



**PROTECTING THE WORKER'S INTEREST IN
ENTERPRISE BARGAINING: THE 'NO
DISADVANTAGE' TEST IN THE AUSTRALIAN
FEDERAL INDUSTRIAL JURISDICTION**

FINAL REPORT

Prepared for the Workplace Innovation Unit, Industrial Relations Victoria

by

Richard Mitchell, Rebecca Campbell, Andrew Barnes, Emma Bicknell, Kate
Creighton, Joel Fetter and Samantha Korman

The Centre for Employment and Labour Relations Law

Law School

The University of Melbourne

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1. Introduction

Enterprise-based bargaining in the determination of employment conditions, rights and duties has now been in place as part of Australian industrial relations policy and practice for well over a decade, stimulating substantial controversy in political, industrial and academic quarters.¹

Most labour market and industrial analysts seem generally agreed on certain aspects of the enterprise bargaining experience, viewing it as essentially a negative one for workers, demonstrated in a deterioration in levels of pay and conditions and a corresponding loss of power or voice in the workplace.² Many have also pointed to the adverse outcomes of the enterprise bargaining process for unions and union organisation at workplace level.³ In short, enterprise bargaining seems, in the eyes of many, to be about the exploitation of labour and the diminution of collective resistance to that exploitation rather than ushering in a 'new era' of creative and dynamic agreements supporting both higher wages and more productive and efficient workplaces.⁴

However, whatever its impacts might have been, the Australian route to enterprise bargaining has not been an exercise in fundamental labour market *deregulation*. *De-centralisation*, or *de-collectivisation* might be more accurate terms to employ,⁵ but to speak of de-regulation in this context would be misleading. In point of fact, it is not controversial to state that the process of re-orienting Australian industrial relations away from centrally state-determined awards under the control of trade unions and industrial tribunals, towards workplace/enterprise-based bargaining by the resident parties, has occurred only through *extensive further regulation* of industrial relations practices. Of major importance in this regulation is the raft of legislative conditions, both procedural and substantive, subject to which the workplace parties are permitted

to enter into their own forms of enterprise-based systems of labour utilisation and control.⁶

Without doubt, the single most important of the regulatory conditions imposed upon the enterprise bargaining process in the *Workplace Relations Act 1996* (Cth) (*WRA*) is the requirement that any agreement reached through the process must not ‘disadvantage’ the worker in relation to his or her employment conditions.⁷

The ‘no disadvantage test’ (NDT), as it has come to be known, has been part of the enterprise bargaining system more or less since its inception.⁸ Simply put, the test requires the regulatory authorities to examine the conditions set down in the enterprise agreement in order to ensure that those conditions do not ‘disadvantage’ the employee when compared with the employee’s conditions under previously applying regulatory arrangements. The main forms of ‘enterprise agreements’ relevant for these purposes at Australian federal level are Australian Workplace Agreements (AWAs)⁹ made between individual employers and employees, agreements between groups of employees and employers (s.170LK agreements),¹⁰ and agreements between unions and employers (s.170LJ agreements).¹¹ The regulatory authorities charged with the responsibility of applying the NDT are the Office of the Employment Advocate (OEA),¹² which assesses AWAs for compliance with the test,¹³ and the Australian Industrial Relations Commission (AIRC), the members of whom are responsible for applying the test to AWAs when these are referred on to the AIRC by the OEA, and to s.170 LK and LJ agreements in the first instance.¹⁴

But what does it mean to say that a worker should not be ‘disadvantaged’ through enterprise bargaining? To some extent the terms of the regulatory scheme set out in the provisions of the *WRA* make this question a little easier to answer by excluding many conditions and rights which would normally be thought to be part of any ‘no disadvantage’ calculation. This Report returns to these matters in due course. However, even allowing for these regulatory incongruences, the NDT is inherently problematical.¹⁵ When will the removal or reduction of certain employment rights or conditions in return for the increase of some other rights or conditions, or the introduction of new ones, amount to a ‘disadvantage’? Plainly this is not just a

difficult question in its own right; the very complexity of Australian industrial regulation of necessity means that many things must be ‘measured’ and these will not always be capable of precise quantification, or indeed of quantification at all.¹⁶

At the political level, the expression ‘no disadvantage’ was re-stated by the Prime Minister to convey a message to workers that they would not be made ‘worse-off’ under the industrial relations reforms embodied in the government’s *WRA* of 1996.¹⁷ It is perhaps not unreasonable to take the fundamental intent of this promise as meaning only that workers would not be ‘disadvantaged’ financially rather than in any broader sense. But, again, the terms of the *WRA* leave great scope for doubt. The relevant statutory provision¹⁸ requires only that the enterprise agreement not ‘disadvantage’ employees *in relation to their terms and conditions of employment*.¹⁹ Whilst it is true, as we noted earlier, that the relevant terms and conditions are circumscribed for the NDT purpose, the test nevertheless, for all *relevant* terms and conditions, includes not merely those which have some direct monetary value (such as pay rates, bonuses, leave entitlements and so on) but also those which have none (such as a limited duties statement, unpaid leave entitlements, and so on).

Employees may be ‘disadvantaged’ in all sorts of ways through the alteration or removal of non-pecuniary conditions and benefits. For example, even if an employee is no ‘worse-off’ financially as the result of a certified agreement, he or she may be worse-off in personal enjoyment terms measured as job satisfaction or enjoyable family life. The scope for disagreement over meaning and interpretation is boundless.

In approaching the operation of the NDT much depends, obviously, on subjective assessment.²⁰ Even if one were able to be in complete command of all of the legislative, economic and workplace specific detail, a position almost impossible to attain, it is dubious whether there would be wide ranging agreement on the validity of the outcomes of the NDT application across many industries and enterprises. Given the nature of the NDT itself, and the complexity of Australian industrial regulation, in our view it could hardly be otherwise.

In the application of the NDT much depends not merely on the regulation itself, but on the conventions and techniques utilised by the regulatory authorities. This combination of statutory terminology and administrative discretion means that issue may be taken with the appropriateness or fairness of enterprise outcomes on at least three levels; first, in the legislative construction of the NDT itself; second, in the decision-making methods and techniques used by the regulators to apply the NDT; and thirdly, in the accuracy or rectitude of application in each case.

The structure of this Report is as follows. Part 2 sets out the regulatory framework for the operation of the NDT as provided in the terms of the *WRA*. Part 3 reviews the critical literature on the purpose, function and implementation of the NDT. In Part 4, we set out the administrative and determinative approaches to the operation of the NDT adopted by the AIRC and the OEA. Part 5 presents the evidence we have gathered in our examination of the NDT issue. This includes material drawn from a detailed examination of 36 enterprise agreements across a range of industries, supplemented by information gathered from a further 48 agreements reviewed more partially. Part 6 offers an analysis of the operation of the NDT. That analysis necessarily has to respond to the major demands of the Project Brief, subject to which the work for the Report has been carried out. A copy of the Project Brief is attached to the Report (Appendix A). Part 6 also offers some suggestions for regulatory reforms in light of the research findings. Part 7 is a concluding section.

2. The Regulatory Framework

2.1. History

The first legislative support for enterprise-specific bargaining²¹ appeared in the Federal Labor government's *Industrial Relations Act 1988*,²² which was introduced in the wake of the Hancock Inquiry into the Federal industrial relations system.²³ The bargaining provisions of the 1988 legislation did not include an NDT as such. However, they did require that enterprise agreements be both in the interests of the parties immediately concerned, and not contrary to the 'public interest' in order to be certified.²⁴ While these requirements were more attuned to the general 'public

interest' in protecting the general standards of the federal system of wage and conditions regulation, the AIRC, on occasion, did use the provisions as a vehicle for considering the material interests of particular groups of employees who would be covered by such agreements.²⁵

The bargaining provisions of the Act were again amended by the Labor government's *Industrial Relations Legislation Amendment Act 1992 (Cth) (IRLAA)*, repealing the existing provisions relating to consent awards and certified agreements²⁶ and replacing them with a new Division 3A in Part VI of the Act. These new provisions were designed to strengthen the move from award regulation to enterprise-based bargaining.²⁷

Whilst in general terms the role of the AIRC in approving or rejecting enterprise agreements was reduced in the 1992 legislation, for the first time it was specifically directed to consider whether or not employees would be 'disadvantaged' by the agreement to which they were to be parties. Section 134E (1)(a) of the 1992 Act stated that the AIRC 'must not'²⁸ certify an agreement unless ... it [was] satisfied that: (a) the agreement [did] not, in relation to their terms and conditions of employment, [disadvantage] the employees who [were] covered by the agreement'.

Section 134E (2) elaborated:

For the purposes of paragraph (1)(a), an agreement is only taken to disadvantage employees in relation to their terms and conditions of employment if:

- (a) certification of the agreement would result in the reduction of any entitlements or protections of those employees under:
 - (i) an award [defined to include a certified agreement]²⁹; or
 - (ii) any other law of the Commonwealth or of a State or Territory that the Commission thinks relevant; and

- (b) in the context of their terms and conditions of employment considered as a whole, the Commission considers that the reduction is contrary to the public interest.

In his Second Reading Speech to the amending Bill, the Minister described the NDT as a ‘key element’ in the enterprise bargaining scheme which was designed to boost productivity and improve living standards of workers.³⁰ In applying the NDT the Minister said that the AIRC was to have regard to:

the context of the terms and conditions of [the] employees considered as a whole. The provision is not intended to operate in a way to reduce well established and accepted standards which apply across the community, such as maternity leave, standard hours of work, parental leave, minimum rates of pay, termination change and redundancy provisions and superannuation.³¹

Two points should be noted about the NDT in the 1992 amending Act. First, these provisions introduced the idea of the dual component NDT by requiring first an examination of whether or not employees’ terms and conditions were reduced by the agreement and then a consideration of whether or not, in any such case, the certification would be contrary to the public interest having regard to the employees’ terms and conditions of employment as a whole. This dual structure made it possible for the AIRC to certify an agreement which reduced one or a number of the entitlements or protections of the relevant employees provided that it was not contrary to the public interest to do so. Secondly, it was clear from the Minister’s speech that the NDT was aimed specifically, though not exclusively, at the maintenance of broad ‘community standards’, such as various forms of minimum pay and leave, which were not to be subject to trading-off in the enterprise bargaining process.

The *IRLAA* was a short-lived exercise in legal reform, and as a result there was no substantial body of AIRC commentary on s.134E. In general, however, academic opinion has leaned to the view that the NDT in this provision weakened stronger versions of protection set out in the previous legislation and in statements by the AIRC.³²

The provisions of the *IRLAA* were shortly replaced by the *Industrial Relations Reform Act 1993 (Cth) (IRRA)*. Two different types of enterprise-based agreements were introduced in this new legislation,³³ each of which was subject to a NDT stated in the same terms. This NDT retained the same standard set down in s.134E (2) of the

previous legislation.³⁴ There were, however, certain new conditions which had capacity to impact upon the operation of the NDT. One of these was a requirement that enterprise agreements could only be negotiated where the employees were already regulated by one or more Federal or State awards.³⁵ According to Naughton this requirement amounted to a strengthening of the NDT as it prevented the construction of an enterprise agreement without the existence of an underpinning award regulation and insured that in the absence of a Federal award, a State award would be included as the NDT measure.³⁶

On the other hand, a second condition imposed in the *IRRA* excluded existing certified agreements and enterprise flexibility agreements from constituting part of the NDT standard.³⁷ This arrangement differed from the terms of the *Industrial Relations Act 1988*, and the *Industrial Relations Legislation Amendment Act 1992*, both of which had included a certified agreement in the definition of ‘award’.³⁸ The clear effect of this variation in terminology was to reduce the regulatory base for comparison of existing and proposed conditions in the NDT. Employees with above award conditions in existing agreements would have any subsequent agreement measured only against the (lesser) award standard.³⁹

In his Second Reading Speech upon the introduction of the *IRRA*, the Minister reaffirmed that the purpose of the NDT was to continue to protect the ‘well established and accepted standards which apply across the community’.⁴⁰ The Minister also reaffirmed that the enterprise agreement must not disadvantage employees in relation to their terms and conditions of employment ‘considered as a whole’, though whether that included contractual terms and conditions outside of the award remained a debateable issue.⁴¹

Importantly, however, the Minister also noted that the NDT allowed for ‘a wide range of variations to award conditions’, and that it also allowed for ‘agreed reductions’ if those were judged not to be contrary to the public interest, as, for example, could be the case as part of a strategy for dealing with a short-term business crisis and revival.⁴²

What emerges most clearly from these newly restated set of enterprise bargaining regulations is that whilst the government was expecting the AIRC not to permit the wholesale trading away of fundamental rights such as paid annual leave in return for pay increases, it was nevertheless indicating to the enterprise parties that the trading away of award conditions in return for new or enhanced conditions in enterprise agreements was the order of the day.⁴³ In short, the government was actively seeking to reduce the role of awards to that of a safety-net facility, and to encourage the enterprise parties to regulate their own workplaces in the form of enterprise agreements.

As was the case with earlier legislative changes to the NDT the 1993 regulations were generally seen by academic commentators as weakening the test and reducing its ability to protect the interests of employees.⁴⁴ The approach taken by members of the AIRC to the new standards was, nevertheless, mixed. On the one hand some of its members seemed to have accepted the position that there could be a more open trade-off of a range of award conditions, particularly in return for wage increases.⁴⁵ These included the incorporation of annual leave loading and/or shift work premiums and/or allowances into base rates of pay,⁴⁶ reductions in penalty rates, changes to overtime, and alterations in the spread of ordinary hours of work.⁴⁷ On the other hand, other members continued to police 'community standards' fairly rigorously through the public interest component of the NDT, typically refusing certification of agreements providing for the cashing out of annual leave⁴⁸ and sick leave⁴⁹ entitlements.⁵⁰ Despite this, however, on occasion the AIRC did move to an acceptance of the trading away of 'community standards' for wage increases.⁵¹

The election of the Liberal / National Party Coalition government in 1996 brought with it a renewed emphasis on enterprise bargaining. New forms of agreements were introduced, including, importantly for purposes of this discussion, statutory agreements able to be made between individual employees and their employers (AWAs). This new round of legislation (the *Workplace Relations and Other Legislation Amendment Bill (WROLA Bill)*; *Workplace Relations Act 1996* (Cth) (*WRA*)) also gave rise to renewed debate over the NDT. The new Federal government's position on this matter was to remove the NDT, and to remove awards

as the benchmark of disadvantage. In place of these concepts the Coalition proposed that workers should have the benefit of seven minimum conditions, and that enterprise agreements should provide outcomes that were ‘no less favourable’ (NLF) than those minimum standards.⁵²

The government’s design here was to reduce the level of interference by the members of the AIRC in determining what the scope of enterprise bargaining should be. Introducing the *WROLA Bill*, the Minister described the policy as departing from ‘the highly paternalistic presumption’ that employees could not protect or understand their own interests without assistance from unions and industrial tribunals.⁵³

When it reached the upper house the *WROLA Bill* was referred to a Senate Economic Reference Committee for examination. This enquiry focused extensively on the NDT and its intended replacement, the NLF provision. The Majority Report of the Committee,⁵⁴ supported by the separate Report of the Democrat Party Senator Murray,⁵⁵ was opposed to the replacement of the NDT, on the grounds that the government’s replacement of awards with the seven minimum conditions represented ‘a fundamental watering down of the existing protection [of employees]’.⁵⁶

As a consequence of the Report of the Senate Committee the government was obliged to reinstate the NDT into the enterprise bargaining provisions of the proposed *WRA*, albeit in a form modified from the 1993 version.⁵⁷ In keeping with the general trend in the development of the NDT, those modifications were generally regarded as further weakening the protections afforded to employees in the process of enterprise bargaining. These issues are pursued further in Part 2.2 below.

2.2. *The Present Regulatory Framework*

The current no-disadvantage test is contained in Part VIE of the *WRA*. Section 170XE provides:

- (1) An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment

- (2) Subject to sections 170XB, 170XC and 170XD, an agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those employees under:
- (a) relevant awards or designated awards; and
 - (b) any law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant.

It follows from this legal text that the benchmark against which the NDT requires the agreement to be compared is either a ‘relevant award’ (or, if one does not apply, a ‘designated award’) and ‘relevant’ laws. Note that ss.170XB-XD provide a lower benchmark for employees undertaking approved apprenticeships, traineeships or Supported Wage System places.

A relevant award is one (including a State award) which regulates ‘any term or condition of employment of persons engaged in the same kind of work’ as the person to whom the agreement will apply and which is binding upon the employer immediately before the agreement commences, but does not include an exceptional matters order or a s.170MX award.⁵⁸

If there is no relevant award in relation to some or all of the persons to whom the agreement will apply, the AIRC (or the Employment Advocate, in the case of an AWA) must determine which award or awards are ‘appropriate’ for use as the NDT benchmark. The designated award must be a federal award regulating employees engaged in the same kind of work or (if one does not exist) an equivalent State award.⁵⁹

Agreements are also measured up against ‘relevant’ laws. The term ‘laws’ is not defined but the expression is used elsewhere in the *WRA*. Potentially this extension of comparison is of importance though little has been made of it to date. This issue is discussed further in later sections of the Report.⁶⁰

In the case of s.170LJ and s.170LK certified agreements, no such agreement can be certified by the AIRC unless it passes the NDT.⁶¹ However, if the agreement fails the NDT but the AIRC is satisfied that certification is ‘not contrary to the public interest’, the agreement is ‘taken’ to pass the NDT.⁶² A legislative example of where this might occur is provided in s.170LT(4) – the situation where the agreement is ‘part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of ’ a business.

In the case of AWAs, the OEA must approve an AWA if it is sure that it passes the NDT.⁶³ However, if the OEA has ‘concerns’ about whether the AWA passes the NDT, which are not resolved by the giving of written undertakings by the employer, or by the taking of some other action by the parties, the OEA must refer the AWA to the AIRC.⁶⁴ The AIRC must then approve the AWA if it is satisfied that it passes the NDT.⁶⁵ However, even if the AIRC has ‘concerns’ about whether the AWA passes the NDT, and those concerns are not resolved by undertakings or other means, the AIRC must still approve the AWA if it is ‘not contrary to the public interest’ to do so.⁶⁶ Once again, a legislative note to this sub-section gives the example of the short-term business crisis as a justification for approving an AWA which otherwise would fail the NDT.

In keeping with earlier versions of the text, therefore, the NDT essentially is composed of two parts. The first requires a comparative examination of the award and agreement to see if the agreement disadvantages the employee. If it does disadvantage the employee, within the meaning of the expressions used in s.170XA, then the agreement may still be approved or certified if it meets the second component of the text, i.e. if it is not contrary to the public interest for the agreement to be certified.

As noted above, there is no doubting the fact that the 1996 version of the NDT appeared substantially to weaken the test when measured against earlier versions.⁶⁷ Clearly that was the government’s intention. Speaking of the version of the NDT which was ultimately approved by parliament in passing the *WRA* the Minister, Peter Reith, said:

the legislation makes it clear that the no disadvantage test is a global one. That is, the test is whether an agreement would result in a reduction in the overall terms and conditions of employees to be covered. The government's intention is that, apart from this overall assessment, flexibility is not to be constrained. Subject only to the global test, employers and employees are now at liberty to strike genuinely innovative agreements without contrivances or artificial restrictions... [A]ny term or condition of employment may be negotiated or dealt with by agreement, provided it is consistent with the Act.⁶⁸

Two of the most important changes brought about to the wording of the NDT were the inclusion of the requirement that the agreement 'on balance' result in a reduction of the 'overall' terms and conditions of employment⁶⁹ for it to fail the NDT, even prior to its further consideration under the public interest component of the test.⁷⁰ One consequence of this changed wording is that the public interest component of the NDT becomes relevant only when an agreement has received an adverse 'global' evaluation, rather than whenever there is a 'reduction' in any 'entitlements or protections' which was the standard set in the previous legislation. Based on this amended standard it is obvious that fewer agreements are required to go through to the 'public interest' phase of the test.⁷¹ These changes, along with other modifications to the NDT in 1996⁷² were predicted from early on as likely to facilitate more readily the trading away of 'community standards' including sick leave.⁷³

But how has the AIRC responded to the remodelled version of the NDT since 1996? At the outset it is important to note that while tens of thousands of certified agreements have been submitted for certification in the past seven years or so (and, in addition, numerous AWAs passed on by the OEA for approval), in only a small percentage of cases have individual members of the AIRC discussed in detail the application of the NDT to the agreement at hand. Indeed in most cases the member simply notes that the NDT is passed without further elucidation. Clearly this makes it very difficult both to assess the process of reasoning employed by the authorities in applying the NDT (a point to which we return in Part 4 of this Report) and the rectitude of the outcome.

Some trends are, nevertheless, observable in the decided cases. Most important here is the tendency of AIRC decisions increasingly to depart from the notion of protecting community standards, though, as we note in Part 6.1, this departure may not, at this stage, be very extensive in practice. As we have noted, prior to the enactment of the *WRA* the general tendency of the members of the AIRC was to interpret the public interest component of the NDT as protecting important community standards, such as annual and sick leave, against erosion in the enterprise bargaining process. Agreements allowing payment in lieu of annual leave were held to fail the NDT,⁷⁴ as were cases in which public holidays and sick leave were exchanged for cash payments.⁷⁵

However, under the *WRA* the AIRC has permitted the parties to cash out various forms of leave, including annual leave and sick leave, although such departures from these standards are often subject to restrictions on their use.⁷⁶ Employers have also been able to obtain significant gains in functional flexibility, although the AIRC has on occasion rejected agreements which specifically provide for excessive working hours (e.g. working hours of more than 50 per week).⁷⁷

As was the case under the previous versions of the test, the provision for wage increases more often than not goes a considerable way to offsetting reductions in other existing terms and conditions even where the increases are uncertain.⁷⁸ For example, in one matter, the agreement provided for substantial salary increases and was held to meet the NDT despite the fact that it removed meal allowances and rest breaks, expanded the spread of hours for ordinary time work, provided for extra pay rather than time off in lieu of overtime, no longer allowed unpaid leave to count as service for accrual of benefits, removed three days from the personal leave entitlement, removed specification of hours for part-time work and eliminated an existing higher duties allowance.⁷⁹ As the agreement summaries in Appendix B to this Report indicates, this outcome is by no means unusual.

However, not all members of the AIRC have absorbed their responsibilities under the 1996 version of the NDT without quandary. Some members have had difficulty adjusting to what in the first place is a very complex task, and, which, complicating

matters further, appears to involve contradictory measures, particularly when it comes to the issue of so-called ‘community standards’. For example, in *Shop Distributive and Allied Employees Association and Bunnings Building Supplies Pty. Ltd.*, Whelan C refused to certify an agreement which allowed employees to work for 50 hours per week and for six consecutive days in any of those weeks, commenting:

Is the no-disadvantage test a mathematical exercise?

The no-disadvantage test has sometimes been described as a ‘no net reduction’ test implying that the determination of disadvantage can be conducted purely as a mathematical exercise. Entitlements can be ‘bought out’ provided the value of those entitlements is compensated for by the wage the employee takes home at the end of the week, fortnight, month or year.

The benefits of some award conditions, however, cannot be so easily calculated and compensated for in that way. Parental leave, for example, is unpaid leave. It is an allowable matter under section 89A and one of the minimum terms and conditions of employment for Victorian employees covered by Schedule 1A of the Act. It is not inconceivable that an agreement may be reached between an employer and a union or group of employees that in effect ‘buys out’ parental leave as a condition of employment. How does this Commission put a buy out value on the right to parental leave as a condition of employment? Could any agreement which removed the right to parental leave be considered, on balance, not to result in a reduction in the overall terms and conditions of employment of those employees? Should the Commission consider the purpose of award provisions are not simply their financial value to the employee?⁸⁰

It is arguable that the AIRC’s approach to the NDT is most keenly tried when the OEA refers to it for assessment AWAs about which it has ‘concerns’.⁸¹ In most of these cases, it appears, the AIRC has decided that the AWA has failed the ‘reduction of conditions’ component of the NDT,⁸² despite the employer claiming either that non-monetary benefits, such as ‘flexibility’ for the employee, have remedied any financial disadvantage, or, in the alternative, by arguing that the manner in which the AWA would have been implemented in practice (e.g. such as rostering practices) would, in the end result, reward the employee more than the actual wording of the

agreement would suggest. In response to the first argument of the employer one AIRC member has responded that flexibility ‘cannot be quantified’ and ‘is not a factor which weighs heavily in favour of approval’,⁸³ and in relation to the second argument, AIRC members may be unwilling to accept without question the employer’s evidence as to the typical hours which the employee ‘is likely’ to work.⁸⁴

However, although most AWAs referred on to the AIRC by the OEA fail the ‘reduction of conditions’ component of the test, they are very often approved for certification under the ‘public interest’ component – usually because of the presence of a ‘short-term business crisis’.⁸⁵ In such cases the AIRC members balance the benefit to the community (in terms of employment, income and access to services) against the loss of entitlements for the workers concerned.⁸⁶

As we noted earlier in this section of the Report, individual members of the AIRC have rarely reported at length on their approach to the NDT in particular cases. Similarly the way the NDT is to be interpreted and applied has been the subject of comment by a Full Bench of the AIRC in only a handful of cases,⁸⁷ and neither the Federal Court nor the High Court have had occasion to consider and pass judgement upon the test. The most recent and important of the AIRC Full Bench decisions is *Re MSA Security Officers Certified Agreement 2003*.⁸⁸ In that case, Polites SDP at first instance had certified an agreement pursuant to s.170LK of the *WRA* on the basis of the employer’s submissions as to how the clauses on issues including rostering, annual leave and voluntary overtime would be administered. The SDP was also comforted by a provision which allowed employees to raise an allegation of overall disadvantage in practice under the agreement’s dispute settlement procedure.

The Australian Liquor, Hospitality and Miscellaneous Workers Union appealed against the decision of Polites SDP to certify the agreement on the ground that he had failed to exercise the relevant jurisdiction pursuant to ss.170LT and 170XA of the *WRA*. It was argued by the union that the NDT:

requires an assessment of whether certification of an agreement would result, on balance, in a reduction in the overall terms and conditions of employment of the

employees as compared with the relevant award. *Although a degree of impression and judgement is required, the test is still an objective test, requiring analysis of the corresponding provisions of the award and the agreement.*⁸⁹

It was claimed that Polites SDP had erred in accepting the ‘generalised statements’⁹⁰ of the employer as to the effect of the agreement rather than conducting a ‘precise’,⁹¹ ‘analytical’⁹² and ‘elaborate’⁹³ assessment of the benefits and detriments of the agreement weighed against the award. Since there was no apparent weighing up of the benefits and detriments evident in the reasoning of Polites SDP, the union contended that he had failed to ‘“really”, “genuinely”, “properly” or “effectively” satisfy himself that the *mandatory* requirement as to the no disadvantage test had been met’.⁹⁴

The respondent employer submitted, in reply, that the NDT was not ‘a scientific or a precise scientific judgement’.⁹⁵ This was clearly indicated in the use, in s.170XA(2), of the term ‘on balance’ in the construction of the NDT. According to the respondent, the use of that term ‘itself involves a measure of judgment, evaluation and *subjectivity*’.⁹⁶

The decision of the Full Bench was divided on this matter. The majority (Watson SDP and Lewin C) found that Polites SDP had failed properly to exercise the AIRC’s jurisdiction and allowed the appeal. Certification of the agreement was quashed, and, dealing with the application for certification themselves, Watson SDP and Lewin C concluded that the agreement did not pass the NDT.⁹⁷ The AIRC nevertheless gave the respondent employer the opportunity of providing undertakings or advice as to action it proposed to take to make the agreement certifiable without issuing a decision formally refusing certification at that stage.⁹⁸

In reaching this decision, the majority of the Full Bench seems to have endorsed certain ‘guiding principles’ on the application of the NDT. The first of these seems to be that the decision-maker must have some basis for his or her satisfaction that the agreement passes the NDT ‘over and above generalised satisfaction’.⁹⁹ Secondly, in forming the basis for that decision the AIRC should not act in reliance on ‘the

employer's prediction of what the operational circumstances of the business would or might be',¹⁰⁰ nor 'in reliance on the employer's operational intentions',¹⁰¹ nor on the employer submissions as to the legal effect of award provisions.¹⁰² To do so is to misconstrue and misapply the NDT. The NDT 'does not involve an analysis of matters other than the terms and conditions of the Award as against the Agreement'.¹⁰³ Thirdly, the correct approach to the NDT 'is by reference to the terms and conditions of the competing instruments (i.e. a 'comparison',¹⁰⁴ or an 'analysis',¹⁰⁵ of such terms and conditions laid side by side).

Deputy President Blain adopted a contrary position on this issue. In his view the finding by a Full Bench that the *WRA* called for 'a particular methodology' in applying the NDT 'could cause a major and undesirable change in the Commission's established practice'.¹⁰⁶ According to Blain DP the assessment required in the NDT 'is a balancing act which involves subjective judgment and the Commission is not, and should not be, compelled to spell out in full detail its reasoning for its conclusion'.¹⁰⁷

In summarising this section, we make the following points.

Since the advent of enterprise bargaining as a major focus of Australian employment regulation, the NDT has been a controversial, hotly contested, issue.¹⁰⁸ Fundamentally, it forms the line between those who would deregulate the labour market entirely, preserving only a small handful of core minimum standards at best, and those who seek to retain a stronger framework of externally derived (State-based) protective standards for workers.

Generally speaking, our account of the historical evolution of the NDT indicates that it has been progressively weakened by successive government modifications to the standards set down in the current version of the test,¹⁰⁹ though not without some variation in the rate of deterioration.

The current version of the NDT is undoubtedly the weakest when judged by its capacity to prevent the reduction of employees' terms and conditions of employment,

and the present government has made several unsuccessful attempts to weaken it further.¹¹⁰ However, if we are to go by the decision of the Full Bench of the AIRC in the *MSA Securities Officers Case*, it is arguable that the NDT at least requires the AIRC to undertake a serious comparative and reasonably transparent assessment of the relative benefits conferred in the award and the agreement. And, if this view represents the dominant position among members of the AIRC, that should assure that the NDT has some degree of cogency and authority.

Furthermore, whilst the test is a ‘global’ test, and a matter for judgement and impression rather more than a ‘scientific’ process, there is nothing to prevent the members of the AIRC from approaching their task, in the initial stages, on a line by line comparison of the award and the agreement in order to form at least a preliminary impression of whether or not the agreement results in a reduction in the overall terms and conditions of employment ‘on balance’. Indeed, this appears to have been the approach of the majority in the *MSA Securities Officers Case* and perhaps should be regarded as an appropriate part of the process in all cases.

Having surveyed the legal background, and engaged in a preliminary fashion with some aspects of the debate, the Report now turns to a more detailed consideration of the central criticisms directed in the secondary literature towards both the construction and implementation of the NDT.

3. The Secondary Literature

On the whole, assessment of the NDT by academics and other labour market commentators has been fairly condemnatory.¹¹¹ Some of the principal criticisms have been directed towards the constitution of the NDT as it is constructed in the provisions of the *WRA*; others go more to concerns with the difficulties associated with supervising and implementing the measurement process.

Prominent among the former set of arguments is the fact that the NDT does not prohibit the negotiation of reductions in the terms and conditions of employment by employees in any strict sense. As we noted earlier (see Part 2 of the Report) the negotiation of some disadvantage to employees is both anticipated and legitimated in the terms of the *WRA* itself.

Such disadvantage may arise from the ‘global’ nature of the test; for example, some award rights may be lost and not adequately replaced by the terms of the agreement. This will always be a question of ‘judgement’ or ‘impression’ as we have noted, but clearly the system cannot strictly safeguard against employee disadvantage in any objective sense.¹¹²

The first main thrust of the academic criticism in this respect is aimed at the role of the public interest component of the NDT.¹¹³ As we noted earlier, the ‘public interest’ criterion justifies ‘disadvantage’ to employees, that is to say, the *WRA* anticipates that agreements which reduce terms and conditions of employment may still be formalised because they are ‘not contrary to the public interest’.

As most commentators note, this test does not require that a reduction of terms and conditions of employment be ‘in the public interest’. It merely requires that it not be ‘against’ the public interest.¹¹⁴ Merlo has criticised the completely undefined nature of the ‘public interest’ concept in the NDT provisions,¹¹⁵ a criticism which can be levelled at Australian industrial relations generally.¹¹⁶ Nevertheless, the *WRA* does give some assistance on this issue because it provides in the relevant provisions a clear (and by inference paramount) example of where the public interest criterion

might take effect, i.e. where reductions in terms and conditions of employment are necessary because of a short-term business crisis.¹¹⁷ It appears that most agreements which are formalised notwithstanding the fact that they failed the NDT do so on the basis of this ‘short-term business crisis’ rationale. However, it is clear that the public interest component of the NDT is not limited to this example, and that it extends to broader concerns with employment, local economic conditions and so on.¹¹⁸

The second major set of concerns which commentators have with the constitution of the NDT is the deteriorating benchmark against which the test is measured.¹¹⁹ There are several intertwined issues of relevance here.

The starting point is to note that enterprise agreements are measured not against the *actual*¹²⁰ terms and conditions of employment of the relevant employees, but against a set of notional¹²¹ terms and conditions. The principal instruments involved in this measuring concept are the ‘relevant awards or [in case of no award being applicable] designated awards’.¹²² The term ‘awards’ for this purpose is largely assumed not to include certified agreements and AWAs¹²³ although the comparable provisions having this effect in the previous legislation¹²⁴ were not reproduced in the *WRA*, and there is at least some scope for debate on this matter (see below). Logically it also follows that the measure excludes *over-award* conditions and practices.¹²⁵

The *WRA* also authorizes the OEA and the members of the AIRC to take account of any other ‘law of the Commonwealth, or of a State or Territory’ that they may consider ‘relevant’ in measuring agreements for ‘disadvantage’.¹²⁶ Potentially this provision strengthens the NDT somewhat, but the extent of its scope is as yet largely unexplored. It is unclear, for example, whether or not this extension can be argued to include other instruments regulating the employees’ employment under the *WRA*, or whether it includes a common law contract of employment.

However, leaving these arguments to one side, the consequences of measuring the employees’ agreement against the award rather than his or her current actual employment conditions are obvious. As most critics have pointed out, in enterprise bargaining employees are not bargaining from a minimum floor of their present

employment conditions (a position of at least some strength), but rather from an artificially constructed lower point. Thus, enterprise bargaining can produce outcomes in which employees may either improve their terms and conditions, or negotiate a decline in those terms and conditions down to the award floor.¹²⁷ And as most commentators have also pointed out, this position is greatly exacerbated by the fact that awards have been ‘simplified’¹²⁸ and thus contain fewer entitlements for employees, and also that awards are increasingly being reduced to ‘safety net’ standards and thus bear an ever decreasing status vis-à-vis market rates.¹²⁹ In summary, to quote Waring and Lewer, ‘the NDT, as presently constructed, provides little protection against the possibility of employers cutting wages and conditions’.¹³⁰

Other concerns with the NDT expressed by academic and labour market commentators relate to the process of implementing the test. One of the key themes in the literature is the inherent difficulty which the NDT presents to the parties and the determining authorities in its implementation. This is a point which we have noted several times earlier in this Report. There can be no argument but that in substance the test requires a highly complex comparative assessment of at least two industrial instruments, a task which, as Bennett has pointed out, requires ‘careful scrutiny’ of ‘numerous conditions’ and also ‘a means of weighing up monetary and non-monetary benefits and a sufficient knowledge of the work process to deduce effects *not obvious in the terms of the agreement*’.¹³¹ There is considerable documented and anecdotal evidence to suggest, not surprisingly, that serious errors may be made in undertaking this comparison.¹³² Furthermore, there is great scope, on the available evidence presented in this Report, to support the argument that the complexity of the task makes the NDT a highly problematical gauge for assessing the security of employees’ terms and conditions of employment and, hence, their standard of living taken in the round. In particular, it makes the argument that employees are always capable of both understanding and protecting their own interests in enterprise bargaining without the involvement of unions and tribunals highly questionable to say the least.¹³³

In highlighting this problem of application, the commentators have pointed to several discrete issues. One of these concerns the difficulty of obtaining the correct information, particularly about the appropriate award to apply, and whether the

agreement will in fact reduce the employee's conditions of employment measured against that award. As both Naughton and Bennett have pointed out, in practice there is considerable reliance upon the parties to a certified agreement themselves to identify potential disadvantage.¹³⁴ For example, the documents required to be lodged with the AIRC by each party to the agreement pursuant to s.170LJ and s.170LK take the form of statutory declarations in which they are required to identify both reductions to the award standard and offsets in the agreements. The parties are also required, where such reductions occur, to indicate any grounds on which the AIRC should be satisfied that certification would not be in the public interest.¹³⁵

A point also made by most commentators in connection with this argument is that whilst unions are clearly in a position to assist with the provision of information in the application of the NDT,¹³⁶ they are increasingly marginalised in enterprise bargaining,¹³⁷ particularly in the case of AWAs and s.170LK agreements where union involvement is not formally required.

A further set of criticisms focuses more specifically upon the role of the OEA in the process of approving AWAs. At times these criticisms call into question the objectivity of the OEA itself.¹³⁸ Several commentators here focus upon the secrecy regulations attached to the AWA provisions¹³⁹ which 'do not allow for thorough public scrutiny of the formation and implementation' of such agreements, and 'hinder a detailed analysis of AWAs'.¹⁴⁰ They also point to the fact that the OEA appears to have a conflict of interest in the approval of enterprise agreements since it is required both to advise employers as to 'how they can maximise their interests in the process, yet at the same time protect workers'¹⁴¹ against disadvantage. In the same vein are arguments that the OEA lacks independence from political direction by the Minister,¹⁴² and that there is no ongoing capacity in the Federal parliament to scrutinize the role of the OEA and the processing of AWAs through that office.¹⁴³

All of these arguments, by implication at least, question whether both the AIRC's and the OEA's role is essentially compromised by a lack of information, and whether in the case of the OEA in particular its role is compromised further by a lack of expertise

and perhaps also by desire to pursue particular outcomes in enterprise bargaining which diverge from the purpose behind the NDT provisions.

4. Administrative and Determinative Approaches to Applying the NDT

4.1 Certified Agreements

Applications for the certification of s.170LJ and s.170LK agreements (the collective enterprise agreements with which this Report is centrally concerned) are made in accordance with the provision of the *WRA* and its rules and forms.¹⁴⁴ In the process of hearing the application for certification, the AIRC, and other parties to the process, including unions, employers, employees, and others acting for those parties may seek evidence, ask questions, produce witnesses, provide testimony and so on, all of which may serve to shed light on whether or not the NDT is satisfied. It is highly unlikely in most cases, however, that there will be fundamental discord between the parties seeking the agreement's certification. That fact alone usually places the AIRC and its members at the centre of the investigative process which underlies the NDT.

As we noted earlier in this Report, the extent to which the members of the AIRC conduct their own examination of the relative worth of the agreement and the award, and the thoroughness with which they do so is unclear from the reported cases in most instances. Sometimes it is evident in the terms of the reported decision that a thorough analysis has been carried out.¹⁴⁵ However in a substantial proportion of cases in which agreements are certified, the reported decision merely signifies that the agreement is found to pass the NDT with little or no further elaboration.

As we also noted earlier, commentators have pointed to the difficulties involved in carrying out a detailed comparative examination of the agreement and an award, and have suggested that there might be a tendency, in consequence of this difficulty, for members of the AIRC to rely overly on the information and advice submitted to them by the parties to the agreement.¹⁴⁶

Our informal inquiries¹⁴⁷ indicated that unlike the case with the OEA's approach to the approval of AWAs (see Part 4.2 of this Report below), the AIRC has not adopted a particular set of procedures as a mechanism for ensuring some degree of uniformity in the application of the NDT. This seems to leave open a range of investigative techniques which will inevitably vary according to the degree of intervention considered appropriate by individual members.

A recent decision of a Full Bench of the AIRC suggests, however, that there may be limits upon the kind of process which individual members might adopt. In this case¹⁴⁸ Lewin C had formed doubts about whether certain agreements submitted to him for certification satisfied the NDT. Accordingly, and no doubt mindful of the difficulty of the task, the Commissioner sought the advice of an academic consultant at Victoria University¹⁴⁹ as to whether the agreements met the test. Commissioner Lewin did not notify the parties that he had taken that step; however the consultant made contact with, and enquiries of, the employer's representative as part of his investigation. Approximately 15 weeks later the consultant reported to Lewin C that the agreements passed the NDT, subject to the giving of certain undertakings.¹⁵⁰ Commissioner Lewin adopted the consultant's report in his decision to certify the agreements. This decision was appealed by the employer parties to a Full Bench of the AIRC.

The Full Bench set aside the decision of Lewin C to certify the agreement, directly criticising the procedure adopted by the Commissioner in the following terms:

There may be cases in which it is useful to have available a mathematical comparison between remuneration under the proposed agreement and remuneration under the relevant award or awards. Such calculations may assist the Commission in applying the no-disadvantage test. The application of the test, however, often goes beyond mathematical calculations and requires the exercise of a value judgment or judgments. *Those judgments must be made by the Commission itself.* In this case the report was not confined to mathematical calculations but also included a value judgment about the application of the no-disadvantage test and action thought necessary to ensure that the test was satisfied...

Of course we are unable to say what effect if any the report had on the Commissioner's decision-making in this case, but it is desirable that we emphasise the fact that value judgments provided in this way cannot be uncritically accepted. It would be most unfortunate if... the impression were given that the proper discharge of the Commission's independent statutory functions had been compromised.

It is also clear that there was a significant communication between [the employer's representative] and [the consultant] as to the application of the no-disadvantage test. This communication was outside the Commission's normal process and perhaps even in substitution for it. Where the Commission requests a report of this kind it should be produced in proper evidentiary form before the Commission, and, if required, the author should be made available for cross-examination so that the Commission can consider the report in light of the evidence and whatever submissions the applicant wishes to make. Speaking generally, this is a process which has proven efficient, expeditious and fair.¹⁵¹

Clearly these remarks suggest two things about which the members of the AIRC should be mindful in applying the NDT. First, care should be taken in seeking independent advice and guidance, so that it is rendered in the proper way, i.e. as evidence, and open to challenge and investigation in the evidentiary process. Second, to the extent that applying the NDT requires the exercise of value judgements, such deliberations should be those of the AIRC members themselves. The delegation of such judgements to some other person or institution would be likely to constitute a failure of the statutory process.

4.2 *AWAs*

As we noted, in Part 2.2 of the Report, the principal body for approving AWAs is the OEA. Only if the OEA has 'concerns' about whether or not the AWA lodged for approval passes the NDT is the matter referred on to the AIRC. Official figures indicate that the overwhelming proportion of AWAs lodged with the OEA are approved. Of AWAs lodged between 1997 and 2001, 90% were approved without changes. A further 8% were approved with undertakings. Approximately 1% of

AWAs lodged were referred on to the AIRC, and about 1% were ultimately refused.¹⁵²

In apparent contrast with the AIRC, the OEA has a relatively sophisticated system in place for processing AWAs, the terms and mechanics of which are set out in the OEA's *AWA Procedures Guide*.¹⁵³ That system sets out the process for lodgement, assessment, the policy in applying the NDT, the approval process (including the process for seeking undertakings), and referral to the AIRC. The procedural devices include a 'NDT calculator' for quantifying remuneration comparatively between the award and the AWA, and a system whereby AWAs submitted under certain arrangements are more or less approved without detailed scrutiny.

It is not possible for us to examine the OEA processes exhaustively. As is the case with the practice of the AIRC, much of the internal process of approval within the OEA is undisclosed, although we were able to clarify some points in informal discussions with some OEA officers.¹⁵⁴ Our assessment is, therefore, confined to several major issues which we believe deserve special attention.

To begin with, we support the implicit view taken by the OEA that a system for formalising the process of applying the NDT, and thus presumably at the same time making its application more uniform and more regular, is desirable. As we noted earlier, the apparent lack of a systematised approach to the application of the NDT among the members of the AIRC has the potential to produce widely differing outcomes from worker to worker and from one group of workers to another.

However, be that as it may, the question remains whether the system adopted by the OEA is necessarily the best or most desirable having regard to the intent of the relevant provisions in the *WRA*. We suggest that there are at least two grounds for concern with the way the OEA systematically applies the NDT to AWAs. We examine each of these in turn.

First, there was a considerable amount of uncertainty (if not to say scepticism) expressed by many practising parties on the extent to which the OEA has abrogated

its responsibility for applying the NDT. Indeed, the terms of the OEA's *AWA Procedures Guide* perhaps give some force to this view. For example, the Guide states in part that:

The type of assessment [of the AWA] done depends on the nature of the case. *If it is possible to be sure of the result of a NDT without actually doing a detailed NDT, we do so, and approve the case accordingly.*

and

If an AWA is submitted by specified entities, we can be sure that the AWA meets the NDT.¹⁵⁵

In keeping with the sentiments of these directions there has been suggestion in some quarters that AWAs are more or less rubber-stamped by the OEA particularly in those prescribed circumstances where parties external to the OEA are charged with the responsibility of carrying out the NDT, or where the special relationship between the OEA and the outside group might give rise to a less exacting examination of the AWA on the part of the OEA. There are many different types of such arrangements between the OEA and external parties. These include agreements submitted in what are termed '*Specified Programs*':¹⁵⁶ AWAs from a '*non-excluded industry*' (all industries other than Security, Retail, Hospitality and Accommodation, Service, Stations, or Clubs) where the OEA has previously approved an AWA in that industry for a worker in the same award classification; agreements in the same terms as a certified agreement previously approved by the AIRC; agreements lodged by a '*specified employer*' whose agreements the OEA is 'confident' from past experience will pass the NDT; and agreements lodged by one of the approximately 100 employer groups, employer-oriented law firms, and human resource consultancy businesses which have joined the OEA's '*industry partner*' program. These industry partners are provided with, and trained in how to use, the 'NDT calculator' developed by the OEA to apply the NDT, and partners sign a declaration stating that they will '[l]odge only AWAs that the OEA's NDT calculator indicates will meet the NDT'.

Even if an AWA does not qualify for a '*Specified Program*' it may yet qualify for a '*Streamline Assessment*' and whilst the OEA's procedures do not explain what a '*Streamline Assessment*' involves, this again raises questions about the extent to

which the OEA is satisfactorily meeting its statutory obligations. A *'Streamline Assessment'* is conducted where the AWA is in substantially the same terms as a previously approved AWA, where the AWA affects only *'simple issues'*, where the AWA has been *'pre-assessed'* (an assessment at the request of the employer, before official lodgement) and was found to pass the NDT at that stage, and where the AWA is from *'specified employers for specified classifications'*.

However, notwithstanding the contrary impressions which arise from the nature of its *AWA Procedures Guide*, the OEA has assured the authors of this Report that it carries out an in-house 'full' NDT on every AWA submitted to it from all sources, including those in the 'specified partner' set of programmes where what appear to be preliminary assessments are already made.

A second major conceptual difficulty we have with the OEA's approach (and one which we think it shares in common with the AIRC: see the discussion in Part 6.1 of the Report, below) is that, even where a *'Detailed Assessment'* is conducted (i.e. where the AWA does not qualify for a specified program nor for a streamline assessment, or where the AWA fails the streamline assessment), the calculation may not take into account all relevant considerations.

The OEA uses the 'NDT calculator' to conduct a detailed NDT assessment. This is a spreadsheet which calculates the annual remuneration that the employee would receive under the AWA compared with the remuneration he or she would have received under the award. This calculation is based on data entered about the number and pattern of hours likely to be worked, the basis for remuneration (e.g. whether penalty rates or casual loadings apply), information about allowances and entitlements (amount of leave, leave loading, superannuation contributions, public holiday loadings) and whether the employee is entitled to redundancy, long service or accident make-up pay. The spreadsheet has been programmed to assign a notional value to these last set of entitlements.

One major issue here is whether or not employees are adequately compensated (if at all) for non-monetary advantages (in the award) and for non-monetary detriments (in

the agreement). The NDT requires that the agreement not disadvantage the employee in relation to the employee's 'terms and agreements of employment', and, as we noted earlier, this is not necessarily restricted to remuneration considerations nor to conditions that can be quantified by reference to some financial calculation. This fact is recognised in the terms of the OEA procedures themselves, creating a greater degree of discretion in the relevant officer's capacity to approve the agreement:

An AWA may appear to disadvantage an employee when compared to the award in purely dollar terms, but may offer terms and conditions that benefit the employee in some other way. If the employee's preference is for such benefits, an AWA that would otherwise require undertakings may pass an NDT.

As a consequence, there may be ... subjective components (e.g. hours of work more suited to lifestyle, flexible arrangements, etc.) that need to be taken into account when performing an NDT. If the objective components do not show a clear advantage, consider how the employee values the terms and conditions. If there is any doubt about the employee's perception of the AWA, it may be appropriate to contact the employee.

Clearly such considerations create the opportunity to place some value on the employee's lifestyle and other subjective preferences in assessing whether the agreement passes the NDT. On the other hand, however, such an approach fails to comprehend that the AWA may also impose non-calculable *detriments* (such as the removal of employee rights to participate in decision making, or the extension of managerial prerogative over job management) upon the employee when compared with the award, and that these, by the same reasoning, should be taken into account in applying the test.

To summarise our position, in our view there are aspects of the OEA's systematised approach to the application of the NDT which raise some questions about the integrity of the process. As we noted earlier, there are sections of criticism in the secondary literature that would seek to cast doubt on the bona fides of the OEA's operations,¹⁵⁷ and, again in our view, some of the matters raised above could only further fuel such debate. During 2002–2003 the OEA rejected or referred on to the AIRC less than 1%

of the (approximately) 100,000 AWAs processed over that two year period.¹⁵⁸ It is likely, of course, that with the passage of time, the users of AWAs have become more skilled and sophisticated in their use, and therefore more able to calculate what will, and will not, be acceptable to the authorities. It is also likely that the guidance and support given by the OEA to parties entering into AWAs is important in reducing errors or eliminating them entirely. Nevertheless, the very low rate of rejection of AWAs, and the low rate of their referral onto the AIRC, remains a source of concern to many parties.

5. The Evidence: Methodology and Research Findings

5.1 Methodology

The brief for this project (see Appendix A) required us to examine three general issues in relation to the operation of the NDT.

First, we were required to report on the general effectiveness of the NDT in protecting employees' interests in the enterprise bargaining process.

Secondly we were required also to report on some specific instances of 'disadvantage' to employees that might occur in the bargaining process, particularly insofar as these outcomes might be leading to a failure to protect and maintain certain 'community standards' of employment.

Thirdly, we were required to advise on the extent to which the NDT was able to prevent any deterioration in the capacity of workers to balance their work and family lives.

The methodology we employed in the research on these issues was as follows. Our primary database was constructed by carrying out a detailed analysis of 36 enterprise agreements (s.170LJ agreements, s.170LK agreements, and AWAs), drawn from four different industries, against the principal award or awards in that industry (Retail

Trade, Building and Construction, Automotive Component Manufacturing, and Food Manufacturing).¹⁵⁹

We selected the s 170LJ agreements and s 170LK agreements by searching the Federal Government's Wagenet database,¹⁶⁰ looking for the most recent agreements that had been certified in our target industries. We chose the first agreements that we found that met our selection criteria.¹⁶¹ The s.170 LJ and s.170 LK agreements chosen were necessarily skewed towards smaller employers in some industries because large employers tended to have individual underpinning awards for their enterprise agreements. Thus, employers such as Coles Myer, whose Coles supermarkets s 170 LJ agreement is widely acknowledged as having some of the best terms and conditions for employees in the retail trade industry, were excluded from the sample. The OEA supplied us with the AWAs that we analysed, based upon our specification of the target industries and relevant awards. We did not independently choose the AWAs for analysis.

The detailed analysis of the 36 agreements involved a line-by-line comparison of the relevant award with the agreement for the purpose of determining whether or not the agreement passed the NDT in each case. Ultimately, as we have pointed out elsewhere in this Report, the NDT is not a test which is capable of precise mathematical application; it also involves an element of subjective judgement on the part of the body charged with the responsibility of its application.

Consequently we decided to present our findings from this detailed examination in a simplified tabular form (see Appendix B) to enable readers to draw some conclusions of their own about the nature and effect of the test's application. However, to give greater substance to these tables, and to add strength to our analysis in Parts 5.2 and 6 of the Report (below), we also ranked the agreements according to our perceptions of how each agreement measured up against the NDT. These categories are marked as *acceptable* (indicating those agreements we believed should pass the NDT clearly); *marginally questionable* (indicating those agreements about which we had some reservations, but these reservations could possibly be alleviated by undertakings regarding hours, rostering and overtime); or *highly questionable* (indicating those

agreements with which we had some serious concerns, regardless of any undertakings that may have been given by the employer.

Our second data source was derived from a less-detailed analysis of a further 48 agreements (12 in each of the nominated industries). These agreements were examined more superficially with a view to supporting our detailed analysis with some further quantifiable data, and also with the view of focussing more specifically upon certain matters which we were required to address by the Project Brief (Appendix A) (for example provisions which might be regarded as ‘community standards’, or going to the issue of work / life balance), or otherwise generated from within our own enquiry (for example provisions pertaining to the increase in the employer’s discretionary use of labour and/or the decline of employee voice). Responses were gathered from this less detailed study according to a simple yes/no format. In keeping with our more targeted intentions in this part of the research, not all allowable award matters were analysed in this process.

In the case of both data sets, the agreements were measured against the relevant award without reference to any other relevant ‘law of the Commonwealth, or of a State or Territory’ unless that law was specifically mentioned in the text of agreement or the award (common examples where this occurred include State long service leave legislation and Commonwealth superannuation legislation). Thus we have taken a relatively narrow view of the existing ‘entitlements and protections’ of employees which are to be weighed up against the agreement pursuant to s 170XE(2)(b) *WRA*. This approach is justified, in our view, until such time as there is a clearer picture of what other laws in general the AIRC and the OEA might be prepared to take into account in applying the NDT.¹⁶²

Similarly, we also did not search for, or assess, any undertakings given by the parties other than where these are obvious on the face of the agreement or explicitly mentioned in the text of the AIRC’s decision (the OEA did not provide us with copies of any undertakings required in respect of the agreements it made available to us for purposes of this research).

Finally, all of the agreements we analysed were certified at first instance, and did not involve consideration of the second ‘public interest’ aspect of the NDT.

Inevitably, given the nature of the exercise involved in this project, and the inherent imprecision of the NDT itself, the research generated many questions and issues which were not able to be answered from the documented research findings. As will be apparent from our presentation of the research findings, and our analysis in the next section of the Report (Part 6), some of these questions are not able to be answered in any definitive way. We have attempted to fill some of the gaps in our understanding of both the process and outcomes of the application of the NDT by interviewing a number of relevant parties, including those responsible for the application of the test (i.e. members of the AIRC and officers in the OEA), lawyers, trade union officials, and other agents engaged in the process. These interviews were conducted in an unstructured, informal manner, and were designed only to seek clarification on specific points where we lacked relevant information.

5.2. Research Findings – Introduction

We commence discussion of the outcomes of our research with an overriding note of caution. It follows from what has been said in the opening section of the Report, and from what has been said about our methodology, that it is extremely difficult to reach conclusions on the application of the NDT with any degree of certainty. Indeed the inherently problematical nature of the test itself, and the difficulties in accurately measuring differing terms and conditions of employment against each other, inevitably make this exercise quite subjective, and the ‘truth’ fairly elusive. Consequently our discussion is conditional and our conclusions open to question.

Nevertheless, despite this note of reservation we do feel that the Report makes a useful contribution to the debate over the NDT for several reasons.

First the research is able to provide, in a reasonably systematic fashion, a picture of how the NDT operated in 36 agreements across four key industries (see Appendix B). We are able to see what terms and conditions in the award have been exchanged by

employees in return for other entitlements in the agreement. From this presentation the reader will be able to form a view of the role that is presently being played by the NDT in enterprise bargaining, and whether, on the face of the evidence, that role is broadly consistent with the legislative intention. *Our* assessment of the NDT's role is seen in the way we have categorised the agreements.

Secondly, we are able to point to several specific outcomes which we think are important to the general issue of the NDT device, and its operation. These points go to the impact that the NDT is having on matters concerning work / private life balance, and on the balance of power at the workplace, and are dealt with further in the following analysis of the evidence and also in Part 6.

Thirdly, the research carried out for this Report has allowed us to consider the regulatory structure and content of the NDT and some possible avenues to legislative/administrative reform.

5.3 Research Findings and Analysis of Agreements: The Substance of Exchange

The exchange inherent in enterprise bargaining needs to be understood at two levels. The basic level, on which the essence of the negotiation and agreement is founded, concerns largely monetary considerations. In almost all agreements, this includes a narrow range of matters concerned with pay and hours flexibility, the removal of extraordinary payments for certain types of work, the extension of hours of work, the trading away of some leave benefits, and so on.

Beyond this, however, there are other important issues which necessarily impact upon the exchange but in a less obvious and immediate fashion. These issues, which concern matters of functional flexibility, job control and employee empowerment, in our view deserve greater attention in the enterprise bargaining process than they presently attract. We have already noted the relevance of some of these issues in our earlier discussion of the OEA's approach to the approval of AWAs in Part 4.2 of this Report. These arguments are however generally applicable also to the function of the

AIRC in certifying agreements and are discussed further in following sections of the Report (see Part 6.1).

We turn now to consider our research findings across several broad categories of subject matter.

5.3.1 Pay

Pay rates are the primary consideration in deciding whether an agreement passes the NDT. However, for various reasons which we have noted throughout this Report, it is often difficult to assess the exact position of employees in relation to their take-home pay simply on the basis of the face of the agreement, and without having recourse to the supporting documentation. For these reasons, our findings in relation to this issue are highly conditional, and the conclusions which we reach in Part 6 are clearly stated to be based upon our subjective judgement of the worth of particular exchanges forming the substance of the agreements we examined.

The general trend across all agreements was to higher base rates of pay. Of itself this does not necessarily mean that actual pay has increased under these agreements because the higher base rates are the result of rolling in certain other components of the total remuneration package applying under the awards. For example, almost all Building and Construction agreements collapse some or all of the allowances provided for in the National Building and Construction Industry Award (e.g. standard allowances such as supplementary payments, special allowances, follow the job loading, industry allowances and tool allowances; and non-standard payments such as special disability allowances for those working in extreme heat and cold conditions, or on multi-storey projects) into the base wage rate.

Whilst the s.170LJ agreements in the Building and Construction industry only collapse the 'standard' allowances paid to employees, the s.170LK agreements in that industry also attempt to collapse (at reduced rates) the special disability allowances, and the AWA in our Building and Construction sample does away with almost all allowances without any attempt to compensate these through the base rate of pay.

Furthermore, trends in base rates of pay as compared with the underpinning award varied greatly between industry and agreement types. For example, it was clear that all s.170LJ agreements in the Building and Construction, and Food Manufacturing, sectors had significantly above award base rates of pay, and consequently were not considered to be questionable in meeting the NDT standard. But on the other hand, in s.170LJ agreements in the Retail Trade sector, the base rates of pay were not significantly above-award, and it was consequently more difficult for us to classify such agreements as acceptable, given the other concessions made by the employee in the terms of these agreements. The same conclusion was reached about s.170LK agreements across all industries.

A significant number of agreements (5 in total: 3 s.170LK agreements and 2 AWAs) failed to build in wage increases over the life of the agreement. On the other hand, all s.170LJ agreements in our sample contained built in increases over the term of the agreement. Where provision for such increases was included, this was generally similar to, or slightly above, that provided for in awards via Safety Net Wage determinations.

A reduction in the casual loading (typically by 5%) was a common change in the s.170LJ agreements in the Building and Construction, and Retail Trade sectors. Otherwise casual loadings remained on a par with those in the award. The one exception to this in our sample of agreements was a s.170LK agreement (*Lake Road Constructions* – Building and Construction) which cashed in all entitlements for all employees in exchange for a single rate of pay.

Penalty rates were only of any significance in relation to the Retail Trade sector. In that group of agreements, the availability of penalty rates, and the level of rates of pay for penalty-rated work, were reduced in every single agreement that we analysed in detail. The extent of this reduction varied according to the type of agreement. In all s.170LJ agreements the reduction was significant, and in the case of the s.170LK agreements and AWAs, penalty rates were either severely reduced or completely abolished.

5.3.2 *Working Time*

Span and number of hours

One of the key trends in the bargaining process over working hours was the trend towards an increased span of hours across all industries and agreement types. Approximately three quarters of all agreements in our sample provided for an increased span of ordinary hours, including all AWAs, and all s.170LK agreements with 1 exception (*Haigh's* – s.170LK agreement, Retail Trade).

Increasing the span of ordinary hours of work was clearly a key in both the Building and Construction, and Retail Trade sectors, where all agreements except 1 in each sector increased the span of ordinary hours.

Three agreements expanded ordinary hours to the point where there was no limit upon the span of ordinary hours – i.e. an employee could be required to work at any hour of the day or night, and on any of the days of the week, at ordinary hourly rates of pay (these included 2 AWAs, 1 in Building and Construction and 1 in Retail Trade; and 1 s.170LJ agreement in the Retail Trade – *Miller's*).

Most agreements also contained scope for variation in the ordinary hours of work from those set down in the agreement. Where agreements altered the discretion to vary ordinary hours generally, and to varying degrees, the discretion of employees was reduced, and the discretion of the employer was extended.

In the Building and Construction s.170LJ agreements, there was a clear and commensurate trade off for employees in return for a slightly increased span of ordinary hours. That involved the move to a standard '36 hour week' which is delivered through an extra paid day off (RDO) every month. A few other agreements in Automotive Component Manufacturing, and Food Manufacturing, effected a similar trade off by providing for one RDO per month (4 s.170LJ agreements and 1 s.170LK agreement).

Apart from the Building and Construction s.170LJ agreements, the 38 hour week was largely preserved in our sample of agreements, although a considerable number moved towards a 4 week or 2 week cycle (where the number of hours worked per week averaged rather than equalled 38 hours) to enable greater flexibility in rostering.

In a few instances, employees were ordinarily expected to work more than 38 hours. In 2 s.170LJ agreements (*DBT Argenton* – Automotive Component Manufacturing; and *PZ Cussons* – Food Manufacturing), 1 s.170LK agreement (*Nike* – Retail Trade) and 1 AWA, employees were expected to work up to 40 hours per week (or up to 45 hours in the case of the *Nike* agreement) without overtime payment for the extra hours.

In 2 agreements which attempted to cash in all entitlements and pay a single flat hourly rate (*Lake Road Constructions* – Building and Construction; and 1 AWA – Food Manufacturing) employees were expected to work between 46–58 hours per week without overtime payment for work in excess of the 38 ordinary working hours. In 1 s.170LJ agreement (*Priceline* – Retail Trade) overtime availability was reduced during the Christmas trading period, and full-time employees working up to 44 hours per week were paid the casual loading of 25% for hours worked in excess of the standard working week (38 hours).

Overtime

As is clear from the preceding discussions, the span and number of ordinary hours of work is closely related to the availability to employees of overtime hours. As the span of ordinary hours increases, and the number of hours in an ordinary working week increases, the availability of work performed under overtime conditions commensurately decreases. The flexibility granted to employers of having employees working more hours under ordinary rates of pay, without being financially constrained by overtime payments has obviously been a key driving factor in enterprise bargaining.

As our preceding discussion indicates, work at overtime rates is substantially reduced across all industries in our sample agreements. However, where work *is* performed at overtime rates, most agreements in our sample preserved award rates of pay applicable to such work.

Nevertheless, a significant number of AWAs and s.170LK agreements (for example, the *Bocar*, *Savers* and *Lake Road Constructions* s.170LK agreements) provided reduced overtime rates, often in addition to reduced overtime availability. Most of these agreements attempted to pay out most overtime at time and a half, or at a flat loading of less than 50% of the ordinary hourly rate, as compared with the standard provision under awards and other agreements where double time is paid after 2–4 hours of overtime.

The starting point in most awards regarding the commitment to work overtime is that the employer may require *reasonable* overtime to be worked. Consequently employees may refuse overtime where that request is *unreasonable*. This position is largely maintained in the agreements, although the rights of employees in most Building and Construction s.170LJ agreements was strengthened to enable them to refuse overtime which would extend the number of hours worked to more than 56 in any one week.

5.3.3 *Functional Flexibility*

The general trend in our sample agreements, and consistent with other research,¹⁶³ is to significantly increased functional flexibility across all industries, and all agreement types. This includes the scope to vary the employee's duties, or to add to them, or both. In almost all cases, where the scope to add to, or vary, duties arose, the discretion to do so rested entirely with the employer. However, in most cases such discretions were limited by the terms of the enabling clause to requiring employees to perform such duties which were 'within their skill, training and competence', or 'reasonable' or 'incidental to the job' and so on. On the other hand, there were some instances where the job duties clause made it clear that work at a lower skill level than that usually exercised by the employee might be required in certain circumstances.

Functional flexibility was also assisted in other ways. Approximately half of the agreements in our sample did not define employees' duties, leaving it open to question as to where the employer's prerogative comes to an end. At the same time, about half of our sample agreements specifically departed from award classification structures, with about one quarter supplying enterprise specific classifications, and the other quarter providing only a poorly defined classification structure or none at all. Most examples where there was no classification structure set out in the agreement, or only a poorly defined structure, were in s.170LK agreements and AWAs. Consequently in these agreements it was consistently difficult to determine the relationship, if any, between the classifications in the relevant award, and those in the agreement, whether or not those in the agreement required the same competencies as those in the award, and the extent to which work performed in different (higher) classifications would attract 'mixed' or 'higher' function rates of pay.

Twenty of our 36 sample agreements also contained scope for variation in the employee's work location. In some cases, such as the Building and Construction sector, this is an unavoidable aspect of work organisation, and is generally compensated for by generous travel allowances. However, of the 3 AWAs and 2 s.170LK agreements which specifically required employees to work at any business location of the employing company, only 1 provided travel allowances to compensate the employee for shifting location. Only 1 agreement in our sample specifically guaranteed that no employee would be forced to relocate.

For reasons which we have adverted to earlier, and upon which we expand in Part 6.1 of this Report, we take the issue of functional flexibility to be of importance to a proper consideration of the operation of the NDT. For that reason it has to be noted that there is, at the outset, some doubt over the extent to which the award limits the employer's discretion to alter the employee's job without his or her approval. That being the case, it is by no means clear that functional flexibility clauses in agreements necessarily derogate from awards, and, if that is the case, such clauses do not require consideration as part of the NDT.

However, the view that we are adopting in this Report is that at the very least awards do set some outer legal limits on the employer's disposition of the employee's intellectual or physical labour. For example, awards will typically say, in addition to setting out classifications and indicative duties within these classifications, that employees are required to perform a 'wider range of duties including work which is incidental or peripheral to their main tasks or functions' or 'such duties as are within the limits of the employee's skill, competence and training'. In our view, these award provisions at least implicitly do recognise a certain defined scope within which the employee can be engaged and consequently do not permit employers the unfettered discretion to engage employees freely across all or any grades or functions of work carried out by that employer.

Finally on this point we note that this difficulty is further complicated by the use of discretions activated by the employer through company procedures and manuals. Over half of our sample agreements directly incorporated, or otherwise adopted or referred to, company policies which tended to increase the discretions of the employer vis-à-vis the employee. These range from Uniform Policies to more complex Drug and Alcohol Policies, but also include very detailed company handbooks and manuals. For reasons pertaining to the factual overlapping and interacting nature of these policies, the contract of employment, and any agreement to which they are relevant, and the complex *legal* ordering inherent in such arrangements, it is extremely difficult to ascertain the consequences of such incorporations and references.¹⁶⁴

5.3.4 *Job Security*

Most of the awards against which we compared our sample agreements provided reasonably standard provisions for notice of termination and redundancy provisions.

The vast majority of our sample agreements provided the same notice of termination conditions as those set down in the award, Part VIA of the *WRA* and Schedule 1A of the *WRA*. The only exception to this rule were 5 s.170LJ agreements which provided above award / statutory notice of termination provisions (2 in Automotive Component

Manufacturing, 2 in Food Manufacturing, and 1 in Building and Construction), and one AWA which appeared to provide slightly below award / statutory provisions. All agreements with the exception of 1 AWA provided time off during the notice period to look for work which was at or above the award standard.

Redundancy payouts were an area where employees across all industries and agreement types either secured above-award standards or at least maintained the status quo. Only 2 of our sample agreements provided for redundancy pay which was at a level below the award rate. One of these was a s.170LK agreement in Retail Trade (*Haigh's*) which contained no provisions for redundancy pay, and 1 AWA in Building and Construction which provided for slightly below award payments.

Over 50% of our sample agreements provided for above-award entitlements, with most of these being *significantly* over-award. Many s.170LJ agreements in the Building and Construction, Automotive Component Manufacturing and Food Manufacturing sectors also secured payouts of long service leave, sick leave, annual leave and annual leave loading upon redundancy. One s.170LJ agreement (*N. E. Concrete – Building and Construction*) made provision for limited redundancy payouts to casual employees. In recognition of the inherent instability of the construction industry, all Building and Construction agreements (except for the one AWA analysed in Building and Construction) provided for employee's redundancy entitlements to be paid into a trust fund to secure them against corporate collapse.

5.3.5 *Employee Empowerment*

As is to be expected, many certified agreements reintroduce into the employment relationship various matters relating to employee empowerment that have been removed from awards as part of the award simplification process. In particular, provisions for training, consultation and union involvement in the workplace are common features of s.170LJ enterprise agreements. As we have noted throughout this Report, in theory there is no reason why such matters cannot be classed as benefits to employees in applying the NDT. However, as is the case with other non-monetary considerations, there is very little evidence as to the extent to which such matters are

taken into account in applying the NDT (see further the discussion on these issues in Part 4.2 and 6.1 of the Report).

Consultation

More than three quarters of our sample agreements contained provision for consultative mechanisms between the employer and employees in some form. Of the 7 agreements which did not do so, 3 were s.170LK agreements and 4 were AWAs.

The scope of consultative mechanisms varied greatly from agreement to agreement. In most s.170LJ agreements, the consultative committees established in the terms of the agreement were ongoing, and appeared to be designed to play a meaningful role in the decision making of the enterprise. Many s.170LJ agreements, particularly those in the Building and Construction, Automotive Component Manufacturing and Food Manufacturing sectors, reinstated the AIRC's Termination, Change and Redundancy standards, which are no longer allowable award matters. Some s.170LJ agreements went so far as to require the agreement of a majority of employees (and sometimes a 75% majority) before something categorised as a Major Change could be introduced (see *Capilano Honey* – Food Manufacturing; *A B Food and Beverages* – Food Manufacturing). One agreement established a workplace organisation evaluation study.

Among s.170LK agreements and AWAs the picture was quite different. Only 1 s.170LK agreement established an ongoing and meaningful consultation process, with the remainder of the s.170LK agreements and the AWAs establishing weak or single-issue-specific consultation mechanisms.

Union involvement

Without exception, s.170LJ agreements provided for union involvement in the workplace, whereas s.170LK agreements and AWAs did not, or provided only for limited union representation of employees in the case of industrial disputes.

At the same time, most s.170LK agreements and AWAs did not *explicitly* exclude union involvement.

Most s.170LJ agreements provided for trade union training leave for union delegates and limited rights of entry for union officials at the workplace. The strength of a particular union's power and the strength of its relationship with the employer was often reflected in s.170LJ agreements. For example most agreements in the Building and Construction and the Automotive Component Manufacturing sectors (agreements between employers and the Construction, Forestry, Mining and Energy Union) contain extensive union-friendly measures, including the provision of company resources to support union organisation and activities.

Training

Twenty-eight of the 36 agreements making up our primary sample contained some provision for training of employees. Such training programmes were commonly linked to the development of workplace flexibility and career development, and provided for the payment of employees for attending training.

Of the 8 agreements which contained no training provisions, 4 were s.170LK agreements, 3 were AWAs and 1 was a s.170LJ agreement. No AWA made clear provisions for 'paid' training leave, and 1 AWA contained a provision that 'employees recognise that undertaking of training will not automatically result in an upgrading of classification'.

5.3.6 Leave

Parental leave

Parental leave was not an area where great deviation was seen in agreements as compared with the relevant awards. Most agreements adhered to the minimum standards of parental leave set down in the *WRA* with the exception of 4 agreements (3 s.170LJ agreements and 1 s.170LK agreement) which provided for paid maternity

and paternity leave for employees. Interestingly, the *Nike* s.170LK agreement (Retail Trade), which we considered questionable in many other respects, provided the most generous paid parental leave terms of all agreements (10 weeks paid maternity leave and 2 weeks paid paternity leave).

Annual leave and leave loading

The basic entitlements to annual leave have been left untouched in the enterprise bargaining process; most employees still have the right to 4 weeks annual leave per year. However, there are clear examples in s.170LK agreements and AWAs of some tendency towards a cashing in of annual leave. At the most extreme, 2 agreements, 1 s.170LK agreement (*Lake Road Constructions*, Building and Construction) and 1 Food Manufacturing AWA compulsorily cashed in all entitlements to paid annual leave, in exchange for higher base rates of pay. In the 2 workplaces covered by these agreements, any annual leave taken is unpaid. Three other AWAs and 1 s.170LK agreement introduced optional systems whereby employees were able to cash in some or all of their annual leave entitlements in return for lump sum payments or increased base rates of pay.

Annual leave loading was preserved at the award rate of 17.5% in almost all s.170LJ agreements, but was abolished in about one-third of the AWAs and s.170LK agreements in our sample. About another one-third of our AWAs and s.170LK agreements incorporated the annual leave loading into the base rate of pay, or paid it in a lump sum at a time determined by the employer. Only 1 agreement (*Valley Dale* – s.170LJ agreement, Building and Construction) provided for a leave loading that was above the award standard (19.9%). Where the annual leave loading was abolished or specifically incorporated into the base rate of pay, it was often difficult to see how this was accurately reflected in actual increases in the base rates.

All agreements contained at least some discretion regarding the timing of annual leave; the key difference between agreements lay in who held the discretion to determine when such leave would be taken. In one-third of agreements (of which half were s.170LK agreements and AWAs) the employer gained greater discretion over

the timing of annual leave when compared with the relevant award. In another one-third of agreements, the employer maintained a similar level of discretions to those in the award. Only 7 agreements exhibited a greater discretion in favour of employees when taking annual leave (5 s.170LJ agreements, and, perhaps surprisingly, 2 AWAs).

Public holidays

Public holidays were also not an area of large movement in the bargaining process. The general position that full-time employees (and part-time employees who work on the relevant days) were entitled to a day off with pay was largely maintained across all industry groups, and across all types of agreements. About one-third of agreements provided that employees might be required to work on public holidays, although most clearly provided that they should be paid at double-time-and-a-half when that occurred. Only 2 agreements (both in Retail Trade) unequivocally provided that work on public holidays was entirely at the discretion of the employee. Various s.170LJ agreements provided for an additional holiday each year for employees. The *Nike* s.170LK agreement (Retail Trade), on the other hand, provided that Easter Saturday was not a public holiday for some stores, and Easter Monday was not a public holiday for any of its retail stores.

Long service leave

Long service leave, like annual leave and parental leave, was not an area of substantial change in the enterprise bargaining process. More than three-quarters of agreements provided for long service leave entitlements as per the relevant award or legislation. About one-quarter of agreements provided for above award or legislative standards, either in the form of higher rates of accrual of long service leave, or earlier access for accrued entitlements. One AWA compulsorily cashed in the entitlement to long service leave in return for a higher base rate of pay. Two other agreements (*Haigh's* – s.170LJ agreement, Retail Trade; *Capilano Honey* – s.170LJ agreement, Food Manufacturing) contained an option for an employee to cash in all or some of his or her long service leave. About half of all s.170LJ agreements in the Building and

Construction sector contained provisions for a portable long service leave scheme for employees.

5.3.7 *Community Standards*

As we have noted in the discussion above (5.3.6) 8 agreements contained provisions for the compulsory or optional cashing in of various forms of leave. This included 2 agreements (*Lake Road Constructions* – s.170LK agreement, Building and Construction, and an AWA in Food Manufacturing) which provided for a complete and compulsory cashing in of all paid leave entitlements in return for higher base rates of pay. In the *Lake Road Constructions* agreement, this saw a loaded hourly rate with a premium of approximately 50% in exchange for the abolition of personal leave, annual leave, annual leave loading, 10 paid public holidays per year, overtime payments for Saturday work and various other matters. In the case of the AWA the hourly rate of pay was given a 22% loading in exchange for annual leave, annual leave loading, long service leave, personal leave (including sick leave, bereavement leave and carer's leave) and other matters.

The other 6 agreements were more restrained in providing for the cashing out of leave provisions. Those 6 agreements (4 AWAs, 1 s.170LK agreements and 1 s.170LJ agreement) each provided that the decision to cash in leave was at the employee's discretion, and even then related only to certain portions of annual leave and sick leave (*Bocar*, s.170LK agreement, Automobile Component Manufacturing), excess annual leave (AWA – Retail Trade), or made cash available only in circumstances of pressing domestic necessity (AWA – Retail Trade). Two agreements provided for the optional cashing-in of long service leave entitlements after a certain period of time (*Haigh's* – s.170LK agreement, Retail Trade; *Capilano Honey* –s.170LJ agreement, Food Manufacturing).

5.3.8 *Family-friendly Measures*

On the whole it was difficult to find outcomes of enterprise bargaining that could be classed as 'family-friendly' in any real developmental sense. In short we could find

very little in our sample of agreements which suggested that enterprise bargaining was leading to ‘innovative’ agreements forging a new balance between family / private responsibilities and work.

As noted above, only a small number of agreements instituted paid maternity and paternity leave entitlements. No agreements made provisions for child care, either within or outside the workplace, nor did they provide guaranteed ‘family-friendly’ measures such as the ability for employees to telephone family members during working hours. Although such matters may be accommodated in practice, they are not forming part of the bargaining process.

The general exception to this fairly bleak picture is in the retail trade sector. Here, ‘family-friendliness’ and ‘community-mindedness’ were clearly priorities for the Shop Distributive and Allied Employees Association in a sector which is predominantly staffed by females, a substantial proportion of whom are part-time workers.

This ‘family-friendly’ policy outlook was reflected not only in s.170LJ agreements in the sector, but to some extent was carried through into s.170LK agreements and AWAs in the sector also. Section 170LJ agreements in the Retail Trade generally provided for paid Carer’s leave (in addition to other personal leave entitlements); additional unpaid personal leave where required; paid Blood Donor’s leave; paid Emergency Services leave; and unpaid Natural Disaster leave.

A small number of s.170LJ agreements across all industries expressly provided for ‘flexitime’ and additional unpaid personal leave for employees to accommodate personal and family responsibilities.

6. Analysis and Suggestions for Reform

6.1 *The Substance of the Exchange*

The first, and most important, issue to be dealt with requires us to make an assessment of the overall effectiveness of the NDT (see Item 16 in the Project Brief attached in Appendix A). For reasons which we have advanced earlier in this Report, and as a result of matters which are enlarged upon in the ensuing discussion, it is extremely difficult to make such an assessment in other than general and conditional terms.

There can, of course, be no doubt that the NDT fails to protect the interests of some workers in particular instances.¹⁶⁵ Given the nature of the test, and the difficult task of comparing complex documents in the form of agreements, awards and accompanying documentation disclosing the substance of the benefits and disadvantages exchanged by the parties, it could hardly be otherwise. But does this mean that in an *overall* sense the NDT is producing a serious and consistent level of aberrant outcomes, substantially disadvantaging employees in their terms and conditions of employment, and amounting, more or less, to a failure to meet the intention of the legislature?

In our interview of selected practising parties in this jurisdiction,¹⁶⁶ the overwhelmingly predominant view expressed to us was that overall the NDT is working effectively at protecting employees against disadvantage in their terms and conditions of employment. This general view, however, sat oddly with many of the more specific points drawn out in the interview discussions. A substantial proportion of those interviewed, for example, had serious reservations about the process and the quality of the outcomes of the NDT applied to AWAs by the OEA. Similarly, there were concerns expressed about several aspects of the process adopted within the AIRC, and probable inconsistencies and irregularities in outcomes associated with that process. These matters are addressed in further detail below, but we suggest that there is scope for a general questioning of the effectiveness of the NDT on several fronts, and that there may be serious doubts about the efficacy of the test judged by its statutory purpose.

Our own evidence, drawn from the 36 agreements examined in detail alongside the award, suggest to us that there are concerns with the operation of the test, particularly in the case of s.170LK agreements and AWAs.

As Appendix B shows, on our analysis of the 36 agreements, 8 agreements were in the highly questionable category, 11 marginally questionable, and 17 acceptable. This is a high proportion of dubious outcomes. All of the agreements classed as highly questionable were AWAs or s.170LK agreements (4 in Retail Trade, 2 in Building and Construction, and 1 each in Auto Component Manufacturing and Food Manufacturing). Agreements in the marginally questionable category included a mix of s.170LJ and s.170LK agreements, and AWAs. Overwhelmingly the dubious quality agreements were in Retail Trade (4 highly questionable, 5 marginally questionable) and in Auto Component Manufacturing (1 highly questionable, 6 marginally questionable). With the exception of 1 s.170LK agreement and 1 AWA in Building and Construction, and 1 AWA in Food Manufacturing, the agreement outcomes in those industries, on the basis of our research findings, were uniformly acceptable.

We must, however, add a note of caution here. The tables contained in Appendix B have been constructed for the purpose of giving a broad overview of the types of exchanges occurring systematically under the auspices of the NDT. They enable us, and the reader, to see what typically occurs in the exchange underlying the formation of enterprise agreements. Our analysis, however, has been based only on the evidence contained in the agreement and any documents formally attached to it. Much of the documentation supporting the NDT is contained in calculations, spreadsheets, proposed rosters and so on which are submitted in evidence to the AIRC, or to the OEA as part of the lodgement process, but which are not usually available for examination on the public record. These documents may also be further supported by undertakings made by the employer to the authorities in respect of concerns that the authorities might have with the NDT. These extraneous materials were not examined by us in the course of this research.

Consequently, where we have categorised agreements as questionable or highly questionable, we have done so simply on the basis that *in our judgement* there are

reasons to question whether or not the monetary advantage to employees is justified in the total picture of the exchange between the parties. Where agreements are deemed by us to be either questionable or highly questionable, it is usually on the basis of a substantial number of small differences between the award and the agreement adding up to a questionable ‘monetary’ outcome in our judgement rather than any major single element in the agreement.

There are, however, many other aspects to the exchange in enterprise bargaining which, quite apart from the monetary value of the exchange inherent in the NDT taken on its face, give rise to concern, both in terms of the test’s construction and its implementation.

First, it is well recognised that the NDT is being measured up against a benchmark which is consistently losing ground against market standards. As a consequence it is certain that many workers, particularly those in industries where agreements do not produce good wage outcomes (for example, where unions are relatively weak, or in non-union agreements), are failing to maintain their employment conditions relative to their position prior to the NDT commitment.

As other critics have noted, this is something which could be addressed simply enough by legal change to the test requiring either the measurement of the agreement up against the employees’ *existing* conditions of employment contained in the current or previously relevant enterprise agreement applicable to the employees’ employment, or in the employees’ contract of employment, or in other relevant laws. Part of the difficulty here, as we have noted earlier in the course of this Report, lies in the fact that it remains unclear what laws or instruments may be taken into account in applying the NDT.

However, the fundamental issue on this matter is principally one of policy. The purpose of the construction of the NDT in this way is presumably to ensure that the *WRA* leaves scope for enterprise bargaining to be conducted on a scale which may either increase or decrease costs to enterprises according to the capacity of the enterprise to pay. But in giving effect to this policy, the present government is not in

any real sense meeting the commitment which lay behind the introduction of the NDT in the first place.

Secondly, as we have also noted, agreements are not certified or approved simply on the basis of what is disclosed on the face of the agreement. Much of the NDT process depends upon the extra documentation submitted by the employer particularly as to how the agreement is to be operationalised after certification. As noted above, this includes material on shifts, rosters, and other arrangements which set out what the agreement's impact will be upon the earnings of various groups of employees.

Many of the parties we spoke to saw this as a major problem in securing compliance with the NDT. In particular, it was noted that failure of the test sometimes arises either because the agreement might not be operationalised in the way it was anticipated, or because the employer might not adhere to the same plan over the life of the agreement.

In the view of the authors of this Report, this presents a serious difficulty with the application of the NDT, particularly in the case of AWAs and s.170LK agreements. To what extent can we expect, in the case of these agreements, where no union is involved, that there is sufficient ongoing protection for the interests of employees? Even assuming that employees have copies of the text of the agreement to which they are parties,¹⁶⁷ can it be assumed that they will also be aware of the accompanying material in the form of statutory declarations, undertakings and other supporting documents which in most cases, as we have noted, contains the gist of the monetary exchange inherent in the agreement's operationalisation?

These are more than hypothetical problems. The fact that they were seen as giving rise to *actual* rather than mere potential failures in the NDT is indicated in the range of suggestions put to us about how to deal with the problem.

It is unclear to what extent either the AIRC or the OEA carries out a method of scrutinising or policing the method of activating agreements. Once the agreement is approved or certified, there is no apparent statutory obligation upon the authorities to

ensure that the agreement retains its NDT status. However, several methods were suggested to us as appropriate devices to protect employees against NDT failure during the life of the agreement.

One of these methods was to introduce as a part of the agreement, or as an undertaking pursuant to it, that the employer would undertake an *audit*, at a particular point in the life of the agreement, or on departure from employment of an employee, whereby the employer would be obliged to compare the remuneration actually arising from the agreement as against the award, and making good any deficiencies which were shown to arise.¹⁶⁸ A second method requires the employer to *report back* to the AIRC during the course of the agreement for a review hearing.¹⁶⁹

It was put to us that these and other ‘warning mechanisms’ can be expensive for employers because they require a constant or at least periodic monitoring of all of the relevant information pertaining to the operationalisation of the agreement. Be that as it may, it appears that the likelihood of failure of the NDT standard in the post-certification period due to the failure of employers properly to operationalise the agreement is substantial. That being the case, some *formalised requirement* for revisiting the operation of the agreement during its lifetime would appear to be both warranted and advisable.

A third issue of concern with the NDT is that it is unclear whether the test is applied with a view to the position of every employee covered by the agreement, or whether there are decisions being reached to certify or approve the agreement on the basis of some kind of ‘generalised’ or ‘averaged’ position. There is mixed opinion on this issue.

Several parties to whom we spoke conceded that some agreements might disadvantage a few employees as a result of the way they are operationalised across the workforce as a whole. Such outcomes are not necessarily safeguarded against by undertakings and other measures in the agreement. It seems clear that without other safeguards, these agreements do not satisfy the terms of the *WRA* which requires that

no employee be disadvantaged in relation to his or her terms and conditions of employment.

A fourth issue of importance concerns several aspects of the substance of the exchange between the parties to agreements.

As the discussion of our research findings in Section 5.2 above shows, most of the content of the exchange bound up in the NDT is concerned with what we might call quantifiable remuneration considerations, or monetary considerations (i.e. the exchange of certain industrial rights under awards to do with working time, various forms of leave, extraordinary rates of pay and so on, usually in return for wage increases and perhaps other improvements in terms and conditions).

However, as we have noted, the NDT is to be taken ‘on balance’, and ‘in the round’, and hence it is possible that *any* form of advantage to the employee might be taken into account. One example of this which appears to occur periodically is the factoring in of such benefits as meals provided by the employer, the provision of uniforms and so on. Other examples include discounts on products or services provided by the employer. Whilst it is clear enough that employees can obtain benefits from these types of provisions, they do raise, in some circumstances, at least some cause for concern.

In the first place, some of these practices have overtones of the ‘truck’ payment system which was outlawed more than a century and a half ago. We do not support the view that it is now appropriate to consider employer products as a major part of a remuneration package.

Secondly, evidence put to us anecdotally by various parties seems to suggest that such benefits may be taken into account as part of the NDT for all employees even where some of these are unable to, or do not intend to, avail themselves of the opportunity. It is not clear if in all such cases the employer is required to make up the balance of the exchange to those employees.

A further example of the kind of matters which might be taken to ‘advantage’ employees outside of the typical range of conditions are those entirely non-quantifiable (some would say ‘life-style’) rewards such as greater flexibility for the employee to organise his or her own working hours beyond what would be possible under the award. Though we have not come across any applicable examples in AIRC decisions, some relevant illustrations were cited to us by the OEA, and it is evident that these kinds of issues have some currency.¹⁷⁰

Whilst we accept that there must be scope for non-monetary benefits and rewards exchanged between the parties, it would seem that in the AIRC and the OEA these are likely to be treated very cautiously.¹⁷¹

More important, from our point of view, is the general failure to factor in to the NDT similar non-monetary benefits which advantage employers and disadvantage employees. As we have noted, the substance of the exchange in most agreements concerns issues such as pay and temporal flexibility. Yet it is also clear that the employer in many agreements (particularly AWAs and s.170LK agreements) is also obtaining substantial functional flexibility and job control.

It is the view of the authors of this Report that this latter issue is not being taken into account in the NDT calculation, probably because it does not give rise to the most usual substantive concerns of the parties. It is also true, of course, that at least since the award simplification process, awards do not substantially inhibit the job control of the employer. Hence provisions such as consultative mechanisms, disputes procedures, restrictive classification structures and so on, which might have placed boundaries around the employers’ discretion to control the performance of work have been largely removed. Notwithstanding this, we believe this criticism still has some cogency, particularly in instances where agreements permit employers unfettered discretion to add to, or vary, job duties and the applicable award contains classification structures or duties references which expressly or impliedly limit the job function able to be assigned to workers engaged in any of the jobs regulated by that award (as we noted above in Part 5.3.3 of the Report). If non-monetary ‘flexibility’ benefits are properly part of the NDT equation in evaluating *advantages* to

employees, then we must suppose that equally they should apply to non-monetary *disadvantages* suffered by employees in the exchange.

We are required by the Project Brief (Appendix A) to address two further questions pertaining to the quality of the exchange in applying the NDT.

The first of these concerns the issue of *community standards*.

As we have noted elsewhere in this Report, there is nothing in principle which prevents the bargaining away of such rights as annual leave, parental leave, sick leave and long service leave for wage increases or other benefits in enterprise bargaining. However, whilst there have been some concerns expressed at the desirability of this policy,¹⁷² the work carried out for this report does not reveal this to be a widespread problem in practice. On the contrary, the anecdotal evidence drawn from our interviews suggested that, to the extent that there is a practice of exchange in this area, it is principally confined to the trading away of excess leave, or bringing ‘above’ community standards down to general community standards, rather than wholesale cashing-out of such entitlements. These views were consistent with the bulk of the agreements which we examined in depth, and confirmed by our analysis of the other 48 agreements examined as a check on the research findings. To restate the point, where leave is being traded away for better ‘monetary’ outcomes to the employee, this is overwhelmingly being done by way of trading off excess leave balances, or reducing, rather than entirely eliminating, the right to paid leave. Having said that, however, we have also identified in our sample two agreements which do entirely remove the availability of all paid leave. If the view is taken that there is a ‘community standard’ to be protected in ensuring not merely the level of earnings of employees but also a sufficient degree of paid time available to workers to attend to family needs and recreational pursuits, the existence of *any* such agreements must give rise to concern.

The second issue concerns the impact which enterprise bargaining is having upon the development of *family-friendly policies*.

Our conclusion on this point can be more straightforward. Leaving aside the Retail Trade sector which is, as noted, developing promising policies through agreements, there is, beyond the existing legal minima contained in award and legislative provisions, virtually no serious uptake of family-friendly policies in enterprise bargaining agreements taken as a whole. This finding was confirmed in the content of the additional 48 agreements examined for the purposes of checking the results drawn from the detailed analysis of our principal data set.

6.2 *Process*

As we have noted, the terms of the *WRA* provide very little direction on how the NDT is to be applied. The Act sets out a process whereby parties may seek to have agreements certified by the AIRC or approved by the OEA. This requires certain documents (including the agreement and other supporting information) to be filed or lodged with the authorities. A hearing is also required before the AIRC may certify an agreement which falls within its jurisdiction. However, beyond that, how the authorities exercise their functions is largely a matter of their discretion. The AIRC is required to perform its functions in a way that furthers the objects of the *WRA* and, in the case of certified agreements, the specific object of Part VIB of the Act which deals with Certified Agreements.¹⁷³

The OEA has a number of functions in relation to AWAs, including their filing and their approval.¹⁷⁴ None of these functions may be delegated to anyone other than a member of the staff of the OEA appointed pursuant to s.83BD.¹⁷⁵

Several issues arise as a result of the processes adopted both by the AIRC and the OEA which, in our view, raise some concerns for the integrity of the NDT.

First, insofar as the AIRC is concerned, it is clear that each member exercises his or her discretion according to their own judgment. Several points were made to us by the various parties we interviewed in respect of the AIRC's approach. These are as follows:

- there is enormous variation in approach to the certification of agreements between different members
- some members adopt a highly exacting line-by-line analysis of the agreements prior to the hearing process, whereas others adopt only a rudimentary examination
- there is no consistent use of research and other services within the AIRC to conduct a preliminary examination of the agreement and the relevant award¹⁷⁶
- to a considerable degree, members of the Commission are prone to rely very heavily upon the evidence of the union and the member's own experience in the industry with respect to the certification of section 170LJ agreements
- there is over-reliance on the statutory declarations required to be completed by employers pursuant to rules 48–50 of the *Australian Industrial Relations Commission Rules 1998* (Cth). In many instances, these are not properly completed, and thus may not indicate differences between the award and the agreement as required. Nevertheless, in many such cases the agreements are still certified.

Dealing with this problem is very much an issue for the AIRC itself. Clearly more could be done to make sure that employers satisfactorily complete documentation which is designed to alert AIRC members to possible conflicts between award standards and the content of the agreement. We understand that there are moves afoot to alter the relevant rules concerning the employer's statutory declaration submitted in support of certification which may overcome some of the difficulties. It also seems to us to be in keeping with the spirit of the NDT provisions, and with a recent decision of an AIRC Full Bench,¹⁷⁷ that a fairly thorough line-by-line analysis be carried out within the AIRC as a preliminary stage to certification hearings.

Secondly, the NDT is applied only at a single point in time – i.e. the point of approval or certification. There is nothing in the *WRA* which requires that the agreement must

pass the NDT at any other point of time throughout its duration. We have already pointed to the problem this presents in relation to the substance of the exchange in our discussion in Part 6.1 above.

Finally we make one or two brief points about the process adopted by the OEA in approving AWAs. As we have noted, the OEA has a more systematised approach than the AIRC, and this perhaps serves to make the outcomes of the process less prone to the inconsistencies which may occur amongst members certifying agreements in the AIRC. Nevertheless, there are concerns with the process of the OEA which require some consideration at least.

First, as we noted earlier, much of the process leading to the approval of AWAs, at least in the preliminary stages, is externalised by the OEA to ‘industry partners’ in various schemes which try to facilitate the making of such agreements. It would seem to us that the adoption of these processes might in fact *assist* the parties in making better agreements and is thus to be welcomed from this point of view. On the other hand, there is as a consequence of this practice, a perception that the OEA is abrogating its responsibilities, at least to a degree. Although the OEA carries out its own full NDT on all agreements, the fact that it is heavily involved in the *promotion* of AWAs and with assisting parties to prepare them, and the consequent appearance of a duality of functions (as both promoter and regulator),¹⁷⁸ continues to give rise to questions about the OEA’s independence. The fact that there is no hearing requirement attached to the approval of AWAs at the OEA level exacerbates this appearance still further.

One possible way of dealing with this problem would be to enlarge and develop the OEA’s function of promoting new and innovative work practices and arrangements, and move the approval of all AWAs into the jurisdiction of the AIRC.¹⁷⁹

7. Conclusions

This Report presents a wide-ranging discussion of a number of issues relating to the NDT, and a summary of evidence gathered to deal with the specific questions put to us in the Victorian government's Project Brief (see Appendix A).

The approach adopted in the Report is a consequence of several factors. First, in being asked to provide 'An Overview of the Application of the NDT' (Project Brief: Item 16(i)) it was necessary for us to consider the NDT at various levels. As we noted in the Introduction to this Report, the NDT can be examined from at least three different standpoints: at the level of its construction in the terms of the *WRA* (the content of the test); from the point of view of the manner or procedures through which the NDT is implemented (process); and the nature of the outcomes of the application of the NDT (i.e. whether or not the relevant agreement did or did not pass the NDT). A proper understanding of the operation of the NDT required us to examine relevant aspects of each of these dimensions.

Secondly, gathering, presenting and analysing evidence in satisfaction of the Project Brief was also very difficult. Much of the information required in order to carry out a complete analysis of the NDT is not on the public record. The application of the NDT, at the end of the day, is heavily reliant upon the subjective judgement of the relevant bodies charged with its exercise (the AIRC and the OEA). Very often, there is little information available to guide the researcher on how particular outcomes were arrived at. Approaches to the application of the test, particularly in the case of the members of the AIRC, vary enormously, and hence it is difficult to predict on the consistency of how the test will be applied and the sorts of outcomes that might be reached.

Nevertheless, despite these problems, we have formed a view, in response to the Project Brief, which we regard as being cautious but nevertheless sound. It is our general view that *the NDT is failing adequately to protect employees, in certain defined respects, from a deterioration 'in relation to their terms and conditions of employment'*.

In arriving at this conclusion, we have relied principally on the flow of argument set out below.

If we consider purely the ‘monetary’ nature of the exchange involved in enterprise bargaining, it seems that in almost all cases the employee will be receiving at least the same but usually more pay, and perhaps appreciably more pay, than that person would have received under the award against which the NDT comparison is made. There are, however, several other factors which need to be taken into account which bear upon this evaluation.

Our detailed examination of the primary data set (36 agreements) reveals that in many instances the difference between the monetary outcomes in the agreement and the award are very thin. This is particularly the case with respect to s.170LK agreements and AWAs. Where that is so, given the number and nature of non-monetary concessions which are made in such agreements, it is at least questionable whether there is sufficient value to the employee for the agreement to have passed the NDT.

Moreover, this position is compounded because many of the items being traded away by employees (or unions acting for them) in bargaining do not appear to be accounted for as important in the exchange equation. These items may be assembled into two groups. First, there are those that go to the employee’s *quality of working life*. However one looks at the NDT ‘on balance’ or ‘in the round’ it is difficult to avoid the conclusion that taken as a whole employees are suffering a significant deterioration in the quality of their working lives in several respects. For example, many have suffered the loss of a clearly defined working week, with consequent disturbance to personal and family life. Many have suffered a loss of control over when they can take annual holidays. Many no longer have the control / discretion over the nature of their job duties and functions. This list can be extended, but the point is that for many workers, enterprise bargaining has led to a deterioration in the quality of working life of substantial proportions, compensated for, in many cases, by small or non-existent pay increases.

Secondly, there is the issue of workplace *power*. In entering into s.170LK agreements and AWAs, employees are, in most cases, being dispossessed of protective power to offset against the employer’s managerial discretion. As we have noted, many

agreements considerably extend the employer's power on such matters as the scheduling of work, the definition of job duties and functions and so on, without the need for consultation with employees or unions. Peetz has characterised some arrangements like this, in cases where high wage increases have occurred, as attaching a 'non-union premium' to the agreement.¹⁸⁰ However, it is obvious from our agreement studies that in many instances, such transfers of power are occurring in agreements with little or no recognition of the need for a power-transfer premium.

The next major part of our conclusion concerns the manner in which agreements are given effect after their approval by the OEA, or certification by the AIRC.

Whether or not the content of the bargain is adequate for both parties, it seems clear that the provision of adequate outcomes to employees is highly dependent on the post-approval or post-certification stage. The anecdotal evidence gathered for this project suggests that this is an area of concern: i.e. many employees may receive lower than expected payments during the life of the agreement owing to a failure by employers to give effect to the agreement in the manner proposed to the authorities as part of the NDT.

Finally, both in the case of the AIRC and the OEA, there are identified concerns about process and consistency. These include the lack of a follow-up enforcement or supervisory element to realise the supposed objectives of the NDT throughout the life of the agreement, the inconsistent practices of the members of the AIRC, the over-reliance upon the advice of employer and trade union parties, and the externalisation of the OEA's approach to the NDT process. There is no evidence that any of these factors of themselves is leading to widespread failures of the NDT, but each problem points to the potential for undesirable, aberrant and inconsistent outcomes in particular cases.

There are various modifications which might be made to the NDT to alleviate some of these and other problems. For example, it has been widely suggested that a more realistic construction of the NDT would be to measure the agreement against the

employee's *existing* terms and conditions of employment rather than the more basic award.

However, assuming such a radical reconstruction of the NDT to presently be out of the question, there are other possible avenues to reform on major points of interest.

First, greater protection could be given to the employees' interest in the substance of the exchange. Quality of working life could be protected by entrenching a few fundamental community standards (such as annual leave, sick leave and so on) as untradeable minima, not subject to the enterprise bargaining process. In addition, the AIRC and OEA could be more clearly directed towards giving a fuller consideration of relevant matters which should be taken into account in assessing the NDT 'globally' or 'on balance' – including the loss of discretion over working life, the loss of job definition, and weakened power to influence decisions affecting employees in the workplace.

Secondly, greater assistance could be given to employees, and particularly those party to s.170LK agreements and AWAs where they lack the support of trade unions, to enable them to monitor their position when agreements are operationalised. In our view it is unrealistic to expect individual employees always to have either the knowledge or the resources to determine what their position is and what it should be. One way of dealing with this problem would be for the AIRC and the OEA to systematise a checking process at certain points in the life of the agreement. An alternative or additional form of protection would be to extend the rights of individual workers to take greater control of their own position. Some thought might be given to the creation of an appropriate complaints process through which employees could raise concerns about the conduct of agreements. A necessary pre-condition to any such process would be to enable access for employees to complete and accurate information about agreements to which they are parties.

ENDNOTES

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- ¹ For a good overview and critique of the process and related research see MacDonald, Campbell and Burgess (2001).
- ² General references include: Peetz (1998); ACIRRT (1999); Allan, O'Donnell, and Peetz (1999); Burgess ((2002); Watson *et al* (2003). But note somewhat different views by Campling and Gollan (1999) and Wooden (2002).
- ³ Lee and Peetz (1998).
- ⁴ Buchanan and Briggs (2000).
- ⁵ Mitchell (1998).
- ⁶ See Part 2.2 of this Report.
- ⁷ See ss.170LT and 170VPB *WRA*.
- ⁸ See Part 2.1 of this Report.
- ⁹ Part VID *WRA*.
- ¹⁰ Section 170LK *WRA*.
- ¹¹ Section 170LJ *WRA*.
- ¹² Part IVA *WRA*.
- ¹³ Section 170VPB *WRA*.
- ¹⁴ See ss.170VPC (3) and 170LT *WRA*.
- ¹⁵ Waring and Lewer (2001).
- ¹⁶ See, for example, *Shop, Distributive and Allied Employees Association and Bunnings Building Supplies Pty Ltd: Section 170LJ Application for Certification of Agreement* (Print P6024, Whelan C, 21 October 1997).
- ¹⁷ See *The Australian*, 9 January 1996, p. 1.
- ¹⁸ Section 170X4 *WRA*.
- ¹⁹ Our emphasis.
- ²⁰ 'The determination of whether or not the [NDT] has been met in a particular case will largely be a matter for the *impression* and judgment of the Commission members at first instance', *Enterprise Flexibility Agreement Test Case 1995*, (1995) 59 I. R., pp. 430–457 (our emphasis).
- ²¹ Provisions for collective bargaining within the Federal system date back to 1904; see Creighton, Ford and Mitchell (1993), and McCallum and Smith (1986).
- ²² See ss.115–117 of the *Industrial Relations Act 1988* (Cth).
- ²³ See *Report of the Committee of Review on Australian Industrial Relations Law and Systems*, Vols. 1–3, AGPS, Canberra, 1985 (Chairman K. Hancock).
- ²⁴ Section 115 (4) of the *Industrial Relations Act 1988* (Cth).
- ²⁵ See, for example, Creighton, Ford and Mitchell (1993), p. 863. On the whole, however, very few agreements submitted for certification were refused prior to the amendment to the bargaining provisions in 1992: see Creighton, Ford and Mitchell (1993) p. 863 and McCallum (1990).
- ²⁶ Sections 112 and 115–117 of the *Industrial Relations Act 1998* (Cth).
- ²⁷ See Creighton, Ford and Mitchell (1993), p. 866.
- ²⁸ Our emphasis.
- ²⁹ The importance of this point is examined further in the following text and in Part 3 of the Report.
- ³⁰ *Commonwealth Parliamentary Debates*, Senate, 7 May 1992 (P. Cook, Minister for Industrial Relations), Second Reading Speech, p. 2517 at p. 2519.
- ³¹ *Ibid*, at p. 2520.
- ³² See Waring and Lewer (2001), p. 67.
- ³³ These were Certified Agreements and Enterprise Flexibility Agreements; see ss.170MC and 170NC of the *Industrial Relations Reform Act 1993* (Cth).
- ³⁴ Naughton (1994), p. 152.
- ³⁵ See ss.170MC(1)(b) and 170NC(1)(d).
- ³⁶ Naughton (1994), p. 153.
- ³⁷ Sections 170MC(6) and 170NC(3).
- ³⁸ *Industrial Relations Act 1998*(Cth), s.4.
- ³⁹ This change was by design of a House of Representatives amendment to the legislation. The House wish to ensure that enterprise flexibility agreements could not provide the NDT benchmark for a subsequent enterprise flexibility agreement: *Supplementary Explanatory Memorandum to the Industrial Relations Reform Bill 1993* (House of Representatives).

- ⁴⁰ *Commonwealth Parliamentary Debates*, House of Representatives, 28 October 1993 (L. Brereton, Minister for Industrial Relations), Second Reading Speech, p. 2777 at p.2780.
- ⁴¹ McCarry (1998), p. 65.
- ⁴² *Commonwealth Parliamentary Debates*, House of Representatives, 28 October 1993 (L. Brereton, Minister for Industrial Relations), Second Reading Speech, p. 2777 at p. 2781.
- ⁴³ 'In the bargaining process employees want and deserve the security of knowing they cannot be worse off – worse off in totality. The security of knowing that the conditions they currently enjoy are not to be traded off without something being offered in return. It may not always be a pay rise, it may be extra training, more flexible rosters, or just greater job security; it will be something nevertheless', *Commonwealth Parliamentary Debates*, House of Representatives, 28 October 1993 (L. Brereton, Minister for Industrial Relations), Second Reading Speech, p. 2777 at p. 2778.
- ⁴⁴ Ford (1997); Waring and Lewer (2001).
- ⁴⁵ See Bray and Waring (1998).
- ⁴⁶ See *Stratic Pty Ltd Enterprise Flexibility Agreement 1994*, (Print L3890, Ross V.P., 17 June 1994).
- ⁴⁷ See, for example, *IOF Modular Offices (Mfg) Pty Ltd Enterprise Flexibility Agreement*, (Print L3367, Ross V.P., 18 May 1994).
- ⁴⁸ *Lilianfels Blue Mountains Enterprise Flexibility Agreement* (1995) AILR ¶3–067; *Arrowcrest Group Pty. Ltd re Metal Industry Award* (1994) AILR ¶356; *Re Independent Order of Oddfellows of Victoria Friendly Society* (1996) 65 IR 129.
- ⁴⁹ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v. Tweed Valley Fruit Processors* (1995) 61 IR 212; affirmed on appeal, *Tweed Valley Fruit Processor Pty Ltd v. Ross and Ors* (1996) 137 ALR 70.
- ⁵⁰ Other examples include the refusal to allow an agreement which traded off transport home for young employees working late shifts (see *Re Application by Toys'R'Us (Australia) Pty Ltd* (1994) AILR 1,283), and an agreement which permitted 24 hour shifts see *Metropolitan Ambulance Service Knox Branch Team Enterprise Flexibility Agreement 1994*, (Print L6280, Ross VP, 18 November 1994).
- ⁵¹ See generally Bray and Waring (1998).
- ⁵² Proposed s.170LT of the *WROLA Bill*.
- ⁵³ *Commonwealth Parliamentary Debates*, House of Representatives, 23 May 1996 (P. Reith, Minister for Industrial Relations), Second Reading Speech, p. 1295.
- ⁵⁴ Senate Employment, Workplace Relations, Small Business and Education Committee, *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* (August 1996) Commonwealth. (Majority report: Senators Collins, Bishop, Childs, Mackay).
- ⁵⁵ Senate Employment, Workplace Relations, Small Business and Education Committee, *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* (August 1996) Commonwealth (Supplementary Report by Senator Andrew Murray for the Australian Democrats).
- ⁵⁶ Senate Committee Majority Report, above n. 54, pp. 92–3; Senate Committee Supplementary Report, above n. 54, p. 339.
- ⁵⁷ See Merlo (2000), p. 213
- ⁵⁸ Section 170X *WRA*.
- ⁵⁹ Sections 170XE and 170XF *WRA*.
- ⁶⁰ See notes 126–7 and accompanying text.
- ⁶¹ Section 170LT(2) *WRA*.
- ⁶² Section 170LT(3) *WRA*.
- ⁶³ Section 170VPB(1) *WRA*.
- ⁶⁴ Section 170VPB(3) *WRA*.
- ⁶⁵ Section 170VPG *WRA*.
- ⁶⁶ Section 170VPG(4) *WRA*.
- ⁶⁷ See Naughton (1997); Merlo (2000); Waring and Lewer (2001).
- ⁶⁸ *Commonwealth Parliamentary Debates*, House of Representatives, 21 November 1996 (P. Reith, Minister for Industrial Relations), Amendments Speech, p. 7221.
- ⁶⁹ Section 170XA(2) *WRA*.
- ⁷⁰ Sections 170LT(3) and 170VPG(4) *WRA*.
- ⁷¹ See Ford (1997).
- ⁷² For example the provision promoting the 'business crisis' criterion to the status of a statutory note.
- ⁷³ See Pittard (1997), pp. 83–84.
- ⁷⁴ See above note 48.
- ⁷⁵ See above note 49.

⁷⁶ *Silver Chain Registered Nurses Agreement 1997*, (Print P1281, Dight C, 27 May 1995); *Chubb Security – Darling Harbour Rangers Enterprise Agreement 1998*, (Print R0015, MacBean SDP, Duncan DP and Jones C, 18 December 1998); *Just Cuts (Canberra and Queanbeyan) Agreement 2000–2003*, (Print P7746, Larkin C, 4 July 2000); *Greyhound Pioneer Australia Limited Certified Agreement 1998*, (Print P8624, Gay C, 5 February 1998).

⁷⁷ *Shop Distributive and Allied Employees Association and Bunnings Building Supplies Pty Ltd, s170LJ application for certification of agreement* (Print P6024, Whelan C, 21 October 1997).

⁷⁸ *Pacific Access Pty Ltd Application for Certification of Agreement*, (Print R2944, Holmes C, 30 March 1999).

⁷⁹ *Department of Finance and Administration and Others*, (Print P8703, Duncan SDP, 10 February 1998).

⁸⁰ *Shop Distributive and Allied Employees Association and Bunnings Building Supplies Pty Ltd, s170LJ application for certification of agreement* (Print P6024, Whelan C, 21 October 1997). See also the comments of Simmonds C in *Daviesway Pty Ltd Enterprise Agreement 1999*, (Print R9030, 14 September 1999).

⁸¹ Pursuant to s.170VPB(3) *WRA*.

⁸² This component is in s.170XA *WRA*.

⁸³ *Re Australian Workplace Agreements*, (Print S5352, Duncan DP, 28 April 2000).

⁸⁴ See, eg, *Re Australian Workplace Agreements* (Print S8540, Duncan DP, 26 July 2000).

⁸⁵ Section 170LT(4) *WRA*.

⁸⁶ See for example *Re Australian Workplace Agreements*, (Print Q7881, Duncan DP, 23 October 1998).

⁸⁷ See, eg, *Provincial Hotel; Re Provincial Hotel Certified Agreement - With Employees 1998* (Polites SDP, Williams SDP & Merriman C, 6 September 1999, R8813); *Kalinga Enterprises Pty Ltd; Re Just Cuts (Canberra And Queanbeyan) Agreement, 2000 – 2003* (Giudice J, Polites SDP & Redmond C, 30 November 2000, T3829); *Magnet Mart Pty Limited* (2002) 120 IR 241 (Duncan SDP, Cartwright SDP & Harrison C, 22 October 2002, PR923848); *Australian Liquor, Hospitality and Miscellaneous Workers Union; Re MSA Security Officers Certified Agreement [2003]* (Watson SDP, Blain DP & Lewin C, 15 September 2003, PR937654).

⁸⁸ *Re MSA Security Officers Certified Agreement 2003* (PR937654, Watson SDP, Blain DP and Lewin C, 15 September 2003).

⁸⁹ Paragraph [36] of the printed judgment of Watson SDP and Lewin C, our emphasis.

⁹⁰ Paragraph [32] of the printed judgment.

⁹¹ Paragraph [38] of the printed judgment.

⁹² Paragraph [37] of the printed judgment.

⁹³ *Ibid.*

⁹⁴ Paragraph [38] of the printed judgment; our emphasis. The expressions in this quoted section of the judgment were drawn from *Deloitte Touche Tohmatsu v. Australian Securities Commission* (1996) 136 ALR 453 at 468, pertaining to ‘What it means to “take into account” a relevant consideration’; see fn. 13 of the printed judgment.

⁹⁵ Paragraph [46] of the printed judgment.

⁹⁶ *Ibid.*, our emphasis.

⁹⁷ Paragraph [114] of the printed judgment.

⁹⁸ Paragraph [115] of the printed judgment.

⁹⁹ Paragraph [72] of the printed judgment.

¹⁰⁰ Paragraph [82] of the printed judgment.

¹⁰¹ Paragraphs [76–79] of the printed judgment.

¹⁰² Paragraph [79] of the printed judgment.

¹⁰³ Paragraph [81] of the printed judgment.

¹⁰⁴ Paragraph [81] of the printed judgment.

¹⁰⁵ *Ibid.*

¹⁰⁶ Paragraph [12] of the printed judgment of Blain DP.

¹⁰⁷ *Ibid.*

¹⁰⁸ See Senate Report into *WROLA Bill*, above n. 54, and Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (November 1999) Commonwealth.

¹⁰⁹ Naughton (1997), pp. 19–22; Ford (1997); Riley, McCarry and Smith (1997), p. 323; Merlo (2000); Waring and Lewer (2001), p. 66.

¹¹⁰ A list of the present government's major proposals for legislative reform to the structure and role of the NDT and a brief description of the contents of these proposals is contained in Appendix C of this Report.

¹¹¹ See Goodman (1998); Merlo (2000); Waring and Lewer (2001); but see Ronfeldt (1997).

¹¹² See Goodman (1998), p. 15.

¹¹³ See Merlo (2000), pp.217–219; Waring and Lewer (2001), p. 70.

¹¹⁴ By extension, the logic of this position clearly anticipates that an agreement might not be approved or certified even if it definitely is not positively *in* the public interest; see *Appeal Against Certification of Chubb Security – Darling Harbour Rangers Enterprise Agreement 1998* (Print R0015, MacBean SDP, Duncan DP and Jones C, 18 December 1998).

¹¹⁵ See Merlo (2000), p. 217.

¹¹⁶ See Benson, Griffin and Smith (1992).

¹¹⁷ Section 170LT(4) *WRA* and the note to s.170VPG (4) *WRA*.

¹¹⁸ See notes 85–6 above and accompanying text. See also *Australian Workplace Agreements* (Print P5472, Duncan DP, 26 September 1997); *Australian Workplace Agreements 1997* (Print Q7881, Duncan DP, 23 October 1998).

¹¹⁹ Merlo (2000), pp. 223–224; Waring and Lewer (2001), pp. 73–77.

¹²⁰ See Merlo (2000), p. 228.

¹²¹ Or 'fictitious', see Merlo (2000), p.215.

¹²² Sections 170XA(2)(a), 170XE and 170XF *WRA*.

¹²³ See Turner (1998), p.5; Merlo (2000), p. 215; Waring and Lewer (2001), p. 68.

¹²⁴ Sections 170MC(6) and s.170NC(3) of the *IRRA 1993*.

¹²⁵ See Goodman (1998), p. 13; Merlo (2000), pp. 228–229.

¹²⁶ Section 170XA(2) *WRA*.

¹²⁷ Neatly illustrated by Waring and Lewer (pp. 76–77), who also point to the potential pressure that this can place on unions and employees in the enterprise bargaining process should employers choose to cancel agreements as part of their bargaining strategies.

¹²⁸ See Lee (1997), p. 42; Bray and Waring (1998), pp. 71–74; Naughton (1999); Merlo (2000), pp. 223–224; Waring and Lewer (2001), pp. 73–75.

¹²⁹ See Merlo (2000), p. 223; Waring and Lewer (2001), p. 75;

¹³⁰ See Waring and Lewer (2001), p. 77.

¹³¹ See Bennett (1995), p. 144.

¹³² See, for example, instances highlighted in Waring and Lewer (2001), pp. 7–73. See also Merlo (2000), p. 225, pp. 232–233; and Senate Estimates Committee (*Workplace Express*, 22 February 2001).

¹³³ This was one of the justifications for the new enterprise bargaining system put forward by Minister Peter Reith in his Second Reading Speech introducing the *Workplace and Other Legislation Amendment Bill 1996* (Cth), see *Commonwealth Parliamentary Debates*, House of Representatives, 23 May 1996, p.1295

¹³⁴ See Bennett (1995), p.144 and Naughton (1997), p. 21.

¹³⁵ See forms R28 and R30 of the AIRC Rules 1998.

¹³⁶ See Bennett (1995), p. 144; Merlo (2000), p. 225.

¹³⁷ See generally Deery and Mitchell (1999); see also Bennett (1995), pp. 144–145 and Merlo (2000), pp. 231–232.

¹³⁸ See for example Goodman (1998) (at p. 10) 'Is the EA Truly Independent?'; and Merlo (2000) (at p. 224), 'The Employer Advocate?'

¹³⁹ Sections 170WHB, 170WHC, 170WHD and also s.83BS.

¹⁴⁰ Merlo (2000), p. 225; see also Goodman (1998), pp. 9–10.

¹⁴¹ See Goodman (1998), p. 12 and Merlo (2000), p. 225.

¹⁴² *Ibid.*

¹⁴³ See Goodman (1998), pp. 9–10; Merlo (2000), p. 213.

¹⁴⁴ These generally require that an agreement submitted to the AIRC for certification must be accompanied by a statutory declaration from each party in accordance with a form prescribed under the *Australian Industrial Relations Commission Rules*. The form requires each party to specify the relevant awards or, if there is no relevant award, to state whether application has been made for the determination of a designated award. The parties are also required by the *Rules* to state whether the agreement passes the NDT and, if it does not, why the AIRC should nevertheless be satisfied that

certifying the agreement is not contrary to the public interest. If the agreement is said by a party to pass the NDT but yet contains ‘any reduction’ in the employees’ terms and conditions, the party must specify such reductions and also specify the other terms which supposedly result in the agreement satisfying the NDT: see *Rules* 48, 48A, 49; Forms R28, R28A, R28B, R30.

¹⁴⁵ An example is the decision of Commissioner Deegan in *Bermkuks Pty Ltd Certified Agreement [2003]* (PR 943124, 28 January, 2004).

¹⁴⁶ See nn. 135–6 above and accompanying text.

¹⁴⁷ We conducted informal interviews with several members of the AIRC, and other relevant parties, to seek further information on this point and on other pertinent issues arising from the research carried out for this report.

¹⁴⁸ *Re Knightwatch Security Pty Ltd* (PR 943374, 6 February 2004, Giudice J, Ross VP, and Whelan C).

¹⁴⁹ Mr Jamie Doughney, Workplace Studies Centre, Victoria University.

¹⁵⁰ Pursuant to s.170LV of the *WRA*, if the AIRC has concerns about whether the agreement passes the NDT, it may certify the agreement if it receives satisfactory undertakings from the parties (in most cases the employer). Section 170LV also provides that ‘in any case, before refusing to certify the agreement, the Commission must give the persons who made the agreement an opportunity to take any action that may be necessary to make the agreement certifiable’.

¹⁵¹ At paragraphs [44–46] of the printed decision (our emphasis).

¹⁵² DEWR (2002).

¹⁵³ <<http://www.oea.gov.au/docs/AWAGUIDE.CHM>>.

¹⁵⁴ For further explanation, see the discussion in the methodology section of the report (Section 5.1 below).

¹⁵⁵ Our emphasis.

¹⁵⁶ In the following sections the italicised expressions are as they appear in the OEA procedures.

¹⁵⁷ See nn. 139–144.

¹⁵⁸ 7.5% of these were only approved after undertakings.

¹⁵⁹ As might be expected, this proved to be a very difficult and time consuming task. The number of agreements we were able to treat fully in this detailed fashion reflected the resources made available to us for the purposes of carrying out the research.

¹⁶⁰ <www.wagenet.gov.au>.

¹⁶¹ We must note that the Wagenet database search engine is notoriously unreliable, and constantly supplies inconsistent results. Due to this problem, we were forced to exercise a certain amount of judgment (including a brief perusal of an agreement’s contents) before we chose an agreement for further analysis.

¹⁶² See the discussion on this point above in Parts 2.1 and 2.2 of the Report.

¹⁶³ Other research carried out on AWAs reveals a substantial percentage of agreements which permit the employer to vary the employees’ job duties with no limitations at all: see Mitchell and Fetter (2003).

¹⁶⁴ For a preliminary study of these issues, based on AWAs, see Fetter and Mitchell (2004)

¹⁶⁵ Note the failure of attempts to certify s.17LK agreements in substantially the same terms as previously approved AWAs: *Faull’s Shoes Pty Limited Certified Agreement* (PR924957, Watson SDP, 22 November 2002) and *Silvers Nightclub Certified Agreement (With Employees) 2003* (PR934114, Watson SDP, 13 June 2003).

¹⁶⁶ These included several lawyers, several members of the AIRC and the Employment Advocate and some officers of the OEA.

¹⁶⁷ The text of the s.170LK agreements is available on the Wagenet database.

¹⁶⁸ See *Lone Star Steakhouse and Saloon Western Australia – Certified Agreement 2002–2005* (PR936265, Watson SDP, 13 August 2003).

¹⁶⁹ See *Lone Star Steakhouse*, above, and *Pancake Parlour (A.C.T.) Certified Agreement with Employees 2001* (PR917175, Watson SDP, DATE).

¹⁷⁰ For example, we have noted the provision of scope for such arguments in the OEA *AWA Procedures Guide* earlier in this Report. Such arguments have also been raised in the AIRC though without success in the instances we have seen; see *Re Australian Workplace Agreements*, (Print S5352, Duncan DP, 28 April 2000).

¹⁷¹ See the decision of Duncan DP in *Re Australian Workplace Agreements*, above n.166. Interview with OEA and senior officers, 3 May 2004.

¹⁷² For example see above the decision of Whelan C referred to in n.80.

¹⁷³ Section 170L.

¹⁷⁴ Section 83BB.

¹⁷⁵ Section 83BE(2).

¹⁷⁶ However, in the case of the reference of AWAs to the AIRC, which go only to the Sydney registry, there is a comparison carried out within the registry of the agreement and the relevant award.

¹⁷⁷ See notes 88–107 above, and accompanying text.

¹⁷⁸ A point also noted by Peetz (2001) p.1.

¹⁷⁹ Shifting the approval of AWAs from the OEA to the jurisdiction of the AIRC was suggested by Professor J. Isaac in his *Personal Submission to the Senate Employment, Workplace Relations, Small Business and Education Committee – Enquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*.

¹⁸⁰ Peetz (2001) p.9.

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APPENDIX B: AGREEMENT SUMMARIES

APPENDIX A

PROJECT BRIEF:

THE APPLICATION OF THE ‘NO DISADVANTAGE TEST’ UNDER THE WORKPLACE RELATIONS ACT 1996 (Cth)

BACKGROUND

1. A number of weaknesses in relation to the capacity of the no disadvantage test (NDT) to protect workers’ wages and conditions have emerged since the first introduction of the test.
2. The concept of the NDT first emerged in the early 1990s as a statutory device to ensure that workers’ conditions would not be worse off as a result of the move towards enterprise bargaining.
3. Prior to certifying an agreement, the Australian Industrial Relations Commission (the Commission) was obliged to compare the proposed agreement with existing conditions (award, certified agreement or over award payments) at the workplace, to ensure that no worker would be disadvantaged.
4. In its earlier manifestations in the former Industrial Relations Act, the NDT was applied as a clause by clause comparison with the award or certified agreement. However, subsequent legislation changed the way the NDT was calculated allowing the Commission to use a broader definition of costs and benefits as well as limiting the comparison only to the relevant award.
5. The Workplace Relations Act 1996 retains a similar version of the NDT. However, it is one that reinforces the global application of the test to the relevant award.
6. Currently, the NDT is applied by the Commission in certifying agreements or by the Employment Advocate in approving AWAs.
7. However, the application of the NDT and how conditions are measured in order to determine whether workers are worse off has drawn considerable criticism.
8. In particular, there is some evidence that certain core entitlements such as sick leave, annual leave and arrangements around hours of work are being traded for one off wage increases. The issue is not only whether these conditions are adequately compensated for in terms of wage increases, but also, whether the purpose of the conditions in supporting wider social policies, such as work/life balance, are being compromised in the trade off.
9. For instance, the Shadow Workplace Relations Minister Robert McClelland questioned the Deputy Employment Advocate Peter McIlwain for approving an AWA that disadvantaged workers by “allowing families to be stripped of basic working conditions”. The AWA, covering Michel’s Patisserie franchise, stated that annual and sick leave entitlements “do not apply” (Workplace Express: 30 August 2002, Attachment A1).
10. The Deputy Employment Advocate did not comment on the AWA in question, but confirmed that the OEA had approved deals “in those terms”. He said that the NDT was a global one, and provided employees were not worse off when the deals were measured against the award, they could be approved. He said the “easiest and most straightforward way”

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of compensating for lost leave entitlements was via pay increases (Workplace Express: 30 August 2002).

11. Commissioner Whelan in the Bunnings Case goes to this very issue of whether a dollar figure can be put on all entitlements:

The benefits of some award conditions...cannot be so easily calculated and compensated...Parental leave, for example, is unpaid leave. It is an allowable matter under section 89A and one of the minimum terms and conditions of employment for Victorian employees covered by Schedule 1A of the Act. It is not inconceivable that an agreement may be reached between an employer and a union or group of employees that in effect 'buys out' parental leave as a condition of employment. How does this Commission put a buy out value on the right to parental leave as a condition of employment? Could any agreement that removed the right to parental leave be considered, on balance, not to result in a reduction in the overall terms and conditions of employment of those employees? Should the Commission consider the purpose of the award provisions are not simply their financial value to the employee?

12. Here, Whelan suggests that in fact a simplistic mathematical approach to determining no disadvantage may in fact be an inadequate measure in that it does not take into account the purpose of entitlements in supporting wider social policies (Bunnings Case, 1997 [Print P6024]) Attachment A2).

THE PROJECT

13. The Victorian Government is committed to ensuring a fair, safe and secure workplace for every Victorian worker. Furthermore, the Government is committed to promoting workplace practices that support workers in balancing their work and life/family commitments.

14. Given the issues raised above, the Government is concerned that the global application of the NDT, resulting in financial trade offs of entitlements may be in fact compromising workers' abilities to balance their work and family lives.

15. The focus of the research is the application of the NDT, particularly in relation to award entitlements that affect workers' abilities to balance their work and life/family commitments as well as ensure appropriate standards of employee well being. To the extent that it is possible, the research would also consider any differences in application of the NDT between section 170LJ agreements, section 170LK agreements and AWAs.

16. It is therefore proposed that the successful applicant would undertake and produce a report on the following:

- (i) An overview of the application of the NDT in relation to section 170LJ agreements, section 170LK agreements and AWAs;
- (ii) A detailed analysis of how entitlements are being measured and compensated in relation to the following award entitlements:
 - hours of work: compensation for non-standard working days or hours, span of hours, flexibility of hours, meal breaks.
 - Leave provisions: annual leave, sick leave, bereavement leave, carer's leave, parental leave, study leave, trade union leave.
 - Other family friendly measures.
- (iii) An analysis of the above findings by section 170LK agreements, section 170LJ agreements and AWAs.

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- (iv) An analysis of the above findings by industry.
- (v) A general discussion on the findings, and in particular the capacity of the NDT to safeguard workers' abilities to balance their work and family lives as well as ensure appropriate standards for employee well being.

CONTACT

Researchers interested in undertaking such case studies on behalf of Industrial Relations Victoria should contact:

Peter Gahan, Director
Workplace Innovation Unit
Industrial Relations Victoria
1 Macarthur St
Melbourne VIC 3002
Tel. 9651 2713
Email: peter.gahan@iird.vic.gov.au

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Industry	<p>Agreement Name AWA [Publication of name not permitted] Auto component manufacturing</p> <p>Type of Agreement AWA</p> <p>Our Categorisation Highly questionable</p> <p>Concessions by the employer</p> <ul style="list-style-type: none"> * maximum 38 hours * two paid 10 minute tea breaks * ordinary hours 6am-6pm Mon-Fri * 3 days (not 16 hours) bereavement leave per year * will launder employee uniforms * no discretion to vary ordinary working hours * annual leave need not be taken within 6 months of accrual (12 months instead) * casuals seem to be entitled to public holiday overtime loading (2.5 times normal pay rate) * no stand-down provisions * commits to paying for training programs from time to time <p>Concessions by the employees</p> <ul style="list-style-type: none"> * may be required to work at any of employer's business locations * may be required to work public holidays * no bonus/performance based pay * no allowances * no minimum shift length for work outside ordinary hours * no detail re duties on face of agreement * slightly less paid personal leave * no commitment to permanent labour * no right to consultation * no wage rises built into the agreement 	Agreement Name	DBT Australia Pty Limited Rooty Hill Certified Agreement 2003
		Industry	Auto component manufacturing
		Type of Agreement	s.170LK Agreement
		Our Categorisation	Marginally questionable
		Concessions by the employer	Concessions by the employees
		<ul style="list-style-type: none"> * Above award wage increases. * Performance management incentive scheme. * Coy not to implement annualised wages without employee consent. If this occurs, company will explore opportunities to provide employees with tax effective, remuneration packaging options. * Authorised absences do not affect accumulation of paid RDOs (except where absent for 10 days in 8 weeks or 5 days in 4 weeks due to workers' comp, unauthorised absence or long service leave). * "Excess" sick leave can be cashed in- but this does not affect the accrual of entitlement to sick leave going forward. * Employee choice between 2 super funds chosen by employer. * "National Standards" clause. * Above or equal to award redundancy payments, plus payout of annual leave, leave loading, LSL from 5 years' service, one day per week employment search leave, and preferential re-employment all granted. * Commitment to maintain apprentices under their current contract of training under the Award should redundancies/retrenchments occur. 	<ul style="list-style-type: none"> * "no precedent" clause - this agreement shall not be used to obtain similar arrangements or benefits in any other plant or enterprise. * Company to explore annualised wages. * Excess time worked during a cycle is credited to workers' comp time taken during that cycle (for which RDO may otherwise not accumulate). * No provision that demotion will constitute retrenchment.

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Agreement Name Employees - Bocar Automotive Products Certified Agreement
Industry Auto component manufacturing
Type of Agreement s.170LK Agreement
Our Categorisation Marginally questionable

Concessions by the employer

* Employer undertakes to make employees aware that on the 12 month anniversary date of the Agmt, employees can request a reconciliation of the remuneration received under this Agmt in comparison with the amount that would have resulted from payment in accordance with the Award provisions.

* No person employed by the Employer at the coming into operation of the Agmt shall have their rate of pay reduced because of the coming into operation of the Agmt. ("no disadvantage" clause)

* Afternoon shift and night shift loadings payable, even to casuals.

* Above-award rates for juniors.

* Entitlement to one rest break where 8 or more hours are worked in a day, of which 15 minutes is paid. Further breaks by agreement.

* Weekly payment of wages

Concessions by the employees

* 3% pay rises for four years.

* Some employees appear to have a significant disadvantage in the base rate of pay compared to under the award, notwithstanding possible protection/reconciliation according to the "no disadvantage" cl, and the undertaking for notice of reconciliation of income to Award levels after 12 months.

* Allowances collapsed into base rate of pay but appears that there is inadequate compensation provided.

* No disadvantage clause doesn't protect prospective employees from under-award wages.

* Agreement stands alone, not read in conjunction with award.

* Unpaid meal break for 6 hrs worked rather than 5.

* Short minimum engagement for casuals (2hrs).

* No entitlement to not work on public holidays.

* Sick leave probably marginally worse than the Award. Require a medical certificate for every absence of 1 day or more.

* Agreement that absenteeism is unacceptable.

* Possible discrimination on the basis of sexual preference irt bereavement leave - for wife (or de facto wife) or husband (or de facto husband) automatically, otherwise requires approval.

* Ordinary hours of work and rates of overtime are modifiable by agreement. This discretion is a derogation from the benefits of the collective agreement process

* Option, by agreement, to trade in all but 2 weeks of annual leave, and all but 5 days sick leave, per year, in

exchange for 15% loading on pay.

* No right not to work on public holidays.

* Restriction on holding ownership interests in any other business deemed to be in competition is a significant restraint.

Agreement Name Crown Equipment Pty Ltd and Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union and the Australian Workers' Union: N.S.W Service Department Enterprise Agreement 2003-2006

Industry Auto component manufacturing

Type of Agreement s.170LJ Agreement

Our Categorisation Marginally questionable

Concessions by the employer

* Marginally above-award pay increases.

* Wage rises occur earlier c.f. award.

* National Standards clause, which protects employees from ordinary time earnings, or in national standards such as annual leave or LSL, being reduced compared to those standards going forward.

* Commitment not to pursue AWAs with current or new employees.

* Comprehensive, formal, paid consultation process.

* Guaranteed formal training process; commitment to career development where possible.

* Above-award long service leave.

* Commitment to protect employee entitlements, specifically referring to transmission of business and cessation of trading.

* Commitment to maintain apprentices.

* Flexible RDO regime.

* 60 days Union Training seminar leave for Delegates.

* Above-award \$40 afternoon shift allowance, in addition to 15% wage loading.

* Blood donation leave.

Concessions by the employees

* Greater span of ordinary working hours.

* Reduced access to overtime.

* Company policies attached to the Agreement.

* Selection for dismissal rests entirely with the Coy.

* Commitment to Company's overriding goals - productivity, efficiency, profitability and global competitiveness.

* Cooperation of employees required re vehicle maintenance.

* Employee responsibility for keeping detailed and accurate time records, with a log of worked versus paid hours.

* Use of personal mobile phones at work discouraged.

* Company commitment to have the capacity to honour employee entitlements as they fall due (not in a trust fund in advance).

* Heat policy is not rules-based.

* Reduced casual loadings.

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- * Commitment to provide safe and efficient tools.
- * Right of entry for union officials.
- * Preference for re-employment.
- * Above award redundancy payouts (includes sick pay, Annual leave loading, RDO leave, and pro-rata LSL for employees over 5)

Agreement Name Air Radiators Pty Ltd Certified Employment Agreement 2003
Industry Auto component manufacturing

Type of Agreement s.170LJ Agreement
Our Categorisation Marginally questionable.

Concessions by the employer

- * Significantly above award Long Service Leave and redundancy entitlements.
- * Above CPI-wage increases (4.6% per year for three years).
- * Union right of entry, and 5 days' paid training leave for delegates.
- * Reintroduction of termination and major change consultation provisions (not an allowable award matter).
- * Company will reasonably mitigate adverse effects on employees.
- * Company will provide reasonable time for employees to consult with union regarding the next enterprise bargaining agreement.
- * Apprentices/trainees will be paid for attending training.
- * Strong commitment to paid training within ordinary working hours.
- * Use of contractors/casuals limited (maximum duration for casuals of 12 weeks).
- * Flexible superannuation arrangements, superannuation paid for 52 weeks if on workers compensation.
- * Union dues by direct debit.
- * Strong commitment to OH&S.
- * Very strong income protection (2 yrs or insurance).
- * Extra "public holiday" - Monday preceding Melbourne Cup Day.
- * Paid maternity/paternity leave using personal leave.
- * Employee entitlements guaranteed by GEERS scheme and detailed annual audit/report to union at employer's expense.
- * Uniform provided. Overalls

Concessions by the employees

- * No specific training/career path specified in the agreement.
- * Commitment to avoid industrial action while dispute resolution processes are being undertaken.
- * Consultative committee cannot make recommendations without 2 management representatives agreeing.
- * Union agree to confidentiality in respect of information received as part of the annual employee entitlement audit.
- * Employees liable for equipment not properly maintained.
- * Employees not to ask for nor accept any "fee, gratuity, commission or other benefits" arising out of performing the duties of employment, other than from the employer or with the employer's consent.
- * Employees agree to small docking of pay for smoking other than outside, at allotted work breaks.
- * Strict time-keeping requirements
- * Fairly strict medical certificate requirements for sick leave.
- * Need for retrenchments of employees will be decided by employer at its sole discretion.
- * Travel policy and Air Radiators' Hand Book incorporated into the Agmt. These include significant responsibilities for employees.
- * Travel is paid to a maximum of 12 hrs per day, and compulsory rest stops are not included in this calculus.

Agreement Name Clark Equipment Australia Pty Ltd Omega Heavy Lift Truck. Division, Enterprise Agreement 2003
Industry Auto component manufacturing
Type of Agreement s.170LJ Agreement
Our Categorisation Marginally questionable

Concessions by the employer

- * (marginally) above award base rates, with equal pay rise after one year.
- * strong commitment to OH&S.
- * strong commitment to permanent employment.
- * strong commitment to acquisition and application of skills.
- * continuation of the Clark Incentive Scheme.
- * above-award redundancy payouts (higher severance pay, cashing in of long service leave, accumulated sick leave, accumulated annual leave + 17.5%, and preferential hiring for recently retrenched workers)
- * current practice in relation to right of entry of duly accredited Union Officials will prevail.
- * training of apprentices will continue.
- * accident pay policy will continue.

Concessions by the employees

- * no agreement not to employ via AWAs or other individual contracts.
- * engagement of casual employees ultimately at the discretion of the employer.
- * training of apprentices is subject to Company needs.
- * Offer of continued employment outside the employer's trade (i.e. transfer to lower paid duties) does not constitute redundancy, although failure to accept such employment does.
- * no limitation on AWAs or individual contracts.

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provided and laundered.
 * Meal (reasonable) and travel accomodation (\$80-\$100 per night) allowances provided.
 * Improved amenities for employees.

<p>Agreement Name AWA [Publication of name not permitted] Industry Auto component manufacturing Type of Agreement AWA Our Categorisation Marginally questionable.</p> <p>Concessions by the employer</p> <ul style="list-style-type: none"> * commitment to safety in objectives clause. * commitment to job creation through efficiency in objectives clause. * Above-award pay rates. * Paid meal and tea breaks for continuous shift workers working 8-12 hrs * Night and afternoon shift get loading. * Employees can only be required to work reasonable overtime. * Commitment to training and career path development for e'ees. * Annual leave in line with Award, but loading can be cashed whether leave is taken or not, and leave can be cashed by agreement where more than 4 weeks accrued). * provision for salary sacrifice into super. * strong commitment to OHS. 	<p>Concessions by the employees</p> <ul style="list-style-type: none"> * KPIs determined by management. * Significant flexibility in ordinary working hours, essentially at the discretion of the e'er (48 hrs notice or by agreement earlier). Any worker can be allocated to continuous shift work. * Agreement to staggered meal breaks (social cost?) * Probationary period can be extended by mutual agreement - problematic as probationary employees are in a very weak bargaining position. * Leave conditions inferior to award. * Requirement to work reasonable overtime. * Requirement to work public holidays (with 2.5 loading) if required. * Acknowledgement that training will not result in upgrade of classification (and pay). * Agreement to cooperate in transfer of skills. * RDOs appear entirely at the discretion of employer. They are scheduled and can be rescheduled or cancelled subject only to consultation (not agreement). They can also be cashed out at the rate at which they were accrued. At the last pay of the calendar year, all accumulated RDOs are automatically paid out. * Dispute Resolution process is mediation instead of conciliation at the final stage, and the e'ee can only stop work for safety concerns with the agreement of the e'er. * Workplace policies incorporated into agreement - anti-discrimination; drugs and alcohol; smoke free workplace.
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APPENDIX B: AGREEMENT SUMMARIES

*Cashing in of long service leave and annual leave available by agreement.

Agreement Name
Industry

DBT Australia Pty Ltd Argenton Certified Agreement 2003
Auto component manufacturing

Type of Agreement
Our Categorisation

s.170LJ Agreement
Acceptable

Concessions by the employer

- * mandatory payment of bonus if formula satisfied
- * sick leave can be paid out once >20 days is accumulated
- * redundancy pay is the higher of (i) 2 weeks per completed year of service (pro rata monthly), or (ii) award rate
- * clothes laundering service provided
- * Superannuation payment will be maintained at pre-injury level whilst the employee is in receipt of workers compensation payments for up to a maximum of 26 weeks.
- * Consideration will be given to an employee who is unable to change shifts because of personal, family or religious reasons
- * support of union activities (delegates entitled to conduct union business during work hours, membership fee deduction from salary, paid union training for delegates)
- * strong commitment to consultation, including consultation with employees and unions re introduction of significant change
- * workplace organisation processes study

Concessions by the employees

- * employees will carry out any duties nominated by a Supervisor
- * morning shift workers: 40 hours per week; other shift workers: 38.35 hours per week (not 38 hrs/p/wk)
- * shifts may be altered with immediate notice
- * Employer has greater flexibility re change in hours
- * no provision for casuals to automatically become permanent after a specified period
- * no dispute settlement training for union delegates

Agreement Name
Industry

Calsonic Certified Agreement 2003
Auto component manufacturing

Type of Agreement
Our Categorisation

s.170LJ Agreement
Acceptable

Concessions by the employer

- * additional allowances payable
- * overtime: double time payable after 2 hours instead of 3
- * employee involvement when hours are modified + employee's external commitments taken into account in this process
- * increased paid carer's/family leave
- * consultation with employees re when leave can be taken
- * long service leave payable after 10 years (not 15 years), with pro rata payment if employment terminated between 7 and 10 years (not b/t 10 and 15 years)
- * 10 days sick leave after first 12 months (not 60 hours)
- * max 3 days bereavement leave (not 16 hours)
- * significantly above award redundancy payouts, including payout of all outstanding annual leave, leave loading and sick leave.
- * limited use of contractors and consultation with shop steward re their use
- * limited use of casuals and consultation with shop steward re their use (max 3 months employment)
- * shop stewards entitled to 6 days training (not 5 days)
- * union involvement encouraged in the workplace

Concessions by the employees

- * certain allowances eliminated
- * increased span of "ordinary hours" = 24 hours, Mon - Fri (but 8 hours to be worked each day)
- * no minimum shift length for weekend work
- * no position demarcation
- * overtime rate for Saturdays not specified
- * no sick leave entitlements during first month
- * if employee terminates within first 6 months, must repay sick leave taken that had not accrued
- * no provision for casuals to automatically become permanent after a specified period

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name	Scania Australia Pty Ltd (NUW) Certified Agreement 2002
Industry	Auto component manufacturing
Type of Agreement	s.170LJ Agreement
Our Categorisation	Acceptable
Concessions by the employer	Concessions by the employees
<ul style="list-style-type: none"> * Max hours work without paid rest break of 15 mins is 2.5 hours * above-award allowances * mandatory performance-based bonus * will consult with employees re individual requirements for shift allocation * journey insurance * private healthcare fund will be established if medicare is dismantled * Unused carer's/sick leave paid out when employee leaves the company + 20% bonus of the unused balance's value * Increased redundancy notice periods * Above award redundancy payments, especially for long term e'eyes (max 54 weeks) * Employee participation in rosters * Employee involvement in developing classifications * Employee involvement in RDO discussions * no discretion to vary ordinary hours * Strong consultation mechanisms * union involvement in workplace * commitment to permanent labour and consultation prior to temporary labour 	<ul style="list-style-type: none"> * restrictions on RDOs and their potential removal * no minimum shift length outside ordinary hours * less paid personal leave in first 12 months, award level after first 12 months

Agreement Name	Lake Road Constructions Pty Ltd Enterprise Agreement 2003-2006
Industry	Building and Construction
Type of Agreement	s.170LK Agreement
Our Categorisation	Highly questionable
Concessions by the employer	Concessions by the employees
<ul style="list-style-type: none"> * Higher base rates of pay (but this includes allowance that would previously have been paid) * Higher overall per hour wage rates * Increased Travel and Fares Allowance * Productivity Allowance * Redundancy Trust Arrangement * Wage rises guaranteed for next 3 years * Provision of protective clothing and work apparel for employees 	<ul style="list-style-type: none"> * Loss of allowances (multi storey and special rates converted into a single "productivity allowance"; most other allowance not mentioned but given that the intent of agreement is to pay a single hourly rate, appears that they have been abolished without compensation. * Loss of paid annual leave, personal leave and public holidays. * Reduced overtime and penalty rates (including no overtime pay on saturday unless >38 hour week) * Less descriptive job classifications * Longer probationary period for e'ees * Less paid meal breaks during overtime (especially on Saturday and Sunday work); less breaks overall during overtime * Wage rises over life of agreement are set at a constant rate rather than indexed to CPI * Full timers employed on a daily (rather than weekly) basis - and can therefore be terminated on one day's notice * Increased span of hours * No provision for shift work loadings (but not clear whether shift work is worked) * Unclear but probable that leave entitlements do not accrue between years * Complete "casualisation" of the workforce - essentially all e'ees in practice treated as casuals * Loss of RDOs

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name AWA [Publication of name not permitted]
Industry Building and Construction
Type of Agreement AWA
Our Categorisation Highly Questionable

Concessions by the employer

- * well above award rates of pay for skilled labourers; above award rates of pay for semi-skilled labourers.
- * Sick leave - E'ees with > 1 years service can be paid out for unused sick leave (up to 10 days) each year.
- * Hours - Employees (by agt) have more flexibility re working hours
- * Annual leave can be cashed in
- * Appears that overtime must be by mutual agreement between the parties (rather than at the discretion of employer).
- * Part-time e'ees - work a regular roster, with average no. of hours b/n 10 and 35.
- * Redundancy payments paid out pro-rata to include part-years of service, but maximum payout is below-Award
- * Strong commitment to OHS
- * Weak commitment to training program, promotion of learning, skill recognition and training.
- * Weak commitment to consultation

Concessions by the employees

- * Reduced entitlement to sick leave, which does not accrue.
- * No entitlement to bereavement or carer's leave.
- * Increased ordinary hours of work - total of 40 hours per week.
- * Greatly increased span of ordinary hours - 24 hour spread, 7 days a week.
- * reduced overtime rates, reduced availability of overtime due to increased span of hours
- * no overtime for casuals
- * no annual leave loading
- * less flexibility in when leave is taken
- * annual leave can be cashed out
- * reduced casual loading (20% c.f Award is 25%).
- * no entitlement to a minimum number of hours for casuals.
- * significantly reduced or abolished allowances
- * Dispute resolution procedure - No provision in dispute settlement procedure for union involvement or representation of e'ees in the dispute resolution process. Further, no right to strike while dispute settlement procedures are being followed.
- * no RDOs
- * no accident make-up pay
- * no provision for meal breaks
- * Commitment to training to increase productivity and efficiency of the coy.
- * Inclement weather - if e'ees are unable to work due to inclement weather, then employees (by agreement) may use other entitlements such as sick leave, annual leave, etc
- * Commitment to harmonious industrial relations w/i the coy.
- * Commitment to significant

- flexibilities, including flexibility to carry out all works and services by the coy regardless of the location or nature of projects.
- * Increased functional flexibility without provision for appropriate remuneration
- * Weak consultation mechanisms

Industry Delnote Constructions/CFMEU Collective Agreement 2003 Building and Construction
Agreement Name s.170LJ Agreement
Type of Agreement Acceptable
Our Categorisation

Concessions by the employer

- * 36 hour week from 1 July 2004 (2 RDOs per month)
- * Well-above award base rates of pay and allowances
- * RDOs scheduled to coincide with public holidays
- * Redundancy trust fund for all employees
- * Improved conditions for casuals - minimum shift of 8 hours, or paid for at least 8 hours.
- * Employer to provide injury and sickness insurance. Casuals working more than 36 hours a week entitled to income protection benefits.
- * Strong union involvement in workplace. Union membership encouraged.
- * Superannuation is above award (and legislative) requirements.
- * Commitment to OHS, including provision for protective clothing.
- * Strong commitment to permanent, rather than casual, labour.
- * Commitment to training of employees.

Concessions by the employees

- * Commitment to real gains in productivity through increases in skills, flexibility and motivation.
- * Commitment by e'ees to training to increase efficiency and competitiveness of the coy.
- * Greater spread of hours and flexibility under the Agreement.
- * Commitment to reduce industrial action.
- * Employee commitment to a target of 0% absenteeism and lateness.
- * Reduced flexibility re when annual leave is taken.
- * Commitment to abide by company OHS policy and to work in a safe and responsible way.
- * Commitment not to pursue any further wage increases or changes to conditions during the life of the Agreement.
- * Although casuals are not to be employed beyond 4 weeks (concession by employer), this can be extended to 8 weeks by agt of the parties. In the award casuals can only be employed for up to 6 weeks.

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name Bedroc Levelling (Aust) P/L and CFMEU Building and Construction Industry Collective Bargaining Agreement 2002-2005
Industry Building and Construction
Type of Agreement s.170LJ Agreement
Our Categorisation Acceptable

Concessions by the employer

- * Significantly above-award base rates of pay.
- * 12% pay increases over 3 years - likely to be significantly above-award rises
- * Higher OH&S standards, including provision of protective clothing and equipment for employees
- * Commitment to avoid excessive overtime
- * 36 hour week, 1 RDO per fortnight
- * Ongoing consultation with e'ees and union; very strong union involvement in the workplace; right of entry for union officials
- * Probably above award and legislation superannuation contributions
- * Income Protection and Trauma Insurance, and Journey Insurance for all employees
- * Commitment to use casual and supplementary labour only for short terms or top up purposes

Concessions by the employees

- * Casual loading reduced by 5%
- * Increased flexibility in starting and finishing times
- * Increased span of hours
- * Commitment to increased productivity and reduced industrial action
- * Commitment to waste minimisation - decrease unnecessary expenditure and ensure ongoing viability of the coy

Agreement Name Adelaide Fibrous Plasterboard Linings/CFMEU Collective Agreement
Industry Building and Construction
Type of Agreement s.170LJ Agreement
Our Categorisation Acceptable

Concessions by the employer

- * Extensive employee and union consultation mechanisms
- * Significantly above-award base rates of pay
- * Probable above CPI wage increases for next three years
- * Injury and Sickness insurance for employees
- * Above-award (and legislation) superannuation contributions from 1/6/2004
- * Strong training program paid for by employer
- * Strong commitment to OHS
- * Higher travel allowances
- * Above-award Disability Allowance (in lieu of Special Rates and Multi-Storey Allowance)
- * Sanctioned Union involvement in workplace, particularly in dispute resolution

Concessions by the employees

- * Reduction in lost time and/or production arising out of disputes or grievances
- * Increased productivity
- * Target of zero absenteeism and lateness over life of agreement
- * Longer probationary period
- * Commitment to reduced industrial action
- * Compulsory training program
- * Greater flexibility over RDOs, normal hours of work and meal and crib break times

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name N.E. Concrete Reinforcing Pty Ltd/CFMEU Collective Agreements 2003
Industry Building and Construction
Type of Agreement s.170LJ Agreement
Our Categorisation Acceptable

Concessions by the employer

- * Above-award base rates of pay with probable above-CPI rate increases included
- * Above-award allowance payments with above CPI rate increases included
- * Strong commitment to OHS
- * Redundancy payout trust
- * Casuals eligible for redundancy benefits via BIRST Fund
- * Limitations on casual employment
- * Strong commitment providing training
- * Income protection insurance for employees
- * Above SGC superannuation contributions from 1/4/2004

Concessions by the employees

- * Strong commitment to settling disputes without industrial action
- * Commitment to productivity increases (including reduction of lost time due to inclement weather)
- * Greater flexibility over RDOs, normal hours of work and meal and crib break times
- * Increased span of hours
- * Target of zero absenteeism and lateness over life of agreement
- * Commitment to abide by OHS and training programs

Agreement Name Page Window Systems Pty Ltd/CFMEU Enterprise Agreement expiring 31 October 2005
Industry Building and Construction
Type of Agreement s.170LJ Agreement
Our Categorisation Acceptable

Concessions by the employer

- * Well above-award base rates of pay with probable above-CPI rate increases included
- * Above-award allowance payments (productivity allowance especially)
- * Strong commitment to OHS
- * Redundancy payments for casuals
- * Most variations and changes are by agreement, particular regarding reduction in productivity allowance and changes to normal working hours)
- * Wider definition of 'ordinary time earnings' for superannuation means larger contribution by employer
- * Top-Up Workers Compensation Insurance and 24 Hour Income Protection
- * Commitment to ongoing training, including taking on apprentices
- * Prohibited from engaging in all-in payments and sham sub-contracting to avoid the Agreement and the Award
- * Stronger restrictions on employment of casual labour than award. Controls on sub-contracting.
- * Agreement to limit overtime

Concessions by the employees

- * Strong commitment to settling disputes without industrial action
- * Commitment to productivity increases (including reduction of lost time due to inclement weather)
- * Greater flexibility over RDOs, normal hours of work and meal and crib break times
- * Increased span of hours
- * Target of zero absenteeism and lateness over life of agreement
- * Commitment to abide by OHS and training programs
- * Rate of payment in lieu of notice where terminated does NOT include allowances
- * Payment for first crib break in overtime subsumed into productivity allowance
- * More flexible travel provisions for projects outside main city areas
- * Agreement to work reasonable overtime

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name	Valley Dale Pty Ltd t/as Nebill Contractors and CFMEU Building and Construction Industry Collective Bargaining Agreement 2002-2005
Industry	Building and Construction
Type of Agreement Our Categorisation	s.170LJ Agreement Acceptable
Concessions by the employer	
<ul style="list-style-type: none"> * Well above award rates of pay. * 36 hour week. 2 RDO's every month. * Protected redundancy payments (via a redundancy trust). * Superannuation payments are above award (and legislative requirements). * Income Protection, Trauma and Journey Accident Insurance. * Employer commitment to improve the job satisfaction and standard of living of its e'ees. * Employer commitment to adhere strictly to dispute settlement procedures. * Portable long service leave scheme for employees. * If there's an applicable project site agreement in place with better terms and conditions than this Agreement, then the project agreement prevails. * Strong commitment to OH&S, including provision for protective clothing. * Above award annual leave loading (19.9%). * Very strong commitment to training, including commitment to employee apprentices. * Strong consultation mechanisms. * Agreement to limit overtime. * Strong union involvement. * Strong commitment to permanent, and not casual labour. * Improved employee amenities. * Drug and alcohol rehabilitation program. * Worker's compensation rehabilitation program. 	
Concessions by the employees	
<ul style="list-style-type: none"> * Commitment to real gains in productivity. * Increased flexibility as to spread of hours. * Parties can agree to up to 3 more workplace efficiency and flexibility provisions in the agreement. * Commitment not to pursue any increases in wages or other improvements to conditions of employment during the life of the Agreement. * Commitment by employees not to take any industrial action during the course of the Agreement for the purpose of trying to secure new and improved rates and conditions during the life of the Agreement. * Reduction in casual loading to 20%, and minimum shift length. 	

Agreement Name	Skidteck Construction and the Rigger/Steel erector CFMEU (Victorian FEDFA and Construction & General Division's) Collective Bargaining Agreement 2002-2005
Industry	Building and Construction
Type of Agreement Our Categorisation	s.170LJ Agreement Acceptable
Concessions by the employer	
<ul style="list-style-type: none"> * 36 hour week with 2 RDOs per month. * Well above-award base rates of pay with above CPI increases. * Above award allowances. And several additional allowances not included in the award. * Extra penalty rates not in the Award - higher Sunday penalty and hot weather penalty. * Strong commitment to OH&S. * Above-award accident make-up pay * Commitment to permanent labour - casual and supplementary labour to be used only for short term or top up purposes, casuals 'deemed' to be permanent employees earlier than under Award. * Income protection, trauma and journey accidents insurance for e'ees. * Commitment by e'er and e'ees not to work excessive overtime – life/family balance. If working more than 56 hours per week it must be by agreement between the parties. * Above award (SGC and other Act) superannuation contributions. * Strong consultative mechanisms * Extensive provision for union involvement at the workplace 	
Concessions by the employees	
<ul style="list-style-type: none"> * Reduction in casual loading from 25% to 20%. * Reduced minimum length of casual shift * Employees duties are not clearly defined. * Increased span of ordinary hours. * Commitment to strong training program. * Commitment to gains in productivity and performance improvements. 	

APPENDIX B: AGREEMENT SUMMARIES

Concessions by the employer

- * Greater notice to employees of roster changes, with greater regard to employers personal circumstance.
- * Portable long service leave.
- * Under the Agreement if overtime is more than 56 hours per week it must be by agreement between the parties, as compared to the Award where it's at the discretion of the e'er.
- * Drug and alcohol rehabilitation policy.
- * Trade union training leave.
- * Redundancy payment trust for employees entitlements.
- * Upon termination employer cannot give pay in lieu of notice.
- * Commitment to strong training program (can be viewed both as a concession by the e'er and e'ees).
- * Building Industry Picnic Day - employees entitled to attend

Concessions by the employees

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name AWA [Publication of name not permitted]
Industry Food Manufacturing
Type of Agreement AWA
Our Categorisation Highly questionable

Concessions by the employer

- * Well above award rates of pay (but all cashed in entitlements included in this rate)
- * Disputes re OHS problems will be dealt with immediately.
- * Casual employees are entitled to have 1 week's notice or pay in lieu of notice upon termination.
- * If employees are made redundant they are entitled to 1 day off per week of notice to attend job interviews (under the Award it's just 1 day upon notice of termination).
- * Overtime rate -only for the first 2 hours- is higher than in the Award (1.63 compared to 1.5 in Award).
- * Weak consultation mechanisms re redundancies

Concessions by the employees

- * Greatly increased spread of ordinary hours
- * Up to 48 ordinary hours per week
- * Long service leave, annual leave, annual leave loading, sick leave, bereavement leave, carer's leave, first 10 hours of overtime and possibly accident make-up pay compulsorily cashed in for increased hourly rate
- * Parental Leave - reduced flexibility than under the Award to take annual leave and LSL in conjunction with parental leave.
- * Abolition of most allowances
- * Reduced entitlement to accident make-up pay.
- * Reduced availability and rate of overtime.
- * Notice of termination - no provision for time off to look for work during notice period
- * Reduced availability and length of rest and meal breaks
- * No public holiday pay, only a day off in lieu at the e'ees choosing (cl 13.2).
- * No provision for training.
- * Reduced union involvement in dispute resolution
- * Weaker consultation mechanisms
- * No entitlement to jury service make-up pay

Agreement Name Capilano Honey Limited, Victoria, NUW (Enterprise Bargaining) Agreement 2003
Industry Food Manufacturing
Type of Agreement s.170LJ Agreement
Our Categorisation Acceptable

Concessions by the employer

- * Above award base rates of pay (apart from introductory employees)
- * Above CPI wage increases built into agreement
- * Strong Commitment to OHS
- * Strong emphasis in favour of permanent over casual employment
- * Commitment to collective bargaining - agrees not to employ via AWAs or other individual contracts
- * Long Service Leave can be taken pro-rata after 10 years or cashed in
- * Commitment to provide and pay for ongoing training
- * Greater discretion to employees re when annual leave is taken
- * Commitment to ongoing consultation with e'ees and union via consultative c'tee. Cannot implement changes to work practices without agreement of the majority of e'ees concerned.

Concessions by the employees

- * Commitment to peaceful resolution of grievances and avoidance of industrial action during disputes
- * Possible loss of annual leave loading
- * Long Service Leave can be cashed in
- * Commitment to co-operate and attend training programs
- * Commitment to work with employer to ensure appropriate security procedures and OHS practices
- * Commitment (through Consultative Committee and Agreement generally) to increase productivity, efficiency and competitiveness of the Company
- * More restrictive mixed-functions provisions - likely to get less reward for performing higher duties
- * Increased spread of hours, flexibility regarding overtime and rostering.
- * Slightly less flexible sick leave/personal leave provisions

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name AB Food and Beverages Australia Pty Ltd Certified Agreement 2003-2006
Industry Food Manufacturing
Type of Agreement s.170LJ Agreement
Our Categorisation Acceptable

Concessions by the employer

- * Well-above award base rates of pay
- * Improved sick leave entitlements
- * Paid parental leave and increased flexibility to take family leave
- * Trade union training leave
- * Commitment to collective bargaining - commitment not to employ persons under AWAs or any other form of individual contract
- * Strong commitment to paid training
- * Above award superannuation payments.
- * Strong union involvement in the workplace.
- * Part -time e'ees guaranteed a min. 4 hours per day.
- * Very strong consultation mechanisms with Union and employees.
- * Above award meal allowance.
- * Blood donation leave.
- * Long Service Leave can be taken on a pro-rata basis after 7 years.
- * Improved workplace amenities
- * Commitment to OHS

Concessions by the employees

- * First-aid allowance reduced.
- * Annual leave loading incorporated into the base rate of pay.
- * Reduced flexibility regarding maternity leave - must take 6 weeks compulsory (unpaid) leave after giving birth.
- * Time off in lieu of overtime for family leave it is at ordinary time rate.
- * Significantly reduced rate of overtime pay for part-time employees who work overtime.
- * Slightly reduced bereavement leave
- * Laundry allowance removed

Agreement Name Warnambool Cheese and Butter Factory/NUW Enterprise Agreement 2002-2003
Industry Food Manufacturing
Type of Agreement s.170LJ Agreement
Our Categorisation Acceptable

Concessions by the employer

- * Well above award base rates of pay
- * Well above award pay increases built in
- * Penalties for over-employing casual labour
- * Commitment to collective bargaining (no AWAs)
- * Very substantial redundancy provisions
- * Above-award Accident Make-Up pay provisions
- * salary sacrificing available to e'ees
- * commitment making the next EBA more comprehensive when this one expires
- * commitment to review of all job classifications
- * some sick leave paid out upon separation of employment
- * paid maternity and paternity leave
- * earlier access to LSL

Concessions by the employees

- * No concessions by employees compared with the award

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name PZ Cussons Australia Pty Ltd Certified Agreement
Industry Food Manufacturing
Type of Agreement s.170LJ Agreement
Our Categorisation Acceptable

Concessions by the employer

- * Base rates of pay begin at significantly above Award rates, and probable above-award increases built in (4% raise at 31 May 2003, 4% raise at 31 May 2004).
- * Job classifications are specified, based upon e'er specific competency and training requirements, linked to promotion.
- * Comprehensive training/skilling arrangements are provided, with the acknowledgement that these are skills that will be useful to the employees outside the job as well as in the job.
- * Generous relocation scheme when workers are moved instead of being retrenched, with commitment that no employee will be forced to relocate.
- * Above Award meal and rest breaks.
- * Statement of no intent to casualise the workforce.
- * Above Award severance pay plus long service pay in addition to pay out of accrued long service leave.
- * Above Award notice of termination.
- * Strong and specific training commitment.
- * Strong consultation mechanisms put in place.

Concessions by the employees

- * Much greater working flexibility:
 - Essentially no restriction on ordinary working hours for rotating shift workers. Example ordinary hours are given for afternoon/night/day (which may get penalty rates), but setting ordinary hours is ultimately e'er's discretion after consultation and 3 weeks' notice. Note fixed shift workers have fixed hours, but this is subject to be changed by the e'er if "business conditions require additional flexibilities".
 - This also affects overtime qualification.
 - E'er's discretion after consultation with notice applies to rostering also.
- * Implicit derogation from guaranteed 38 hr average week - RDO every month with 5*8 hrs days only averages to 38hrs a week where all months are 28 days. In addition, "handover" responsibilities add further time at work to that counted as working in this Agmt.
- * All Award allowances (such as heat, dirt, meal allowances) except for shift allowances, first aid allowance, temporary team leader allowances, are scrapped and incorporated into the base rate of pay.
- * E'ees are responsible for "handover" i.e. they must be at their station from the beginning and until the end of the shift. Increase of effective working hours, unpaid.

Concessions by the employer

Concessions by the employees

- * Overtime is reformulated, and derogates slightly from the Award. Mostly equivalent, except Saturdays now attract a penalty rate of 1.5 times which is effectively less than the Award structure where Saturday has no penalty rate, but is automatically overtime and therefore is charged at 2 times after 2 hours at 1.5 times.
- * Agreement that workers can be put to work at anything for which they have the required competency (i.e. including below their job description) if needed in extraordinary circumstances and for training. i.e. ultimate e'er discretion to alter job description.
- * responsibility for tools lost or damaged due to employee negligence.
- * E'er discretion as to working overtime (unclear how this interacts with the Award's right for e'ees not to work excessive overtime).
- * No restriction on casual labour.
- * Dispute resolution clause allows for continuation of work "wherever practicable" instead of the Award's specific reference to an e'ee's safety concerns.

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name Nestle Dennington - National Union of Workers Agreement 2001
Industry Food Manufacturing
Type of Agreement s.170LJ Agreement
Our Categorisation Acceptable

Concessions by the employer

- * flexible sick leave provisions (entitled to claim sick days during annual leave/public hols)
- * overtime rates for shifts without notice + if employee disturbed at home
- * commitment not to use AWAs or other individual contracts - commitment to permanent workforce
- * Employees and union have right to consultation re major changes and production changes
- * training committee makes recommendations on training programs
- * significantly above award redundancy payments, especially for older employees
- * competency based classification structure
- * strong commitment to training and implementation of training program
- * significantly increased shift allowances and higher utilities allowances
- * flexi-time by agreement, so that can accrue stored days off to a max of 12 days to be taken at mutually agreed time
- * Sunday - double time and a half (not double time)
- * increased sick leave entitlements
- * unpaid personal leave is available with e'er consent (in addition to paid sick leave)
- * increased bereavement leave
- * increased accident make-up pay period
- * commitment to OH&S, including protective gear provided
- * make up time: with employer

Concessions by the employees

- * restricted meal allowance
- * e'eeey may be called for a shift without notice
- * some wage increases are subject to continuous improvement in performance
- * industrial action for which union is reasonably responsible and which hinder productivity may effect wage increases
- * no entitlement to full day's pay on Sunday
- * untaken leave paid out upon termination but without loading
- * accident make up pay levels fixed at current Act rates, and will not increase even if Act is amended
- * casuals have no entitlement to maternity/paternity/adoption leave, even if worked regularly over 12 month period

consent, employee can take time off ordinary hours and work those hours at a later time during the ordinary spread of hours
 * increased union involvement, including membership fee deduction from wages

Agreement Name Yakult Australia Pty Ltd National Union of Workers Agreement 2002
Industry Food Manufacturing
Type of Agreement s.170LJ Agreement
Our Categorisation Acceptable

Concessions by the employer

- * Well above award rates of pay.
- * Severance payments are the same as in the Award, however, in the Agt the union expressly reserves the right to make additional claims in respect of terminations and redundancy.
- * Improved allowances, including shift allowances
- * Provision for protective clothing
- * Strong union involvement in workplace.
- * Journey Accident Insurance and improved workers compensation top up.
- * Blood Donors leave added.
- * Strong commitment to training, including commitment to providing employees with more fulfilling and rewarding jobs.
- * Earlier access to long service leave

Concessions by the employees

- * Commitment to the improvement of productivity including the quality of work as an integral component of the work.
- * Allowances reduced
- * Commitment to training
- * Express statement ensuring that there is no restriction on casual labour
- * Parental Leave - no entitlement for casual employees to have parental leave

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name Bentley Chemplex Pty Ltd (Brisbane) Enterprise Agreement 2002
Industry Food Manufacturing
Type of Agreement s.170LK Agreement
Our Categorisation Acceptable

Concessions by the employer

- * establishment of consultative committee (optional in award)
- * No increase in number of hours worked: employee will not be required to work in excess of the agreed annualised hours and if overtime requirements increases, employees and employer will review this and develop a plan to reduce hours
- * significantly increased redundancy payments

Concessions by the employees

- * three month (instead of one month) probationary period
- * no higher duties pay where employee is undertaking structured training

APPENDIX B: AGREEMENT SUMMARIES

Industry	Agreement Name	Haigh's Chocolates (Victoria) Certified Agreements 2001
		Retail
	Type of Agreement	s.170LK Agreement
	Our Categorisation	Highly questionable
	Concessions by the employer	Concessions by the employees
	<ul style="list-style-type: none"> * Employee profit-sharing bonus * Rostering commitment to ensure e'ees are not disadvantaged by new penalty arrangements * weak consultation mechanism * employer to pay for training programs (but not employees time for attending) * Slight reduced span of ordinary hours (but unlikely to make much practical difference) * option for employee to cash in up to 50% of LSL 	<ul style="list-style-type: none"> * Loss of penalty rates for casual staff, lower penalty rates for permanent staff * Reduced eligibility for overtime and probably reduced rates for overtime overall * Annual leave loading collapsed into an allowance * Public Holiday pay collapsed into an allowance for part time employees * Confidentiality restraint of trade * Must abide by company policy * Below award base rates of pay * Below award wage rises throughout agmt * No redundancy pay * increased discretion to e'er over rostering * Employees required to attend training outside ordinary hours without pay * Employees must work at least 1 weekend in 3 and can be required to work on a Sunday * reduced e'ee discretion re when annual leave is taken * reduced flexibility re personal leave (re carer's leave)

Industry	Agreement Name	Nike Australia Retail Enterprise Agreement 2000
		Retail
	Type of Agreement	s.170LK Agreement
	Our Categorisation	Highly Questionable
	Concessions by the employer	Concessions by the employees
	<ul style="list-style-type: none"> * Marginally above-award base rates (although very difficult to tell) * Paid Maternity and Paternity leave for permanent staff (esp 10 weeks for maternity leave) * NIKE retail dollars (all employees) * Performance Sharing Plan (permanent staff) * Team Player Share Purchase Plan * Redundancy Payout * minimum and maximum hours must be set for part-time employees * strong commitment to training programs and ongoing mentoring and staff development * increased sick leave for permanent staff 	<ul style="list-style-type: none"> * Large increase in span of hours * Overtime loadings severely reduced or abolished * Penalty rates reduced or abolished * No sick leave, compassionate leave for casuals * No annual leave loading * Easter Monday "not a public holiday" * Extra hour before a second paid rest break * No guaranteed wage rises built into the agreement * increased discretion to employer over rostering * extensive performance management program, including disciplinary procedures

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name Greenery Garden and Leisure Centre Employment Agreement
2003
Industry Retail
Type of Agreement s.170LK Agreement
Our Categorisation Highly Questionable

* limit on jury service leave make-up payment to max of 4 weeks
* no entitlement to paid bereavement leave
* no sick leave for casuals
* no overtime for casuals

Concessions by the employer

- * above award redundancy entitlements, including higher entitlements for those over 45
- * ordinary hours and rostering (permanent) = shorter spread of hours on weekdays
- * weak workplace environment commitment - re harassment, unlawful discrimination, equal opportunity, OHS
- * probable above award base rates of pay for permanent employees
- * commitment to maintain "above award" rates (10% for F/T and P/T, 25% for casuals [although unclear what relevant comparable award rate is for casuals])
- * up to 3 years unpaid bereavement leave

Concessions by the employees

- * encouragement of individual bargaining, including express acknowledgement that AWAs and "individual agreements" will override this agmt to extent of any inconsistency
- * no requirement of reasonably predictable hours for part time employees, hours can be varied at complete discretion of employer
- * limitation upon union representation during dispute resolution - can only be represented by a fellow employee up until AIRC stage
- * ordinary hours and rostering (permanent staff) = almost complete discretion to employer - can vary start and finish times, no restrictions upon number of ordinary hours worked per day (i.e. shift length), longer spread of hours on weekends
- * ordinary hours and rostering (casual) = no rostering restraints whatsoever, can be required to work Sundays
- * shorter and more restricted meal/rest breaks
- * all allowances abolished
- * severely decreased and/or abolished penalty rates for all employees (partic for permanents)
- * annual leave loading abolished
- * reduced accident make-up pay time period
- * no wage increases built into the agreement
- * e'ers commitment to maintain "above award" rates (10% for F/T and P/T, 25% for casuals) is set against the award at date of certification and so can diminish in value over time

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name AWA [Publication of name not permitted]
Industry Retail
Type of Agreement AWA
Our Categorisation Highly Questionable

Concessions by the employer

- * slightly above award base rates for junior supervisors (because no junior rates apply for supervisors)
- * can cash in accrued annual leave in circumstances of pressing and domestic necessity
- * work on public holidays - extra 50% loading c.f. award
- * Birthday Leave: entitled to day off with pay on Birthday (permanent employees)
- * State Emergency Services Leave - 3 days paid per calendar year
- * wider definition and longer paid period for bereavement leave
- * wider definition of family for carer's leave
- * can take unpaid leave and convert 5 single days of annual leave to carer's leave
- * above award redundancy payouts, especially for over 45 yrs of age

Concessions by the employees

- * same as award base rates for shop assistants, adult supervisors (but wages rises occur later in year, so below award rates for most of year)
- * 10% lower junior rates for employees under 16 years of age
- * supervisors required to have first aid qualification but are not paid a first aid allowance
- * all allowances abolished
- * no rostering restrictions re number of starts and consecutive days off, split shifts allowed without additional allowances
- * increased span of ordinary hours
- * ambiguity in overtime clause could be ready down to remove 20% casual loading from calculation for casual overtime
- * reduced overtime availability because of increased span of hours
- * reduced overtime rates for overtime within ordinary span of hours for permanents.
- * abolished loadings for nightfill staff
- * reduced role for unions: limitation upon union representation during dispute resolution at workplace level, no right of entry for union officials (c.f. award)
- * penalty rates abolished completely, except for work on public holidays
- * payment for sick leave may be withheld during first 3 months
- * Blood Donor's Leave and Trade Union Training Leave abolished
- * no entitlement to minimum payment during stand-down
- * employee subject to overt video surveillance in the workplace
- * employee must not engaged in any outside employment without written consent of employer
- * can be required to work Sundays

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name Priceline Retail Employees Enterprise Agreement 2001
Industry Retail

Type of Agreement s.170LJ Agreement
Our Categorisation Marginally questionable

Concessions by the employer

- * Slightly above award base rates of pay
- * much stronger restrictions on rostering, notice and overtime than the award
- * casuals entitled to overtime pay
- * restrictions on the min/max hours of work for part time employees
- * paid carer's leave
- * Unpaid leave of absence available
- * Unpaid Natural Disaster Leave
- * permanent employees entitled to paid emergency service leave, defence forces leave, paid blood donors leave
- * well above-award redundancy entitlements
- * preference for permanent, rather than casual, employment
- * Commitment to training = paid training and Priceline Study Support Policy
- * commitment to ongoing consultation and provision for union involvement in workplace

Concessions by the employees

- * Slightly tougher eligibility reqts for superannuation and slighter narrower definition of ordinary time earnings for the purposes of calculation.
- * Slightly reduced meal and travel allowances
- * greatly reduced penalty rates
- * reduced sick leave entitlement for F/T and P/T
- * loss of sick leave for casuals

Agreement Name Just Jeans Group Limited Retail Agreement 2003
Industry Retail

Type of Agreement s.170LJ Agreement
Our Categorisation Marginally questionable

Concessions by the employer

- * Medium strength consultative mechanisms with e'ees and union - re major changes, especially re redundancy, equal opportunity and harassment policy development and implementation
- * Union involvement in dispute resolution procedure
- * Guidelines re interviewing of staff, security checks and carrying of coy moneys by staff
- * Higher rates of pay for juniors
- * More structured meal and rest breaks to ensure they are spaced throughout shift
- * Unpaid leave readily available in special circumstances
- * Personal/Carer's Leave
- * Lots of paid "community" leave: blood donors, bone marrow donors, emergency services etc.
- * Additional non-award allowances - First Aid and Location Allowance

Concessions by the employees

- * Commitment to avoid/reduce industrial action in resolution of disputes
- * Reduced loading (by 5%) for casual e'ees
- * Casuals must work reasonable overtime
- * No sick leave entitlement for casuals
- * Reduced availability and size of penalty rates

APPENDIX B: AGREEMENT SUMMARIES

Agreement Name Miller's Apparel National Certified Agreement 2002
Industry Retail

Type of Agreement s.170LJ Agreement
Our Categorisation Marginally questionable

Concessions by the employer

- * safe transport home for employees working late or early overtime
- * above award base rates of pay (although less above-award for casuals because of reduced casual loading)
- * above or same as award wage increases built into agreement
- * no junior rates for managers
- * variations to permanent employees rosters must not be frequent and must take into account family responsibilities
- * rostering generally more family-friendly eg. must get one weekend off in two, maximum number of rostered hours/week
- * min and max no of hours for part-time employees specified
- * increase night shift weekday penalties
- * improved family leave, including blood donor's leave and pre-natal leave
- * potentially extended application of Bereavement Leave, more time off for interstate and overseas deaths
- * improved junior rate %s for 17 and 18 year olds

Concessions by the employees

- * grievance procedure restricted to grievances under the agreement, not grievances generally
- * 5% reduced casual loading
- * can be required to work Sundays (unless covered by savings provision)
- * no span of ordinary hours - reduced access to overtime
- * no overtime for part time employee working more than their agreed ordinary hours but less than 72 hours per fortnight
- * Abolished Saturday and evening penalties; reduced Sunday penalties
- * no sick leave for casuals

Agreement Name Savers Australia Inc. Enterprise Agreement 2001
Industry Retail

Type of Agreement s.170LK Agreement
Our Categorisation Marginally questionable

Concessions by the employer

- * Above award wage rises (5% p.a. for 3 years)
- * perfect attendance bonus payments
- * paid Family Leave and Personal Leave
- * paid day off on Birthday
- * weak commitment to training program

Concessions by the employees

- * overtime rate reduced to flat extra \$5/hour for permanent employees
- * abolition of Saturday penalties
- * large reductions in Sunday and Public Holiday penalties
- * full employer discretion over location of work
- * increased span of ordinary hours
- * increased employer discretion over rostering
- * reduced sick leave entitlement
- * no explicit provision for union involvement in dispute resolution
- * no overtime for casuals

Agreement Name AWA [Publication of name not permitted]
Industry Retail
Type of Agreement AWA
Our Categorisation Marginally questionable

Concessions by the employer

- * Employee bonus scheme
- * Safe Transport Home guarantee
- * Employee Training Program
- * improved junior rates for 17 and 18 year olds
- * Key Holder Allowance and First Aid Officer Allowance
- * Above award base rates of pay for non-trainee e'ees (~7.5% for Retail E'ees, ~4% for Senior Sales Consultants, although basically same as award for Jun-Oct each yr because Safety Increases come in earlier than agmt increases)
- * Probable slightly above CPI wage increases built into agreement (generally <0.5% difference)
- * Sick Leave entitlement >61 hours may be converted to Special Leave (additional Annual Leave)
- * Paid family leave provided for (in addition to conversion of sick leave)
- * definition of immediate family includes de facto partners of same sex
- * payment in lieu of annual leave available by agmt for any due leave in excess of 4 weeks

Concessions by the employees

- * no guarantee in savings provision that employees will not suffer disadvantage by implementation of AWA
- * meal allowance reduced in monetary value and availability
- * reduced Travel Allowance for employees working away from ordinary place of employment
- * probationary/inexperienced employees paid below-award for first three months (3-5% below award)
- * no span of ordinary hours - e'ees can be rostered on 24 hrs
- * Reduced penalty rates for Sunday work
- * Abolished penalty rates for Saturday work, and work between 6-9pm weekdays
- * Reduced rates for Late Night Work, because under the award this would have been overtime
- * No span of ordinary hours - ordinary hours can be worked 24 hours a day/7 days a week
- * Cap on sick leave payouts to 380 hours/yr
- * Definition of immediate family excludes adopted children, and immediate family of a spouse/partner
- * No unpaid bereavement leave
- * part timers unlikely to be paid for public holidays
- * part timers: entitlements (sick leave, annual leave etc) do not accrue on hours worked in excess of core hours, even when they are not classed as overtime
- * no annual leave loading
- * payment in lieu of annual leave available by agmt for any due leave in excess of 4 weeks
- * restrictions upon when annual leave can be taken
- * no entitlement to accident make-up pay