understanding is that the commission is of the view that it has adequate resources to undertake the award modernisation process'.[101] The committee believes that if additional funding is required it will be made available, since award renewal is the basis for a workable system of collective agreements.

An arbitration role of the Australian Industrial Relations Commission

1.122 Evidence to the committee included detail of an intractable dispute that was allowed to continue for nearly nine months, and which resulted in considerable suffering for employees and their families over that time. The Australian Workers Union (AWU) representative described the case to the committee.

> The example of Boeing and the dispute that we had at Williamtown highlights the immense deficiencies and unfairness that has existed in Australian workplaces since 1996. Here we had workers who, working in a relatively new facility, decided to join their union and wanted to bargain

97 National Farmers' Federation, *Submission 21*, p. 3.

98 DEEWR, *Committee Hansard*, 11 March 2008, p. 12.

99 DEEWR, *Committee Hansard*, 11 March 2008, p. 11.

100 DEEWR, *Committee Hansard*, 11 March 2008, p. 11.

101 ibid., p. 12.

> collectively with their employer to seek very few changes in their working conditions aside from being able to bargain collectively and having the right to be represented by their union. Boeing failed to negotiate with the union regarding these claims. We represented the majority of the workers at the facility. Initially we were locked out for a month then let back in. We took protracted industrial action after that. In the end we had our members out on strike for 265 days. The worst part of that dispute is that, several weeks after they returned to work, the company decided to put in a collective arrangement after 265 days on the grass. What was highlighted in this dispute was that we were unable to go anywhere. We sought the assistance of the commission to resolve the dispute. The commission did not have the powers to resolve that dispute. Under the commission's auspices we conducted ballots on whether the majority of the workers wanted to be represented. The ballot was returned with an 80 per cent plus vote. In the end the New South Wales Industrial Relations Commission conducted an inquiry into the dispute and asserted that they had jurisdiction over the site – which was overturned by the Federal Court.
>
> …At the end of the day, the dispute destroyed a number of families. Two of our members had their homes repossessed. There were several break-ups. Today there are only three of those initial employees still on site. Most of them resigned after they went back to work because they could not stomach working for that company, particularly because after 265 days the company gave them a collective agreement within three weeks. The fact that there was absolutely nowhere to go clearly and indisputably demonstrates how unfair that system was.[102] [103]

1.123 The committee majority considers it to be outrageous that a dispute like this should have been allowed to continue for so long without resolution. Despite its regulatory volume and complexity, the provisions of the WRA provided no assistance. The committee majority considers that dispute resolution should remain as an important role for the Australian Industrial Relations Commission.

Conclusion

1.124 The committee majority is pleased to report that the overwhelming evidence provided to the committee supported the bill's workability and balanced approach to transitional arrangements. We were disturbed to hear yet more stories of AWAs being used to cut wages and conditions of vulnerable workers who have little or no bargaining power or experience. The ability for employers to use AWAs in this way must be stopped as soon as possible, by removing mechanisms which have perpetuated these injustices.

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102 AWU, *Committee Hansard*, 6 March 2008, pp. 15-16.

103 Boeing has responded to the AWU claims regarding the dispute at Williamtown. This response does not go to the issue of the mechanisms of resolving protracted disputes. Letter, tabled papers.

1.125 AWAs are mostly pattern agreements drafted by the employer and presented to employees on a 'take it or leave it' basis. There is no evidence that ordinary unskilled workers have directly negotiated their individual work needs with their employers.

1.126 Not only does the small proportion of the workforce on AWAs mean there will be minimal effect on the economy by preventing any new AWAs being made, but the evidence to the committee was that if anything there will be a positive effect. The committee majority view is that the restored morale of the workforce currently subjected to AWAs will itself be an incentive to higher productivity and that employers will find that the use of collective agreements results in far less time and resources devoted to administration and dealing with the red tape of an individual statutory agreement for each employee. The Opposition continued to run a defensive line on individual statutory agreements during the hearings, leaving no doubt that an Opposition returned to government in the next few years would re-introduce a form of individual agreement. Regardless of their public posturing, reminiscent of the GST, they are still committed to Work Choices and to the instruments that have stripped the pay and conditions from working families.

1.127 Many employer organisations complained of not being able to re-engage previous employees on ITEAs. The committee majority believes this provision encourages employers to move quickly to negotiate collective agreements. The indefinite continuation and use of ITEAs is not a role contemplated in the bill.

1.128 The committee has raised a number of technical issues and possible unintended consequences which await the attention of policy makers in their drafting of more substantive legislation to be considered by parliament later in the year.

1.129 The committee majority notes that there are a few technical issues raised in submissions which have not been included in the report and notes assurances from DEEWR that they have been monitoring submissions and will consider the issues raised in them.

Recommendation 1

1.130 **The committee majority recommends that the Senate pass the bill.**

Senator Gavin Marshall

Chair