

Australian Democrats' Additional Remarks

Introduction

The Australian Democrats support the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* (the Bill) as improving the *Workplace Relations Act 1996* (the Act), not least from a fairness perspective. I said in my third reading speech on 2 December 2005, that in passing WorkChoices¹ the Coalition were making '*not just an economic mistake, not just a social mistake, but a political mistake*'. I said:

This bill assaults the cultural, economic, social, institutional, legal, political and constitutional underpinnings of work arrangements in Australia. It aims to radically alter our work systems and values. ... Our problem is that the case still, to this moment, has not been made that the economic and the social situation in this country desires or needs this radical change. This change would not have happened if the Australian Democrats still held the balance of power in this chamber.

I support much in the Majority Report. Nevertheless, there are a number of additional remarks that are warranted. I do not intend to cover all the ground outlined by the witnesses and for these purposes focus on just one or two of the main issues.

Nevertheless I note that academic union and employer witnesses to the Inquiry have all made a case for amendments that would improve the Bill, and in some instances have provided draft wording for the legislative changes suggested.

Plus ca change

When I saw the Majority recommendation that the Bill be passed, without any other formal recommendation for specific amendments, I recalled the epigram² - 'the more things change the more they stay the same'.

It beggars belief that when a range of witnesses make a case for amendments that would improve the Bill – including recommendations from such reputable and experienced witnesses as the Australia Industry Group, the Australian Council of Trade Unions, and Professors Buchanan and Stewart – that the Majority cannot find even one change to formally recommend. Admittedly the Majority have indicated areas of concern – both technical and substantive – but those do not constitute recommendations.

1 The *Workplace Relations Amendment (Work Choices) Bill 2005*.

2 Attributed by *Wikipedia* to the 19th Century French journalist Alphonse Karr – *plus ca change, plus c'est la meme chose*

It may not be the case with respect to the members of this Committee, but as a general point, it is a matter of long regret in our Senate that senators from the government – any government – often seem to feel themselves sufficiently constrained by their party being in government, and a belief that the Executive should have passage of their legislation, that they cannot bring themselves to carry through the logic of a Senate review process, and that is to formally recommend evidence-based changes to a bill.

The failings of Work Choices are generally (and rightly) sheeted home to the former Prime Minister John Howard and his government, but Coalition senators who knew how slim the government's Senate majority was had the power of numbers. Just a couple of Coalition senators holding out for substantive changes could have altered the course of that bill. Those that heard the evidence and did not act therefore share the blame. If the Coalition senators participating in the truncated charade of the Work Choices Senate inquiry had responded to the widespread criticism of so many witnesses, and exercised their conscience vote based on the evidence before them, then perhaps Work Choices would never have been quite the failure it became.

Another feature of the Work Choices inquiry and debate was that the very essence of academic freedom³ was threatened at times by McCarthyist attitudes from some Coalition senators towards academics critical of that bill. I protested at the time that such attacks were a discredit to the Senate. The memory of those days obviously still rankles. In this Inquiry Professor Buchanan opened with these remarks:

*...before talking about the key issues that I want to get to, I just want to note that academic participation in forums such as these has become a bit of an occupational hazard.*⁴

I was pleased that in this new parliament, this Committee saw a return to greater latitude in allowing questions, the normal courtesy to witnesses, and a return to the better and more considered and considerate Senate Committee processes and practices that were sometimes absent during the term of the last parliament.

Unfair Dismissal (UFD)

Professor Stewart made some key observations on dismissals that deserve attention:

Protecting employees from dismissal

Proposed s 346ZJ provides that an employer must not dismiss or threaten to dismiss an employee because a workplace agreement does not or may not pass the NDT. However there are at least three obvious loopholes in this

3 ABC Tuesday 26 February 2008 interview with Professor George Williams UNSW – Salleh: 'Williams says some countries like New Zealand have specific legal protection for academic freedom and a bill of rights that provides general protection for free speech. But Australia has neither.' "Australian researchers are uniquely vulnerable when it comes to the lack of protection for academic freedom and free speech," he says.

4 Dr John Buchanan *Committee Hansard*, 6 March 2008 p. 31

provision as drafted. The first is that an employer could offer a worker employment under an ITEA on a “take it or leave it” basis, with a clause in the employment contract that if the ITEA subsequently fails the NDT and is annulled, the employment will automatically cease. In such a case there is arguably no “dismissal” in the strict legal sense: the employment contract would simply have ended by reason of the operation of its own terms, rather than by any action of the employer.⁵ Hence an employer using such a device would arguably not be at risk of any prosecution under proposed s 346ZJ. To avoid this result, the prohibition should be extended to cover a refusal to offer further employment. The second loophole may arise even where it is clear that the failure of a proposed agreement to pass the NDT has resulted in the dismissal of an employee. The employer may seek in such a case to argue that the “sole or dominant reason” for the dismissal was not the failure of the agreement to pass the NDT as such, but the fact that they could not afford to employ the worker on the terms demanded by the Authority as a basis for satisfying the test.⁶ This sort of sophistry could be avoided by providing that the prohibition applies when one of the reasons for the employer’s action is the failure or possible failure of an agreement to pass the NDT, or any consequences likely to follow from such a failure. A third drawback of proposed s 346ZJ is that it applies only to dismissal, not to lesser “reprisals” such as the reduction of hours for casual and/or part-time employees. The prohibition could usefully be extended to cover any action that injures an employee in their employment or that alters their position to their prejudice.

The other major issue in this area of law concerns the continuing exemption of the millions of employees that fall under federal law from the unfair dismissal (UFD) protections that are available to employees of large organisations with more than 100 employees.

The Democrats support the right to protection from UFD, not only for employees in organisations employing more than 100 persons, which is the present provision in the Act, but for all employees. ILO Convention 158, ratified by Australia, holds that an employee must have a “valid reason” for dismissing an employee.

The Democrats do accept that complex loosely drafted and costly UFD provisions are highly undesirable. Such negativities are regarded as having particular affects on small business. Both small business and their employees do have a need for rapid

5 In the same way that there is no dismissal or termination at the initiative of the employer when a contract for a fixed term reaches its expiry date: see eg *Victoria v Commonwealth* (1996) 187 CLR 416 at 520.

6 Cf the reasoning adopted in cases such as *Grayndler v Brown* [1928] AR (NSW) 46 and *Klanjscek v Silver* (1961) 4 FLR 182, and also by Merkel and Finkelstein JJ in *Greater Dandenong City Council v ASU* (2001) 184 ALR 641.⁶

low-cost dispute resolution, and for minimising vexatious claims. Recognising that need, the Democrats negotiated changes to UFD law that saw the number of federal UFD applications fall by over 60 per cent from 1996, 50 per cent after our successful 1996 negotiations and a further 12 per cent after our successful 2001 negotiations.

These matters have been the subject of extensive Senate debate and a number of reports.⁷

The extent of the UFD problems under federal law was wildly exaggerated. Using Western Australia as an example (the figures below were provided by the federal government, who later ceased providing the data): there were less than 100 UFD applications for WA small business a year under federal law. The vast majority of UFD applications were actually under state law.⁸

- WA 1996 total UFD applications under federal law were 1 875.
- WA 2003 total UFD applications under federal law were 316, of which small business constituted 79; (note the fall of 83 per cent).
- WA 1996 UFD applications under state law were 918.
- WA 2003 UFD applications under state law were 1 314.

While there were 6 954 applications nationally for federal UFD in 2003, only 34 per cent or 2 153 of those were for small business nationally. One argument has been that anecdotal evidence exists of 'go away' money being paid, so that the resolution of UFD incidents has been understated. Over the years the evidence of large-scale 'go-away' money payments has never been supported in any credible manner in employer submissions to the Committee. It certainly exists, but there is no empirical evidence that it existed in federal UFD applications to the extent implied or asserted.

The Democrats and Labor have never accepted the claims that exempting small business from UFD creates tens of thousands of new jobs. On the job creation front, comprehensive research undertaken by Senior Lecturer Paul Oslington and PhD student Benoit Freyens at the University of NSW School of Business found that ending UFD laws for employers with fewer than 100 employees could create 6 000 jobs, not the 77 000 claimed by the Howard Government.

So what motivated the Coalition's long UFD campaign? Prior to the 1996 federal election the Coalition promised to replace Labor's unfair dismissal laws with a "fair go all round" for employers and workers. Little detail was provided, but it was clear that

7 See for instance Senate Employment Workplace Relations and Education Reference Committee Report June 2005: 'Unfair dismissal and small business employment'

8 If you want to know just how different the state regime was - see the Senate Employment Workplace Relations and Education Reference Committee Report June 2005: 'Unfair dismissal and small business employment' (Appendix 6).

all workers would have access to the regime, and that the test for unfair dismissal would be closer to the pre-1993 rules. After the Democrats' 1996 negotiations with the Howard government it was clear the Coalition had no intention at all of changing their pragmatic UFD 'qualified support' policy in 1996/7, on which they had negotiated an acceptable UFD outcome with the Democrats.

One of the things the Howard Government did want early in its term was a double dissolution (DD) trigger to maximise their election date options,⁹ ideally on a simple single proposition that they knew would be rejected. UFD was just such an issue. I have always maintained (see Hansard debates) that the first UFD exemption bill was designed solely for the purpose of a DD trigger. The *Workplace Relations Amendment Bill 1997* proposed a permanent exclusion from UFD rights for new employees in businesses of less than 15 employees. The 1997 bill was to become the DD trigger the government wanted.

Only later did the proposed UFD exemption for small business reach totemic status as a Coalition policy. Later UFD bills not only had the virtue of being an assured DD trigger, but were a popular (with certain media/business/political sections) policy rallying call.

UFD is germane to this Bill, which intends to introduce greater fairness into the workplace. As this Hansard extract shows, Curtin University's Professor Alison Preston was among a number of witnesses who made it clear that a provision for dealing with UFD was an essential element of a fair regime for employees.

Under Work Choices, the group of workers that we are particularly interested in following—which is women, many of whom are in the low-paid sector—were particularly disadvantaged by the industrial relations system, partly because of the provisions in AWAs but perhaps more importantly because of the restrictions on prohibitive content and also the removal of protection from unfair dismissal. When I look through the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 that is in front of you now, I am very pleased with the changes that have been proposed there. My main concern is that I do not think that it goes far enough. I was disappointed to see that it does not yet address the question of unfair dismissal. I know that the ALP has made a commitment to a five-year transition period for AWAs signed now. That is a long and generous period for transition. It would be more favourable for many of the

9 Double Dissolution Triggers - 38th Parliament (30/4/96 to 31/8/98): Parliamentary Service Bill 1997; Public Service Bill 1997; Public Employment (Consequential and Transitional) Amendment Bill 1997. The status of these bills as triggers was disputed on the basis that the usual procedure was not followed. The Senate was not given an opportunity to reconsider its amendments and decide not to insist on them, thereby allowing the bills to pass. In any case later versions of these bills were passed in a subsequent Parliament. So the only real trigger was the Workplace Relations Amendment Bill 1997 which was negatived by the Senate at second reading on 21 October 1997 and the [No. 2] bill was negatived by the Senate at second reading on 25 March 1998.

workers who had been disadvantaged to have a shorter transition period, but I understand that that is not what the bill is going to address.¹⁰

This provoked this later line of questioning:

Senator MURRAY—I want to turn to your unfair dismissal remarks. Mr Rothwell from Austal, a witness earlier today, told us that Austal had 1,200 employees. Under the present law, they are all subject to unfair dismissal provisions because there are over 100 employees. So your remarks relate to below the 100 employees. You might not know but I am a strong supporter of unfair dismissals for all employees subject to the proper probationary period and various protections. Do you support the government policy of cutting off organisations below 15 employees from unfair dismissal provisions?

Prof. Preston—No, I do not. My position is that all organisations should be subject to the unfair dismissal provisions—again, as you said, subject to probationary periods et cetera. Again, many women work in small businesses. The small business sector is very large in Western Australia—unfortunately, I do not have the statistics here—and many organisations work with less than 15 employees. I do not see why, if you work in an organisation of less than 15 employees, you should not be able to access the same provisions as your colleagues in slightly larger firms.

Senator MURRAY—Is the main point in your submission—and I obviously have not had a chance to read it—that this bill would be improved if unfair dismissal provisions were restored immediately because that would allow a greater measure of fairness to exist during the transition period? Is that what you are saying to us?

Prof. Preston—I do not think I could have put it any better.

...

Senator MURRAY—The essential argument of the coalition was that small business should not be subject to unfair dismissal provisions, yet they applied it at 100 employees, which is greater than the ABS definition. So you would argue that it would be a significant improvement if unfair dismissal was at least to apply at the level already determined by Labor and agreed to by the coalition, which is essentially at the small business level. Labor is saying 15 and the coalition might say 20, but there is not that much difference.

Prof. Preston—I am sure you will not be surprised to find that I agree with you again. No, I would absolutely. The argument around unfair dismissal is very much that, if you put it there, it is going to limit employment growth. I think the other arguments around unfair dismissal have to look at the productivity effects of those provisions. I think the onus comes back on the employer. With suitable probationary periods there, they have ample time to work out whether or not an employee is suitable, is performing, and do

10 Professor Preston, *Committee Hansard*, 4 March 2008, p.25.

not need to have the protection of a system that says that you are able to dismiss at will.¹¹

Unions WA also supported comprehensive UFD coverage:

Senator MURRAY—A previous witness, Professor Preston, put forward the proposition that employee protections in this bill would be enhanced if unfair dismissal provisions were restored for those organisations with fewer than 100 employees. What is the policy of UnionsWA with respect to unfair dismissal provisions?

Ms Hammat—We would wish to see the unfair dismissal provisions changed as soon as possible.

Senator MURRAY—Would you stop at 15 employees?

Ms Hammat—I suppose it begs the question: why would an organisation with 15 employees be treated differently to one with more than 15?

Senator MURRAY—I happen to agree with that.

Ms Hammat—With the number of 15?

Senator MURRAY—No—with your argument.

Ms Hammat—It seems very arbitrary to simply move the benchmark from 100 to 15. We see 15 as a clear improvement. We would want to see those aspects of the legislation changed as soon as possible. We are disappointed that the unfair dismissal provisions are not changed in this bill rather than waiting. Those provisions leave many employees very vulnerable in their workplaces, and the sooner they are changed the better.¹²

As did other witnesses in Melbourne and Brisbane.

Ms O'NEILL—This sometimes characterises issues about union rights. I would like to give you some examples of issues that are about workers' rights. Right now, if I try to put a right for unfair dismissal in an agreement for low-paid textile workers, if they want to bargain to get back some of their unfair dismissal rights in their collective agreement, then not only can I be fined and my union be fined but in fact the workers that asked to have that protection included in their agreement can also be fined. How can it be that a government—this government—that is saying it is going to restore unfair dismissal rights for workers, in this period of so called transition, cannot address the fact that where workers want to bargain to have those rights included now they in fact would be fined for just asking for it? You will see workers and their unions fined for asking for something that is now government policy. It is nonsensical to think that, in improving conditions, there should be those sorts of provisions applying when these things are in fact in keeping with current government policy.

11 Professor Preston, *Committee Hansard*, 4 March 2008, pp. 27-28.

12 Unions WA, *Committee Hansard*, 4 March 2008, p. 36.

Going back to Ms Wiles's point about the intersection, the other issue for us is that, if you are able to be unfairly dismissed in the system and this bill does not deal with the restoration of unfair dismissal rights for workers—and many of the members and workers in our industry are in workplaces with less than 100 employees—back into the system, whatever the size of the workplace you work in, then your vulnerability to the other things that I have described increases dramatically. If you have the combined effect of having your job threatened, with no rights of redress in terms of dismissal, as well as the loss of jobs and the economic pressure on workers in this industry, as well as the effect of ongoing AWAs and ITEAs and the effect of not getting your union into the site, you can see how it leaves this group of workers, whom we say are going to have an entrenched disadvantage over this period of the transition bill.¹³

Mr GOODE—To wrap this up, Ms Walsh referred to our submission to the Queensland Industrial Relations Commission inquiry into Work Choices in 2006. We made it clear then that we opposed the absence of a no disadvantage test for AWAs, and we are on record as saying that. The other part that we put a fairly strong opposition to was the imposition of the 100-employee arbitrary cut-off for access to the unfair dismissal laws. We opposed that as well. In that regard we welcome the abolition of the 100-employee arbitrary cut-off.¹⁴

Recommendation 1

That unfair dismissal provisions for all employees be restored to the Act.

Individual Statutory Agreements (ISAs)

The Australian Democrats believe a mix of agreement making between employers and employees – collective industry awards, collective enterprise bargains and individual agreements - in all their various forms – provide the necessary flexibility and choice for employment contracts in a modern economy. The over-riding proviso is that all agreements must be fair to both employers and employees.

A modern liberal democracy should always enshrine fair minimum standards of wages and conditions for workers. A modern workplace relations system must also make a material contribution to Australia's efficiency, wealth and job creation, productivity and internal and external competitiveness.

As stated earlier, the Australian Democrats opposed the Coalition's Work Choices workplace laws. Those laws are best summarised as unfair, inefficient and counter-productive. This Bill of course does not replace Work Choices – it just attends to some elements of it.

13 Textile, Clothing and Footwear Union, *Committee Hansard*, 7 March 2008, p. 23.

14 Local Government Association of Queensland, *Committee Hansard*, 10 March 2008, pp. 43-44.

The Democrats opposed Work Choices AWAs and will be glad to see the back of them.

In her submission, Professor Alison Preston provided a table¹⁵ drawn from the Australian Bureau of Statistics (ABS) May 2006 (6306.0) series, that in summary indicated that Australian employees are covered by the following broad categories of collective agreements:

- awards (federal/state) only – 21 per cent
- collective agreements (registered/unregistered; union/non-union) - 44.5 per cent
- individual agreements (statutory/common law) - 34.5 per cent

Employment is presently estimated as above 10.6 million, perhaps moving towards 11 million by 2009. If we use the 10.6 million figure, this breaks down as:

- awards (federal/state) only - 2.1 million persons
- collective agreements (registered/unregistered; union/non-union) - 4.7 million
- individual agreements (statutory/common law) – 3.7 million

These statistics can be accepted as accurate but not exact. They are historical, subject to time lag, and collecting evidence in this area is not always easy. For instance although the number of (federal and state) registered ISAs are around 3 per cent according to the ABS, I have seen later estimates of them being 5 per cent or even 7 per cent of all agreements. Whatever, ISAs do not cover more than 1 in 15 employees at best, and likely, not more than 1 in 20. Still, at the least, that is more than half-a-million people on ISAs.

To end the contractual rights of half-a-million Australians would be a significant step, especially if the chosen instrument is genuinely a matter of free choice. The assumption is that all Australians on Work Choices AWAs will be happy to see the end of them. That may be so for many Australians on Work Choices AWAs, but it is a long jump from there to decide that means that half-a-million Australians were also all opposed to the very different pre-Work Choices AWAs, or are all now opposed to ISAs as a distinct class of industrial instrument.

Here is what Professor Preston had to say on the matter:

Senator MURRAY—Bearing in mind that the government supports common-law individual agreements, and also bearing in mind that individual statutory agreements can be of many kinds—Work Choices is just one kind; a very bad kind, but one kind—do you take the view that individual statutory agreements are always going to be worse than common-law individual agreements? And if you do, why?

Prof. Preston—No, I do not. I think, again, given that we know that the individual statutory agreements are going to be for employees who earn \$100,000 or more, I think that that in some ways is a very fair cut-off point.

15 Professor Preston, *Submission 46*, Table 6, p. 16.

At that point you can expect that individuals will have a bit more ability to negotiate terms that are going to be suitable to themselves.

Senator MURRAY—My general point is this: if you devise a fair individual statutory agreement, the protection for both employees and employers—and, by the way, it needs to be enforced by a strong regulator—is greater than under the common law, as a general principle. Do you accept that argument?

Prof. Preston—Yes, I do.¹⁶

Fortunately, it does seem that Labor is being more cautious in government than might have been predicted before the election, certainly judging by this Bill and its transitional ISA stream – the Individual Transitional Employment Agreement (ITEA).

The odd thing about Labor and union policy is that both support (in Labor’s case) and accept (in unions’ case) that individual agreements are needed as an ongoing form of employment contract, yet both seem to subscribe to the myth that common-law individual agreements are automatically somehow better than ISAs.

The AWU’s Mr Howes attitude to individual common-law agreements was this:

Senator MURRAY—Does your union support common-law individual agreements?

Mr Howes—We do not support common-law individual agreements. We think the best way of bargaining for workers is through collective, registered agreements, but we do not oppose individual agreements. They have been in existence in the Australian workplace since Federation and we certainly do have a number of members who work under common-law individual agreements.¹⁷

The President of the ACTU was equally clear in her belief that only collective agreements can protect and sustain working people in a way that ISAs, by their nature, cannot:

Ms Burrow—...Common law exists; if people really want individual arrangements then you can do your best to use that, but working people, employees, should always have their rights protected. Statutory individual contracts have never and will never do that because it shifts the power balance.¹⁸

The easy demonisation of all ISAs by the very evident failings of just one version of ISAs (Work Choices AWAs) of the many possible versions of ISAs, is indefensible from a policy perspective, despite its political success.

16 Professor Preston, *Committee Hansard*, 4 March 2008, pp. 27-28.

17 Australian Workers Union, *Committee Hansard*, 6 March 2008, p. 13.

18 ACTU, *Committee Hansard*, 7 March 2008, p. 45.

Common law agreements put employees far more at the mercy of employers than do fair ISAs that are fair and properly regulated. With respect to employment matters, Australian common law precedents are often rooted historically in English master-servant concepts, often with a bias towards master, the very criticism levelled against Work Choices AWAs.

Unions often portray themselves as champions of human rights. They do have a long and proud history of standing against tyranny of one sort or another. Yet campaigning against ISAs as a class of industrial instrument in favour of individual common-law agreements represents a diminution of human rights.

My eye was caught by an article on a charter of rights.¹⁹ The President of the NSW Bar Association said:

It is abundantly clear that human rights are not adequately protected under the common law...

The common law is unwritten law based on custom or court decisions. Statute law is the law laid down in Acts of Parliament. It provides certainty.²⁰ Why regulate industrial relations by statute at all? Why not just let the common law apply to the whole industrial relations process, including collective agreements?

The answer is because the common law is inadequate. Common-law is not precise, as it comprises accumulated and varying judgements and judicial principles only established on a case-by-case basis. Statute is much more precise. Statute is easier for the parties to an agreement to administer and comprehend, but if a dispute gets serious, statute makes a difference when courts have to adjudicate.

Precise statute leads to precise judgements. Imprecise common law leads to imprecise judgements. Statute also allows contract disputes to be resolved in fast low-cost easy access tribunals, instead of the slow costly courts. Furthermore, statute can ensure easy enforcement and penalties for transgressions.

In industrial relations, statute provides much greater protection, flexibility, and easier usage than the common law. Statute is able to add protections and precision denied by common law. This is why workers compensation laws for protection in case of work injuries are now almost completely regulated by statute law.

There are three basic types of individual employment agreement in Australia: individual agreements based solely on statute; individual agreements based on common law but with awards applying to them (hybrid statute/common law agreements); and individual agreements based solely on common law.

19 The Australian Friday 14 March 2008 page 34 Legal affairs section – Anna Katzmann SC President of the NSW Bar Association - Charter of rights will make pollies more accountable

20 From an employer's perspective on certainty, see Perth hearing Chamber of Commerce and Industry Western Australia Tuesday 4 March Committee Hansard, p. 11.

Labor is proposing the hybrid type of individual agreement. They are proposing two classes of individual agreement – arbitrarily divided on what basis no one knows - one above \$100 000 earnings, where supposedly completely flexible common-law agreements apply (but subject to statute through the yet-to-be-finalised National Employment Standards)²¹; and those below \$100 000, with stronger statutory protections, and a reference back to the applicable award.

It is important to understand that employees under pure common law individual agreements are the most exposed to employer prerogative and are the least protected, and have much more difficult disputation resolution, while those under hybrid type agreements have the least flexibility in varying their working conditions to suit individual circumstances.

The policy lines are clearly drawn. Of the political parties, only the Democrats had believed that properly enforced and regulated ISAs must be underpinned by the applicable award, (with awards restricted to allowable matters), subject to a global no-disadvantage test. Post the 2007 federal election, this seems to be becoming a ‘mainstream’ position.

Since 1996 the Democrats have been joined with the Liberals and Nationals in believing ISAs must be available as an alternative to both hybrid statutory/common law individual agreements and pure common law individual agreements. The Greens do not support these propositions.

Intriguingly, this Bill, as some witnesses to the Inquiry pointed out, does seem to offer a permanent (and fairer) ISA regime going forward, at least until the substantive bill due later this year, so perhaps Labor’s position is less antagonistic to ISAs than was previously thought. Time will tell.

There is one basic point to decide on: do you need ISAs to provide protections and choice to employees that the common law does not provide - hence Labor is wrong?

A great weakness of Labor and others is to argue that collective agreements are the alternative to individual common-law agreements. That assumes that the choice between the group and individual is always present. That is not so. Where individual agreements are likely to pertain, or are the preferred choice, the only alternative to the common-law agreement would be an ISA. Otherwise the only choice left is a Hobson’s one, an individual common-law agreement or nothing, take-it-or-leave-it.

Labor and the unions must surely understand that provided, and these are strong provisos:

- statutory provisions are fair;

21 Employees earning above \$100 000 pa would be free to agree to their own pay and conditions without reference to awards – see DEEWR Committee Hansard Canberra 11 March 2008 p4

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- fairness provisions are oversights and enforced by an active regulator;
 - ISAs are underpinned by a credible safety net of wages and conditions; and
 - ISAs are subject to a global no-disadvantage test referenced back to the applicable award

that ISAs will provide much greater certainty and protection than individual common law agreements.

There remains the question of disputation. If one part of employment contracts is the process of agreement-making, the other half is the resolution of disputes.

How much cheaper, quicker, and more satisfactory is having a statutory instrument in dispute referred to an industrial relations tribunal than to the courts?

Professor Andrew Stewart rightly identified as a matter of concern how appropriate protection might be given to the 30 per cent (at least) of employees governed not by awards or registered workplace agreements, but by common law contracts.

As matters stand, the “model dispute resolution process” set out in Division 2 of Part 13 of the WR Act applies only to disputes over certain entitlements created under the Act, not those arising under the common law (or for that matter other federal or State legislation). The process can in any event only operate where all parties to a dispute agree to some form of “alternative dispute resolution”. If just one of them holds out, then in the absence of some prior commitment to an ADR process, any entitlements must be pursued in court. For some proceedings, the Federal Magistrates Court may now be used. But it has no jurisdiction over common law claims arising from the terms of an employment contract, except where those claims arise from the same facts as a statutory claim with which it can otherwise deal. This can be contrasted with the position in South Australia, where the Industrial Relations Court has formal jurisdiction over any claims for money due under a federal award or agreement, a State award or agreement, *or* a contract of employment: see *Fair Work Act* 1994 (SA) s 14. This has for many years allowed the Court to offer a low cost, accessible and (generally) prompt process for resolving monetary claims by employees, whatever the source of those claims. (I put to one side certain technical arguments as to the effect of the Work Choices reforms on that jurisdiction.) A recent and very useful innovation has provided for such claims to be the subject of conciliation in the Industrial Relations Commission before proceeding to any adjudication by an Industrial Magistrate. Likewise, s 29(1)(b)(ii) of the *Industrial Relations Act* 1979 (WA) confers a broad jurisdiction on the Western Australian Industrial Relations Commission to hear a claim by an employee or ex-employee in respect of the denial of any “benefit” to which they are entitled under their employment contract. It will be open to the federal government, in drafting the legislation that will apply from 2010, to make provision for a low-cost and speedy process of dispute resolution that is available to *all* employees seeking to enforce employment entitlements, whether arising under legislation, awards, workplace agreements, contracts or the common law — subject to imposing a monetary limit (say \$40,000), and subject also

perhaps to excluding claims for the likes of defamation, personal injury and so on. Such a process would go some way to allay concerns about the impact of removing higher earning employees from the award system. It is a reform that I would in any event strongly advocate for its own sake.

Protecting Workers Covered by Common Law Agreements

Under the government's proposed new system, there will be a growing number of workers who are either not covered by awards at all, or who are able to enter into contractual arrangements with their employers to take advantage of the flexibility clauses to be built into awards. That in turn makes it less likely that they will make or become subject to registered workplace agreements. The question put to me concerns how those workers might appropriately be protected, bearing in mind that they will still be covered by the National Employment Standards and that those earning less than around \$100,000 per year will have access (at least after a qualifying period) to the unfair dismissal regime. Once again, much will turn on the availability of a low-cost and accessible process of dispute resolution. I repeat my comments above as to the desirability of such a reform to the federal system.²²

Recommendation 2

That Labor design an individual statutory employment agreement system as an alternative to individual common-law contracts, that has the following characteristics:

- **the statutory provisions are fair;**
- **fairness provisions are oversighted and enforced by an active regulator;**
- **the individual statutory agreements are underpinned by a credible safety net of wages and conditions;**
- **individual statutory agreements are subject to a global no-disadvantage test referenced back to the applicable award; and**
- **fast low-cost disputation processes are available.**

Senator Andrew Murray

22 Professor Andrew Stewart, *Supplementary Submission 16A*, pp. 4-5.