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**WORKPLACE AGREEMENT-MAKING:
LEGAL RULES AND INSTITUTIONAL PROCESSES**

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The Workplace and Corporate Law Research Group (WCLRG) is a research concentration within the Department of Business Law & Taxation, Faculty of Business & Economics, at Monash University. It has been in operation since March 2008, having previously operated as the Corporate Law and Accountability Research Group (CLARG) since November 2005.

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Workplace Agreement-Making: Legal Rules and Institutional Processes

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1 Introduction

The changes to the agreement-making rules were at the heart of the former Coalition Government's Work Choices reforms. The key stated objective of these changes was to 'simplify' agreement-making - by removing the no-disadvantage test (NDT) and introducing an administrative process of automatic approval of agreements on lodgement - with a view to encouraging the spread of agreements.¹ According to the government, an increase in the use of statutory agreements would, in turn, increase productivity.² These aims were reflected in the objectives of the legislation which stated that the system should encourage the parties to set their own conditions at the workplace level (through statutory agreements).³ However, the objective of supporting fair agreement-making was removed from the legislation, suggesting that the protection of employees was of secondary importance in the new system.

At the time that the Work Choices reforms were introduced, it was immediately apparent from the text of the legislation that the reforms weakened the substantive and procedural rules which had previously been in place to protect employees from unfair bargaining

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¹ J Howard, 'Prime Ministerial Statement: Workplace Relations, Parliament of Australia', *Commonwealth Parliamentary Debates*, House of Representatives, 26 May 2005, 39.

² Ibid.

³ Workplace Relations Act 1996 prior to the Work Choices amendments (pre-reform WR Act) s 3(e). The WR Act as amended by the Work Choices legislation (pre-transition WR Act) included an objective of 'ensuring compliance with minimum standards, industrial instruments and bargaining processes' by providing effective enforcement mechanisms: s 3(f).

practices and outcomes.⁴ It was also evident that changes to the institutional arrangements for assessing compliance with these rules would have an impact on the effectiveness of the remaining protections. There is now a substantial body of evidence which demonstrates that the weakening of the legal safeguards for employees has resulted in poor bargaining outcomes for vulnerable employees, particularly in low paid sectors such as retail and hospitality⁵ and in employer greenfields agreements.⁶ There is also some evidence to suggest that the institutions responsible for supervising agreement-making are failing to adequately safeguard these workers.

The legal rules for agreement-making are contained in the Workplace Relations Act 1996 (Cth) (Workplace Relations Act) as amended by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (Work Choices Act), which commenced operating on 27 March 2006. Some aspects of these rules were substantially altered by subsequent reforms to the legislation, introduced by successive governments in 2007 and 2008. The first of these changes was the introduction of a new ‘fairness test’ (with effect from 1 July 2007⁷) in an attempt to address the ‘perception’ within the community that the rules were unfair.⁸ The strategy did not succeed and the failure of the Coalition to hold onto power at the November 2007 election was largely attributed to its Work Choices laws. The new Labor Government moved quickly to remove the most unpalatable aspects of the Work

⁴ See A Forsyth and C Sutherland, ‘Collective Labour Relations Under Siege: The Work Choices Legislation and Collective Bargaining’ (2006) 19 *Australian Journal of Labour Law* 183; S Cooney, ‘Command and Control in the Workplace: Agreement-making under Work Choices’ (2006) 16 *Economic and Labour Relations Review* 147; J Fetter, ‘Work Choices and Australian Workplace Agreements’ (2006) 19 *Australian Journal of Labour Law* 210; K van Barneveld, ‘Australian Workplace Agreements under Work Choices’ 16 *Economic and Labour Relations Review* 165.

⁵ J Evesson, J Buchanan, L Bamberly, B Frino and D Oliver, ‘Lowering the standards’: *From Awards to Work Choices in Retail and Hospitality Collective Agreements*, Report to the Queensland, New South Wales and Victorian Governments, September 2007; Office of the Workplace Rights Advocate, Report of the Inquiry into the Impact of the Federal Government’s Work Choices Legislation on Workers and Employers in the Victorian Retail and Hospitality Industries, November 2007.

⁶ P Gahan, *Employer Greenfields Agreements in Victoria*, Report to the Victorian Office of the Workplace Rights Advocate, 17 August 2007.

⁷ Although the ‘fairness test’ had retrospective operation in relation to agreements which were lodged on or after 7 May 2007, the Stronger Safety Net Act did not pass through Parliament until 20 June 2007 and was proclaimed to take effect on 1 July 2007.

⁸ C Sutherland, ‘All Stitched Up? The 2007 Amendments to the Safety Net’ (2007) 20 *Australian Journal of Labour Law* 245.

Choices system through the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth) (Transition Act). These reforms, which took effect on 28 March 2008,⁹ re-introduced a NDT and removed the option of making new Australian Workplace Agreements (AWAs).

The aim of this paper is to reflect on the legal and practical effect of the agreement-making rules in operation from 2006 to 2008 and to consider the implications of the government's proposed changes to these rules. The first section of the paper outlines the changes made by the Work Choices Act to the processes for approving agreements. These processes are discussed at the outset because of their influence on the effectiveness of the substantive and procedural rules. The sections which follow consider the various parameters set by the legal framework and provide evidence of the ways in which the legal rules are operating in practice. These sections cover: forms and duration of agreements; pre-lodgement processes and limits on bargaining conduct; prohibited content; the Australian Fair Pay and Conditions Standard (the Standard) and the removal of the NDT; the 'fairness test'; and the new NDT. The final section focuses on Labor's proposals for further changes to the agreement-making system, including the introduction of a 'better off overall test' to be administered by a new institution, Fair Work Australia (FWA), from (no later than) 1 January 2010.

The paper makes reference to various versions of the Workplace Relations Act. To distinguish between these different versions, the following abbreviations will be used: 'pre-reform Workplace Relations Act' refers to the legislation prior to its amendment by the Work Choices Act; 'pre-transition Workplace Relations Act' means the legislation in place after the Work Choices amendments and prior to the Transition Act amendments. It will be evident from the text where this version of the legislation has been further amended by the Workplace Relations Amendment (A Stronger Safety Net) Act 2007 (Cth) (Stronger Safety Net Act). Finally, the 'Workplace Relations Act' refers to the

⁹ The Transition Act passed through Parliament on 20 March 2008 and was proclaimed to take effect on 28 March 2008.

legislation in place at the time of writing, including any amendments introduced by the Transition Act.

One of the changes introduced by the Stronger Safety Net Act was the establishment of the Workplace Authority (WA) and the Office of the Workplace Ombudsman (WO) as statutory agencies, replacing the Office of the Employment Advocate (OEA) and the Office of Workplace Services (OWS) respectively.¹⁰ Where possible, the names of the original institutions, the OEA and the OWS, will be used in the discussion of the provisions in the pre-transition Workplace Relations Act, while discussions of the provisions introduced by the Stronger Safety Net and Transition Acts, and of the practices of the institutions after 1 July 2007, will make reference to the new agencies, the WA and the WO.

2 Changes to the approval processes

A new ‘streamlined, simpler and less costly’ process of automatic approval of agreements on lodgement was promoted by the Coalition Government as an attractive feature of the Work Choices reforms.¹¹ The former role of the Australian Industrial Relations Commission (AIRC) in scrutinising collective agreements for compliance with the legislative rules was dismissed by the government as ‘inflexible’ and a ‘hindrance to agreement making’.¹²

Under the pre-reform Workplace Relations Act, it was a *prerequisite* for the certification of collective agreements by the AIRC, and approval of AWAs by the OEA, that the parties had demonstrated compliance with the rules for agreement-making. The evidence of compliance was assessed by the AIRC and OEA in the form of statutory declarations. Both the employer and the employee, union or other representative of employees were required to lodge a declaration. In these declarations, the parties were required to answer

¹⁰ Pre-transition WR Act ss 153B, 166P.

¹¹ Howard, above n 1, 41.

¹² Ibid, 38.

questions about compliance with each of the procedural rules (such as the employer providing a copy of the agreement and explaining the effect of the agreement) and the substantive rules (principally, compliance with the NDT). The AIRC could explore any concerns it might have had about compliance at a certification hearing.

Under the Work Choices process, all agreements were lodged by the employer with the OEA, accompanied by a standard form declaration.¹³ However, the legislation explicitly required the OEA to ‘accept lodgement’ of agreements,¹⁴ and the supporting materials made it clear that it was not expected that the OEA would scrutinise these agreements or the statutory declarations which accompanied them.¹⁵ These aspects of the legislation have not been altered by subsequent reforms, with the exception of the ‘fairness test’ and NDT assessments which were grafted on to a process which otherwise relied largely on self-regulation by employers.

Consistent with this legislative framework, the standard form declaration produced by the OEA, and a similar form produced by the WA, requires the employer to tick various boxes to confirm compliance with the agreement-making rules. The general statements, which are required to be affirmed on the form, are not particularly exacting. For example, the employer is required to tick just one box to confirm that the employer has *either* provided employees with ready access to the agreement *or* that this right to access has been waived in writing by the employees. There is no requirement for 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 to confirm that a majority of employees have approved the agreement without specifying whether the approval was obtained by a vote or otherwise, and without providing any evidence in support of the

¹³ Pre-transition WR Act s 344.

¹⁴ Pre-transition WR Act s 151(1)(e).

¹⁵ Pre-transition 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 did not change this approach, except that the Workplace Authority was required to assess agreements against the ‘fairness test’.

statement.¹⁶ The OEA and the WA have not produced a standard form declaration to be filled in by an employee, union or other representative of employees to assert their views about compliance with the rules.¹⁷

These processes mean that employers are not subjected to the former consequences of non-compliance with the procedural rules, which included non-certification of the certified agreement (or non-approval of an AWA). A workplace agreement comes into operation even if the procedural rules have not been met.¹⁸ In the extreme case where an employee has not approved a workplace agreement,¹⁹ or has been induced to approve a collective agreement by an employer's false or misleading statement,²⁰ or because of coercion by the employer,²¹ the only option available to the employee under the legislation is to institute proceedings under the civil remedy provisions.²²

The introduction of a 'fairness test' in 2007 and the reintroduction of a NDT in 2008 grafted a new layer of assessment onto the streamlined approval processes established by the Work Choices Act. While the reforms meant that, for the first time, the WA was required to scrutinise agreements, its assessment was limited to compliance with the 'fairness test' (and later the NDT). There was no requirement to check for compliance with any of the other substantive and procedural rules. Under the 'fairness test', agreements continued to come into effect on lodgement,²³ but were later scrutinised for

¹⁶ See, for example, the Employer Declaration Form – Employee Collective Agreement available on the Workplace Authority's website at <<http://www.workplaceauthority.gov.au/docs/makingagreements/eca/EDF-ECA-0508.pdf>>. Note, however, that sections 137.1 and 137.2 of the Criminal Code apply. These sections make it an offence to provide false or misleading information or documents: see note to s 344(2) WR Act.

¹⁷ The only exception to this was the optional 'Fairness Statement' which could be lodged by employees during the operation of the 'fairness test' to confirm that they viewed the compensation which they had received under an AWA as 'fair'.

¹⁸ Pre-transition WR Act s 347(2).

¹⁹ Pre-transition WR Act s 341.

²⁰ Pre-transition WR Act s 401.

²¹ Pre-transition WR Act s 400(1).

²² Pre-transition WR Act Part 8, Division 11.

²³ Pre-transition WR Act (as amended by the Stronger Safety Net Act) s 347(1).

compliance with the test. This complicated the WA's process and led to the referral of 11,759 failed agreements to the WO to enforce back payments to affected employees under those agreements.²⁴ The Transition Act has removed the mechanism of automatic commencement of agreements on lodgement in the case of workplace agreements applying to existing employees: these agreements do not commence until 7 days after the WA issues its determination that the agreement has passed the NDT.²⁵ However, agreements which will apply solely to new employees (such as greenfields agreements) continue to operate from the date they are lodged with the WA.²⁶

The impact of the streamlined lodgement process on the effectiveness of the substantive and procedural rules for agreement-making will be discussed in the following sections which outline various aspects of these rules.

3 Forms and duration of agreements

Forms of agreements

The pre-transition Workplace Relations Act provided a choice of six forms of agreement which could be registered under the legislation: employee collective agreements,²⁷ union collective agreements,²⁸ AWAs,²⁹ multiple business agreements,³⁰ union greenfields agreements³¹ and employer greenfields agreements.³² All of these agreements were referred to more broadly as 'workplace agreements' in the legislation.

²⁴ B Bennett, Evidence to Estimates Hearing, Senate Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 3 June 2008, p 19.

²⁵ WR Act s 347(1)(b).

²⁶ WR Act s 347(1)(a).

²⁷ An agreement between an employer and a group of employees in a single business, or part of a single business: pre-transition WR Act s 327.

²⁸ 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: pre-transition WR Act s 328.

²⁹ An agreement between the employer and an individual employee: pre-transition WR Act s 326.

³⁰ A collective agreement involving one or more businesses or parts of businesses which are carried on by one or more employer: pre-transition WR Act s 331.

³¹ An agreement between an employer and an eligible union for a new business being established by the employer: pre-transition WR Act s 329.

Of these options, only the employer greenfields agreement was new under the Work Choices Act. This form of agreement allows employers in a new business, project or undertaking to set conditions of employment unilaterally, before any employees are engaged, and to apply these conditions to employees as they join the business. Until the employer greenfields agreement has expired, the new employees are legally proscribed from engaging in industrial action to support bargaining for different arrangements.³³ This form of agreement therefore limits the capacity of employees in the new business to bargain with their employer over wages and conditions.

Union greenfields agreements were previously available under the pre-reform Workplace Relations Act, but the requirement for unions to be a party to such agreements provided some protection to employee conditions in itself.³⁴ Prior to the Work Choices amendments, a narrow definition of ‘new business’ applied, leaving some doubt about whether the greenfields mechanism could be used for new projects undertaken by an existing business. These doubts were removed by the new definition in the Work Choices Act and the guidance provided by the Explanatory Memorandum.³⁵

Moving swiftly to fulfil an election promise, the Rudd Government’s Transition Act removed the option of making new AWAs,³⁶ and introduced a new form of individual statutory workplace agreement, the Individual Transitional Employment Agreement (ITEA). This agreement is available for a limited time and in limited circumstances. The

³² An agreement made by an employer prior to the employment of any employees in a new business: pre-transition WR Act s 330.

³³ Pre-transition WR Act ss 440, 494.

³⁴ Pre-reform WR Act s 170LL.

³⁵ See Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), 146. For examples of the use of greenfields agreements for new projects of existing businesses, see C Sutherland, *Agreement-making under Work Choices: The Impact of the Legal Framework on Bargaining Practices and Outcomes*, Report for the Victorian Office of the Workplace Rights Advocate, Victoria, 2007, pp 36-37.

³⁶ See further C Sutherland, ‘First Steps Forward (with Fairness): The Implications of the Transition Legislation’ (2008) 21 *AJLL* 137.

nominal expiry date of an ITEA must be no later than 31 December 2009,³⁷ and ITEAs may only be used by employers who have previously used individual statutory agreements,³⁸ and only to cover new employees or employees who are already regulated by an individual statutory agreement.³⁹ The limited application of ITEAs, and the more generous benchmark which applies for the assessment of the NDT in the case of ITEAs, makes it unlikely that this form of agreement will be popular.

Duration of agreements

All workplace agreements automatically include a nominal expiry date which is five years after the date on which the agreement is lodged, unless the parties specify an earlier nominal expiry date.⁴⁰ There are three exceptions to the five year expiry rule: an employer greenfields agreement has a maximum nominal expiry of one year after the agreement is lodged;⁴¹ an ITEA, as a transitional instrument, must include a nominal expiry date which is no later than 31 December 2009;⁴² and collective agreements which are deemed to pass the NDT in exceptional circumstances must have a nominal expiry date no later than two years from commencement.⁴³

The five year term for the majority of agreements represents a substantial increase on the nominal maximum duration of three years which applied to agreements made under the pre-reform Workplace Relations Act. The WA's assessment of agreements against the NDT takes into account pay rates at the time the agreement is lodged and does not

³⁷ WR Act s 352(1)(aa).

³⁸ This means an AWA (made under either the pre-reform or the pre-transition WR Act), a preserved individual State agreement, or a Victorian employment agreement (made under Part 2 of the Employment Relations Act 1992 (Vic) before 1 January 1997): WR Act s 326(3). The employer must have had at least one employee engaged under such an agreement as at 1 December 2007: WR Act s 326(a).

³⁹ WR Act s 326(2)(b). Following amendments to the Bill, these new employees may be former employees of the employer provided their employment was not terminated in order for the employer to re-hire them on an ITEA: s 326(2)(b)(ia); see further Supplementary Explanatory Memorandum, Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, p 3.

⁴⁰ WR Act s 352(1)(b).

⁴¹ WR Act s 352(1)(a).

⁴² WR Act s 352(1)(aa).

⁴³ WR Act s 352(1)(ab).

consider any disadvantage that might otherwise occur during the life of the agreement.⁴⁴ This approach provides a significant incentive for employers to inflate the rates that apply on lodgement in order to pass the test and then to keep rates static for the five year term.

The Transition Act introduced various measures to facilitate the extension of pre-Work Choices agreements during the transition period (prior to the introduction of more substantial changes in 2010). The Act automatically extended the operation of Notional Agreements Preserving State Awards (NAPSAs) to 31 December 2009,⁴⁵ and made provision for pre-reform certified agreements⁴⁶ and preserved collective State agreements⁴⁷ to be extended for a period of up to 3 years on application to the AIRC.

Under the Workplace Relations Act, workplace agreements continue operating after their nominal expiry date until replaced by a new agreement, or terminated. The Work Choices reforms made it easier for agreements to be terminated, particularly by allowing a party to unilaterally terminate an agreement after the nominal expiry date by giving 90 days' notice to the other party and lodging a declaration with the OEA.⁴⁸ The Work Choices provisions also ensured that, on termination, the employees did not return to the industrial instruments which formerly applied, but fell back on the lower safety net set out in the Standard. Following the 2008 reforms, collective agreements may no longer be unilaterally terminated,⁴⁹ and employees regain the protection of an applicable award upon termination of a workplace agreement.⁵⁰

⁴⁴ WR Act s 346F.

⁴⁵ WR Act Sch 8 cl 38A(1)(a), although this date can be extended by the regulations: Sch 8 cl 38A(1)(b). Under the pre-transition WR Act, NAPSAs were due to expire on 27 March 2009.

⁴⁶ WR Act Sch 7 cl 2A.

⁴⁷ WR Act Sch 8 cl 16A.

⁴⁸ Pre-transition WR Act ss 381, 393, 395.

⁴⁹ Unless the terms of the collective agreement provide for unilateral termination: WR Act s 392. In contrast, ITEAs and AWAs may be unilaterally terminated (allowing employees to return to potentially superior conditions in collective industrial instruments): see WR Act s 393 (ITEAs); WR Act Sch 7A cl 2 and pre-transition WR Act ss 381, 393, 395 (AWAs).

⁵⁰ WR Act s 349(1).

4 Rules about the agreement-making process

Pre-lodgement rules

The Work Choices Act altered various aspects of the procedural protections which formerly applied to the parties to an agreement at the pre-lodgement stage.⁵¹ These amendments removed from the legislation any explicit requirement for employers to establish that employees had ‘genuinely approved’ workplace agreements (both collective and individual) in order to obtain approval of an agreement.⁵² The reforms also removed the former requirement for an employer to take reasonable steps to ensure that the terms of the agreement had been explained to employees, in ways that were appropriate for the particular employees’ circumstances.⁵³

The remaining procedural obligations are limited in scope and remain largely unaltered by the more recent reforms. These obligations are that all employees to be covered by the proposed agreement must be given an opportunity to vote on, or approve, the agreement, and a majority of those employees must give their approval.⁵⁴ There are also obligations on employers which apply during a seven day ‘consideration period’ prior to a vote.⁵⁵ These include taking ‘reasonable steps’ to provide employees with a standard information statement prepared by the WA,⁵⁶ and a copy of the agreement.⁵⁷ Each of

⁵¹ These requirements do not apply in the case of greenfields agreements because the nature of these agreements is that there are no employees engaged by the employer at the pre-lodgement stage who could receive the benefit of these protections.

⁵² Pre-reform WR Act ss 170LT(5),(6). See further the supporting obligations in ss 170LE, 170LK(1), 170LJ(2), 170LR.

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

⁵⁴ WR Act s 340(2).

⁵⁵ Prior to the Work Choices amendments, employers were required to take reasonable steps to ensure employees were given a copy of, or ready access to, the proposed agreement at least 14 days before the approval of the agreement: pre-reform WR Act ss 170LJ(3)(a), 170LK(3), 170LR(2)(a). For non-union agreements, employers also needed to give written notice of the intention to make the agreement at least 14 days prior to the approval of the agreement.

⁵⁶ WR Act s 337(2)-(4).

⁵⁷ WR Act s 337(1),(3).

these requirements may be waived by the employees in writing.⁵⁸ During this consideration period, the employer is also required to ‘meet and confer’ with any employee-appointed bargaining agent, or agents, during the seven day consideration period.⁵⁹

Limits on bargaining conduct

The Work Choices Act retained the existing prohibitions on the use of coercion or duress to induce the making of a collective agreement or AWA.⁶⁰ Perhaps in recognition of the gap left by the removal of the positive obligation employers to explain the effect of agreements to employees, the reforms also added a new safeguard in the form of a prohibition against making false and misleading statements causing a person to make or not make a collective agreement.⁶¹ This prohibition had previously only applied in relation to bargaining for AWAs.⁶²

To establish a contravention of the provision, the applicant must demonstrate three elements: first, that a false and misleading statement has been made; secondly, that the person making the statement was ‘reckless’ as to whether the statement was false or misleading;⁶³ and, thirdly, that the statement *caused* the applicant to make or approve the workplace agreement.⁶⁴ While it may be straightforward to demonstrate the first of these elements, the second and third elements are often more difficult to establish.⁶⁵ Further, in *SDA v Karellas Investments Pty Ltd*, a Full Court of the Federal Court raised doubts

⁵⁸ Either by shortening the consideration period or eliminating it altogether. In the case of a collective agreement, the written waiver was required to be signed by all employees to be covered by the agreement: WR Act ss 337(5), 338.

⁵⁹ WR Act s 335. This was not an onerous obligation in that it did not impose any obligation to bargain: see *Re Coles Myer Pty Ltd Clerical and Administrative Employees Agreement 1998* (Print R3504, Whelan C, 31 March 1999).

⁶⁰ WR Act s 400(1), (5).

⁶¹ Pre-transition WR Act s 400.

⁶² Pre-reform WR Act s 170WG(2).

⁶³ Pre-transition WR Act s 401(1)(b).

⁶⁴ Pre-transition WR Act s 401(1),(c).

⁶⁵ See *Fleming v Restaurant Services Group & Ors* [2008] FMCA 455 (11 April 2008); *Shop Distributive and Allied Employees’ Association v Karellas Investments Pty Ltd* [2008] FCAFC 42 (4 April 2008).

about the application of the provision to the making of collective agreements, due to the language used in the third element of the section. In the view of the court, a single individual cannot ‘make [or] approve’ a collective agreement: [a]t most they are expressing an opinion which, depending on the majority view, might or might not lead to the agreement being made or approved’.⁶⁶ This suggests that a claim under the provision will not succeed unless there is direct or indirect evidence that the majority of employees were induced by the false or misleading statement to make or approve the agreement.

5 Rules about ‘prohibited content’

A controversial aspect of the Work Choices amendments was the addition of specific prohibitions on the types of matters which could be included in agreement negotiations and outcomes.⁶⁷ The introduction of these ‘prohibited content’ rules appeared to run counter to other aspects of reforms, which were designed to ‘free up’ the content of agreements, and facilitate bargaining.⁶⁸ Although these restrictions apply equally to employers and employees, the majority of the excluded provisions relate to employee and union rights and benefits.

Examples from the extensive list of prohibited content include: clauses conferring rights or remedies in relation to harsh, unjust or unreasonable dismissals, clauses providing for trade union training leave, clauses requirement the payment of union ‘bargaining fees’ and clauses restricting the employer’s engagement of independent contractors or restricting the making of AWAs.⁶⁹ There are severe penalties for employers who lodge

⁶⁶ [2008] FCAFC 42 at [41].

⁶⁷ These added to the requirement, under the pre-reform WR Act and its predecessors, that the contents of statutory workplace agreements be limited to ‘matters pertaining’ to the employment relationship: pre-reform WR Act s 170LI(1). See further M Pittard, ‘Recent Legislation and Legislative Commentary: Agreements Straying Beyond Employment Matters: The Impact of the Agreement Validation Matters Legislation’ (2005) 18 *Australian Journal of Labour Law* 71 at 75.

⁶⁸ See Commonwealth of Australia, *WorkChoices: A New Workplace Relations System*, 9 October 2005, p 19.

⁶⁹ WR Act s 356; Workplace Relations Regulations 2006 (Cth), Ch 2 regs 8.4-8.7.

agreements containing prohibited content,⁷⁰ and for any person who ‘recklessly’ seeks to include prohibited content in an agreement,⁷¹ or misrepresents that a particular term does not contain prohibited content.⁷² The Coalition Government’s Stronger Safety Net Act transferred some of the prohibited content rules relating to union matters from the Regulations to the legislation, making it more difficult for a future Labor Government to alter them.⁷³ Otherwise, the prohibited content rules have remained untouched by the 2007 and 2008 amendments.

In practice, the WA, as the agency responsible for ensuring that agreements comply with the prohibited content rules, has treaded lightly in this area. The WA may remove prohibited content at its own initiative or at the request of the parties.⁷⁴ However, for the period from 1 May 2007 to 1 May 2008, the WA has only removed clauses from 23 agreements, and most of these assessments were initiated by the parties themselves.⁷⁵

6 The Standard and the removal of the no-disadvantage test

Perhaps the most significant change to the agreement-making rules introduced by the Work Choices Act was the removal of the NDT which required that employees not be worse off overall under agreements compared with the terms and conditions which would otherwise apply under any relevant award or law.⁷⁶ In place of the test, the Act introduced the Standard, a set of five minimum entitlements which apply to all employees covered by the legislation.⁷⁷ The Standard provides a minimum rate of pay, maximum

⁷⁰ WR Act s 357.

⁷¹ WR Act s 365.

⁷² WR Act s 366.

⁷³ See further C Sutherland and J Riley, ‘Industrial Legislation in 2007’ (2008) 50 *Journal of Industrial Relations* 417 at 425.

⁷⁴ WR Act s 359.

⁷⁵ B Bennett, Evidence to Estimates Hearing, Senate Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 3 June 2008, pp 147-8.

⁷⁶ Pre-reform WR Act s 170XA.

⁷⁷ Except employees covered by pre-reform workplace agreements. These employees will only be entitled to the conditions in the Standard where their agreement does not deal with the subject matter of the

hours of work, annual leave, personal leave/compassionate leave, and parental leave entitlements.⁷⁸ 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.⁷⁹

However, it is not unlawful to include, in an agreement, terms which are less favourable than the Standard. Data collected by the OEA and by independent researchers reveal that workplace agreements have been approved, since the commencement of the Work Choices Act, which include terms which fall below the Standard (including pay rates which fall below the applicable minimum rates).⁸⁰

The insertion into the Act of new assessment requirements in relation to the ‘fairness test’ and NDT has not extended to an obligation on the WA to check agreements for compliance with the Standard.⁸¹ For the purposes of performing the NDT assessment, the WA assessor assumes that an employer is providing conditions in accordance with the Standard, even where less favourable benefits are specified in the agreement.⁸² It is not part of the WA’s role to ensure that the terms of agreements are consistent with the

Standard (rates of pay, hours of work, annual, personal, compassionate and parental leave): WR Act Sch 7, cl 30.

⁷⁸ Pre-transition WR Act Part 7. See further R Owens, ‘Working Precariously: The Safety Net after the Work Choices Act’ (2006) 19 *Australian Journal of Labour Law* 161 at 162-169; C Fenwick, ‘How Low Can You Go? Minimum Working Conditions under Australia’s New Labour Laws’ (2006) 16 *The Economic and Labour Relations Review* 85 at 104-10.

⁷⁹ Pre-transition WR Act ss 172(2), 173.

⁸⁰ See P Gahan, *Employer Greenfields Agreements in Victoria*, Report to the Victorian Office of the Workplace Rights Advocate, 17 August 2007, pp 8-11; P McIlwain, Evidence to Estimates Hearing, Senate Committee on Employment, Workplace Relations and Education, Parliament of Australia, Canberra, 29 May 2006, 132-7; N Wilson, Evidence to Estimates Hearing, Senate Committee on Employment, Workplace Relations and Education, Parliament of Australia, Canberra, 28 May 2007, 137-8.

⁸¹ Eg, the Standard is not a reference instrument, therefore it does not form part of the benchmark for the NDT assessment: WR Act s 346E. However, if a reference instrument is an award, the APCS which is derived from the award will be used as the benchmark for the pay rate: see Workplace Authority, *Agreement Making and the NDT Policy Guide*. p 16.

⁸² B Bennett, Evidence to Estimates Hearing, Senate Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 3 June 2008, 34; NDT Policy Guide, above n 81, p 29.

Standard.⁸³ Instead, the WA reminds employers about their obligations under the Standard in notices which it issues to the employer as part of the NDT process.⁸⁴ An employee should be entitled to assume that an agreement which has been ‘approved’ by the WA is consistent with the employee’s minimum entitlements under the legislation. The failure of the system to insist upon rectification of agreements which undermine the Standard means that some employees will be misled in relation to their legal entitlements.⁸⁵

In addition to the Standard, the Work Choices Act introduced a new procedural protection in relation to the removal or modification of certain conditions in awards and transitional State instruments.⁸⁶ These ‘protected award conditions’ were: rest breaks; incentive-based payments and bonuses; annual leave loadings; public holidays; overtime or shift loadings; some monetary allowances; penalty rates; and outworker conditions.⁸⁷ However, prior to the introduction of a ‘fairness test’ in July 2007, the ‘protection’ of these award conditions was very limited: the legislation only required that the employer explicitly set out in the agreement how protected award conditions were being removed or modified, otherwise the conditions were deemed to be included in the agreement.⁸⁸ This protection was therefore of little benefit to employees in a weak bargaining position,

⁸³ Similarly, the WO has no role in ensuring that agreements that are inconsistent with the Standard are rectified: see C Sutherland, ‘Fair Agreements under Work Choices? A Closer Look at Bargaining Outcomes’, paper presented to the 22nd Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ) conference, 6-8 February 2008, Melbourne, pp 8-10.

⁸⁴ NDT Policy Guide, above n 81.

⁸⁵ In relation to particular issues which arise in enforcing the Standard, see T Hardy, ‘Changing of the Guard: Enforcement of Workplace Relations Laws since Work Choices and Beyond’ in A Forsyth and A Stewart (eds), *Australian Labour Law: From Work Choices to Fair Work*, Federation Press, forthcoming, 2009.

⁸⁶ A Transitional State instrument, such as a ‘notional agreement preserving a State award’ (NAPSA) or a ‘preserved State agreement’ (PSA), applied to employees who were formerly covered by a State award or a State agreement, where their employer was effectively transferred from one of the State industrial relations systems to the national system by the Work Choices Act.

⁸⁷ Pre-transition WR Act s 354(4). Under s 354(4)(j), the Workplace Relations Regulations 2006 (Cth) could specify new protected award conditions, but no Regulations were made pursuant to this section.

⁸⁸ Pre-transition WR Act s 354(2). See further R Owens and J Riley, *The Law of Work*, Oxford University Press, South Melbourne, 2007, p 498. The exception was outworker conditions, which could not be excluded by a workplace agreement: s 354(3).

who might readily accept the explicit removal or modification of the protected award conditions.

7 The ‘fairness test’

In response to community unease about the effects of the Work Choices laws, the Coalition Government introduced the Stronger Safety Net Act which commenced operating on 1 July 2007. The most substantial reform introduced by this legislation was the introduction of a ‘fairness test’. An agreement passed the ‘fairness test’ if the WA Director was satisfied that it provided fair compensation in lieu of the exclusion or modification of protected award conditions.⁸⁹

However, not all agreements were subject to the ‘fairness test’. The test did not apply to AWAs where the annual income of the employee to be covered by the AWA was \$75,000 or more. Otherwise, the test only applied to an agreement (of any type) or agreement variation: firstly, which was lodged on or after 7 May 2007;⁹⁰ and, secondly, where one or more of the employees to be covered by the agreement worked in an industry or occupation usually regulated by an award;⁹¹ and, thirdly, where the agreement or variation excluded or modified one or more protected award condition.⁹² As a result of the application of these threshold conditions, the ‘fairness test’ did not apply to approximately 18% of the 215,777 agreements which were processed by the WA between 7 May 2007 and 31 May 2008.⁹³

⁸⁹ These were the protected award conditions that were already specified in the legislation, see above n 87 and accompanying text, with the exception of outworker conditions which could not be traded away under the ‘fairness test’: see pre-transition WR Act ss 346B(2), 354(3)-(4); 346M(1).

⁹⁰ Pre-transition WR Act ss 346E(1)(a), 346E(2)(a), 346F(1)(a), 346F(2)(a). In this discussion of the ‘fairness test’, references to the pre-transition WR Act are to that Act as amended by the Stronger Safety Net Act.

⁹¹ Pre-transition WR Act s 346E(2).

⁹² Pre-transition WR Act ss 346E(1)(d) and 346E(2)(c).

⁹³ B Bennett, Evidence to Estimates Hearing, Senate Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 3 June 2008, 9-10.

In applying the ‘fairness test’, the primary factors which the WA Director was required to take into account were: first, the monetary and non-monetary compensation that the employee(s) would receive under the agreement; and, secondly, the work obligations of those employees.⁹⁴ Non-monetary compensation was defined to mean compensation to which a monetary value could be assigned and that conferred a benefit of significant value to the employee (or employees).⁹⁵ However, it was clear from the WA’s Policy Guide that ‘fairness test’ assessors were not expected to contact employees as a matter of course to determine the value which they actually placed on any non-monetary compensation.⁹⁶ This suggests that assessors applied their own notional value to these benefits.

Agreements could be deemed to pass the test without providing ‘fair compensation’ (in monetary and non-monetary terms) for the loss of ‘protected award conditions’ based on the employee’s personal circumstances (such as family responsibilities) or ‘exceptional circumstances’ relating to the employee or employer.⁹⁷

The ‘fairness test’ did offer some measure of additional protection for employees by imposing limits on the systematic removal of award conditions without compensation. However, agreements were assessed against a limited benchmark of protected award conditions, a significant proportion of agreements were not subject to the test, and it is not known what proportion of agreements were deemed to pass the test without providing ‘fair compensation’.

The ‘fairness test’ assessment was uneasily grafted onto the existing approval processes. Under these processes agreements were automatically approved on lodgement with the WA. Then, at some later stage (often considerably later) the WA assessed the agreement,

⁹⁴ Pre-transition WR Act s 346M(2).

⁹⁵ Pre-transition WR Act s 346M(7).

⁹⁶ Workplace Authority, Fairness Test Policy Guide, 25 July 2007, p 23.

⁹⁷ Pre-transition WR Act s 346M(3), (4).

and new rules applied to cover the situation where an agreement subsequently failed the ‘fairness test’, including arrangement for compensation to employees.

The WA has subsequently criticised the way in which the ‘fairness test’ was introduced. The former Coalition Government unexpectedly announced on 4 May 2007 that it was introducing a new ‘fairness test’ which would apply to workplace agreements lodged on or after 7 May 2007.⁹⁸ However, the details of the test did not become known until the Stronger Safety Net Bill was introduced in Federal Parliament on 28 May 2007, and the legislation did not come into effect until 1 July 2007. This meant that, during the period from 7 May 2007 to 1 July 2007, the WA was unable to process new agreements. This created a substantial backlog of agreements from the outset, with 55,000 agreements being lodged during this period, most of which did not meet the requirements of the ‘fairness test’.⁹⁹ This led to substantial delays in processing agreements. Ultimately, the outcome of the November 2007 federal election suggested that the introduction of the test failed to address the unease within the electorate about the fairness of the Work Choices system.

8 The new no-disadvantage test

The replacement of the ‘fairness test’ with a NDT under the Transition Act means that, by January 2010, five different assessment mechanisms will have operated over a period of five years: first, in 2005, prior to the introduction of the Work Choices reforms, agreements were assessed against a NDT; secondly, from 27 March 2006, this test was removed and a new set of minimum conditions in the Standard were introduced; thirdly, from 8 May 2007, agreements were assessed under a ‘fairness test’; fourthly, from 28 March 2008, agreements are subject to a new NDT; finally, from 1 January 2010, agreements will be assessed against a ‘better off overall test’. During this period, three

⁹⁸ J Howard, *Joint Press Conference with The Hon Joe Hockey MP, Minister for Employment and Workplace Relations*, Commonwealth Parliamentary Offices, Melbourne, 4 May 2007.

⁹⁹ B Bennett, *Evidence to Estimates Hearing, Senate Committee on Education, Employment and Workplace Relations*, Parliament of Australia, Canberra, 3 June 2008, 12.

different institutions will have assumed responsibility for approval of agreements: the AIRC, the OEA (and its successor the WA), and the FWA.

The wording of the new NDT is almost identical to the wording of the pre-Work Choices test: in essence, an agreement passes the NDT if the WA Director is satisfied that the agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the employees under any applicable ‘reference instrument’.¹⁰⁰

For collective agreements, the applicable ‘reference instrument’ is any ‘relevant general instrument’ which regulates, or would regulate (if not for the operation of the new agreement), the employment. If there is no ‘relevant general instrument’, the WA Director may designate an award.¹⁰¹ The kinds of instruments which may be a ‘relevant general instrument’ are federal awards, notional agreements preserving State awards (NAPSAs), and various other forms of awards.¹⁰²

A broader benchmark applies for the assessment of ITEAs. In relation to ITEAs, the benchmark for the NDT is any combination of instruments which regulate, or would regulate (if not for the operation of the new agreement), the employment. The types of instruments which may be included in the benchmark for ITEAs as ‘reference instruments’ are: any ‘relevant collective instrument’¹⁰³; or a ‘relevant collective instrument’ and a ‘relevant general instrument’ where the two operate concurrently; or, if there is no collective instrument, any ‘relevant general instrument’; or, if there is no ‘relevant general instrument’, any designated award.¹⁰⁴

¹⁰⁰ WR Act s 346D(1),(2).

¹⁰¹ WR Act ss 346E(1)(b), 346G, 346H.

¹⁰² These other forms of awards are common rule awards, transitional Victorian reference awards and transitional awards: WR Act s 346E(5).

¹⁰³ Under s 346E(2) of the WR Act a ‘relevant collective instrument’ is a collective agreement, a pre-reform certified agreement, an old IR agreement, a preserved collective State agreement, a workplace determination, or a section 170MX award, which would have applied to the employment but for the operation of the new agreement.

¹⁰⁴ WR Act s 346E(1)(a). In addition, applicable State or Territory law relating to long service leave are deemed to be a ‘reference instrument’ for both collective agreements and ITEAs. However, the long

Although the new test is similar in substance to the pre-Work Choices NDT, it has been inserted into a legal and institutional framework which contains very few procedural safeguards. For example, like the ‘fairness test’ assessment, the NDT assessment is applied ‘behind closed doors’. A lack of transparency is evident in a process in which there is no requirement for the WA to provide reasons for its decisions,¹⁰⁵ no avenue of appeal,¹⁰⁶ and very little opportunity for employees and their representatives to participate in the decision-making process.¹⁰⁷

The opaque nature of the process presents difficulties for employers too. For example, the vagueness of the criteria for the assessment creates uncertainty about whether an agreement will pass the test. Although the Policy Guide provides useful information about the way in which the WA might apply the legislation, this information is by no means comprehensive. The Guide is supplemented by a telephone advice line which is supported by 218 members of the WA’s staff.¹⁰⁸ But these staff members provide information about the broad principles applied by the WA in practice, not detailed advice about the WA’s interpretation of the legislation, and there is no guarantee that there will be an exact (or even approximate) correlation between the information provided by the advice line and the principles applied by the assessors. There are 300 assessors within the agency, 35 of whom are assessing agreements against the NDT at present, but this number will increase once the backlog of ‘fairness test’ assessments has cleared.¹⁰⁹

service leave entitlements are included in the benchmark only if they have application to the employees immediately before the agreement is lodged: WR Act s 346D(2A).

¹⁰⁵ With the exception of decisions made to pass agreements on the basis of ‘exceptional circumstances’: WR Act 346D(5).

¹⁰⁶ Except by application to the High Court for judicial review under s 75(v) of the Constitution. For a further discussion of the transparency of the WA’s processes: see Sutherland, above n 8, 264.

¹⁰⁷ The process largely relies on the information provided by the employer in a statutory declaration, although the new process does at least permit employees to ask for copies of this information: see NDT Policy Guide, above n 81, p 11.

¹⁰⁸ B Bennett, Evidence to Estimates Hearing, Senate Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 3 June 2008, 7.

¹⁰⁹ Ibid, 7, 20.

There are some aspects of the process which reveal a shift in approach to ensure greater protection of employees (in comparison with the process applied under the ‘fairness test’). The effect of these changes is to provide much less ‘wriggle room’ for employers under the new test. Under the pre-transition Workplace Relations Act, employers were able to apply to the WA for a pre-lodgement assessment to ensure their agreement was ‘fairness test’ compliant before it was put to employees for a vote. If employers did not choose to obtain this assessment, and subsequently found that their agreement failed the ‘fairness test’, they were permitted to provide an undertaking (which had the effect of varying the agreement) in order to pass the test.¹¹⁰

Neither of these options is available under the NDT. Where an agreement fails the test, the employer must obtain approval from employees to vary an agreement to ensure it subsequently passes the test.¹¹¹ The only pre-lodgement assessment that is available is through an application to the WA to designate an award. This process might be used where the employer is uncertain about whether a particular reference instrument will be used by the WA for the purposes of the test. Having applied for an award designation, the employer should receive a response from the WA which either identifies the appropriate reference instrument or designates an award to be used for the purposes of the NDT assessment.¹¹² If an award is designated by the WA at the pre-lodgement stage, the WA cannot later depart from this designation unless new information comes to light.¹¹³

The WA’s Policy Guide reveals others ways in which the WA’s approach to assessing agreements under the NDT appears to be more protective of the position of employees than its earlier approach. For example, the Guide advises that contingent benefits such as performance pay will not be accepted as offsets for the loss of monetary entitlements

¹¹⁰ Pre-transition WR Act s 346R(2)(b).

¹¹¹ WR Act ss 346N, 346P, 346W, 346X. An undertaking is still effective to vary an employer greenfields agreement: s 346W(2)(b).

¹¹² The assessment which the WA is required to undertake in order to designate an award includes determining whether there is a reference instrument which applies: see s 346G.

¹¹³ WR Act s 346G(5),(6).

which are not ‘at risk’.¹¹⁴ This illustrates a change from the earlier practice of the WA to take into account contingent benefits for the purposes of the ‘fairness test’ assessment, provided the assessor considered they provided sufficient value to employees.¹¹⁵ The new Policy Guide also indicates that ‘reconciliation’ or ‘guarantee’ clauses can no longer be relied on by employers to ensure that an agreement passes the NDT. These clauses typically provide a guarantee from the employer that employees will not be disadvantaged by the operation of the agreement in comparison with the reference instrument and an undertaking to make good any shortfall in take-home pay that might occur in practice.

An additional indication of a shift in the WA’s approach is in its policy of protecting each individual employee under the NDT. For the purposes of the ‘fairness test’, it was not clear that the test needed to be passed with respect to each employee or class of employees. In determining whether a collective agreement provided fair compensation in its ‘overall effect’ on employees, the WA Policy Guide stated that the WA took into account ‘the categories, number and proportion of employees’ affected by the exclusion or removal of protected award conditions.¹¹⁶ This suggested that the ‘fairness test’ was only required to be satisfied for a high proportion of employees, not for every employee. In contrast, the Policy Guide for the NDT and statements by the WA Director make it clear that an agreement will not pass the NDT where it is apparent that an individual employee, or a class of employees, will be disadvantaged by the agreement in comparison with the reference instrument.¹¹⁷

¹¹⁴ NDT Policy Guide, above n 81, pp 14, 21.

¹¹⁵ Based on ‘the likelihood that the employee [would] receive the performance pay and the likely amount’: Fairness Test Policy Guide, above n 96, p 23.

¹¹⁶ Fairness Test Policy Guide, above n 96, p 18.

¹¹⁷ NDT Policy Guide, above n 81, p 22; B Bennett, Evidence to Estimates Hearing, Senate Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 3 June 2008, p 30.

9 Labor's proposals for agreement-making in 2010

The transitional measures introduced in 2008 will be in place for a period of just under 2 years. Under the system proposed in Labor's Forward with Fairness policy,¹¹⁸ commencing in 2010, FWA will take over the role of approving workplace agreements. Such agreements will be measured against a new 'genuinely better off overall' test. It is not clear whether the more positive words 'genuinely better off overall' to replace 'no disadvantage' will represent any substantial change of emphasis. It would appear that the substance of the test will be similar to the NDT to the extent that awards will be used as benchmark instruments for the assessment of collective agreements. However, with the 'modernisation' of awards, this may represent an expanded benchmark. The government has not yet determined whether agreements will be reviewed for compliance with the new National Employment Standards.

Very little is known about the process which will be used to assess agreements, except that a new institution, FWA, will assess agreements 'on the papers'. It is difficult to take seriously Labor's estimation that agreements will be assessed within 7 days of the agreement being lodged,¹¹⁹ given that the Department of Workplace Relations had similarly estimated that 'fairness test' assessments would take 7 to 10 days, whereas some employers reported delays of up to 6 months, and the WA now estimates that agreements which are lodged with all the necessary information will take 30 days to process.¹²⁰

There has been a subtle shift in the approach of the WA to the assessment of agreements in favour of the protection of employees. We might expect a continuation of this approach in the practices of FWA. However, the determination of the Labor Government

¹¹⁸ K Rudd and J Gillard, *Forward with Fairness: Labor's Plan for Fairer and More Productive Workplaces*, April 2007, pp 14-15; K Rudd and J Gillard, *Forward with Fairness: Policy Implementation Plan*, August 2007, p 14.

¹¹⁹ K Rudd and J Gillard, *Forward with Fairness – Policy Implementation Plan*, August 2007, p 10.

¹²⁰ B Bennett, Evidence to Estimates Hearing, Senate Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 3 June 2008, p 10.

to retain an efficient, administrative process must have a cost in the substantive and procedural protections which can be offered to employees.

10 Conclusion

From the commencement of the Workplace Relations Act in 1996 to the most recent reforms in 2008, there have been dramatic changes in the rules which have applied to the making of collective statutory agreements. Individual statutory agreements - which affected the bargaining position of employees and unions seeking collective arrangements - were introduced in 1996 and abandoned in 2008.¹²¹ The content rules changed from a broad requirement in 1996 for agreements to deal with matters 'pertaining to the employment relationship', to the restrictive 'prohibited content rules' introduced by the Work Choices Act. Although the 1996 version of the NDT was weaker than its predecessors, the removal of that test in 2006 was the aspect of Work Choices which attracted the most criticism, because of well founded fears about the potential for erosion of employment conditions.

By replacing the AIRC's certification processes with the OEA's (and, subsequently, the WA's) process of automatic approval of agreements on lodgement, the Work Choices reforms reduced the accountability of employers for compliance with the agreement-making rules. The subsequent imposition of a 'fairness test' in 2007 and a NDT in 2008 provides greater protection to employees in relation to substantive outcomes, but there remain concerns about the transparency of the WA's process for approving agreements. It is anticipated that Forward with Fairness system will offer more substantial protections for employees who enter into statutory workplace agreements. Nevertheless, the new system will retain an administrative process, and the emphasis will be on efficiency. Like its predecessor, a key objective of the Labor Government is to promote statutory agreement-making in the pursuit of higher productivity. The shift towards fairness is

¹²¹ Although the 2008 reforms permitted the making of ITEAs as a transitional measure. The legislation also anticipated that individual flexibility arrangements would be made available as part of the award modernisation process.

likely to be subtle, and may well depend as much on the internal processes of the FWA as it does on the rules in the legislation.