



Agreement-making under WorkChoices:

The impact of the legal framework on
bargaining practices and outcomes

October 2007



OFFICE OF THE
WORKPLACE RIGHTS
ADVOCATE

A Victorian
Government
initiative



Agreement-making under Work Choices

The impact of the legal framework on bargaining practices and outcomes

Carolyn Sutherland

Corporate Law and Accountability Research Group,

Work and Employment Rights Research Centre

and

Department of Business Law and Taxation

Monash University

Executive Summary

1. The Work Choices reforms substantially altered the rules for making agreements. This report identifies at least 15 ways in which the legal framework has shifted the balance of bargaining power away from employees.
2. The introduction of a 'Fairness Test' purports to remedy the effects of just one of these changes: the removal of the 'no disadvantage test'. It is clear that this single measure will be unable to address the multiple ways in which the framework undermines the bargaining position of employees.
3. Contrary to the Government's assertions, the Fairness Test is not, by any measure, stronger than the former 'no disadvantage test' – the new test is clearly narrower in scope and provides fewer procedural protections than the former test. Overall, there must be considerable doubt that the Fairness Test will provide outcomes which are procedurally or substantively fair for employees.
4. The emerging evidence of outcomes under workplace agreements confirms that the potential for the new framework to undermine the bargaining position of employees has been realised. Data on employer greenfields agreements strongly suggests that substantial numbers of employees have received no compensation for the removal of protected award conditions via these agreements. A combination of statistical and anecdotal evidence leads to a similar conclusion in relation to AWAs.
5. In the case of collective agreements, the report highlights a number of templates which are being used to set the terms and conditions of employment for retail and hospitality workers. Following a reduction in the involvement of traditional third parties in agreement-making (ie, the AIRC and unions), these templates have been adopted (often without alteration) by many employers. The effect is to allow an alternative third party - the industrial relations consultant - to exercise significant influence over the content of agreements.
6. The widespread replication of these templates in collective agreements in the retail and hospitality industries suggests that there is very little genuine bargaining taking place. A study of the templates themselves reveals the extent to which it is possible for an employer to reduce and remove employee benefits through the powerful mechanism of the Work Choices workplace agreement. The templates provide instances of the reduction of employee rights of control over hours of work, rostering, job location and job functions. The effect of these provisions is not only to displace conditions from awards and State legislation, but also to jeopardise the rights of an employee under his or her individual contract of employment.
7. The report also highlights some of the problems which have arisen because of the removal of a certification or vetting process before agreements are approved. The existence of provisions in

agreements which fall below the 'safety net', or which mislead employees about their legal entitlements, suggests that the new framework is failing to ensure compliance with the basic legal rules.

8. The legal framework also appears to legitimate certain unfair employer bargaining practices by removing any positive requirement for employers to explain the effect of workplace agreements to employees, or to obtain genuine approval for these agreements, and by providing only weak protections against false or misleading conduct and duress. These unfair (but not unlawful) practices include: offering AWAs on a take-it-or-leave-it basis to new employees; using employer greenfields agreements on new projects to set a low base of employment conditions and to create a union-free environment; and 'starving out' employees by holding back pay rises until the employees enter into AWAs.
9. Perhaps emboldened by the environment created by Work Choices, some employers are engaging in unlawful bargaining practices, such as targeting employees who refuse to sign AWAs by reducing their shifts, or threatening to remove other employee benefits, or ending their employment.
10. Fundamental changes, not stop-gap measures, are required to address the bargaining practices and agreement outcomes which are permitted, and to some extent encouraged, under the Work Choices framework. Without legislative reform to ensure genuine bargaining and compliance with the agreement-making rules, it is inevitable that the working conditions of vulnerable employees will be further diminished.

Guide to the Report

The Legal Framework

1. The Work Choices reforms substantially altered the rules for making agreements. This report indicates that there are at least **15 ways in which the legal framework has shifted the balance of bargaining power away from employees**:
 - 1.1. **The removal of a certification process, or any assessment of compliance with the rules, prior to the approval of agreements.** This means that:
 - a. the Office of the Employment Advocate approves agreements without checking the terms of agreements for compliance with rules about content, or for consistency with minimum standards, or for ineffective or misleading provisions; **(pp 9-11)**
 - b. unions no longer have the opportunity to review non-union collective agreements in order to highlight any compliance issues prior to the approval of agreements; and **(pp 11, 14)**
 - c. there is no requirement for employers to *demonstrate* compliance with the procedural rules (such as providing access to the agreement, and obtaining employee approval of the agreement) as a pre-requisite for the agreement to commence operating. The only requirement is for employers to affirm, in broad terms, that they have complied with the rules. **(p 9)**
 - 1.2. **The automatic approval of agreements as soon as they are lodged with the Office of the Employment Advocate.** Any defects in the agreement, or in the agreement-making process, can only be raised through litigation after the agreement has commenced operating. **(p 10)**
 - 1.3. **The removal of the 'no disadvantage test',** which required that employees be 'no worse off' under agreements compared with any relevant award or law. This has been replaced by a much more limited safety net of five minimum conditions, which cannot be bargained away. This means that a Work Choices agreement can remove or reduce the following entitlements:
 - a. 'protected award conditions' (covering conditions such as monetary loadings and allowances, rest breaks and public holidays), provided they are *expressly* removed or modified by a workplace agreement; **(p 5-6)**
 - b. entitlements under State legislation (eg, long service leave); and **(pp 6, 20)**
 - c. other entitlements in awards which give the employee control over workplace conditions (eg, rights to notice and control over rostering). **(p 20)**

- 1.4. **The expansion of prohibited content rules** which restrict the types of matters which can be included in agreements. The majority of these excluded matters relate to employee and union rights and benefits. (p 7)
- 1.5. **The removal of the requirement for employers to obtain 'genuine approval'** from employees in relation to agreements. (pp 8-9)
- 1.6. **The removal of provisions designed to address the information asymmetry between employers and employees.** For example, the new framework:
 - a. has removed the requirement for employers to explain the effect of agreements and to obtain informed consent to agreements; (p 8)
 - b. permits employees to waive their rights to ready access to the agreement and to receipt of a standard information statement prior to approving agreements; and (p 9)
 - c. permits employers to lodge agreements which incorrectly set out the legal entitlements of employees. (p 5)
- 1.7. **The introduction of a new form of agreement - the employer greenfields agreement** – which permits an employer in a new business, project or undertaking to unilaterally set the conditions of employment for employees for 12 months, effectively setting the starting point for all future bargaining at that workplace. (p 3)
- 1.8. **The inclusion of new provisions which allow employers to unilaterally terminate agreements after their expiry.** This is a substantial expansion on the former rights of the parties to terminate an agreement only by mutual consent, or by satisfying a public interest test. (p 4)
- 1.9. **The lowering of the minimum conditions which apply after an agreement has been terminated, setting a low base for future bargaining.** Whereas employees previously returned to the applicable award or other industrial instrument after the termination of an agreement, employees now return to the Australian Fair Pay and Conditions Standard, plus the limited range of protected award conditions. In other words, once an employee enters into a Work Choices agreement, the employee can't ever return to the full terms of an applicable award or an earlier collective agreement. (p 4)
- 1.10. **The inclusion of weak protections against unfair bargaining tactics by employers.** In particular:
 - a. the prohibition against including false or misleading statements in an agreement or the information accompanying an agreement only applies where the employee can demonstrate that the statement *caused* the employee to enter into the agreement; (p 11)
 - b. the freedom of association provisions have been further restricted so that they are ineffective to guard against individualisation strategies; (p 12)

- c. the provisions which guard against coercion and duress do not protect against the employer's use of its superior bargaining position by offering take-it-or-leave-it AWAs to new employees, or by inducing existing employees to sign an AWA by the offer of an immediate pay rise which is not otherwise available. (p 12)
- 1.11. **The contraction of unfair dismissal rights**, undermining employees' job security. (p 6)
- 1.12. **The introduction of 'Welfare to Work' reforms** which penalise welfare recipients if they refuse a job, even where the job does not provide penalties or other allowances previously available under the award safety net. (p 6)
- 1.13. **The expansion of restrictions on industrial action** by unions or employees. (p 14)
- 1.14. **A reduction in the capacity for unions to represent employees in bargaining**, through the narrowing of the right of entry and freedom of association provisions. (p 14)
- 1.15. **An overall reduction in the collective bargaining rights of employees**, with the legislation giving clear preference to *individual* agreements. (p 14)
2. The introduction of a 'Fairness Test' purports to remedy the effects of just **one** of these changes: the removal of the 'no disadvantage test'. It is clear that this single measure will be unable to address the multiple ways in which the framework undermines the bargaining position of employees.
3. The discussion in section 3 of the report reveals that, contrary to the Government's claim of a 'stronger safety net', the new Fairness Test is narrower in scope and provides fewer procedural protections than the former 'no disadvantage test'. The section concludes that there must be considerable doubt that the Fairness Test will provide outcomes which are procedurally or substantively fair for employees. (pp 14-21)

Evidence of employee outcomes under Work Choices

4. The reported evidence to date confirms that this potential for the legal framework to undermine employee bargaining power has been realised. For AWAs and employer greenfields agreements in particular, statistical data overwhelmingly confirm that employees' conditions have been eroded under Work Choices. (pp 21-23)
5. This section of the report provides additional anecdotal evidence in support of the statistical data. This evidence is drawn from template agreements which are being used in the retail and hospitality industries. The templates provide examples of the ways in which collective workplace agreements are being used to increase the rights of employers to change the *location* of the employee's workplace, the *duties* performed by the employee, and/or the *rosters* and number of *hours* to be worked, often with minimal, if any, rights for the employee to be consulted about, or given advance notice of, these changes. At the same time, these templates often incorporate employer policies 'as amended from

time to time', enhancing the capacity of employers to vary employee entitlements in the future. (pp 24-29)

6. This section also highlights some of the problems which are emerging as a result of the removal of third party scrutiny of agreements before they are approved. In particular, some agreements contain provisions which fall below the safety net floor, or mislead employees about their entitlements. It appears that the supervising institutions (the Workplace Authority and the Workplace Ombudsman) have not been requiring employers to rectify such provisions in agreements, increasing the potential for uncertainty and confusion among employees, and non-compliance by employers. (pp 30-33)

Evidence of employer bargaining practices under Work Choices

7. Academic studies suggest that some employees perceive a change in the climate in which bargaining occurs as a result of Work Choices, and believe that this altered climate prompts employers to engage in unfair bargaining practices. However, no studies have been conducted to directly determine whether employers have changed their bargaining strategies as a result of the changes to the legal framework. Further research is clearly needed to examine the link between the law and the ways in which employers conduct themselves in bargaining. (p 34)
8. This section of the report outlines anecdotal evidence of some of the unfair bargaining practices which have emerged since the commencement of Work Choices. To some extent, the legal framework has legitimated these tactics by removing any *positive requirement* for employers to explain the effect of workplace agreements or to obtain genuine approval for these agreements, and by providing only weak protections against false or misleading conduct and duress. (p 34)
9. Some of the examples of employer bargaining tactics are lawful, but may nevertheless be considered an illegitimate use of the employer's superior bargaining position. These include:
 - 9.1. offering AWAs on a take-it-or-leave-it basis to new employees; (p 34)
 - 9.2. using employer greenfields agreements to preclude any bargaining with employees or unions, and to set a low bargaining base for future agreements; and (pp 35-37)
 - 9.3. 'starving out' employees by holding back pay rises until the employees enter into an AWA. (p 37)
10. There are other examples of employer bargaining tactics which may be unlawful. These include:
 - 10.1. targeting employees who refuse to sign AWAs by reducing their shifts, or ending their employment, or threatening to remove other employee benefits; (p 35)
 - 10.2. making misleading statements in agreements or in the supporting information which is provided to employees. These misleading statements are only unlawful where they induce the employees to approve the agreement. (pp 38-40)

Conclusion

11. The new legal framework does not *require* employers to reduce employee conditions, or to move to individual arrangements which exclude unions, or to engage in practices which pressure employees to accept the employer's preferred terms. However, it does provide increased opportunities for employers to make agreements which operate to the disadvantage of employees overall. **(p 41)**
12. There is substantial evidence to suggest that the changes to the legal framework are leading to an erosion of conditions for employees in a weak bargaining position. There is also some indirect evidence of a connection between the new legal framework and the use of unfair strategies by some employers. **(p 41)**
13. It is anticipated that the existence of a 'Fairness Test' may put some limits on the scope and extent of the erosion of conditions for employees. However, unless fundamental changes are made to the law to encourage genuine bargaining and to ensure compliance with the agreement-making rules, it is inevitable that the working conditions of vulnerable employees will be further diminished. **(pp 41-42)**

Contents

Executive Summary	ii
Guide to the Report.....	iv
1. Introduction.....	1
2. The legal framework for bargaining under Work Choices.....	1
Background	1
Forms of agreement	3
The content of agreements.....	5
Procedural protections.....	7
Genuine Approval	8
Removal of third party scrutiny.....	10
Unfair bargaining tactics.....	11
Reduced capacity to collectively bargain	13
3. Modifying Work Choices: the 'Fairness Test'.....	14
Coverage	15
Fair Compensation	16
Consultation process	18
Specific protections against coercion	18
Efficacy of the Fairness Test	19
4. Evidence of employee outcomes under Work Choices	21
Erosion of protected award conditions.....	21
Lack of compensation for the loss of award conditions	23
Loss of non-monetary benefits	24
The loss of a fixed work location	24
Loss of control over job functions.....	25
Loss of control over rosters and hours of work	26
Removal of minimum hours and a regular salary for part-time workers	28
Incorporation of employer policies.....	28
Increased employee obligations	29
Bargaining outcomes below the safety net	30
Summary of employee outcomes	33

5. Evidence of employer bargaining practices under Work Choices.....	34
‘Take-it-or-leave-it’ AWAs.....	34
Employer Greenfields Agreements.....	35
Economic pressure falling short of coercion.....	37
Misleading statements.....	38
Employer assertions about legal rights.....	38
Incorrect or misleading information in agreements.....	39
Summary of employer bargaining practices.....	41
6. Conclusion.....	41

1. Introduction

This report considers the influences of the legal framework on bargaining practices and outcomes since the commencement of Work Choices. The report was commissioned by the Victorian Workplace Rights Advocate ('WRA'). The brief from the WRA requested an examination of the following issues: the legal framework for bargaining under Work Choices; the way in which the legal reforms have affected employees' bargaining power in practice; and employer bargaining tactics that have emerged since the Work Choices reforms.

The report commences with a detailed discussion of the legal framework for agreement-making under Work Choices. Throughout the report, 'Work Choices' generally refers to the amendments to the Australian workplace relations system introduced by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (Work Choices Act) in March 2006, including subsequent amendments to the legislation.¹ However, section 2 particularly focuses on the version of the Work Choices framework which was in place prior to the introduction of a 'Fairness Test' in July 2007, whereas section 3 focuses in more detail on the 'Fairness Test'. This discussion of the legal framework in sections 2 and 3 provides the foundation for the later sections which discuss outcomes for employees, and the practices adopted by employers in bargaining. Section 4 surveys the evidence of the outcomes of agreement-making for employees, including evidence of the erosion of conditions, such as minimum pay and employee control in the workplace. This is followed in section 5 by a discussion of employer bargaining tactics which have emerged from the legal cases and media reports of bargaining under Work Choices. The final section sets out the conclusions of the report.

2. The legal framework for bargaining under Work Choices

Background

Since the early 1990s there has been a shift in Australian labour law from reliance on centralised award conditions to enterprise bargaining at the workplace level.² The early enterprise bargaining framework was introduced through legislative reforms in 1992³ and 1993⁴. These reforms gained community acceptance because of the inclusion of two important safeguards for the protection of employees: first, agreements were subject to close scrutiny by the Australian Industrial Relations Commission ('AIRC'), to ensure fair

¹ Similarly, the 'WR Act' means the Workplace Relations Act 1996 incorporating the amendments introduced by the Work Choices Act, the Workplace Relations Legislation Amendment (Independent Contractors) Act 2006, and by the Workplace Relations (A Stronger Safety Net) Act 2007 ('Stronger Safety Net Act'). The 'pre-reform WR Act' refers to the Workplace Relations Act 1996 prior to Work Choices.

² This section on the background to the legal framework draws on Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations Under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183.

³ Which inserted a new Div 3A into Part VI of the *Industrial Relations Act 1998*.

⁴ Which replaced these provisions with Part VIB of the *Industrial Relations Act 1998*. See R Naughton, 'The New Bargaining Regime Under the Industrial Relations Reform Act' (1994) 7 *AJLL* 147 and R McCallum 'Enhancing Federal Enterprise Bargaining: The Industrial Relations Reform Act' (1993) 6 *Australian Journal of Labour Law* 63. For a discussion of earlier provisions in the *Industrial Relations Act 1988*, see R McCallum, 'Collective Bargaining Australian Style: The Making of Section 115 Agreements under the Industrial Relations Act 1988 (Cth)' (1990) 3 *AJLL* 21.

treatment of employees in both the content of agreements and the bargaining process; and secondly, enterprise agreements were subject to the 'no disadvantage test' which required that employees not be worse off compared with their terms and conditions under any relevant award or law. Further, enterprise or 'certified' agreements were required to be collective in nature, although the 1993 legislation permitted the making of these agreements without the involvement of trade unions.

Australia's labour relations system was further decentralised by wide-ranging reforms in 1996 which imposed new limits on the award-making powers of the AIRC, and the scope and reach of award regulation;⁵ and measures to enhance the take-up rate of enterprise bargaining, including the option of individual statutory agreements between employers and employees (ie Australian Workplace Agreements or 'AWAs').⁶

One of the primary objectives of the system introduced by the Work Choices Act was to sustain business competitiveness in a global economy.⁷ This goal was stated to be balanced against broader welfare considerations.⁸ For example, the objectives of the Work Choices Act retained the goal of encouraging a labour market which was both flexible *and* fair.⁹ However, in relation to enterprise bargaining in particular, the former objective of supporting 'fair and effective agreement-making'¹⁰ was noticeably absent from the Work Choices Act. The substance of the bargaining framework also appeared to give flexibility priority over fairness through the removal of several protective safeguards and processes. These changes were made in response to the Government's perception of the need to 'free up' the arrangements for workplace bargaining by removing the 'complex, time-consuming and legalistic' processes for agreement approval that have operated in the past.¹¹ However, the shift to a system of pared back rules, and a 'simpler' approval mechanism, which largely relied on the parties to self-regulate for compliance, left many employees unprotected from exploitative practices.

This section will outline the legal framework for agreement-making for the period from March 2006 to July 2007 (prior to the changes introduced by the Stronger Safety Net Act). Throughout this section, the original names which applied to the relevant institutions during the relevant period will be used: the Office of the Employment Advocate ('OEA') and the Office of Workplace Services ('OWS'). In subsequent sections of the report, the names of the successors to the OEA and OWS, the Workplace Authority ('WA') and the Workplace Ombudsman ('WO'), will be used.¹²

⁵ See M Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *AJLL* 62.

⁶ See R McCallum, 'Australian Workplace Agreements – An Analysis' (1997) 10 *AJLL* 50.

⁷ Hon John Howard, Prime Minister, 'Prime Ministerial Statement: Workplace Relations, Parliament of Australia', *Commonwealth Parliamentary Debates*, House of Representatives, 26 May 2005, 39.

⁸ See s 3 WR Act: the Act provides a framework for 'co-operative workplace relations which promotes the economic prosperity and welfare of the people of Australia'.

⁹ WR Act, s 3(a).

¹⁰ Pre-reform WR Act, s 3(e).

¹¹ See eg Commonwealth of Australia, *WorkChoices: A New Workplace Relations System*, 9 October 2005, p 19.

¹² The exception will be where reference is made to particular activities undertaken by the OEA or OWS prior to the renaming of these institutions by the Stronger Safety Net Act.

Forms of agreement

There are 6 options for making agreements under the Work Choices Act: employee collective agreements,¹³ union collective agreements,¹⁴ AWAs,¹⁵ multiple business agreements,¹⁶ union greenfields agreements¹⁷ and employer greenfields agreements.¹⁸ All of these agreements were available under the pre-reform WR Act, with the exception of employer greenfields agreements. This new form of agreement allows employers to set conditions of employment unilaterally and apply these conditions to employees as they join a new business. Quite clearly, this form of agreement precludes any form of bargaining. Until the employer greenfields agreement has expired, the new employees are legally proscribed from engaging in industrial action to support bargaining for different arrangements.

The greenfields mechanism was previously available under the pre-reform Act, but it could only be used where the employer was operating a 'new business', and where the agreement was made with a union.¹⁹ Whether the business was genuinely 'new' was assessed by the AIRC at the point of certification. If the business was not considered sufficiently 'new', the agreement could not be certified. There was some uncertainty in the certification decisions about whether a greenfields agreement could be used for a new project of the employer where the activities were the same as those already being undertaken by the employer, and some of the employer's existing employees were to be engaged for the new project.²⁰ One member of the AIRC expressed concern that the use of a greenfields agreement in these circumstances 'would allow an employer and a union to reach site specific agreements with which existing employees must comply and in which they have no say.'²¹

Under Work Choices, any doubt about the use of a greenfields agreement in these circumstances has been removed.²² A greenfields agreement can be 'made' for any 'new business, project or undertaking', and need not be made with a union.²³ In the building industry, this provides some employers with considerable scope to use greenfields agreement for most projects. Further, the OEA will not consider whether the business is genuinely new at lodgement. In fact, the forms lodged with the OEA do not even require the

¹³ An agreement between an employer and a group of employees in a single business, or part of a single business: WR Act, s 327.

¹⁴ An agreement between an employer and a union, or unions, for employees in a single business or part of a single business, where each union has at least one member employed in the business whose employment will be covered by the agreement; and the union is entitled to represent the industrial interests of that member: WR Act, s 328.

¹⁵ An agreement between the employer and an individual employee: WR Act, s 326.

¹⁶ A collective agreement involving one or more businesses or parts of businesses which are carried on by one or more employer: WR Act, s 331.

¹⁷ An agreement between an employer and an eligible union for a new business being established by the employer: WR Act, s 329.

¹⁸ An agreement made by an employer prior to the employment of any employees in a new business: WR Act, s 330.

¹⁹ Pre-reform Act, s 170LL; see further the discussion of this provision in Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, Federation Press, Sydney, 2005) at 210.

²⁰ See *Pelican Point Complete Scaffold Contracting Pty Ltd Power Station Enterprise Agreement 2003*, (PR931021, O'Callaghan SDP, 7 May 2003); c.f. *Brunel Technical Services Offshore Pty Ltd and Minesite Catering Bayu-Darwin Pipeline Project Agreement 2004* (PR950406, SDP Acton, DP Leary, Cribb C, 4 August 2004).

²¹ SDP O'Callaghan, *Pelican Point Complete Scaffold Contracting Pty Ltd Power Station Enterprise Agreement 2003*, (PR931021, 7 May 2003)

²² See Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) at p 146.

²³ WR Act, s 323; s 330.

employer to declare that the agreement is new.²⁴ Instead, it is up to affected employees, or the OWS, to challenge this after the agreement has commenced operating.

All workplace agreements automatically include a nominal expiry date which is five years after the agreement was lodged, unless the parties specify an earlier nominal expiry date. This is a substantial increase on the duration of agreements prior to Work Choices which was a maximum of three years. The exception to this rule is that employer greenfields agreements have a maximum nominal expiry of one year after the agreement was lodged.²⁵

Consistent with the pre-reform legislation, agreements will continue after the nominal expiry date until replaced by a new agreement, or terminated. However, the Work Choices framework imposes fewer impediments to the termination of agreements after the nominal expiry date has passed. Agreements may be unilaterally terminated by a party after the nominal expiry by giving 90 days' notice to the other party and lodging a declaration with the OEA.²⁶ This represents a substantial expansion on the former rights of the parties to terminate the agreement by mutual consent, or by satisfying a public interest test administered by the AIRC.²⁷

In addition, the rights of employees following the termination of an agreement have been diminished. Whereas previously employees returned to the conditions in any award or other industrial instrument which applied prior to an AWA or certified agreement commencing, under Work Choices, employees return to the five minimum conditions in the Australian Fair Pay and Conditions Standard ('the Standard') plus any protected award conditions.²⁸ This means that once a Work Choices agreement expires, it can be terminated by the employer, returning employees to the award rate of pay and other minimum conditions, thereby putting pressure on employees to finalise negotiations for a new agreement quickly, in order to achieve something approximating their former conditions under the workplace agreement. Clearly, employees' bargaining power is weakened in these circumstances.

Amendments introduced in December 2006 operated to preserve the redundancy provisions in agreements for 12 months after the agreement is terminated.²⁹ These 'preserved' redundancy provisions continue to apply to employees after a transmission of business.³⁰

²⁴ See Employer Declaration Form – Employer Greenfields Agreement, available on the WA's website: <<http://www.oea.gov.au/docs/employers/ega/EDF-EGA-0207.pdf>> at 26 July 2007.

²⁵ WR Act, s 352.

²⁶ WR Act, ss 381, 393, 395. Alternatively, the agreement may be terminated in accordance with the provisions of the agreement itself, which may provide for termination after the nominal expiry date with less than 90 days' notice: s 392.

²⁷ Pre-reform 1996 Act, ss 170ME(2), 170LV(2), 170MG, 170MH and 170MHA (certified agreements); s 170VM (AWAs).

²⁸ Section 399 of the WR Act specifies that an industrial instrument (such as an award or workplace agreement) has no effect in relation to an employee once a workplace agreement has been terminated. The exception is protected award conditions which will once again apply. The Australian Fair Pay and Conditions Standard is described below at n 35 and accompanying text.

²⁹ This applies to workplace agreements after a unilateral termination and to pre-reform agreements after the AIRC terminates an AWA, Preserved State Agreement or Certified Agreement on public interest grounds: WR Act, s 399A, Sch 7, cl 6A, 20A; Sch 8, cl 21A, 21D. Again, however, the protection only extends until the parties enter into a new workplace agreements: WR Act, s 399A(3)(c).

³⁰ In July 2007, the period in which redundancy provisions are preserved was expanded to 2 years to address the tactic, implemented by one employer, of continuing to employ employees whose positions were redundant until the 12 month period

The durability of workplace agreements is also affected by the transmission of business rules. Prior to Work Choices, relevant awards and agreements continued to apply indefinitely (until replaced or terminated) to employees who transferred to a new employer following a transmission of business.³¹ Under Work Choices, the benefit of any AWA, collective agreement, Federal award or Australian Pay and Classification Scale applies to employees who transfer to a new employer following a transmission of business, but the duration of this protection is limited to a period of 12 months.³²

The content of agreements

Prior to the introduction of Work Choices, the flexibility offered by workplace agreements was constrained by a range of protective mechanisms. These included various procedural requirements, which were intended to ensure that employees genuinely consented to agreements, and the 'no disadvantage test'. The 'no disadvantage test' required that employees not be worse off overall under an agreement, compared with the applicable terms and conditions under any relevant award or law.³³ This safeguard was introduced in 1992 and played a crucial role in ensuring community acceptance of the introduction of formal enterprise bargaining.³⁴

Having removed the 'no disadvantage test', the Work Choices Act introduced the Standard which provided 5 legislated minimum conditions: the minimum rate of pay, maximum hours of work, annual leave, personal leave/compassionate leave, and parental leave entitlements of employees covered by Work Choices.³⁵ These conditions are 'protected by law' in the sense that they must be provided to all employees by employers covered by Work Choices. The Standard prevails over any provision in a workplace agreement or contract to the extent to which the Standard provides a more favourable outcome for the employee.³⁶ However, it is not *unlawful* to include, in an agreement, terms which are less favourable than the Standard. Despite a framework which relies on employer compliance with the rules largely through self-regulation, the law does not place an onerous obligation on employers to ensure that employee entitlements are spelled out correctly in agreements.

In addition, where an employee is covered by an award³⁷ prior to entering into a workplace agreement, certain conditions in that award are protected by the legislation.³⁸ These 'protected award conditions' are:

had passed to avoid the more generous redundancy payments: see WR Act, s 598A; Workplace Express, Keeping Tristar employees on books cheaper than making them redundant, court told, Monday 16 July 2007.

³¹ WR Act, Part 11.

³² This period has been extended to 2 years in relation to preserved redundancy entitlements following the 2007 amendments: see WR Act, s 598A.

³³ Pre-reform Act, s 170XA.

³⁴ 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 1996 (Cth)' (2005) 47 *Journal of Industrial Relations* 393 at 394.

³⁵ WR Act, Part 7. See further Rosemary Owens, 'Working Precariously: The Safety Net after the Work Choices Act' (2006) 19(2) *AJLL* 161, 162-169; Colin Fenwick, 'How Low Can You Go? Minimum Working Conditions Under Australia's New Labour Laws' (2006) 16(2) *The Economic and Labour Relations Review* 85-126, 104-110.

³⁶ WR Act, ss 172(2), 173.

³⁷ Or, alternatively, the employee might be covered by a 'notional agreement preserving a State award' (NAPSA) or a 'preserved State agreement' (PSA). These are the transitional instruments applying to employees who were formerly covered by a State award or a State agreement.

rest breaks; incentive-based payments and bonuses; annual leave loadings; public holidays; overtime or shift loadings; some monetary allowances; penalty rates; and outworker conditions.³⁹ However, prior to the 'Stronger Safety Net' amendments of July 2007,⁴⁰ the extent of the protection under Work Choices was weak. It did not guarantee that these conditions would be retained, or that employees would be left no worse off despite the removal of some or all of these conditions. It only required that the employer explicitly set out in the agreement how the protected award conditions were to be removed or modified, otherwise the conditions were deemed to be included in the agreement.⁴¹ This protection was of little benefit to employees in a weak bargaining position, who might readily accept the explicit removal or modification of the protected award conditions.

The Work Choices framework also allows employers to reduce entitlements under State legislation, such as long service leave. A workplace agreement overrides State or Territory legislation to the extent of any inconsistency, and there is no requirement for the agreement to provide compensation for the loss of these benefits.⁴²

As a result of the introduction of the Government's 'Welfare to Work' reforms, which took effect in July 2006, a new group of workers in a weak bargaining position are being pushed into the workforce, due to new 'participation' requirements for particular welfare recipients.⁴³ These welfare recipients are required to seek (and accept) work, even where they will be required to work for the federal minimum wage, without the supplement of penalty rates or other allowances previously available under the award safety net. Where a person refuses such a position, he or she risks a penalty under the 'Welfare to Work' rules of losing welfare payments for up to 8 weeks.⁴⁴

The contraction of unfair dismissal rights is another aspect of the broader legislative framework which affects the bargaining power of many employees by undermining their job security. Under Work Choices, in addition to existing exclusions,⁴⁵ an employee who is dismissed by a 'small business' employer (100 or

³⁸ WR Act, s 354. If the employee was covered by a NAPSA or a PSA, see above n 37, protected award conditions are also taken from the former State award underpinning the NAPSA or PSA or from any applicable State or Territory industrial law: see Sch 8 Pt 2 Div 6A and Pt 3 Div 6.

³⁹ Section 354(4) WR Act. Under s 354(4)(j), the Regulations can specify new protected award conditions. At the time of writing, no Regulations have been made pursuant to this section.

⁴⁰ See above nn 110-146 and accompanying text.

⁴¹ Section 354(2) WR Act. See further Owens, above n 35, at 498. The exception is outworker conditions, which cannot be excluded by a workplace agreement: s 354(3).

⁴² WR Act, s 17(1). However, note that certain matters in State and Territory laws cannot be overridden, eg occupational health and safety, unless the WR Regulations otherwise prescribe: see s 17(2). Regulation 2.1.6 of Chapter 2 of the WR Regulations makes it clear that workplace agreements are not subject to State equal opportunity and anti-discrimination laws.

⁴³ The particular welfare recipients are new applicants for a parenting payment (once their youngest child reaches school age), people with a disability who are able to work between 15 and 30 hours per week, and the long-term unemployed: see Terry Carney, *Welfare reform? Following the 'work-first' way*, Social Policy Working Paper No 7, The Centre for Public Policy, January 2007, at p 3.

⁴⁴ See Social Security Act 1991, Part 2.10, particularly s 500ZE; Part 2.12, particularly s 629(1).

⁴⁵ For example, employees undertaking an automatic 'qualifying period' in the first 6 months of employment, and employees falling into specified categories of employment, such as casuals and fixed term employees, are all excluded from bringing an unfair dismissal claim: see WR Act, ss 643(6), 638.

fewer employees), or who is dismissed for reasons including 'operational reasons', does not have access to unfair dismissal laws.⁴⁶

The prohibited content rules also have the potential to undermine employees' bargaining position, by confining the types of matters which can be included in agreement negotiations. This restriction on bargaining runs counter to other aspects of the legal framework which are designed to 'free up' the content of agreements, and facilitate bargaining. Although these restrictions bind employers and employees equally, the majority of these excluded provisions relate to employee and union rights and benefits. Examples from the extensive list of prohibited content set out in the Workplace Relations Regulations 2006 (Cth) ('WR Regulations') are: unfair dismissal clauses, clauses providing for trade union training leave, or trade union representation, and clauses which restrict the employer's engagement of independent contractors or restrict the making of AWAs.⁴⁷ There are severe penalties for employers who lodge agreements containing prohibited content,⁴⁸ or any person who 'recklessly' seeks to include prohibited content in an agreement,⁴⁹ or misrepresents that a particular term does not contain prohibited content.⁵⁰

The legislation also limits the capacity of the parties to 'call up' content from earlier workplace agreements and awards. The new agreement can only incorporate (by reference) those industrial instruments which applied to the employees immediately before the new workplace agreement was made.⁵¹ If the parties wish to incorporate other industrial instruments, the full text of those instruments must be included in the new agreement. This limits the extent to which numerous instruments can be incorporated, and limits the extent to which the parties can re-introduce instruments which have otherwise ceased to apply.

Procedural protections

The Work Choices framework was introduced with the stated objective of giving employers and employees *greater freedom* to determine conditions to suit their particular circumstances. This freedom was obtained by removing the protective provisions of the 'no-disadvantage test', providing much more flexibility for employers to remove award conditions without providing off-setting benefits. However, there was little in the new framework to ensure that *employee preferences* were taken into account in determining these enterprise-specific conditions, or to ensure that the employee *genuinely agreed* to the proposed conditions. In fact, the Work Choices framework weakened the procedural protections available for employees by:

- removing the requirement for employees to provide **genuine approval** to agreements;
- removing **third party scrutiny** of agreements and of the agreement-making process in the approval process, and relying instead on litigation through the courts for breaches of the agreement-making rules;
- weakening the protections against **unfair bargaining tactics** by employers;

⁴⁶ WR Act, s 643(8),(10).

⁴⁷ WR Act, s 356 and Ch 2 regs 8.4-8.7 WR Regulations.

⁴⁸ WR Act, s 357.

⁴⁹ WR Act, s 365.

⁵⁰ WR Act, s 366.

⁵¹ WR Act, s 355.

- diminishing the **collective bargaining rights** of employees and the capacity for unions to be involved in agreement-making.

Genuine Approval

Prior to Work Choices, there were a number of procedural requirements which were imposed on employers to encourage genuine bargaining. In relation to collective agreements, the requirements on employers included: taking reasonable steps to ensure that employees had access to the proposed agreement 14 days prior to approving the agreement;⁵² and explaining the terms of the agreement to employees in ways that were appropriate for the particular employees' circumstances.⁵³ In the case of non-union agreements, employers were also required to notify employees that they could be represented in the bargaining process by a union, and were required to provide any union representatives with an opportunity to 'meet and confer' with the employer.⁵⁴

In relation to AWAs, the procedural requirements included providing the employee with a copy of the AWA 14 days before the agreement was signed (or 5 days prior in the case of new employees), and explaining the effect of the AWA to the employee.⁵⁵ The OEA was not empowered to approve an AWA unless satisfied that these requirements were met.⁵⁶ The employer was also required to provide the employee with a standard information statement, which explained the rights of the employee in general terms. However, this requirement could be waived if the OEA was satisfied that the failure to meet the requirement did not disadvantage the employee.⁵⁷

Perhaps the most important procedural rule was the requirement that an employee provide his or her genuine consent to an AWA, and that a valid majority of the employees to be covered by a collective agreement genuinely approve the agreement.⁵⁸ According to the Federal Court, this requirement 'plainly betokens a concern with the authenticity and, as it were, the moral authority of the agreement. It is perfectly understandable - indeed, one might reasonably think, plainly necessary - this be so.'⁵⁹ Demonstrating that this requirement had been met was a prerequisite for certification of collective agreements by the AIRC, and a prerequisite for approval of AWAs by the OEA. This proved an obstacle in some certification cases. For example, the requirement was not met where the copy of the agreement provided to employees before the vote differed from the original agreement made between the employer and the union parties to the

⁵² Pre-reform WR Act, ss 170LJ(3)(a), 170LK(3), 170LR(2)(a).

⁵³ Pre-reform WR Act, ss 170LJ(3)(b), 170LK(7), 170LR(2)(b), 170LT(7).

⁵⁴ See the various requirements for valid approval in the pre-reform WR Act, ss 170LK(2),(4),(5), 170LT(6).

⁵⁵ Pre-reform Act, ss 170VPA(1).

⁵⁶ Pre-reform Act, ss 170VPB(4).

⁵⁷ Pre-reform Act, ss 170VN(2), 170VO(1).

⁵⁸ Pre-reform WR Act, ss 170LT(5), (6). See further the supporting obligations in ss 170LE, 170LK(1), 170LJ(2), 170LR.

⁵⁹ CFMEU v AIRC (1999) 93 FCR 317; 114 ALR 73; [1999] FCA 847 at [126] (per Wilcox and Madgwick JJ). See further Iain Ross, John Trew and Tim Sharard, *Bargaining Under Work Choices* (Butterworths, Sydney, 2006) at 30.

agreement.⁶⁰ Nor was it met where the information sheet provided to employees contained misinformation about the contents of the agreement.⁶¹

It may seem obvious that such procedural slip-ups would invalidate the employees' approval of an agreement. However, under the Work Choices process, there is no longer any explicit requirement for employers to establish that employees have 'genuinely consented' to workplace agreements (both collective and individual) in order to obtain approval for an agreement. Nor is there any requirement for the employer to make any attempt to ensure that the employee has understood the terms of the agreement being offered.⁶² For collective agreements, the only relevant issue is whether all employees to be covered by the proposed agreement were given an opportunity to vote on, or approve, the agreement, and that a majority of those employees did give their approval.⁶³ In the case of AWAs, approval is evidenced by the employee's signature on the agreement before a witness, or the signature of the employee's parent or guardian in the case of employees under the age of 18.⁶⁴ There are also obligations which apply during the 7 day 'consideration period' prior to a vote. These include taking 'reasonable steps' to provide employees with a standard information statement prepared by the OEA,⁶⁵ and to provide a copy of the agreement to the employee.⁶⁶ Each of these requirements can be waived by the employee in writing.⁶⁷

The main obligation on the employer, when lodging a workplace agreement, is to submit a standard form declaration. This declaration requires the employer to tick various boxes to confirm compliance with the agreement-making rules. However, the statements which are required to be affirmed on the form obscure vital information. For example, the employer may tick just one box to confirm that they have *either* provided employees with ready access to the agreement *or* that this right to access has been waived in writing by the employees. In other words, this form reveals nothing about whether employees have actually seen the agreement prior to it being lodged. Further, the WA does not require the employer to submit any evidence that employees have waived their right to see a copy of the agreement. Similarly, the employer may tick a box saying that a majority of employees have approved the agreement without specifying whether the approval was obtained by vote or otherwise and without providing any evidence in support of the statement.⁶⁸

⁶⁰ *NTEU v Monash University* (2004) 134 IR 284.

⁶¹ *Re Coles Myer Pty Ltd Clerical and Administrative Employees Agreement 1998* (Print R3504, Whelan C, 31 March 1999) at [115].

⁶² C.f. section 170LK(7) of the pre-reform WR Act, which required the employer to explain the terms of a non-union collective agreement to employees.

⁶³ WR Act, s 340(2).

⁶⁴ Pre-reform Act, s 340(1).

⁶⁵ WR Act, s 337(2)-(4).

⁶⁶ WR Act, s 337(1),(3).

⁶⁷ Either by shortening the period or eliminating it altogether. In the case of a collective agreement, the written waiver must be signed by all employees to be covered by the agreement: ss 337(5), 338 WR Act.

⁶⁸ See, eg, the Employer Declaration Form – Employee Collective Agreement available on the WA's website at <www.oea.gov.au/docs/employers/eca/EDF-ECA-0207.pdf> at 13 August 2007

Note, however, that sections 137.1 and 137.2 of the Criminal Code apply, which make it an offence to provide false or misleading information or documents, do apply: see note to s 344(2) WR Act.

Removal of third party scrutiny

Prior to the reforms, it was a *prerequisite* for the approval of Federal workplace agreements that the parties had demonstrated compliance with the rules for agreement-making. These prerequisites were tested, in the case of collective agreements, through a formal hearing before the AIRC, and in the case of AWAs, through the administrative scrutiny of the OEA.

In the period from 1992 to 1996, the AIRC played a central role in closely scrutinising collective agreements to safeguard employees against market forces and to uphold community standards. This role continued following the 1996 reforms which reduced the content of awards and further encouraged the spread of statutory agreements.⁶⁹ The role of the AIRC in certifying agreements clearly went beyond an administrative function. The AIRC scrutinised agreements and the parties' written declarations, to ensure that the agreements complied with the 'no disadvantage test', and to ensure that procedural requirements were met. The AIRC also heard submissions from the parties at a public hearing.

For AWAs, there was no public certification process, but the OEA was required to be satisfied that the 'no-disadvantage test' and the procedural requirements were met before approving AWAs,⁷⁰ usually through scrutiny of statutory declarations lodged by the employer. The OEA was required to refer AWAs to the AIRC for assessment against the public interest where the OEA had concerns about whether the AWA passed the 'no-disadvantage test', and those concerns could not be resolved by an undertaking or other action by the parties.⁷¹

Under Work Choices, on the other hand, all workplace agreements are automatically approved on lodgement with the OEA. The Work Choices legislation explicitly requires the OEA to 'accept lodgement' of agreements,⁷² and the supporting materials make it clear that it is not expected that the OEA will scrutinise these agreements or the statutory declarations which accompany them.⁷³ The OEA's computer accepts the agreement when all the boxes on the form have been ticked.⁷⁴

As a result of the process of automatic approval on lodgement, employers are not subjected to the former consequences of non-compliance with the rules. These consequences included the non-certification of a collective agreement or non-approval of an AWA. Under Work Choices, a workplace agreement comes into operation even if the bare procedural rules have not been met.⁷⁵ In the extreme case where an

⁶⁹ See M Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *AJLL* 62; Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations Under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19(2) *Australian Journal of Labour Law* 183, 184-185.

⁷⁰ Pre-reform Act, s 170VPB.

⁷¹ Pre-reform Act, s 170VPB(3).

⁷² WR Act, s 151(1)(e) (prior to the 2007 amendments). This provision was subsequently renumbered by the Stronger Safety Net Act and now applies to the WA: see new s 150B(1)(e).

⁷³ WR Act, 342, 344 and Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), 157. The amendments introduced by the Stronger Safety Net Act have not changed this structure, except that the WA is required to assess agreements against the Fairness Test.

⁷⁴ See the evidence provided by the Employment Advocate to the Senate Employment, Workplace Relations and Education Legislation Committee, Estimates, Monday, 29 May 2006.

⁷⁵ Section 347(2) WR Act.

employee has not approved a workplace agreement,⁷⁶ or has been induced to approve a collective agreement by an employer's false or misleading statement,⁷⁷ or because of coercion or duress by the employer,⁷⁸ the only option available to the employee is to bring a court action. The remedies available include a penalty, a variation of the agreement, a declaration that the agreement is void, an injunction and/or an order to remedy any loss of the employee arising from the breach or to prevent or reduce that loss.⁷⁹ Where deficiencies are detected in any of the other procedural steps (such as providing access to the agreement), it is not open to the court to declare the agreement void, although civil penalties may be imposed.⁸⁰

With the removal of the AIRC from the certification process for collective agreements, and the dramatic reduction in union rights to enter workplaces and to raise issues of non-compliance in the certification process, the parties to workplace agreements have lost access to a great deal of industrial relations expertise. Industrial relations consultants have filled this regulatory space by offering template agreements, which appear to be adopted by some parties with little alteration.⁸¹

Unfair bargaining tactics

Given that the Work Choices framework relies largely on self-regulation by the parties, it might be expected that there would be stronger mechanisms in place to guard against unfair bargaining tactics by any of the parties. While there are stronger protections against 'illegitimate' industrial action by unions or employees, the protections against unfair bargaining tactics by employers have, if anything, been weakened. The forms of prohibited conduct of relevance to employers are: making false or misleading statements; discrimination by an employer between unionists and non-union members in negotiations for a collective agreement; and the use of coercion or duress to obtain employee agreement. This section discusses each of these forms of conduct in turn.

False or misleading statements

The prohibition on making false or misleading statements under Work Choices is different from its predecessor in two respects. Firstly, the person relying on the provision (the applicant) needs to demonstrate that the person making the statement was 'reckless' as to whether the statement was false or misleading. This should be easier to prove than the former requirement that the person *knew* that their statement was false or misleading and intended the other person to be persuaded to make or not make an AWA as a result.⁸² However, the second element significantly narrows the scope of the provision, by requiring the applicant to demonstrate that the statement *caused* the applicant to enter into the workplace agreement.⁸³ This means that an employee, or the OWS, cannot take action via the WR Act against an employer solely on the basis that an agreement, or information provided with an agreement, misled

⁷⁶ Section 341 WR Act.

⁷⁷ Section 401 WR Act.

⁷⁸ Section 400(1), (5) WR Act.

⁷⁹ Section 408-413 WR Act.

⁸⁰ WR Act, ss 334(4), 335(4), 337(8)-(10), 342(3) and Pt 8 Div 11.

⁸¹ See the examples of template agreements discussed below at n 165 and accompanying text.

⁸² Pre-reform Act, s 170WG(2).

⁸³ WR Act, s 401(b),(c).

employees in relation to their current or future entitlements – it is also necessary to demonstrate that the employee relied on that information when deciding to make the agreement.

The weakening of the provision on false and misleading statements has occurred alongside the removal of obligations to explain the effect of agreements to employees and to obtain 'genuine' (informed) employee approval of agreements. The removal of third party scrutiny of agreements prior to their approval also means that there is little opportunity for misleading or incorrect information in agreements to be detected. In combination, the effect of these changes is to leave employers largely unaccountable for the inclusion of misleading material in agreements and accompanying documents.

Discrimination against union members

It is prohibited for an employer to discriminate between unionists and non-unionists in negotiating a collective agreement.⁸⁴ This is supported by freedom of association provisions which prohibit an employer from dismissing or otherwise injuring an employee in their employment for a prohibited reason, such as the employee's membership of a union, or entitlement to the benefits of an industrial instrument.⁸⁵ Similar provisions under the pre-reform Act were interpreted narrowly. In *BHP Iron Ore Pty Ltd v AWU*, the Federal Court determined that it was permissible for an employer to offer improved conditions under individual contracts, while refusing to improve the conditions of employees if they opted to remain on the collective agreement.⁸⁶ Amendments to the freedom of association provisions introduced by Work Choices have made it even more difficult for unions to counter individualisation measures by employers. Where the employee claims that they have been dismissed or discriminated against because of their entitlement to the benefit of a collective agreement or award – for example, as part of an individualisation strategy – the employee must now show that this was the 'sole or dominant reason' for the employer's conduct.⁸⁷ Prior to Work Choices, the broader test required that the reasons for any dismissal or other injurious conduct towards employees *included* this prohibited reason.⁸⁸

Coercion or duress

The provisions relating to coercion prohibit any person from taking or threatening to take any action with the intent to coerce another person to enter into (or not enter into) a collective agreement.⁸⁹ The prohibition does not apply to protected industrial action.⁹⁰ Similar provisions apply in relation to AWAs, although the provisions refer to 'duress' rather than 'coercion' and there is no exception for protected industrial action, since it is no longer possible to take protected industrial action in support of AWA negotiations.⁹¹ It is clear

⁸⁴ WR Act, s 402.

⁸⁵ WR Act, s 792.

⁸⁶ (2000) 102 FCR 97; 171 ALR 680; [2000] FCA 430.

⁸⁷ WR Act, s 792(4),(8), s 793(1)(i).

⁸⁸ Pre-reform Act, s 298K(1). See further Andrew Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?' (2006) 16(2) *The Economic and Labour Relations Review* 25-60.

⁸⁹ WR Act, s 400(1).

⁹⁰ WR Act, s 400(2).

⁹¹ WR Act, s 400(5).

that it is *not* duress to require a new employee to make an AWA as a condition of employment.⁹² The provisions also prohibit coercion of an employee in relation to his or her decision to be represented by a bargaining agent in negotiations for an employee collective agreement or an AWA.⁹³

Although the protections against coercion and duress are broadly similar to their counterparts in the pre-Work Choices legislation, these protections are no longer used as a supplement to a certification or vetting process. Whereas previously the detection of employer coercion or duress in bargaining may have prevented approval or certification of an agreement on the basis that employees did not genuinely consent to the agreement, under Work Choices, the approval process does not test for genuine agreement. Accordingly, more reliance is placed on these specific prohibitions against duress and coercion, which can only be pursued through court action.

There are also a range of tactics which might be considered unfair but which nevertheless fall outside the scope of the duress provisions. For example, an employer might provide no pay rises to employees over an extended period (under a collective agreement or otherwise),⁹⁴ and then offer pay rises only to those employees who sign an AWA.⁹⁵ It would also be lawful for an employer to terminate an existing workplace agreement (or threaten to do so), returning employees to the minimum standards in the legislation, in order to persuade employees to accept an AWA which contains provisions which are superior, or equivalent, to those minimum standards.⁹⁶

Reduced capacity to collectively bargain

Prior to the introduction of individual statutory agreements in the form of AWAs in 1996, only statutory collective agreements were recognised by the legislation. The 1996 reforms removed this preference for collective agreements and provided no mechanism to enable employees to insist on collective, rather than individual, arrangements for formal bargaining. In this area, Australia is out of step with other countries such as the United States, the United Kingdom, Ireland and Canada, where there is a mechanism for employees to decide whether to collectively bargain, and then to insist that their choice is recognised by the employer.⁹⁷ Despite the rhetoric of choice associated with the Work Choices legislation, employee choice has been further undermined, with the legislation giving clear preference to individual over collective agreements.

⁹² WR Act, s 400(6). This exception was not explicit in the former provision, Pre-reform Act, s 170WG(1), but reflects the decision of the Full Court of the Federal Court in *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* (2000) 101 IR 435; [2000] FCA 1768. Amendments introduced in 2007 ensure that employees who move to a new employer following a transmission of business *do not* fall within this exception to the duress provisions: WR Act, s 400(6A).

⁹³ WR Act, s 400(3), (4). Similar provisions applied under the Pre-reform Act: s 170NC.

⁹⁴ Provided the existing pay rates were higher than the relevant minimum wage under the AFPCS.

⁹⁵ For further discussion of the Federal Court's view of these tactics see Joel Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 19 *Australian Journal of Labour Law* 210, 214.

⁹⁶ See the discussion of unilateral termination of agreements at n 26 above and see further Fetter, above n 95, at 214-5. The Fairness Test does not prevent employees from being pressured into accepting an agreement which is *less favourable* than their entitlements under a previous workplace agreement, provided that it is at least as favourable as the Standard and any protected award conditions (or provides 'fair compensation' for the loss of those conditions).

⁹⁷ C Briggs, R Cooper and B Ellem, 'What About Collective Bargaining?' in *The State of Industrial Relations: The State of the States 2005*, Evatt Foundation, 2005, p 68.

An AWA overrides a collective agreement in all circumstances,⁹⁸ potentially undermining any gains achieved by employees through collective bargaining. This means that, immediately after a collective agreement has been negotiated and lodged, an employer may offer an AWA to employees which undermines the conditions of the collective agreement, using the employer's superior bargaining power to gain employee agreement. Once the AWA has commenced operating, the collective agreement will not operate again in relation to that individual employee: after the AWA has terminated, the employee will revert to the Standard and protected award conditions rather than the collective agreement.⁹⁹

The Work Choices amendments have substantially reduced the opportunity for unions to collectively represent employees' interests, through the narrowing of right of entry and freedom of association provisions.¹⁰⁰ The amendments also introduced new limits and detailed requirements for protected industrial action in support of employee and union collective agreements. Industrial action is not protected if it is taken in support of claims for 'prohibited content' in agreements,¹⁰¹ or claims arising from 'pattern bargaining';¹⁰² and all protected action by employees or unions must be approved in a secret ballot of employees.¹⁰³ Further, as a consequence of the removal of a formal certification process for collective agreements, unions can no longer intervene, on behalf of employees, to raise concerns about the certification of non-union collective agreements.¹⁰⁴

The Work Choices amendments also reduced the scope for the AIRC to imply 'good faith bargaining' obligations into the agreement-making provisions. Although there were no explicit 'good faith bargaining' obligations in the legislation immediately prior to Work Choices,¹⁰⁵ the AIRC had attempted in some cases to imply such obligations when deciding whether to suspend or terminate a bargaining period. The Work Choices amendments limited the AIRC's capacity to impose such obligations,¹⁰⁶ and also limited the scope for the AIRC to conciliate disputes during the bargaining phase by introducing a time frame of 48 hours for the determination of applications for orders to stop industrial action.¹⁰⁷

3. Modifying Work Choices: the 'Fairness Test'

The Stronger Safety Net Act was enacted by Parliament on 20 June 2007 and proclaimed on 1 July 2007. Amongst other things, the Act introduces a 'Fairness Test' and establishes the WA and the Office of the WO as statutory agencies (replacing the OEA and OWS respectively).¹⁰⁸ The 'Fairness Test' requires that

⁹⁸ WR Act, s 348(2).

⁹⁹ WR Act, s 399(1),(3).

¹⁰⁰ Anthony Forsyth and Carolyn Sutherland, 'From 'Uncharted Seas' to 'Stormy Waters': How Will Trade Unions Fare Under the Work Choices Legislation?' (2006) 16(2) *The Economic and Labour Relations Review* 215-236.

¹⁰¹ 1996 Act, s 436.

¹⁰² 1996 Act, ss 421 and 439.

¹⁰³ 1996 Act, s 445 and Part 9, Division 4.

¹⁰⁴ See pre-reform Act, ss 43(2)(a), 170M(3).

¹⁰⁵ These provisions were removed by the 1996 Act.

¹⁰⁶ See A Forsyth, 'Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission' (2006) 32 *Australian Bulletin of Labour* 27.

¹⁰⁷ See WR Act, s 496(5).

¹⁰⁸ WR Act, ss 153B, 166P.

employees receive 'fair compensation' if an agreement excludes or modifies protected award conditions. The protected award conditions for the purposes of the fairness test are: rest breaks; incentive-based payments and bonuses; annual leave loadings; public holidays; overtime or shift loadings; some monetary allowances; and penalty rates.¹⁰⁹

The stated aim of the Stronger Safety Net Act is to 'ensure that the opportunities and flexibilities inherent in the national workplace relations system are used, but not abused'.¹¹⁰ According to the Government's material, it is intended that the introduction of the Fairness Test 'will provide significant additional protection for vulnerable employees, including young people and workers from a non-English speaking background'.¹¹¹

Despite these stated objectives, various limits on the *coverage* of the Fairness Test will leave many employees unprotected, and the effectiveness of the test will depend largely on the discretionary powers of the new WA which is charged with administering the test. The Fairness Test Policy Guide released by the WA suggests that the legal framework retains an emphasis on self-regulation and reliance on employers to do the right thing. Although the Guide provides only a very limited picture of the approach which the WA will take when applying the Fairness Test, the Guide does suggest that the WA will largely rely on the wording of the agreement itself, and employer information about work patterns and employees' needs, when assessing whether fair compensation has been provided.

Coverage

The test applies to workplace agreements (or variations to workplace agreements) lodged on or after 7 May 2007,¹¹² where the employee to be covered by an AWA, or one or more of the employees to be covered by a collective agreement, works in an industry or occupation which is usually regulated by an award.¹¹³ In the case of AWAs, the Fairness Test does not apply where the employee will earn the full-time equivalent of \$75,000 per year or more as a base salary under the AWA.¹¹⁴ Finally, even if all of these conditions are satisfied, the Fairness Test will only apply where the workplace agreement excludes or modifies one or more protected award condition.¹¹⁵

One substantial limitation of the test is that it does not extend to agreements which were lodged under the Work Choices system prior to 7 May 2007. Many AWAs and collective agreements won't expire for five years, and even after expiry will continue to operate until terminated, or until a new agreement is made.

¹⁰⁹ For the purposes of the Fairness Test, outworker conditions are excluded from the list of protected award conditions outlined in s 354(4) of the WR Act. Outworker conditions cannot be traded away under the Fairness Test: see WR Act, ss 346B(2), 354(3).

¹¹⁰ Second Reading Speech (Stronger Safety Net Bill), below n 118, at 54. The following section draws on Carolyn Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety Net' (2007) 20 *Australian Journal of Labour Law* (forthcoming).

¹¹¹ Explanatory Memorandum, Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (Cth) 5.

¹¹² WR Act, ss 346E(1)(a), 346E(2)(a), 346F(1)(a), 346F(2)(a).

¹¹³ WR Act, s 346E(2).

¹¹⁴ WR Act, s 346E(1) and 346G. This amount may be increased by regulation: s 346G(1).

¹¹⁵ WR Act, ss 346E(1)(d) and 346E(2)(c).

Fair Compensation

An agreement passes the Fairness Test if the Workplace Authority Director ('WAD') is satisfied that it provides fair compensation in lieu of the exclusion or modification of protected award conditions.¹¹⁶ The legislation provides only limited guidance to the WAD about how it should determine whether an agreement provides 'fair compensation'. The primary factors which the WAD *must* take into account in determining this issue are the monetary and non-monetary compensation that the employee or employees will receive; and the work obligations of the employee or employees under the agreement.¹¹⁷

The Government anticipates that the compensation provided in lieu of protected award conditions will usually be a higher rate of pay rather than non-monetary compensation.¹¹⁸ This expectation is consistent with the experience under the former 'no disadvantage test' where it was far more common for employee control over hours and other non-monetary entitlements to be traded away by employees than gained by them. Mitchell et al found that the test as applied by the OEA and AIRC failed to give sufficient weight to the loss of *employee* control over issues such as job duties and hours of work.¹¹⁹ This blindness to the disadvantages imposed by loss of employee control is entrenched in the Fairness Test because the majority of protected award conditions relate to monetary benefits.¹²⁰

Unlike the former 'no disadvantage test', the Fairness Test explicitly states that a collective agreement need only provide fair compensation in its 'overall effect' on employees.¹²¹ The WA's 'Fairness Test Policy Guide' provides no specific guidance about how the WA will assess arrangements which provide fair compensation to the majority of employees, but provide inadequate or no compensation to a minority group of employees. The Guide states that a 'relevant consideration in this regard will be the categories, number and proportion of employees who may be affected by the exclusion or modification of some or all protected conditions'.¹²² The implication is that an agreement may pass the Fairness Test despite the presence of arrangements which do not provide fair compensation to all employees. However, this provides little guidance for employers as to *what proportion* of employees must be fairly compensated in order to reach the WA's threshold requirement.

The 'overall effect' test also applies to multiple business agreements, suggesting that an agreement could pass the test even where employees in one of the affected businesses did not receive fair compensation –

¹¹⁶ WR Act, s 346M(1).

¹¹⁷ WR Act, s 346M(2).

¹¹⁸ Commonwealth, *Second Reading Speech to the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*, House of Representatives, 28 May 2007, 55 (Mr Joe Hockey).

¹¹⁹ R Mitchell, R Campbell, A Barnes, E Bicknell, K Creighton, J Fetter and S Korman, 'Protecting the Worker's Interest in Enterprise Bargaining: The 'No Disadvantage' Test in the Australian Federal Jurisdiction', Final Report for the Workplace Innovation Unit, Industrial Relations Victoria, 2004), 56. See also Evidence to Senate Committee on Employment, Workplace Relations and Small Business, Parliament of Australia, Canberra, 8 June 2007, at p 25 (Mr Scott Barklamb, Australian Chamber of Commerce and Industry) at p 16.

¹²⁰ The exceptions are rest breaks and public holidays.

¹²¹ WR Act, s 346M(1)(b).

¹²² Available on the Workplace Authority's website:

<<http://www.oea.gov.au/docs/employers/Fairness%20Test%20Policy%20Guide%201.0.pdf>> at 9 August 2007.

provided that the majority of employees across all the businesses to be covered by the agreement received fair compensation for the removal or modification of protected award conditions.

There are two additional factors which the WAD may take into account when determining whether an agreement provides 'fair compensation': an employee's personal circumstances, and 'exceptional circumstances' relating to the employee and employer.¹²³ These secondary factors only come into play if the monetary and non-monetary compensation provided by the agreement does not provide 'fair compensation' for the loss of protected award conditions.

According to the WA's Fairness Test Policy Guide, the major focus of the 'personal circumstances' exception is the provision of 'flexible hours' arrangements, such as the removal of penalty rates on a Saturday in exchange for the employer allowing an employee to finish work early each weekday and make up the time on a Saturday. The Guide suggests that the 'important characteristics of 'flexible hours' arrangements are that it is the employee initiates [sic] the request for flexibility'. This provides necessary guidance which is absent from the legislation itself: the Stronger Safety Net Act does not spell out that value to the employee or employee initiation of arrangements are necessary preconditions for the passing of an agreement based on the personal circumstances exception. However, the Guide does not require the assessor to obtain information from the employee to determine who initiated the arrangements in every case. It is only '(i)f there is doubt in assessing the value of [flexible working arrangements, that it is] appropriate to contact the employee and seek feedback on how the employee values the flexible working arrangements'.¹²⁴ The Guide implies that there might be situations where the assessor could be free from doubt about the value of the flexible working arrangement to the employee, but it is difficult to imagine how this could be the case based only on the words of the agreement and the employer's accompanying declaration.

The other discretionary factors to which the WAD may have regard, in exceptional circumstances, and where it is not contrary to the public interest to do so, are the industry, location and economic circumstances of the business and the employment circumstances of the employee.¹²⁵ These broad factors, to be taken into account in 'exceptional circumstances', are not further defined in the legislation. This is the most significant illustration of the breadth of the WAD's discretion to determine whether an agreement should pass the Fairness Test.

The legislation provides one example of the type of arrangement which might be passed in 'exceptional circumstances': a workplace agreement which 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'.¹²⁶ Picking up on recommendations made

¹²³ WR Act, s 346M(3), 346M(4).

¹²⁴ Workplace Authority Policy Guide, above n 122, 30-31. The Guide directs the assessor to assure himself/herself that a flexible hours arrangement has been initiated or requested by the employee only in the case of junior employees, casual employees, apprentices or employees working in businesses that operate on a 24/7 basis: at 32.

¹²⁵ WR Act, s 346M(4).

¹²⁶ WR Act, s 346M(5).

by the Senate Inquiry into the Stronger Safety Net Act, the WA's Policy Guide suggests that agreements made on the basis of the exceptional circumstances' criterion should be time limited.¹²⁷

Consultation process

The effectiveness of the Fairness Test will depend on the internal procedures adopted by the WA. When applying the Fairness Test to an agreement or the variation of an agreement, the WAD 'may inform himself or herself in any way he or she considers appropriate including (but not limited to) contacting the employer and the employee, or some or all of the employees, whose employment is subject to the workplace agreement.'¹²⁸

Given that the WAD will be under enormous pressure to process agreements quickly, it is reasonable to expect that it will continue to rely largely on streamlined processes which fail to take account of the complexity of workplace arrangements. It will be difficult to challenge these decisions, given that there is no requirement in the legislation for the WAD to provide written reasons for its decisions,¹²⁹ nor is there any express right of appeal.¹³⁰ In its Policy Guide, the WAD indicates that there may be circumstances in which the WAD *may* 'reconsider' a Fairness Test assessment, however it retains complete discretion in determining whether it will do so. The Guide suggests that most requests for reconsideration of an assessment will be based on the employer's or employee's belief that the assessment was based on 'incomplete, inaccurate or incorrect information'. Even in those circumstances, the WAD retains the discretion to decide whether to review the assessment.¹³¹

Specific protections against coercion

In support of the Fairness Test, the Stronger Safety Net Act has added a specific provision which prohibits an employer from threatening, taking, or refraining to take, any action for the purposes of coercing an existing employee in relation to bargaining over protected award conditions.¹³² Another new provision prohibits an employer from dismissing, or threatening to dismiss, an employee for the sole or dominant reason that a workplace agreement has not passed, or may not pass, the Fairness Test.¹³³ A reverse onus of proof applies, requiring the employer to prove that the outcome of the Fairness Test was not the sole or dominant reason for any dismissal. This reflects the fact that the employer is in the best position to demonstrate the reasons for the dismissal.¹³⁴

The use of a 'sole or dominant reason' test reduces the effectiveness of the dismissal provision. An employer might argue that the dominant reason for any dismissal was not the fact that the agreement failed

¹²⁷ The agreement itself would either specify time limits within which particular measures would operate or the agreement would have a maximum duration of one or two years: Workplace Authority Policy Guide, above n 122, 33.

¹²⁸ WR Act, ss 346M(6) and 346U(6)

¹²⁹ The only obligation is for the WAD to provide advice about how to vary the agreement so that it passes the test: WR Act, s 346P(3)(a).

¹³⁰ The only avenue of appeal is through an application to the High Court for judicial review of the decision under s 75(v) of the Constitution: see Stewart, below n 143 at 10.

¹³¹ Workplace Authority Policy Guide, above n 122, 37.

¹³² WR Act, s 346ZH(1).

¹³³ WR Act, s 346ZF(1).

¹³⁴ WR Act, s 346ZF(3); Explanatory Memorandum (Stronger Safety Net Act), above n 111, at 32.

the Fairness Test, but that the employer could not afford to pay wages at the rate required under the award or other instrument that would otherwise apply. Further, the new protection from dismissal does not protect employees from conduct which falls short of dismissal such as a reduction in their shifts, where an agreement fails the Fairness Test.¹³⁵

Efficacy of the Fairness Test

The Fairness Test is intended to 'provide significant additional protection for employees, reassuring them that when they enter into a workplace agreement, it will be a fair one that has been assessed by an independent statutory office'.¹³⁶ It is likely that the Fairness Test will provide some measure of additional protection for employees by imposing limits on the systematic removal of award conditions without compensation. However, it is false to 'reassure' employees that agreements which have passed the Fairness Test have been assessed as 'fair' by the WA. The assessment performed by the WA does not involve a broad inquiry about whether the agreement is 'fair', but is limited to an assessment about whether 'fair compensation' has been provided for the loss of a restricted range of conditions. Employees will also no doubt assume that the WA has checked agreements for compliance with other aspects of the legislation, such as the Standard. Yet the legislation does not require the WA to scrutinise agreements against any legislative rules other than the Fairness Test,¹³⁷ and the Fairness Test does not require that agreements are 'fair' in comparison with employees' existing conditions under an agreement or award. The test is limited to a requirement that 'fair compensation' is provided for the loss of any protected award conditions, or that the employer's or employee's circumstances justify the WA passing an agreement that does not otherwise provide 'fair compensation'. It follows that some employees will inevitably be misled by the promise of fair agreement-making under the new framework.

Employees may also be misled by the Government's claim that the Fairness Test not only improves on the existing safeguards, but that it provides a 'stronger safety net' than the former 'no disadvantage test'. The Government has justified this claim on the basis that the test explicitly requires non-monetary compensation to be 'of value' to the employee,¹³⁸ and because the test is underpinned by the five conditions in the Standard which cannot be traded away.¹³⁹

This claim is highly misleading for a number of reasons. First, the new Fairness Test is clearly *narrower in scope* in comparison with the former 'no disadvantage test'. The 'no disadvantage test' measured the agreement against the full range of award conditions, and these award conditions were regularly updated

¹³⁵ See the discussion of these two examples in the Stewart submission to the Senate Committee on Employment, Workplace Relations and Education, Inquiry into the *Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007* and the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* ('the Senate Safety Net Inquiry'), p 12.

¹³⁶ Department of Employment and Workplace Relations (DEWR), *Submission to Safety Net Inquiry*, June 2007, at 3.

¹³⁷ New section 344(5) makes clear that the WA is only required to measure agreements against the Fairness Test, it is not required to determine whether any of the other rules relating to agreement-making have been met. See further Explanatory Memorandum (Stronger Safety Net Bill), above n 111, at 34.

¹³⁸ Evidence to Senate Committee on Employment, Workplace Relations and Small Business, Parliament of Australia, Canberra, 8 June 2007, at p 2 (Ms Natalie James, DEWR).

¹³⁹ Senate evidence (DEWR), above n 138, p 2.

by the AIRC through test cases to keep pace with community standards.¹⁴⁰ The benchmark for the Fairness Test is restricted to the five minimum standards in the Standard, plus a limited range of award conditions known as 'protected award conditions'. These conditions do not include many important items which formed part of the assessment under the 'no disadvantage test'. These include: clauses relating to maximum and minimum hours of work, minimum breaks between shifts, notice and consultation requirements relating to changes to rosters and shift starting times; annual and personal leave entitlements;¹⁴¹ casual loadings;¹⁴² long service leave entitlements under awards or State legislation; and redundancy pay.¹⁴³ Further, the benchmark of protected award conditions under the Fairness Test is likely to diminish over time, because of the replacement of the AIRC's test case function with a more limited power to vary awards for the 'maintenance of minimum safety net entitlements'.¹⁴⁴

Secondly, as has been discussed, the Stronger Safety Net Act, and the guidelines adopted by the WA, offer fewer procedural protections than those which were provided under the 'no disadvantage test'. The assessment is based on largely discretionary rules, with no requirement for the WA to consult with employees, or to provide reasons for its decisions, and no formal avenues for appeal. Prior to Work Choices, the majority of statutory agreements were assessed by the AIRC in an open forum, and the decision of the AIRC was made publicly available and was subject to appeal.

Further, despite the particular focus on vulnerable employees, including young people and workers from a non-English speaking background, the Stronger Safety Net Act does not overcome the information asymmetry which is currently a feature of the system. The Workplace Relations Fact Sheet, which employers are now required to provide to all employees,¹⁴⁵ is a one-size-fits-all approach which provides only a very broad outline of employee rights and minimum entitlements. This no substitute for the requirement, prior to Work Choices, for employers to explain the effect of agreements to employees as a prerequisite for the approval of agreements.¹⁴⁶

¹⁴⁰ Sean Cooney, John Howe and Jill Murray, 'Time and Money Under Work Choices: Understanding the new *Workplace Relations Act* as a scheme of regulation' (2006) 29(1) *University of New South Wales Law Journal* 215, 229-230.

¹⁴¹ Minimum leave entitlements remain protected by the AFPCS, but award entitlements to leave which are *more generous* than the AFPCS are not taken into account under the Fairness Test.

¹⁴² Similarly, minimum casual loadings are protected by the AFPCS, but more generous loadings in awards are not protected.

¹⁴³ Various submissions to the Senate Inquiry addressed this point: see, eg, Stewart submission to the Senate Committee on Employment, Workplace Relations and Education, Inquiry into the *Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007* and the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* ('the Senate Safety Net Inquiry') at 1-2; ACTU submission to the Senate Safety Net Inquiry, at 6.

¹⁴⁴ WR Act, ss 552(1)(c), 553; see further Sean Cooney, John Howe and Jill Murray, 'Time and Money Under Work Choices: Understanding the new *Workplace Relations Act* as a scheme of regulation' (2006) 29(1) *University of New South Wales Law Journal* 215, 232.

¹⁴⁵ WR Act, s154A-154D.

¹⁴⁶ Pre-reform WR Act, ss 170LJ(3), 170LK(3), 170LR(2). But note that the reliance largely on statutory declarations to ensure compliance with these and other procedural rules has attracted criticism: Shelley Marshall and Richard Mitchell, 'Enterprise Bargaining, Managerial Prerogative and the Protection of Workers' Rights: An Argument on the Role of Law and Regulatory Strategy in Australia under the *Workplace Relations Act 1996 (Cth)*' (2006) 22/23 *The International Journal of Comparative Labour Law and Industrial Relations* 299-327, at 311-313.

Overall, while the Fairness Test will provide some additional protection for employees, there remains considerable doubt that the introduction of the test will lead to procedural or substantive outcomes which are fair to employees.

4. Evidence of employee outcomes under Work Choices

It is clear, from the discussion of the legal framework under Work Choices in section 2, that there are multiple ways in which the law has the potential to undermine employee bargaining power in practice. This section of the report will focus on the following specific outcomes which reflect this erosion of employee bargaining power: the removal of protected award conditions; lack of compensation for the loss of award conditions; loss of non-monetary benefits; and the inclusion of conditions in agreements which fall below the safety net.

Erosion of protected award conditions

The removal or reduction of protected award conditions in AWAs has attracted considerable media attention.¹⁴⁷ This information has become available in spite of the secrecy which has surrounded AWAs. Since AWAs were first introduced in 1996, they have not been freely available, unlike collective agreements which were published online. The secrecy which surrounds AWAs has increased under Work Choices due to two factors: first, the OEA and WA have restricted academic access to AWAs lodged under Work Choices;¹⁴⁸ secondly, the then OEA stopped analysing data in relation to protected award conditions under AWAs in June 2006,¹⁴⁹ following negative publicity about data released by the OEA at a Senate Estimates hearing in May 2006.

The figures which were released by the OEA in May 2006 were startling. The OEA's analysis showed, for example, that *all* AWAs in a sample of 250 were found to have removed *at least one* protected award condition, and 16 per cent of the sample removed all protected award conditions.¹⁵⁰ Figures based on a much larger sample of 998 AWAs lodged between May and October 2006 were leaked from the OEA in April 2007. The OEA has confirmed that the leaked data 'matched' data collected (but not analysed) by the OEA, but has raised some concerns that some information appeared to have been deleted from the data, and that the data had not been 'quality assured'.¹⁵¹ Nevertheless, the leaked figures confirmed the picture

¹⁴⁷ See, Mark Davis, 'Revealed: how AWAs strip work rights', *The Sydney Morning Herald*, 17 April 2007; Mark Davis and Misha Schubert, 'Workers' rights lost with AWAs', *The Age* (Melbourne), 17 April 2007.

¹⁴⁸ As at 29 May 2007, no requests for academic access to AWAs had been granted: see P McIlwain, Evidence to Estimates hearing, Senate Employment, Workplace Relations and Education committee, Canberra, 28 May 2007, 46.

¹⁴⁹ P McIlwain, Evidence to Estimates hearing, Senate Employment, Workplace Relations and Education committee, Canberra, 28 May 2007, p 16.

¹⁵⁰ P McIlwain, Evidence to Estimates hearing, Senate Employment, Workplace Relations and Education committee, Canberra, 29 May 2006, p 138.

¹⁵¹ P McIlwain, Evidence to Estimates hearing, Senate Employment, Workplace Relations and Education committee, Canberra, 28 May 2007, pp 4-5.

presented by the earlier data: that AWAs were being used to remove or modify the so-called 'protected' award conditions:¹⁵²

Table 1: Removal or modification of protected award conditions under AWAs¹⁵³

Type of protected award condition	Abolished or modified condition	Abolished condition	Modified condition
Overtime rates	88%	52%	36%
Shiftwork loadings	89%	76%	13%
Penalty rates	89%	68%	21%
Monetary allowances	91%	48%	43%
Incentive payments	85%	70%	15%
Public holiday payments	82%	46%	36%

Unfortunately, it will be much more difficult to obtain data about the impact of the legislation on employee conditions under AWAs in future. The function of providing statistical data to the Minister has been removed from the list of functions of the WAD,¹⁵⁴ and replaced by more limited provisions which allow the Minister to direct the WAD to provide 'specified reports relating to the [WAD's] functions'.¹⁵⁵

At present, collective agreements are readily available on the WA's website, unless one of the parties to the agreement has successfully applied for an exemption from publication. No agreements lodged on or after 7 May 2007 have yet been released, despite reports from the WA that some (albeit a small proportion) of agreements have been approved following an application of the Fairness Test.¹⁵⁶

Peter Gahan has made use of the WA's agreements database for his study of all published employer greenfields agreements from the first year of Work Choices. The findings from this study reveal that, as for AWAs, employer greenfields agreements are being used to systematically remove protected award conditions for the majority of employees who are covered by this form of agreement. 79.3 per cent of the

¹⁵² It is very rare for the modification of protected award conditions to provide an improvement in conditions: see David Peetz, *Assessing the Impact of Work Choices: One Year On*, Department of Innovation, Industry and Regional Development, 19 March 2007

¹⁵³ The data for this table is extracted from David Peetz and Alison Preston, *AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data*, Report to Department of Innovation, Industry and Regional Development (2007) at 3-4. Some of this data was originally published by the Sydney Morning Herald: see Mark Davis, 'Revealed: how AWAs strip work rights', *The Sydney Morning Herald*, 17 April 2007; Mark Davis and Misha Schubert, 'Workers' rights lost with AWAs', *The Age* (Melbourne), 17 April 2007.

¹⁵⁴ See former s 151(1)(i) WR Act (prior to the amendments introduced by the Stronger Safety Net Act).

¹⁵⁵ WR Act, s 163A(1).

¹⁵⁶ See Workplace Express, 'First Deals Fail Fairness Test, Says Bennett', 14 August 2007.

sample of 411 agreements sought to exclude all protected award conditions, and 86.4 per cent of the agreement sought to exclude at least one protected award condition.¹⁵⁷

Lack of compensation for the loss of award conditions

The figures relating to protected award conditions do not reveal the extent to which employees are being compensated for the loss of these conditions through increases in their base rates of pay. Early anecdotal evidence suggested that such compensation may be limited. One example which received media attention in May 2006 was Spotlight's use of AWAs, for retail employees, which provided for a pay rate of \$14.50 per hour (2 cents higher than the pay rate under the relevant State award), but removed overtime pay, penalty rates and paid rest breaks. The AWAs also reportedly eliminated other protections for employees which were not protected award conditions. These conditions related to breaks between shifts and maximum and minimum shift lengths.¹⁵⁸ Dozens of AWAs produced to the Queensland Industrial Relations Commission's Inquiry into the Impact of Work Choices provided further anecdotal evidence of the use of these instruments to erode wages and conditions of employment.¹⁵⁹

Gahan's study also suggests that many employees are receiving no compensation for the loss of protected award conditions. The study shows that nearly half of a sample of employer greenfields agreements provide for rates of pay that sit at, or slightly below the minimum wage set by an Australian Pay and Classification Scale ('APCS').¹⁶⁰ In the study, an applicable APCS was readily identified for 165, or 40.1 per cent, of the total sample of 411 employer greenfields agreements. For these 165 agreements, the rates set for the lowest paid job classification and the highest paid job classification were compared against the relevant rates in the applicable APCS. The analysis of the lowest paid job classification rates showed that 23 per cent of agreements provided for minimum pay rates that *fell below* the relevant APCS and 23.6 per cent contained pay rates equal to the relevant APCS.¹⁶¹ The analysis of the highest paid job classification rates revealed that 36.3 per cent of the agreements contained rates which fell below the minimum pay rate, while 11.9 per cent paid at a rate equal to the APCS.¹⁶²

As Gahan's analysis shows, nearly half of the sample of employer greenfields agreements provided for minimum rates at or below the minimum rates required to be paid by law. When combined with the data which shows that the vast majority of employer greenfields agreements remove one or more protected award condition, it is clear that many employees have lost monetary benefits under awards without receiving any compensation.

¹⁵⁷ Peter Gahan, *Employer Greenfields Agreements in Victoria*, Report to the Victorian Office of the Workplace Rights Advocate, 17 August 2007, 47.

¹⁵⁸ 'Spotlight AWAs could cut retail workers' pay by up to \$100 per week: ALP', *Workplace Express*, 25 May 2006.

¹⁵⁹ QIRC, Final Report, *Inquiry into the impact of Work Choices on Queensland workplaces, employees and employers* (Swan DP, Asbury C, Thompson C, 29 January 2007) Vol 2.

¹⁶⁰ The APCS is derived from the State or Federal award which would have applied to the employee if not for the operation of Work Choices, and is updated by the Australian Fair Pay Commission. If an APCS doesn't apply, then the Federal Minimum Wage applies: WR Act, s 182(1),(3).

¹⁶¹ The lowest rate of pay in the agreement was compared against the relevant rate in the applicable APCS.

¹⁶² Gahan, above n 157, pp 35-37.

Loss of non-monetary benefits

Concerns have been expressed in the past that the application of the former 'no disadvantage test' failed to fully take account of the loss of employee control through workplace agreements. The Work Choices framework has exacerbated this problem, with the removal of any requirement to offset employee losses with benefits, and the overall effect of the framework on employee bargaining power. The addition of a 'Fairness Test' will do little to address this issue because the majority of the protected award conditions relate to monetary benefits rather than employee rights to control in the workplace.

The extracts from collective agreements in this section are *not* isolated examples of the types of provisions which are being used in agreements. Most of these extracted provisions are taken from templates which appear in multiple agreements. The source of these templates is not always clear, although one of these templates contains a signpost to the source, an industrial relations consultancy called Enterprise Initiatives, in the dispute resolution clause.¹⁶³

As recently highlighted by the New South Wales Industrial Relations Commission, the Enterprise Initiatives template agreement provides for low rates of pay (for example, \$8.57 per hour for a 17-year old permanent employee) but removes all protected award conditions, and provides only for pay rises in accordance with decisions of the Australia Fair Pay Commission.¹⁶⁴ As set out below, the template also includes many clauses which substantially erode employee control over workplace conditions. This template has been used widely in the retail sector. From a random sample of 36 agreements in the retail trades industry sector, lodged between 27 March 2006 and 26 March 2007, 9 agreements, or one quarter of the sample, were based on the Enterprise Initiatives template.¹⁶⁵

These templates therefore provide a useful insight into the sorts of arrangements which are being included in agreements in particular industry sectors. The prevalence of these template agreements suggests that there is very little genuine bargaining taking place in these industries.

The following examples of loss of employee control are evident in these templates: the loss of a fixed work location; the loss of control over the duties to be undertaken by the employee; the loss of control over, and advance notice of, rosters and minimum and maximum hours; the increase in control by employers through the incorporation of company policies; and the addition of new obligations on employees.

The loss of a fixed work location

As might be expected, some of the clauses which provide for a variation of the location of employment ensure that an employee's personal circumstances are taken into account. However, there are other examples which make no allowances for employee preference, effectively authorising the transfer of the employee to any location of the business across the State.

¹⁶³ The clause requires referral of the matter to Enterprise Initiatives Pty Ltd where the dispute cannot be resolved at the workplace level and suggests the involvement of EI Legal Pty Ltd where there is a dispute over employee entitlements or employer obligations.

¹⁶⁴ *Child Employment Principles Case 2007* [2007] NSWIRComm 110 at [197] – [198].

¹⁶⁵ These agreements were sourced from the Workplace Authority Agreements Database.

*Retail Franchise Employee Collective Agreement (Queensland)*¹⁶⁶

Clause 44 Transfer of Employment

- 44.1 The Employer may relocate you from 1 store location to another on a permanent basis to accommodate the Employer's business needs, but will first consult with you to ensure that any such relocation takes into account your personal circumstances.
- 44.2 Where the Employer transfers you from one township to another, the Employer shall be responsible for and shall pay the whole of the moving expenses, including fares and transport charges, for you and your family. This amount will be capped as per the Employer's policies.

*Employee Collective Agreement (NSW) based on Enterprise Initiatives template*¹⁶⁷

Clause 4 Contract of Employment

- 4.4 Employees may be reasonably required from time to time to work at sites operated by the Employer other than their regular place of employment...

Retail Outlet Employee Collective Agreement (South Australia)

Clause 12 Work Locations and Flexible Working Hours

All employees of [the employer] are required to be flexible in relation to both working hours and work locations. All employees may be required to work during both the day and at night and they may be required to work any location at which [the employer] has one of its stores. Work may be required on Saturdays, Sundays and on public holidays.

Source: Workplace Authority Agreements Database

Loss of control over job functions

The loss of the right to insist on a particular work location often coincides with the removal of fixed duties. The removal of employee control over job duties is often dressed up as an opportunity for the employee. However, a workplace agreement is not needed to provide employees with the *option* of changing their job functions, the workplace agreement is only necessary if the employer wishes to impose a change on the employee without their consent. In some circumstances, the effect of such a provision will be to remove an employee's existing rights, under his or her individual contract of employment, to continue to perform duties which are consistent with his or her current role.

¹⁶⁶ This agreement was used for one franchise across all its outlets in Queensland. A similar agreement was made for the same franchise in Victoria and New South Wales.

¹⁶⁷ This template was the source of 9 agreements from a sample of 36 agreements in the retail trades industry sector, lodged between 27 March 2006 and 26 March 2007. All of these agreements (except one) were made by employers in NSW. Eight of these agreements were employee collective agreements and one was an employer greenfields agreement.

*Template Employer Greenfields Agreement in the Accommodation and Food Services Industry*¹⁶⁸

Part 2 – Contract of Employment

2.3 Job Rotation

In recognition of the operational and efficiency requirements of the Employer, and to create more varied and interesting work, the Employer may rotate you from one location to another to perform functions outside your usual duties, provided that you have the training and competency to do so and the transfer is reasonable taking into account your personal needs and circumstances.

*Retail Franchise Employee Collective Agreement (Queensland)*¹⁶⁹

Clause 8 Introduction

- 8.1 You are expected to willingly accept flexibility of jobs and duties throughout your employment, and to work on any range of tasks to the extent of your individual skills, competence and training. You must take all reasonable steps to achieve quality, accuracy and completion of any reasonable job or task assigned to you.
- 8.2 The job classifications set out in this Agreement should not be read in such a way as to preclude flexible working arrangements. You may be required to undertake tasks which are described under other job classifications. This interaction of tasks at the various levels of work, between production and sales in bakeries, is a key feature of the Employer's multi-skilled workplace approach.
- 8.3 A reasonable change in duties to accommodate the Employer's business needs will not attract any extra payment and will not be grounds for the termination of your employment.

Source: Workplace Authority Agreements Database

Loss of control over rosters and hours of work

Agreements which provide for employers to set rosters without consulting employees, and/or with little notice to employees of their rostered hours, have a clear impact on the ability of employees to balance their work and life commitments. These provisions suggest that employees may not only be asked to work unsocial hours (for little or no extra pay), but may be asked to work these hours at short notice.

¹⁶⁸ From a random sample of 40 agreements in the accommodation and food services industry sector, lodged between 27 March 2006 and 26 March 2007, five agreements were based on this template (three of these were Employer Greenfields Agreements and two were Employee Collective Agreements).

¹⁶⁹ See above n 166.

*Template Employer Greenfields Agreement in the Accommodation and Food Services Industry*¹⁷⁰

Clause 4.3 Rosters/Scheduling

4.3.2 When is the Employer required to post your roster?

Rosters will be drawn up and where practicable posted 3 days in advance of the commencement of the roster cycle.

4.3.3 How can the Employer change your roster?

Rosters may be changed either before or during a roster cycle on giving you at least 24 hours notice or such lesser period as mutually agreed between you and the Employer. Provided that in the case of emergency, unforeseen operational contingency, absenteeism, or sickness the Employer is required to give you no notice provided they take into account your individual needs and circumstances.¹⁷¹

*Employee Collective Agreement (NSW) based on Enterprise Initiatives template*¹⁷²

Clause 8. Rosters

8.1 As far as practically possible, the Employer will draw up a roster 1 week in advance. Changes to rosters may occur with 24 hours notice or, subject to the availability of the Employee, with less notice if by mutual consent.

Source: Workplace Authority Agreements Database

The Enterprise Initiatives template clause on rostering appears in the context of an agreement which contains no restrictions on the span of hours in which the employee may be required to work, and which allows the maximum of 38 ordinary hours of work per week to be averaged over 12 months. An agreement used by a fast food franchise contained a similar clause allowing for changes to the rosters with 24 hours notice in some circumstances. Again, the clause was combined with a very broad span of hours (6am to 2am Monday to Friday) for which the hourly rate was the minimum rate under the relevant pay scale.

¹⁷⁰ See above n 168.

¹⁷¹ The clause goes on to provide for a decrease or extension of a part-time employee's hours during a roster taking into account the employee's individual needs and circumstances: see clause 4.1.2(f). The factors which are taken into account in drafting the initial roster include employee availability and business needs: see cl 4.3.1, OEA agreement no 072215824.

¹⁷² See above n 167.

Removal of minimum hours and a regular salary for part-time workers

*Template Employee Collective Agreement for Restaurants and Cafés in Queensland*¹⁷³

Clause 11 Hours of work

Part-time Employees/Casual Employees

- (a) The arrangement of hours of work for part-time/casual employees is flexible, up to a maximum of 152 hours per 4 week period, unless otherwise agreed upon by the employee and employer. All part-time/casual employees will be paid for the hours worked per pay period on an hour for hour basis.
- (b) As our business experiences fluctuations in the demand for our services the Restaurant may require employees to work in excess of 152 hours per 4 week period.

Source: Workplace Authority Agreements Database

This template agreement for restaurants and cafés provides an extreme example of the flexibility required of 'part-time' employees. Under this agreement, part-time employees are paid at the minimum level required under the relevant pay and classification scale. These employees are offered no guarantee of minimum hours, or regular hours, and their pay fluctuates according to the hours worked in a pay period. However, if required to do so by the employer, the part-time employees are expected to work up to full-time hours (152 hours over a 4 week period or 38 hours per week on average), *plus* reasonable additional hours. There is little incentive for an employer to pay a casual loading to employees under such an agreement where the part-time provisions provide the same level of flexibility without the addition of a loading.

The Fairness Test may, to some extent, stem the widespread practice of removing penalties and other allowances for working unsocial (or extended) hours, without providing any compensation for the loss of these benefits. However, these other provisions - which diminish the power of employees to exert some control over their work location, duties and hours of work – will not be addressed by the Fairness Test because these matters do not form part of the protected award conditions.

Incorporation of employer policies

Another way in which employee control can be diminished is through the incorporation of company policies into an agreement. The types of policies which are incorporated is usually not specified, but could include policies relating to anything from performance management to the use of company vehicles. The incorporation clause often includes a statement that the policies may be varied at any time by the employer, with or without employee agreement or consultation.

¹⁷³ From the sample of 40 agreements in the accommodation and food services industry sector, 6 agreements were based on this template.

*Employee Collective Agreement (NSW) based on Enterprise Initiatives template*¹⁷⁴

Clause 4 Contract of Employment

4.3 Employees must read and comply with all written Company policies and procedures, as notified and amended from time to time.

*Retail Franchise Employee Collective Agreement (Queensland)*¹⁷⁵

Clause 7 Policies

- 7.1 You are required to be conversant with and to comply with any policies and procedural guidelines in place, and as amended by the Employer from time to time.
- 7.2 This includes the Employer's code of conduct, operational guidelines (eg. behaviour, presentation, health and safety, housekeeping), the...Team Policy and any other policies and procedures communicated to you.
- 7.3 Failure to adhere to the terms and conditions of these policies and procedural guidelines may result in disciplinary action including termination of employment.

Source: Workplace Authority Agreements Database

Increased employee obligations

There are many other obligations which can be imposed on employees via a workplace agreement, but which will not be taken into account under the Fairness Test. For example, an agreement may add obligations which are usually contained in a contract of employment, without providing any offsetting benefit. These obligations might affect an employee's rights on termination, such as restrictions on the use of confidential information and on the employee's ability to compete with the employer after the employment has ended.

*Retail Franchise Employee Collective Agreement (Queensland)*¹⁷⁶

Clause 41 Confidentiality

- 41.1 It is a condition of your employment that you shall neither during or after the period of your employment with the Employer, except in the proper course of your duties or as permitted by the Employer or as required by law, divulge to any person or use any trade secret or any confidential information concerning:
 - (a) The business or financial arrangements or position of the Employer; or
 - (b) Any of the dealings, transactions or affairs of the Employer.

¹⁷⁴ See above n 167.

¹⁷⁵ See above n 166

¹⁷⁶ See above n 166

Employee Collective Agreement – Retail Outlet (Queensland)

Clause 4 Duty of confidentiality

...The employee shall not divulge or use Confidential Information either during the period of employment or after termination of employment.

The employee shall not participate in work place gossip, to the detriment of individual employees and clients.

Clause 5 Intellectual Property Rights

The employer and the employee agree that the employer is the owner of all intellectual property rights in any work or other thing created by the employee during the course of the employee's employment by the employer, whether or not such work was undertaken by the employee as part of the employee's duties.

In the event that the employee is the author of such a work, the employee hereby waives entirely the employee's rights in respect of such a work.

Clause 13 Termination

The employee agrees that if employment is terminated, any amount paid to the employee by the employer is tendered and received in full and final satisfaction of all claims, suits and demands that the employee may have against the employer arising from employment with the employer.

Source: Workplace Authority Agreements Database

The pay rates in the second of these agreements ('Retail Outlet Agreement') are set at the minimum level required by law, but are stated to cover "all allowances, reasonable overtime worked, shift work, work on public holidays, redundancy, long service leave, annual leave loading, and any other financial claim which could be made by the employee". There is also provision for a bonus, but this is to be paid entirely at the discretion of the employer.

The Retail Outlet Agreement was lodged in February 2007. If the agreement had been lodged 2 months later, only the removal of allowances, overtime, shift and public holiday penalties, and annual leave loading would be taken into account under the Fairness Test. The addition of confidentiality and IP obligations (above those which would otherwise apply at law) and the removal of redundancy and long service leave entitlements would not be taken into account in the calculation of fair compensation. In addition, the WA would have no role in advising the employer about the effectiveness of the agreement. Some of the clauses (such as the termination clause which attempts to obtain a release from employees against future claims) appear to be legally unenforceable, yet the WA is discouraged by the legislation from reviewing agreements for their legal effectiveness.

Bargaining outcomes below the safety net

One of the stated benefits of the Work Choices framework is the Standard, a set of five minimum conditions in the legislation which cannot be bargained away. However, as outlined in section 2, the removal of a

process requiring compliance with the rules as a prerequisite for the approval of agreements, has resulted in agreements coming into operation which fall below the safety net floor. Although these agreements are unenforceable (to the extent they fail to comply with the Standard), it is left to the affected employee to identify any inconsistency, and to enlist the services of the WO, or initiate proceedings at their own expense, to recover any lost benefits. Such a framework inevitably deters employees from pursuing underpayment claims.

Gahan's study of 411 Employer Greenfields Agreements detected non-compliance with the Standard in the following areas:¹⁷⁷

- 3.6 per cent of agreements provided for a casual loading below the Standard;
- 2.2 per cent of agreements contained provisions for personal leave entitlements which were inconsistent with the Standard;
- 9 per cent of agreements contained provisions for unpaid carer's leave which were inconsistent with the Standard;
- 10 per cent of agreements provided for maximum ordinary hours greater than the maximum of 38 hours specified by the Standard; and
- 23 per cent of a smaller sample of 165 agreements provided for minimum pay rates for the lowest paid job classification that *fell below* the relevant APCS; and 36.3 per cent of these agreements contained rates for the highest paid job classification which fell below the minimum pay rate.

In May 2006, the OEA released data which identified the following compliance issues in a sample of 250 AWAs:

- 6 per cent provided for inferior annual leave entitlements to the standard;
- 20 per cent provided for hours of work which breached the 38 hour maximum in the standard;
- 14 per cent provided for a casual loading inferior to the 20% minimum standard.¹⁷⁸

Additional data from the OEA, which was leaked to the Sydney Morning Herald in April 2007, appeared to confirm this potential for non-compliance with the safety net floor. From a sample of 5,250 AWAs lodged between May and October 2006, the OEA held concerns that 27.8 per cent might have undercut the Standard in relation to rates of pay and/or basic leave entitlements.¹⁷⁹ In subsequent evidence to the

¹⁷⁷ Gahan, above n 157, 8-11.

¹⁷⁸ P McIlwain, Evidence to Estimates hearing, Senate Employment, Workplace Relations and Education committee, Canberra, 29 May 2006, p 132-133, 137.

¹⁷⁹ Davis, above n 153.

Senate, Mr McIlwain revealed that from an audit of 3,250 AWAs lodged between April and July 2006, 1700 were referred to the OWS for further investigation.¹⁸⁰

The OEA's response to this lack of compliance illustrates one of the consequences of a fragmented institutional framework, with the OEA apparently assuming no direct responsibility for compliance. In May 2006, the Employment Advocate disclosed that his office did not write to inform the relevant parties where non-compliance with the Standard was detected in workplace agreements. Instead, the OEA referred the agreements to the (then) OWS.¹⁸¹ This demarcation of functions between what is now the WA and the WO must necessarily lead to a delay between the time when deficiencies in agreements are picked up by one agency, and when they are investigated by the other.

By May 2007, the WA had ceased undertaking any further audits of this kind, because the WO's investigations had revealed 'high levels of compliance at the workplace level' and therefore no prosecutions resulted from these investigations.¹⁸² However, at the same time, the WO revealed that there were 'high levels of compliance' only in the sense that the WO was satisfied that the majority of employers were prepared to apply the Standard in practice once they became the *subject of an investigation*. For employers who had lodged agreements which misled employees about the terms of the Standard, or provided inferior benefits compared with the Standard, the consequences were not at all severe. Of the 1711 agreements which were referred to the OWS by the OEA:

- in relation to 1187 of those agreements, the OWS was satisfied, based on internal policy documents, or statements from the parties, that the Standard was being applied in practice;
- in relation to 200 or so of those agreements, the employer provided a 'compliance undertaking' or lodged an amended AWA which complied with the Standard;
- 50 of those agreements complied with the Standard without the need for further investigation;
- 7 agreements provided for rates beneath the Standard, and the relevant employers subsequently complied the Standard on a voluntary basis; and
- in relation to 256 of those agreements, the investigations had not been finalised, but the OWS only expected to issue breach notices in relation to 2 of these agreements, and in neither case was the breach of 'sufficient gravity' to warrant litigation.¹⁸³

¹⁸⁰ P McIlwain, Evidence to Estimates hearing, Senate Employment, Workplace Relations and Education committee, Canberra, 28 May 2007, p 31

¹⁸¹ P McIlwain, Evidence to Estimates hearing, Senate Employment, Workplace Relations and Education committee, Canberra, 29 May 2006, p 134. Further evidence provided by Mr McIlwain a year later confirmed that the OEA had retained this approach: Evidence to Estimates hearing, Senate Employment, Workplace Relations and Education committee, Canberra, 28 May 2007, p 30.

¹⁸² McIlwain, above n 180, p 32.

¹⁸³ Mr N Wilson, Evidence to Estimates hearing, Senate Employment, Workplace Relations and Education committee, Canberra, 28 May 2007, pp 137-138

This suggests that the OEA and OWS (and their successors, the WA and WO) will not necessarily take action to remedy the terms of agreements where they set out terms which are inferior to the Standard. In some cases, an employer may lodge an amended AWA or provide an undertaking to comply with the standard. But in the majority of cases, it will be sufficient for employers to provide the minimum conditions in the Standard to employees in practice. This only highlights the flaw in the legal framework: it is *not unlawful* for an employer to lodge an agreement which undercuts the Standard. It is only unlawful if the employer goes on to actually provide conditions which are less than the Standard. In most cases it will be left to the affected employee to identify any inconsistency and to enlist the services of the WO where the employer is not providing the minimum entitlements in practice. If the WO's investigation detects an underpayment, the consequence for the employer will be a requirement to provide back pay to any affected employees. There will usually be no penalty or public embarrassment, provided the employer is compliant in response to the investigation. If an employer is not compliant, the OWS or WO will only prosecute where the breach is 'sufficiently serious'. For employees who are affected by a less serious breach, the only remaining option is to initiate costly proceedings themselves if they wish to recover the underpayment.

The approach taken by the OWS/WO in relation to this issue is clearly framed by its statutory obligation to ensure compliance with the legal rules.¹⁸⁴ However, the gap in the legal framework which permits agreements to set out conditions which are inconsistent with an employee's minimum entitlements appears to undermine another important function of the WA and the WO: to provide education, assistance and advice to employees (and employers) in relation to their rights and obligations under Commonwealth workplace relations legislation¹⁸⁵

The process followed by the OEA in the past suggests that the WA's new function of assessing agreements against the Fairness Test will *not* overcome these problems of non-compliance with the Standard. It is more likely that the WA will again take a narrow approach to its functions, taking note only of those aspects of the agreement which are relevant for assessing 'fair compensation', and overlooking clauses which are otherwise unenforceable, misleading or ineffective.

Summary of employee outcomes

This section has outlined some of the ways in which employee conditions are being eroded under workplace agreements. In particular, there are many instances of the use of AWAs and employer greenfields agreements to remove protected award conditions without compensation. In the case of collective agreements, the section highlights a number of templates which are being used to set the terms and conditions of employment for retail and hospitality workers. Following a reduction in the involvement of traditional third parties in agreement-making (ie, the AIRC and unions), these templates have been adopted (often without alteration) by many employers. The effect is to allow an alternative third party - the industrial relations consultant - to exercise significant influence over the content of agreements.

The widespread replication of these template collective agreements in the retail and hospitality industries suggests that there is very little genuine bargaining taking place. A study of the templates themselves

¹⁸⁴ See WR Act, s 150B(1)(b).

¹⁸⁵ See WR Act, s 150B(1)(a),(b); 166B(1)(a),(b).

reveals the extent to which it is possible for an employer to reduce and remove employee benefits through the powerful mechanism of the Work Choices workplace agreement. The templates provide instances of the reduction of employee rights of control over hours of work, rostering, job location and job functions. The effect of these provisions is not only to displace conditions from awards and State legislation, but also to jeopardise the rights of an employee under his or her individual contract of employment.

This section has also highlighted some of the problems which have arisen because of the removal of a certification or vetting process before agreements are approved. The existence of provisions in agreements which fall below the 'safety net', or which mislead employees about their legal entitlements, suggests that the new framework is failing to ensure compliance with the basic legal rules.

5. Evidence of employer bargaining practices under Work Choices

Academic studies suggest that some *employees* perceive a change in the *climate* in which bargaining occurs as a result of Work Choices, and believe that this altered climate prompts employers to engage in unfair bargaining practices.¹⁸⁶ However, no studies have been conducted to directly determine whether employers have changed their bargaining strategies as a result of the changes to the legal framework. Further research is clearly needed to examine the link between the law and the ways in which employers conduct themselves in bargaining.

This section of the report outlines anecdotal evidence of some of the unfair bargaining practices which have emerged since the commencement of Work Choices. These practices include: offering **'take-it-or-leave-it' AWAs**; using **employer greenfields agreements** to avoid genuine bargaining; applying **economic pressure falling short of 'coercion'**; and making **misleading statements**.

To some extent, the legal framework has legitimated these tactics by removing any positive requirement for employers to explain the effect of workplace agreements or to obtain genuine approval for these agreements, and by providing only weak protections against false or misleading conduct and duress.

'Take-it-or-leave-it' AWAs

It is unlawful for an employer to offer 'take-it-or-leave-it' AWAs to existing employees, although the protection does not extend to new employees. Evidence before the recent SAIRC Inquiry into Work Choices suggested that some employers have made 'full use' of this lawful exception to the duress provisions.¹⁸⁷

Where employer conduct falls within the legal restrictions on duress, it is up to the employee, or employees, to raise the issue with the WO, State and Territory bodies, or the media. The following cases are examples of alleged unlawful conduct which have been brought to light in this way:

¹⁸⁶ In relation to the effect of the Work Choices climate on the attitudes of employers towards employees, see Judge Elton and Barbara Pocock, *Not Fair, No Choice: The Impact of Work Choices on Twenty South Australian Workers and Their Households*, July 2007.

¹⁸⁷ Industrial Relations Commission (SA), *Interim Report of Inquiry into Work Choices and Independent Contractors legislation*, 25 July 2007 [2007] SAIRComm 13 at [7.10].

- Darrell Lea is alleged to have embarked on a deliberate strategy to apply duress to casual staff to sign AWAs which removed their penalty rates for work on weekends and public holidays. The alleged strategy included failing to give the casual employees the required information about the AWAs, and the Store Manager telling the staff they needed to sign the AWAs quickly, and threatening to cut hours on weekends and public holidays if they did not sign the AWA.¹⁸⁸ This form of duress is unlawful because these were existing employees. However, the specific provisions introduced in 2007 - which protect against dismissal for refusing to enter into an agreement which removes protected award conditions - would not extend to this conduct of cutting particular shifts, because this conduct falls short of dismissal.
- The new owner of the Hilton IGA supermarket, Ten Talents Pty Ltd, allegedly applied duress to compel 60 members of staff to enter into AWAs as a condition of their employment following a transmission of business. If they didn't sign the AWAs, the employees were otherwise entitled to the benefit of pay rises, penalty rates and paid rest breaks under a collective agreement.¹⁸⁹
- In another case, the then OWS alleged that a Tasmanian employer, The Mornington Inn, dramatically reduced the hours of two employees who refused to sign an AWA, and threatened to, and then did reduce the shifts of a third employee who refused to sign an AWA, subsequently reinstating the shifts when the worker had signed the AWA.¹⁹⁰
- Finally, the Federal Magistrates Court found that an employer had breached the duress provisions when he threatened to turn the workplace into a 'concentration camp' for those employees who remained on the award, rather than signing an AWA. The employer perceived that one employee in particular was the representative for a group of employees who did not wish to sign the AWA. When this employee refused to sign, the employer immediately cut her regular weekend shifts.¹⁹¹

The extensive media coverage¹⁹² which has been given to these types of cases may add to employee fears, affecting their willingness to resist unfair or unlawful pressure by employers in similar circumstances.

Employer Greenfields Agreements

The introduction of a new form of agreement, the employer greenfields agreement, which can be made by an employer operating a 'new business' or even a 'new project', similarly provides scope for conditions to be offered on a 'take it or leave it' basis. Genuine bargaining is clearly not an option where the employer unilaterally sets the conditions of employment before employees commence in the new business or new project.

¹⁸⁸ See OWS media release, 'Workplace Watchdog Alleges Darrell Lea Is Not So Sweet To Employees', 28 June 2007, available at <<http://www.wo.gov.au/asp/index.asp?sid=7407&page=mediacentre-current-view&cid=5390&id=850>> at 25 July 2007.

¹⁸⁹ Workplace Express, 26 September 2006.

¹⁹⁰ OWS, media release, 'Duress Not On Says OWS: Tassie Inn Taken to Court', 22 November 2006 <<http://www.wo.gov.au/asp/index.asp?sid=7407&page=mediacentre-archive-view&cid=5321&id=679>> at 25 July 2007.

¹⁹¹ *Smith v Granada Tavern & Ors* (No 2) [2007] FMCA 904 (19 June 2007).

¹⁹² In addition to the above cases, see, eg, Peetz and Preston, above n 153, p 20.

The employer greenfields mechanism also provides an opportunity to exclude union involvement: because unions have no right of entry and no ability to take industrial action in support of bargaining until the greenfields agreement has expired, the employer can use this environment to shift employees onto AWAs, consolidating the exclusion of the union into the future.

The experience of construction company, John Holland, provides an example of the way that employer greenfields agreements can be used to disengage from the union and avoid genuine bargaining. A new building project can provide an opportunity to use such an agreement. On the WA's website, John Holland's experiences are used as a case study to demonstrate to employers the benefits of using greenfields agreements. The case study states that employees are engaged at market rates, but also lists 'protection from a rise in labour costs and unexpected delays' (presumably through industrial action) as a benefit for the employer. Other listed benefits for employers include the 'ability to negotiate directly with workers' and 'easy transition to Australian Workplace Agreements for employees who are offered full-time employment'.¹⁹³ This suggests that the exclusion of unions in the initial 12 month period can be consolidated by moving employees onto AWAs before any significant union presence is established on the site.

In practice, John Holland has commenced negotiations for a union greenfields agreement on some of its sites, such as the BHP Billiton port expansion project in the Pilbara. After initial negotiations with the CFMEU and the AMWU, John Holland withdrew, citing delays in the negotiation process. The company then lodged an employer greenfields agreement, illustrating the weak bargaining position of the union. John Holland has subsequently told the CFMEU that it needs to establish a business case if it wants John Holland to negotiate a union agreement in future.¹⁹⁴

Because of the appeal of the employer greenfields option, there have been attempts to use the mechanism for existing businesses. For example, a nursing home closed for 18 months for renovations, redeploying staff to other sites in the meantime. When the nursing home re-opened, the employer put in place an employer greenfields agreement which reduced wages and conditions. The agreement contained a new classification of 'Columbia Lifestyle Officers' to cover nurses at the site, adding to their duties cleaning and kitchen work. Because there is no mechanism under Work Choices for the use of the greenfields option to be challenged, the union representing the nurses has been required to lodge proceedings in the federal court.¹⁹⁵

The SAIRC has also heard evidence, as part of its Inquiry into the Impact of Work Choices, that greenfields agreements have been used in the contract cleaning sector to reduce conditions of employment when

¹⁹³ Workplace Authority, Workplace Relations Case Studies, John Holland Group, <<http://www.oea.gov.au/docs/EMPLOYERS/JohnHollandcasestudy.pdf>> at 26 July 2007.

¹⁹⁴ Workplace Express, 30th March 2006 and 1st August 2006.

¹⁹⁵ Workplace Info, 'Old site but 'new' wages for nurses' 15 May 2007.

contracts are turned over. In some cases, a contract has been awarded to a new employer, who has then employed the existing workers under a greenfields agreement on lower rates of pay.¹⁹⁶

In another case, a Tasmanian employer, Norvac Pty Ltd, took over 13 service stations from Mobil and made an employer greenfields agreement, reducing employee entitlements under a collective agreement which otherwise would have continued to apply to the employees for 12 months under transmission of business rules. The greenfields agreement excluded all protected award conditions and stripped back wages to the bare minimum in the relevant Australian Fair Pay and Classification Scale. This agreement would not pass the Fairness Test if lodged now. However, the agreement will continue to apply until it is terminated or replaced by a new agreement, and provides a very low base for future negotiations with employees.¹⁹⁷

The use of greenfields agreements to set the base for future bargaining is illustrated by the case of Viewstill Pty Ltd, which 'made' an employer greenfields agreement in April 2006, and immediately replaced that agreement with a 5 year employee collective agreement in April 2007, narrowly escaping the requirements of the Fairness Test. The employee collective agreement largely mirrors the terms of the greenfields agreement.

Economic pressure falling short of coercion

As outlined in section 2, the legal protections against duress and coercion are fairly limited. There are some tactics which appear to be legitimated by the current framework but which nevertheless might be considered an unfair use of employer bargaining power.

For example, the legal framework permits an employer to terminate, or threaten to terminate, an expired workplace agreement. This has the effect of returning employees to the conditions provided by the Standard and protected award conditions. This can put considerable pressure on employees to approve a new agreement, even where the offered conditions fall below the standards set by any earlier agreement.

The inability for employees to compel an employer to engage in collective negotiations under the legislation also leaves it open to employers to exert considerable pressure on employees to accept individual agreements. For example, an employer can 'starve out' employees by refusing to grant any pay rises until the employees accept agreement on the employer's terms. This can be an effective strategy once the existing agreement has expired as there will be no lawful entitlement to pay rises (unless the rates of pay fall below the minimum wage after an increase by the Australian Fair Pay Commission). Evidence before the SAIRC Inquiry into Work Choices has confirmed that this practice is being used by employers. For example, one national employer offered AWAs across the workforce at a time when the collective agreement was due to be renegotiated. Employees were told that those who did not sign the AWA would remain on the collective agreement, but they would not receive pay increases.¹⁹⁸

¹⁹⁶ Industrial Relations Commission (SA), *Interim Report of Inquiry into Work Choices and Independent Contractors legislation*, 25 July 2007 [2007] SAIRComm 13, at [7.35], [7.37].

¹⁹⁷ Radio National, 'Tas petrol station workers lose entitlements under new AWA', 5 October 2006, at <<http://www.abc.net.au/pm/content/2006/s1756604.htm>>.

¹⁹⁸ SAIRC, above n 187, at [7.15].

The refusal to provide pay increases to which employees are legally entitled under an existing agreement is likely to breach the duress provisions.¹⁹⁹ However, at the time that most agreements are re-negotiated, there is no further entitlement to pay increases under the agreement, and this tactic of employers would appear to be lawful.

Misleading statements

As outlined in section 2, the provisions which prohibit the making of false and misleading statements are narrowly confined to situations where an employee has been induced to enter an agreement as a direct result of the misleading statement. These provisions are unlikely to prevent forceful assertions by employers about their legal rights where the true position may be unclear, or the inclusion of incorrect or misleading information in an agreement about an employee's entitlements or rights under the legislation.

Employer assertions about legal rights

The WRA has recently investigated conduct by Telstra which relates to Telstra's 'unqualified assertions' to its employees about their legal rights. Telstra had informed its technicians that they were legally obliged to give consent to the installation of global positioning devices in their vehicles, and that Telstra had the right to discipline employees who did not give their consent. The WRA concluded that this legal position was 'attended by doubt and uncertainty' and therefore that Telstra's conduct was unfair and inappropriate, and possible unlawful.²⁰⁰

There are other examples in court decisions of employers who have used their superior knowledge or bargaining power to mislead employees. In the *Pow Juice* case,²⁰¹ the employer (Pow Juice) intended to introduce AWAs for the entire workforce when it took over a juice bar from Pulp Juice. The transmission of business occurred on 25 March 2006, two days before the Work Choices framework commenced operating. Pow Juice was unable to offer AWAs immediately because the relevant forms for lodging AWAs under Work Choices were not yet available. The employer told employees that they would be covered by 'interim AWAs' and provided employees with a document which referred to the 'Work Choices rates' which would apply until AWAs were made. The employer appeared to be well aware that these rates were not based on any industrial instrument or law. The rates were well below the rates set in the Pulp Juice certified agreement which applied to the employees who transferred from Pulp Juice to Pow Juice. The rates were also below those in the State award which would have applied if not for the certified agreement. The Federal Magistrates Court imposed a penalty of \$49,500 for Pow Juice's failure to pay employees in accordance with the certified agreement. When determining the penalty, the Court took into account that the employer continued to pay the lower rates, and continued to refer to the arrangements as an 'interim AWA' long after it had been informed by the OWS that it was required to pay the rates in the certified agreement. The Court also acknowledging that the breaches occurred during the period of transition into the Work Choices system when difficulties may have existed.

¹⁹⁹ See, eg, the alleged conduct of National Jet Systems: Workplace Express, 'OWS takes duress case against National Jet Systems over forced AWAs', 28 May 2007.

²⁰⁰ Office of the Workplace Rights Advocate, *Report on the Investigation into the Installation of Global Positioning Devices in Employees' Vehicles by Telstra Corporation Limited*, 26 July 2007.

²⁰¹ *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140 (Lloyd-Jones FM, 16 February 2007).

It is implicit in the facts of the Pow Juice case that the employer intended to rely on employee ignorance of the Work Choices system, or alternatively the employees' fear for their job security, to pay less than the legally enforceable rates.

The employer in *Connolly v AC & MC Services*²⁰² appeared similarly intent on 'subterfuge' to undercut employee conditions.²⁰³ The employer lodged a collective employee agreement (and a subsequent variation to the agreement) to cover cleaners at the workplace. However, the employer had not yet employed any cleaners, it had only employed administrative staff. Accordingly, it went through the processes of agreement-making with the administrative staff, including obtaining majority approval of the agreement and an employee signature on the agreement, even though the agreement would not cover these staff. Because the agreement was not made by an employer and 'eligible employees' as required by s 327, the Court found that there was no valid employee collective agreement, or even a proposed agreement, and therefore there could have been no breach of the rules for making such an agreement.

This case demonstrates the inherent flaws in a process which does not require the employer to demonstrate compliance with the rules (such as the need for the majority of employees who are to be *covered* by the agreement to approve the agreement) as a prerequisite for the agreement's operation. If not for the media coverage given to the case, and the then OWS's subsequent intervention, the employer might well have succeeded in its plan to set the agreement in operation and then engage new employees as cleaners at rates which were much lower than those in the applicable award.

Incorrect or misleading information in agreements

Despite the Government's stated objective of providing a simpler system of workplace relations regulation, the Work Choices laws are clearly very complex.²⁰⁴ This creates a situation of information asymmetry where the employer (usually) has access to the resources which are necessary to understand the consequences of entering into a particular workplace agreement. In comparison, employees are often unaware of their existing rights to employment conditions, and are therefore unable make a proper assessment of the advantages and disadvantages of any agreement which is offered by the employer.

Employers are able to take advantage of this information asymmetry by misleading employees about the benefits of entering into a workplace agreement, as set out in the following examples.

²⁰² [2007] FMCA 139 (Raphael FM, 22 February 2007).

²⁰³ The Federal Magistrate found that the facts in the case might suggest that the employer was 'attempting to evade the consequences of the Act by subterfuge': at [21].

²⁰⁴ See, eg, Andrew Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210.

*Template Employer Greenfields Agreement in the hospitality industry*²⁰⁵

Clause 5.6.1 What will Employees be paid if they work on a public holiday?

All Employees will be paid the hourly rate of pay as set out in clause 3.2.1 of this Agreement for work on public holidays as that hourly rate of pay has been loaded with an additional amount to compensate for work at these times.

This clause is misleading: the hourly rate in clause 3.2.1 commences at \$12.75 – this was the federal minimum wage at the time the agreement was made. The casual rate of \$15.30 similarly incorporates the minimum casual loading imposed by law. Accordingly, the statement that pay has been ‘loaded’ is incorrect and is likely to mislead employees into believing they have received an offsetting benefit for the loss of penalty rates.

Peter Gahan’s study of greenfields agreements highlights the extent to which workplace agreements are providing employees with misleading information about their rights and entitlements. A substantial proportion of agreements contained provisions which were inferior to those set out in the Standard in relation to minimum rates of pay, hours of work or leave entitlements. These provisions are unenforceable to the extent that they are less favourable than the Standard, however, many employees will be unaware of discrepancy, and will understandably assume that an agreement which has been ‘approved’ by the WA correctly sets out their entitlements.

The study of greenfields agreements also found that 53 per cent of agreements included provisions relating to reasonable additional hours which were inconsistent with the legislative provisions. This does not necessarily mean that the provisions set out an inferior entitlement, but it does suggest that employees are not being provided with the full picture in relation to their legislative entitlements, because all the relevant legislative factors for determining whether additional hours are ‘reasonable’ have not been included. For example, the Enterprise Initiatives template agreement only refers to four out of the seven factors which the legislation says may be relevant to this issue. In a Victorian Employer Greenfields Agreement in the liquor industry the provision set out only one factor which will be relevant to the question of whether additional hours are reasonable:

²⁰⁵ From a random sample of 40 agreements in the accommodation and food services industry sector, lodged between 27 March 2006 and 26 March 2007, 5 agreements were based on this template. Three of these were employer greenfields agreements, which all contained this clause; the other two agreements were employee collective agreements and these included a modified penalty rate for working on public holidays.

Victorian Employer Greenfields Agreement – Liquor Industry

Clause 12 Hours of Work

The Employee will be required to work the Specified Number of Hours based on the Employee's capacity.

Irrespective of the Employee's capacity the Employee will also be required to work such reasonable additional hours as the Employer may require from time to time taking into account the nature of the liquor retail industry and the requirements of the Employer's business.

Summary of employer bargaining practices

This section has considered the way in which the legal framework permits, and to some extent encourage, employer bargaining practices which might otherwise be considered illegitimate. These unfair (but not unlawful) practices include: offering AWAs on a take-it-or-leave-it basis to new employees; using employer greenfields agreements on new projects to set a low base of employment conditions and to create a union-free environment; and 'starving out' employees by holding back pay rises until the employees enter into AWAs.

Perhaps emboldened by the environment created by Work Choices, some employers are engaging in bargaining practices which breach the legislation. These unlawful practices include targeting employees who refuse to sign AWAs by reducing their shifts, or threatening to remove other employee benefits, or ending their employment.

6. Conclusion

This report has discussed the multiple ways in which the Work Choices reforms have undermined the position of employees in bargaining. It is clear that the combination of these legal changes has systematically shifted the balance of bargaining power away from employees. The new legal framework does not *require* employers to reduce employee conditions, or to move to individual arrangements which exclude unions, or to engage in practices which pressure employees to accept the employer's preferred terms. However, it does provide increased opportunities for employers to make agreements which operate to the disadvantage of employees overall.

There is substantial evidence to suggest that the changes to the legal framework are leading to an erosion of conditions for employees in a weak bargaining position. There is also some indirect evidence of a connection between the new legal framework and the use of unfair strategies by some employers. Under these strategies, considerable pressure may be placed on employees to enter into the employer's preferred agreement. In some cases, these tactics are permitted by the legal framework. Even the existence of unlawful bargaining practices will not usually prevent an agreement being approved. Any legal remedy to address such tactics must be obtained through subsequent litigation in the courts.

It is anticipated that the existence of a 'Fairness Test' may put some limits on the scope and extent of the erosion of conditions for employees. However, this single measure is not designed to address the multiple ways in which the framework undermines the bargaining position of employees. Unless fundamental

changes are made to the law to encourage genuine bargaining and to ensure compliance with the agreement-making rules, it is inevitable that the working conditions of vulnerable employees will be further diminished.



© Authorised by the Victorian Department of Innovation, Industry and Regional Development
Southern Cross Building, Level 33, 121 Exhibition, Melbourne, Victoria 3000.
Published October 2007



**OFFICE OF THE
WORKPLACE RIGHTS
ADVOCATE**

A Victorian
Government
initiative

