

## THE VOICES OF THE LOW PAID AND WORKERS RELIANT ON MINIMUM EMPLOYMENT STANDARDS

### ABSTRACT

This article addresses and critiques whether there is adequate provision for certain workers — low paid workers and those who rely on the basic minimum safety net standards provided in the federal system of workplace regulation — to have a ‘voice’. Against the backdrop of historical developments over time in Australia to the present day under the *Fair Work Act 2009* (Cth), it explores the voices of these groups of workers.

### I INTRODUCTION

Throughout the history of the Australian industrial system a constant theme has been that there are mechanisms in place to ‘protect the weak’, whether this is in the form of minimum standards in awards, or the fact that enterprise agreements must satisfy a ‘no disadvantage’ or ‘better off overall test’ (BOOT) for workers. Some would say that the system has always existed for this purpose. The role of unions under the compulsory arbitration system (where minimum standards were determined by a statutory tribunal) was also to ensure that there was an equality of bargaining power between employer and employee parties.

This article considers these historical background issues, but also questions whether there is adequate provision for low paid and disadvantaged workers to have a ‘voice’ under the *Fair Work Act 2009* (Cth) (*Fair Work Act*). On its face, the *Fair Work Act* expressly guarantees protection to workers in the form of the BOOT,<sup>1</sup> by enabling ‘low paid’ employees to enter the enterprise bargaining arena via multi-employer agreements (in cases where they may have previously experienced difficulty utilizing the enterprise bargaining stream), by setting in place more comprehensive equal pay provisions, and by guaranteeing all employees the benefit of statutory minimum standards through access to the National Employment Standards (NES). Just how do these provisions operate, and do they sufficiently protect the ‘voice’ of low paid and disadvantaged employees?

The workers the subject of discussion in this article are generally those regarded as low paid who typically receive the minimum prescribed wage and in some cases have little to no bargaining power relative to their employers. It is beyond the scope

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<sup>1</sup> The requirement that employees covered by an enterprise agreement are better off overall than if they were covered by the relevant modern award: *Fair Work Act* pt 2-4 div 4 sub-div C.

of this article to provide a precise profile of such workers — over time the composition of this group has changed and the industries in which they are engaged also may change. But the defining characteristics remain as those who cannot command for themselves above minimum safety net wage and/or terms and conditions of work and who would be disadvantaged by a freely functioning, deregulated labour market, whether they are full-time, part-time or casual workers.<sup>2</sup>

## II TRADITIONAL MECHANISMS TO PROTECT THE WEAK (OR TO GUARANTEE A FORM OF ‘EMPLOYEE VOICE’)

Australia’s original selection of compulsory arbitration as the mechanism for resolving disputes ensured the system contained a number of unique characteristics: the central role played by a statutory tribunal; the position and status of trade unions as participants in the arbitration process; a concern for the ‘public interest’ (in that the underlying process and the role played by the statutory tribunal existed for the good of the community); and an ongoing emphasis upon protecting the low paid (or ‘the weak’).<sup>3</sup>

The adoption of a system of compulsory arbitration fixed in place by the *Conciliation and Arbitration Act 1904* (Cth) was a response to the turbulent industrial events of the 1890s, when both Australia and New Zealand were faced by arguments about employer freedom of contract in major industries. Compulsory arbitration meant the involvement of a third party tribunal to manage the dispute settlement process, and if necessary, to impose an award or determination upon the parties, rather than allow the free-for-all of collective bargaining.<sup>4</sup>

It was assumed that one element of the statutory tribunal’s role was ‘to protect the weak in the bargaining process by establishing a safety net’,<sup>5</sup> and this was aligned to the public interest. Initially, the public interest was associated with strike prevention, but it soon involved fixing a floor of minimum rights. The independent tribunal’s role was to protect the weak according to the reference point of the ‘public interest’ (as soon reflected by the decision in *Ex parte HV McKay*).<sup>6</sup>

<sup>2</sup> Fair Work Australia has grappled with the meaning of ‘low paid’: *Annual Wage Review 2009–10* (2010) 193 IR 380 [161]–[170].

<sup>3</sup> Richard Naughton is currently undertaking research towards a doctoral thesis identifying traditional themes underlying Australian compulsory arbitration. These themes are drawn from that research. See also: John Niland, ‘The Light on the Horizon: Essentials of an Enterprise Focus’ in Michael Easson and Jeffrey Shaw (eds), *Transforming Industrial Relations* (Pluto Press, 1990), 184–5.

<sup>4</sup> Marilyn J Pittard and Richard B Naughton, *Australian Labour Law: Text, Cases and Commentary* (LexisNexis, 5<sup>th</sup> ed, 2010) ch 7.

<sup>5</sup> J Isaac ‘Labour Market Regulation: Arbitration and Enterprise Bargaining — Are They Compatible’ in M Rimmer and J Isaac, ‘Directions in Labour Market Reform’ (Working Paper No 27, National Key Centre in Industrial Relations, Monash University, 1993) 19–25.

<sup>6</sup> (1907) 2 CAR 1 (*‘Harvester’*). In which Higgins J set a ‘fair and reasonable’ minimum wage for unskilled and skilled workers.

The concept of ‘protecting the weak’ (and this being in the ‘public interest’) was always prominent in the language and ideals of arbitration.<sup>7</sup> At the time of introducing the Conciliation and Arbitration Bill in 1904 Alfred Deakin spoke of legislation that offered the prospect of betterment and advancement for the individual, the family, and the class, as well as for the nation as a whole.<sup>8</sup> When reintroducing the Bill on 22 March 1904,<sup>9</sup> Deakin referred to the Conciliation and Arbitration Court’s wage-fixing jurisdiction, and appeared to anticipate the subsequent *Harvester* decision. He spoke of the Court fixing a fair level of wages in accord with the ‘general standard of civilization of a country’— the rate should be ‘no higher and no lower’ than the conditions upon which the Australian government’s ideals of ‘modern social justice’ were based.<sup>10</sup>

There was a relationship between this language and protecting the public interest: the system sought ‘to strike a fair balance between the interests of capital and labour’.<sup>11</sup> As a means of protecting the weak, it was necessary to remove the ‘might is right’ element from the process of dispute resolution’.<sup>12</sup> Observers of the Australian system suggest that the impact of the public interest requirement is ‘most often observed in the protection of the economically and industrially weak through the provision of minimum wage standards, and ... the operation of an orderly centralized wage fixing process’.<sup>13</sup>

As Deakin may have anticipated, the concept of a basic wage, as resulted from the *Harvester* case,<sup>14</sup> was partly based upon the public interest with employees being paid a ‘fair and reasonable’ wage as a mechanism to protect the weak. The reference in the decision to this wage was calculated on the basis of ‘the normal needs of an average employee regarded as a human being living in a civilized community’.<sup>15</sup>

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<sup>7</sup> John Niland, *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, 1978) 2.

<sup>8</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 30 July 1903, 2865 (Alfred Deakin).

<sup>9</sup> The original Conciliation and Arbitration legislation was withdrawn amid controversy between members of the Barton Protectionist Government concerning the form of the Bill: Greg Patmore, ‘The Origins of Federal Industrial Relations Systems: Australia, Canada and the USA’ (2009) 51 *Journal of Industrial Relations* 151, 157; Pittard and Naughton, above n 4.

<sup>10</sup> This description is similar to the type of language used by Niland: see Niland, above n 7.

<sup>11</sup> It was ‘the perceived need to protect the interests of the community that provided the foundational justification for the inclusion of s 51(xxxv) in the *Constitution*’: J T Ludeke, ‘Is Now the Time for Radical Change?’ in Don Rawson and Chris Fisher (eds), *Changing Industrial Law* (Croom Helm Australia, 1984) 14, 20.

<sup>12</sup> Niland, above n 7, 7. In addition, strikes and lockouts were prohibited under the first *Conciliation and Arbitration Act 1904* (Cth).

<sup>13</sup> W B Creighton, W J Ford and R J Mitchell, *Labour Law — Text and Materials* (LawBook, 2<sup>nd</sup> ed, 1993) [21.5].

<sup>14</sup> *Harvester* (1907) 2 CAR 1.

<sup>15</sup> An additional payment or margin was available to workers who demonstrated exceptional qualities and special skills.

The ‘basic’ wage was not confined to the money necessary for the main requisites of life — food, shelter, clothing. It also allowed for something extra ‘to come and go on’.<sup>16</sup> It was in the public interest to ensure that ‘Australian industrial citizens received sufficient wages to sustain themselves and their families’.<sup>17</sup> In what appears to be an early expression of ‘employee voice’, Higgins J emphasised that issues of fairness and the rights of employees involved more than ‘wages’. Workers were entitled to some say in working conditions; ‘[w]ages and hours are not everything’, he wrote. ‘A man wants to feel that he is not a tool, but a human agent finding self-expression in his work’.<sup>18</sup>

As ‘the interpreter of the social conscience’,<sup>19</sup> the industrial tribunal’s role always involved an ongoing link between establishing community standards and protecting the weak.<sup>20</sup> Over time this protection of the weak extended from wages per se, to a range of minimum employment standards (through the development of standard award conditions).

Another underlying feature of the compulsory arbitration system which demonstrates its ‘protective’ nature was that it was a ‘collective’ system.<sup>21</sup> Arbitral tribunals favoured a ‘single voice’ representing the needs of various workers across industry,<sup>22</sup> with unions being able to represent their members to redress the imbalance between parties to the employment relationship and to protect the weak. By this means, unions were legally entitled to act on behalf of their members, and make claims on behalf of all employees, whether they were members or not.<sup>23</sup> Moreover unions which registered under the federal system gained legal status — they could sue and be sued in their own name, and could hold property in their name.

Initially, it seems, the approach of the Commonwealth Court of Conciliation and Arbitration was to reach decisions on a case-by-case manner. After 1920 it shifted from this case-by-case approach, to a ‘Test-Case’ process, where outcomes flowed through

<sup>16</sup> Henry Bournes Higgins, ‘A New Province for Law and Order — III’ (1920) 34 *Harvard Law Review* 105, 113.

<sup>17</sup> Ronald McCallum, ‘Citizenship at Work, An Australian Perspective’ (Legal Studies Research Paper No 11/17, February 2011).

<sup>18</sup> Higgins, above n 16.

<sup>19</sup> *Merchant Service Guild Case* (1942) 48 CAR 586, 587 (Kelly J).

<sup>20</sup> Marilyn Pittard, ‘Reflections on the Commission’s Legacy in Legislated Minimum Standards’, (2011) 53 *Journal of Industrial Relations* 698.

<sup>21</sup> Breen Creighton, ‘One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?’ (2000) 24 *Melbourne University Law Review* 839.

<sup>22</sup> Andrew Frazer, ‘Trade Unions under Compulsory Arbitration and Enterprise Bargaining — A Historical Perspective’ in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining: Trade Unions and the Law* (Federation Press, 1995) 52, 80.

<sup>23</sup> E I Sykes and H J Glasbeek, *Labour Law in Australia* (Butterworths, 1972) 3; Pittard and Naughton, above n 4, chs 7, 15; Marilyn J Pittard, ‘A Personality Crisis: The Trade Union Acts, State Registered Unions and Their Legal Status’ (1979) 6 *Monash University Law Review* 49.

to Federal awards.<sup>24</sup> For example, in 1920 Higgins J instigated a test case in relation to standard hours of work,<sup>25</sup> and this was followed with similar proceedings in relation to the basic wage.<sup>26</sup> Awards established minimum labour conditions extending beyond wages, to matters such as hours of work, shift rosters, breaks, and allowances. It was a wider range of working conditions than existed in most countries, and by the 1970s contained 60 or more enforceable conditions.<sup>27</sup> This Test Case process has now been described ‘as one of the most significant regulatory institutions/processes in Australian social, economic and political history’.<sup>28</sup> There was evolutionary ‘development of the core safety net’ by the tribunal.<sup>29</sup> Development was ‘piecemeal and incremental, tested and explored over a lengthy period of time’, arguably ensuring that standards endured.<sup>30</sup> It enabled the award minimum standards to evolve through adversary proceedings involving employers, unions and government, and other interested intervening parties, with the final determination being made by the independent statutory body.<sup>31</sup> It also ensured minimum pay and conditions that could not legally be eroded by agreement of the parties. There were enforcement and compliance mechanisms which sought to ensure that awards were not breached. The Test Case process enabled peak unions to initiate claims which, after going through processes of arbitration and being embedded in a relevant award, would ultimately become a standard in an industry or the economy. Many of the improvements in conditions are attributable to this test case process, as in the case of job security, working hours, and maternity leave.<sup>32</sup>

Throughout this period the role of the tribunal and its task of acting by reference to the public interest always meant that it was engaged in a somewhat more sophisticated role than the mere settlement of industrial disputes.<sup>33</sup> Instead, it had the role

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<sup>24</sup> David Plowman, ‘Employers Associations and Compulsory Arbitration’ in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004) 603.

<sup>25</sup> *Standard Hours Case* (1921) CAR 1044.

<sup>26</sup> *Awards of the Court Binding Upon the Australian Railyways Union and Others — Basic Wage Inquiry 1930* (1930) 30 CAR 2; *Basic Wage Inquiry 1940* (1941) 44 CAR 41; *Basic Wage Inquiry 1949–1950* (1950) 68 CAR 698; *Basic Wage and Standard Hours Inquiry 1952–1953* (1953) 77 CAR 477.

<sup>27</sup> Michael Quinlan and Peter Sheldon, ‘The Enforcement of Minimum Labour Standards in an Era of Neo-Liberal Globalisation: An Overview’ (2011) 22(2) *The Economic and Labour Relations Review* 5, 15.

<sup>28</sup> Jill Murray, ‘The AIRC’s Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at Federal Level’ (2005) 18 *Australian Journal of Labour Law* 325.

<sup>29</sup> Pittard, above n 20, 707.

<sup>30</sup> *Ibid.*

<sup>31</sup> See also Pittard, above n 20.

<sup>32</sup> See, eg, *Termination, Change and Redundancy Case* (1984) 8 IR 34; 9 IR 115; *Maternity Leave Decision* (1979) 218 CAR 120; Pittard, above n 20.

<sup>33</sup> Note in particular that typically the jurisdiction of the Commission was limited, in that it was empowered ‘to prevent and settle industrial disputes extending beyond the limits of any one State’: *Australian Constitution* s 51(xxxv).

and functions of a quasi-economic legislature, because its decisions had far-reaching economic effects.

Certain of our observations are subject to the qualification that during the 1960s and through to 1975, collective bargaining-type settlements at enterprise and industry levels grew alongside arbitrated settlements,<sup>34</sup> and many of these were dominated by standards set by collective bargaining (or ‘over-award’ bargaining).<sup>35</sup> Notwithstanding this, it is important to bear in mind that arbitration remained at the forefront of the Australian system until the early 1990s.<sup>36</sup>

### III PROTECTING THE WEAK UNDER BARGAINING PROVISIONS (FROM 1992–2007)

In our view, the ideal of ‘protecting the weak’ (and guaranteeing a form of employee voice for all) has continued through to the enterprise bargaining era (from 1992) with requirements concerning the legitimacy of agreements and the ‘no disadvantage test’ (or the BOOT under the *Fair Work Act*). Further, the low-paid bargaining provisions under the *Fair Work Act* are specifically designed for workers who have not benefitted from the bargaining system. In spite of these arrangements we do make the qualification that various minimum standards (previously existing as award standards) are now fixed as statutory requirements under the *Fair Work Act*. This severely limits the opportunity for the statutory tribunal to consider and review minimum standards by the Test Case mechanism described earlier. Instead the current legislative provisions attract the criticism that the standards may become fixed over time and of increasingly less value to the low paid. The Test Case process is arguably one that better meets the ongoing requirements of the public interest. Having said that, the legislated standards have been informed, and were strongly influenced, by the tribunal test cases.<sup>37</sup>

#### *A The Changing Voice: 1992–2005*

With the exception of the Work Choices period 2005–2007, the focus upon procedural safeguards and a minimum standard test (‘no disadvantage’ test or BOOT) have formed part of Federal bargaining provisions since 1992.<sup>38</sup> At that time the relevant legislation introduced requirements to ensure that agreements did not disadvantage employees when compared with awards and other relevant laws. Where there was

<sup>34</sup> See Mark Bray and Pat Walsh, ‘Accord and Discord: The Differing Fates of Corporatism Under Labo(u)r Governments in Australia and New Zealand’ (1995) 6(3) *Labour and Industry* 1, 11; Dianne Yerbury and J E Isaac, ‘Recent Trends in Collective Bargaining in Australia’ (1971) 103 *International Labour Review* 421.

<sup>35</sup> J Isaac, above n 5, 20.

<sup>36</sup> As late as 1990, 80 per cent of Australian employees had wage rates specified or underpinned by federal awards: Australian Bureau of Statistics, ‘Award Coverage’, (Statistics, Catalogue No 6315, May 1990), cited in McCallum, above n 17.

<sup>37</sup> Pittard, above n 20.

<sup>38</sup> This minimum standards test was introduced in the *Industrial Relations Act 1988* (Cth) by the *Industrial Relations Amendment Act 1992* (Cth).

such a reduction the tribunal was required to consider whether the change proposed was contrary to the public interest in relation to the terms and conditions of those employees considered as a whole. The provision was not intended to reduce well established and accepted standards which applied across the community such as maternity leave, standard hours of work, parental leave, minimum rates of pay, and termination change and redundancy provisions.

Looking back, it is the Keating (Labor) government's *Industrial Relations Reform Act 1993* (Cth) ('*IR Reform Act*') that appears to be the nation's most significant piece of industrial legislation in recent decades (even more so, perhaps, than the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices*'). It formally set in place an enterprise bargaining system and altered the nature of underlying awards. Parties negotiating enterprise agreements were subject to good faith bargaining obligations.<sup>39</sup> It referred to a new set of legislated minimum employment entitlements, described as a 'safety net' for those bargaining under the legislation. These minimum conditions included minimum wages, termination of employment, equal remuneration for women, parental leave, and family leave.<sup>40</sup> Assuming that agreements made under the system (whether negotiated between an employer and union, or a 'collectivity' of employees without union involvement)<sup>41</sup> determined terms and conditions of employment, there was a major change in the role of the Commission (the independent statutory tribunal).<sup>42</sup> Conditions of employment were now fixed via negotiations between the parties, 'with the tribunal relegated to a more or less marginal supervisory role'.<sup>43</sup> In the case of both agreements made in prevention or settlement of an industrial dispute ('Division 2 agreements') and enterprise flexibility agreements made by corporate employers with their employees ('Division 3 agreements'),<sup>44</sup> it was necessary for the agreement to meet a 'no disadvantage' test.<sup>45</sup> The no disadvantage test was two-fold: the no disadvantage test would not be met if employees suffered a reduction in their entitlements under awards or Commonwealth or state laws and if, in the context of terms and conditions as a whole, 'the Commission [considered] that the reduction is contrary to the public interest'.<sup>46</sup> Notwithstanding the no

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<sup>39</sup> See, eg, Richard Naughton, 'Bargaining in Good Faith — The Asahi Decision' (1995) 8 *Australian Journal of Labour Law* 165.

<sup>40</sup> See *Industrial Relations Reform Act 1993* (Cth) s 150A; arguably these provisions are predecessor provisions to what now appears in the National Employment Standards in the *Fair Work Act*.

<sup>41</sup> One aspect of the *IR Reform Act* was that it allowed parties to enter an Enterprise Flexibility Agreement without union involvement ('EFAs'), often known as the non-union bargaining stream. This was a major challenge to the traditional role of unions as the exclusive representative of employees under the Australian industrial system.

<sup>42</sup> The article uses the word 'Commission' to collectively refer to the Australian Industrial Relations Commission and its predecessors.

<sup>43</sup> Creighton, above n 21.

<sup>44</sup> *Industrial Relations Reform Act 1993* (Cth) ss 170MA, 170NA (respectively).

<sup>45</sup> *Ibid* ss 170MC(1)(b), 170NC(1)(d).

<sup>46</sup> *Ibid* ss 170MC(2) (Division 3 agreements), 170NC(2) (Division 2 agreements).

disadvantage test, the Commission was permitted to refuse certification of an agreement that was contrary to the ‘public interest’.<sup>47</sup> Arguably, therefore the concept of the public interest was retained under a different guise because of its relationship with the ‘no disadvantage’ requirement.<sup>48</sup> In addition, the *IR Reform Act* contained various protections for vulnerable employees<sup>49</sup> as the tribunal was required to take account of ‘relevant employees’ at the time certification was sought. The relevant categories were (i) women; (ii) persons whose first language was not English; and (iii) young persons.<sup>50</sup> The Commission was required to satisfy itself that appropriate steps were taken to consult with employees in these categories about the terms and requirements of the agreement. There are some interesting aspects to this. Although the tribunal’s function had changed, it was nevertheless required to perform its traditional role of an independent third party protecting the weak.

Under the Howard (Liberal–National coalition) government, between 1996 and 2007, there was a stronger move towards deregulation of industrial relations, first with the *Workplace Relations Act 1996* (Cth) (*‘Workplace Relations Act’*) (that existed between 1996 and 2005), and later the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*‘Work Choices’*).<sup>51</sup> The *Workplace Relations Act* continued the shift to an ‘enterprise-bargaining culture’, but with some important changes. The objects of the legislation emphasized that the ‘primary responsibility for determining matters affecting the relationship between employers and employees [rested] with the employer and employees at the workplace or enterprise level’.<sup>52</sup> Presumably, this sought to downplay the role of third parties, such as the tribunal and unions.

The *Workplace Relations Act* restricted awards to 20 specified allowable items (or ‘a minimum core of safety net terms and conditions of employment’),<sup>53</sup> and constraints were placed on the Commission’s dispute settling functions. The legislation removed the requirement on parties to ‘bargain in good faith’ (meaning that collective

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<sup>47</sup> Ibid ss 170MD(1) (except where a single business was involved in Division 2 agreements), 170ND(3).

<sup>48</sup> See, eg, Creighton’s discussion both in relation to the *IR Reform Act* and the subsequent *Workplace Relations Act* that there was an ongoing perception that it was contrary to the public interest for employees to be deprived of award benefits or entitlements without the guarantee of a ‘no disadvantage’ test: Creighton, above n 21; Waring and Lewer referred to the no-disadvantage test as ‘a symbol of civility in the Australian industrial relations system — a means to convince workers that equity considerations would not be forgotten in the new decentralised system’: Peter Waring and John Lewer, ‘The No-Disadvantage Test: Failing Workers’ (2001) 12 *Labour and Industry* 65, 66.

<sup>49</sup> See Creighton, above n 21.

<sup>50</sup> *Industrial Relations Reform Act 1993* (Cth) s 170MG; in the case of Division 3 enterprise flexibility agreements: *Industrial Relations Reform Act 1993* (Cth) s 170NG.

<sup>51</sup> Pittard and Naughton, above n 4, chs 11–13; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) ch 12; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011).

<sup>52</sup> *Workplace Relations Act 1996* (Cth) s 3(b).

<sup>53</sup> McCallum, above n 17, 3; see also Pittard and Naughton above n 4, ch 10.

bargaining by employers under the *Workplace Relations Act* became voluntary in nature).<sup>54</sup> The tribunal's jurisdiction to settle labour disputes by making industrial awards was diminished. The Commission's award-making powers were limited to determinations establishing 'a safety net of minimum wage rates and minimum terms and conditions such as ordinary time hours of work, allowances, redundancy pay, and leave arrangements'.<sup>55</sup> The award system remained, but it was regarded as a safety net underpinning bargaining arrangements<sup>56</sup> and there was significant reduction in the industrial matters contained in awards (ie, the 20 allowable award matters). There was less opportunity for the statutory tribunal to fix and review minimum standards having regard to the position of the low paid.

A new pt VIB of the *Workplace Relations Act* dealt with the making of certified agreements, and the 'object' of this part referred to the tribunal's role 'facilitating' the making and certifying of agreements.<sup>57</sup> The legislation allowed for two forms of certified agreement (ie, those made in settlement of industrial disputes or situations,<sup>58</sup> and those made with 'constitutional corporations').<sup>59</sup> The possibility for a corporate employer to make an agreement directly with its employees (without union involvement) first introduced under the *IR Reform Act* was continued. In addition, the *Workplace Relations Act* introduced 'greenfields' agreements that were available in the case of 'start-up' businesses. The requirement that enterprise agreements meet a no disadvantage test was retained under the *Workplace Relations Act*, with this test being administered by the Commission.<sup>60</sup> Although the test remained, it was balanced against the more limited category of allowable award matters, rather than the full content of awards, as was previously the case. Further, agreements were measured against any relevant award or law on a *global basis* to ensure that employees were no worse off *overall*.<sup>61</sup> This suggested there was a significant weakening of the test; in any event, agreements that did not meet the test were able to be certified if this was 'not contrary to the public interest'.<sup>62</sup>

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<sup>54</sup> See also Joe Isaac, 'Reforming Australian Industrial Relations — 21<sup>st</sup> Foenander Lecture' (2007) 49 *Journal of Industrial Relations* 410, 417; Richard Naughton, 'Sailing Into Unchartered Seas: The Role of Unions under the *Workplace Relations Act 1996* (Cth)' (1997) 10 *Australian Journal of Labour Law* 112.

<sup>55</sup> McCallum, above n 17, 4.

<sup>56</sup> Therese MacDermott, 'Australian Labour Law Reform: The New Paradigm' (1998) 6 *Canadian Labour and Employment Law Journal* 127.

<sup>57</sup> *Workplace Relations Act 1996* (Cth) s 170L.

<sup>58</sup> *Ibid* pt VIB div 3.

<sup>59</sup> *Ibid* pt VIB div 2.

<sup>60</sup> *Ibid* ss 170X-170XF.

<sup>61</sup> *Ibid* s 170LT(3); see Marilyn Pittard, 'Collective Employment Relations: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62, 83.

<sup>62</sup> See also Richard Mitchell et al, 'What's Going On With the 'No Disadvantage Test': An Analysis of Outcomes and Processes under the *Workplace Relations Act 1996* (Cth)' (2005) 47 *Journal of Industrial Relations* 393.

It appeared that the Howard government's clear intent was 'to move the Australian system away from its collectivist origins, in which there was a strong role for unions and the tribunal, towards a more fragmented and flexible system of individual bargaining between employees and employers'.<sup>63</sup> The device for individualizing the Australian system was the Australian Workplace Agreement ('AWA'), which initially, at least, was required to meet a 'no disadvantage' test (in comparison with the relevant award), and was scrutinised by a statutory authority (although in this case it was the Office of the Employment Advocate ('OEA') instead of the Commission). The *Workplace Relations Act* marked a stepping-away from some of the elements of the Australian system that we identified as protecting the weak.

Throughout the period when the *Workplace Relations Act* operated (1996–2005), the Commission continued to wield powers of conciliation and arbitration, subject to the various limitations imposed by the legislation about what constituted an 'allowable award matter',<sup>64</sup> and it retained powers to determine key terms and conditions of employment including minimum wages.<sup>65</sup>

The *Workplace Relations Act* undermined the role of unions (and their traditional status as the institution with a specific purpose of protecting the weak).<sup>66</sup> In particular, the legislation sought to outlaw preference clauses and closed shop provisions, imposed strict restraints upon union right of entry to workplaces, and implemented a freedom of association regime where the right not to join a union ranked equally alongside the right to join the organisation.<sup>67</sup>

### B *The Enfeebled Voice Under Work Choices*

While the Commission continued to exercise jurisdiction in relation to agreements under the *Workplace Relations Act*, this jurisdiction was totally removed under the highly controversial *Work Choices* legislation.<sup>68</sup> *Work Choices* mounted a steadfast

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<sup>63</sup> Nick Wailes and Russell D Landsbury, 'Flexibility vs Collective Bargaining?: Patterns of Australian Industrial Relations Reforms During the 1980s and 1990s' (ACIRRT Working Paper No 49, University of Sydney, 1997) 38–40.

<sup>64</sup> Pittard gives an example of this, and also makes the point that there was an express diminution in the Commission's award-making jurisdiction under the *Workplace Relations Act*. Under the *Industrial Relations Act* the Commission was stated to have power of arbitration to prevent and settle disputes 'where necessary'. In contrast, however, the *Workplace Relations Act* referred to arbitration being used 'as a last resort and within limits specified by this Act': Pittard, above n 61, 66.

<sup>65</sup> The best known test case conducted by the Commission during this period is possibly the *Parental Leave Case* (1990) 36 IR 1; a further decision made certain extensions to that decision: *Parental Leave Test Case* (2005) 143 IR 245.

<sup>66</sup> For discussion see Naughton, above n 54.

<sup>67</sup> This would outlaw any preference provisions that may have existed; see also MacDermott, above n 56, 143; see generally Pittard and Naughton, above n 4.

<sup>68</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

attack upon the 'ideals' of compulsory arbitration. It also made changes to the award-making process, and imposed further restrictions upon the ability of unions to act as the acknowledged representatives of employees.<sup>69</sup>

Under *Work Choices* it was only necessary for agreements to meet the five elements of the legislated Australian Fair Pay and Conditions Standard, which included a minimum rate of pay; maximum ordinary hours of work; annual leave; sick leave; and parental leave;<sup>70</sup> plus certain required protected award conditions. Having said this, it was possible for employee parties to 'trade off' these so-called protected award standards by express agreement but not the legislated standards. These 'protected' standards (such as penalty rates, overtime pay, rest breaks, and annual leave loading)<sup>71</sup> were matters previously developed by an independent tribunal in the *Harvester* tradition of protecting the weak. Under *Work Choices*, the Commission's role in developing minimum standards was removed by legislative sleight of hand. The voice of unions in agitating for a change in conditions was limited to their involvement in the making of collective agreements. Just how effective their voice may have been depended on the strength of the unions in the industry and the relative bargaining strength of employer and employee.

Under *Work Choices*, the Commission no longer had a supervisory jurisdiction over collective agreements. Instead, these agreements were simply lodged with the OEA (which later became the Workplace Authority), and took effect from the date of lodgement.<sup>72</sup> *Work Choices* significantly diminished the role of the statutory tribunal — it was no longer possible for the industrial parties 'to seek the compulsory arbitration of industrial disputes',<sup>73</sup> which meant the abolition of the 'arbitral side' of the industrial relations system. It had a consequent reduction in the voice of unions in bringing such matters to the central umpire.

Significantly, the Commission had no award-making power outside the award rationalisation process and the content of awards was now further reduced to 13 minimum

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<sup>69</sup> Other important aspects of *Work Choices* were, of course, the limitations imposed on unfair dismissal rights (which appeared on their face to demonstrably challenge the underlying issue of 'protecting the weak', or an emphasis of the legislation upon 'fairness').

<sup>70</sup> For some discussion of the Australian Fair Pay and Conditions Standard and its relation to previous award minima see Joo-Cheong Tham, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123, 144–5.

<sup>71</sup> See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 354. This provision was repealed by the Rudd–Gillard Government in 2008.

<sup>72</sup> The lack of pre-approval 'vetting' led Forsyth and Sutherland to observe that there were serious concerns 'about the absence of meaningful protection of employees' interests': Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations under Siege: The *Work Choices* Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183.

<sup>73</sup> Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) 84.

standards.<sup>74</sup> The Commission's role 'facilitating' the agreement-making process, or conciliating or mediating a workplace dispute, was removed. In relation to bargaining, the Commission's powers were essentially limited to granting protected action ballot orders with respect to strike action taken during the course of bargaining.

Individual agreements ('AWAs') were elevated in status and became the dominant form of industrial instrument, prevailing over not only awards but collective agreements. Certainly individual low paid employees would have feeble voices, if heard at all, in negotiating AWAs.

The effect of these changes meant that the tribunal, trade unions and collective bargaining were 'marginalised'. The diminished significance of awards and diminished role of trade unions meant those elements of the compulsory arbitration system that gave a voice to the low paid were downgraded.<sup>75</sup> In conjunction with the removal of virtually all protections against unfair dismissal, this impact was even greater for the weaker and disadvantaged employees except those fortunate enough to be employed by large employers.<sup>76</sup> The fear of losing their jobs also meant the loss of voice by the weaker and more vulnerable employees to complain about unfairness at work or even to attempt to negotiate better conditions.<sup>77</sup>

*Work Choices* appeared to envisage that awards would disappear before too long. No new awards could be made and once an agreement was in place, an award would effectively have no more relevance to the parties. On the agreement's termination, it was not the entire award that would 'revive', but only the so-called 'protected' conditions (which then applied to an individual's employment together with the Australian Fair Pay and Conditions Standard).<sup>78</sup> The Commission's powers to revise minimum wages on a regular basis were handed to the Australian Fair Pay Commission ('AFPC'), thus it was this newly appointed statutory body that fixed minimum wages instead of the Commission. It appeared to envisage a new type of wage-fixing far removed from the traditional emphasis upon 'wages being "fair

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<sup>74</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 539; Jill Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35 *Industrial Law Journal* 343, 344; see also Colin Fenwick, 'How Low Can You Go? Minimum Conditions Under Australia's New Labour Laws' (2006) 16 *Economic and Labour Relations Review* 85, 90–1.

<sup>75</sup> Forsyth and Sutherland, above n 72, 197.

<sup>76</sup> See Marilyn Pittard, 'Back to the Future: Unjust Termination of Employment under the Work Choices Legislation' (2006) 19 *Australian Journal of Labour Law* 225; Marilyn Pittard, 'Fairness in Dismissal: A Devalued Right' in Julian Teicher, Rob Lambert and Anne O'Rourke (eds), *WorkChoices: The New Industrial Relations Agenda* (Pearson Education, 2006) 74–90.

<sup>77</sup> Regarding impact of *Work Choices* on job security see David Peetz, 'Assessing the Impact of WorkChoices One Year On: Report to Department of Innovation, Industry and Regional Development' (19 March 2007).

<sup>78</sup> Joel Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 19 *Australian Journal of Labour Law* 210.

and reasonable” and supporting a decent standard of living’.<sup>79</sup> Instead, the AFPC’s deliberations in wage-setting were expressly to promote ‘the economic prosperity of the people of Australia’; and to this end it was required to consider issues such as ‘the capacity of the unemployed and low paid to obtain and remain in employment’, ‘employment and competitiveness across the economy’ and ‘a safety net for the low paid’.<sup>80</sup>

Another aspect of *Work Choices* (which to be fair had evolved from earlier legislative developments) was implementation of the Australian Fair Pay and Conditions Standard as statutory minima. This again raised the question of ‘legislated standards’ being imposed in the employment area, rather than the use of what might be termed ‘arbitrated’ standards (including the test case mechanism) that were responsive ‘to the voice and needs of the industrial parties, government and community’.<sup>81</sup> As we have seen, the former standards were developed by an independent tribunal in the *Harvester* tradition of protecting the weak. Even though the Australian Fair Pay and Conditions Standard was derived from the standards set by the Commission in the test cases,<sup>82</sup> the Commission’s primary role of developing minimum standards was removed. Over time there had been a transition from a system of collective labour relations that existed at the commencement of the 1990s to the concept of legislated standards that were focussed on the individual.<sup>83</sup> Did these ‘universal standards’ allow for ‘dynamic regulatory change’, or change that was responsive to the voice and needs of individual employees?<sup>84</sup>

#### IV PROTECTING THE WEAK UNDER THE FAIR WORK ACT

There has now been a dramatic reversal from the position under the *Workplace Relations Act* and *Work Choices*. The objects of the *Fair Work Act* insist that the purpose of the legislation is to provide ‘a balanced framework for cooperative and productive workplace relations ... by achieving productivity and fairness through an emphasis on enterprise-level collective bargaining objectives and clear rules governing industrial action’.<sup>85</sup> In fact, the objects provisions contain a politically-charged statement referring to the maintenance of a guaranteed safety net of minimum wages and conditions that ‘can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace system’.<sup>86</sup>

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<sup>79</sup> Rosemary Owens, ‘Working Precariously: The Safety Net After Work Choices’ (2006) 19 *Australian Journal of Labour Law* 161.

<sup>80</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 7J.

<sup>81</sup> Owens, above n 79.

<sup>82</sup> Pittard, above n 19.

<sup>83</sup> Owens, above n 79.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Fair Work Act* s 3(f).

<sup>86</sup> *Ibid* s 3(c).

Although the legislation is primarily focussed upon bargaining, the *Fair Work Act* reinforces some of the Australian system's traditional emphasis upon concern for the weak (or low paid): it reinstates power to the statutory tribunal, refers to the 'public interest' throughout its provisions, and gives considerably more influence and authority to unions. In our view the strongest indications of this decision by government to revert to a position allowing for more emphasis upon 'employee voice' are the strengthening of the position of unions at the workplace, the requirements for approval of agreements (including BOOT) that are exercised by the statutory tribunal, and the process enabling low paid employees to enter the bargaining stream. Moreover, it is not insignificant for the rights of vulnerable workers, as well as workers more generally, that there are increased protections against dismissal and unfair treatment at work under the general protections in pt 3-1 of the *Fair Work Act* and that the unfair dismissal protections previously lost under *Work Choices* are restored.

#### *A Agreement Making under the Fair Work Act*

The emphasis of the *Fair Work Act* is on collective bargaining. This has been described as a 're-regulation' of the bargaining provisions,<sup>87</sup> and the provisions have been described as marking a return to the collectivist principles that underlay the traditional Australian system.<sup>88</sup> It is evident that unions will more than likely be bargaining representatives for the purpose of negotiating agreements,<sup>89</sup> and can activate statutory support mechanisms that may lead to the imposition of arbitrated outcomes upon 'recalcitrant employers'. Further, only trade unions and employers can be a party to a greenfields agreement.<sup>90</sup>

The provisions refer to the Fair Work Commission ('FWC'), previously Fair Work Australia, facilitating good faith bargaining by making bargaining orders, dealing with disputes where bargaining representatives request assistance, and ensuring that applications for approval of enterprise agreements are processed 'without delay'.<sup>91</sup> It is evident that the statutory tribunal is once more at the center of this bargaining procedure.

The legislation refers to a number of pre-approval requirements which include employers having to take all reasonable steps to ensure that employees who will be covered by the agreement are given access to a copy of the agreement (and any materials incorporated by reference into the agreement) seven days before it

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<sup>87</sup> Rae Cooper, 'The "New" Industrial Relations and International Economic Crisis: Australia in 2009' (2010) 52 *Journal of Industrial Relations* 261, 262.

<sup>88</sup> Ibid.

<sup>89</sup> Rae Cooper and Bradon Ellem, 'Fair Work and the Re-Regulation of Collective Bargaining' (2009) 22 *Australian Journal of Labour Law* 284. It may be possible for individual employers to nominate their own BR, but this is unlikely. The relevant union is the bargaining representative unless the employee nominates their own representative: *Fair Work Act* s 174(3).

<sup>90</sup> *Fair Work Act* s 172(2)(b); Cooper and Ellem, above n 89, 295.

<sup>91</sup> *Fair Work Act* s 171(b)(i)-(iii).

is subject to a vote of employees.<sup>92</sup> An employer must take all reasonable steps to ensure that the terms and effect of the agreement are explained to employees, taking into account the particular circumstances and needs of those employees.<sup>93</sup> Importantly, FWC believes that its role deciding whether approval requirements have been satisfied requires it to take account of its role facilitating the making of agreements.<sup>94</sup>

Agreements must not contravene those *Fair Work Act* provisions concerning the interaction of agreements and NES,<sup>95</sup> and must satisfy the obligation that they pass the BOOT.<sup>96</sup> The BOOT replaces the ‘no disadvantage test’ that has now applied at different stages as the applicable approval test since 1992, except during the Work Choices period. The test builds a ‘safety net’ mechanism into the bargaining system, and seeks to ensure that the ‘weak’ are protected. As Creighton has noted, it also builds a public interest element into the statutory approval process.<sup>97</sup> The BOOT requires FWC to be satisfied that, at the time approval of the agreement is sought,<sup>98</sup> each award-covered employee and prospective award covered employee to be covered by the agreement ‘would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee’.<sup>99</sup> The legislation has built in requirements about when an employer must advise employees of their representation rights.<sup>100</sup> The relevant notice must tell employees that their bargaining representative may represent them in negotiations towards an agreement.<sup>101</sup> The individual employee may appoint any person as the bargaining representative, but if they are a member of a union and do not appoint another person to act as their bargaining representative, the relevant union becomes bargaining representative by default.<sup>102</sup>

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<sup>92</sup> Ibid s 180(2)-(6). In other versions of the legislation, there were similar procedural steps prior to agreement approval.

<sup>93</sup> Ibid s 180(5).

<sup>94</sup> Having said this, the following decision of FWA suggests that the statutory requirements are to be considered in ‘a practical, non-technical manner’: *McDonalds’s Australia Pty Ltd v Shop Distributive and Allied Employees’ Association* [2010] FWAFB 4602 (21 July 2010). Aside from these provisions, the tribunal has no discretion to approve an enterprise agreement if the mandatory pre-approval requirements have not been met: [2010] FWAFB 4602 (21 July 2010) [13].

<sup>95</sup> *Fair Work Act* ss 55, 186(2)(c).

<sup>96</sup> Ibid s 186(2)(d).

<sup>97</sup> Creighton, above n 21, 862.

<sup>98</sup> Ibid s 193, as to the ‘test time’, and the accompanying definition in s 193(6).

<sup>99</sup> Ibid s 193(1); FWC is entitled to assume that the BOOT requirements are satisfied if a particular employee is a member of a class, and the test is generally satisfied when applied to that class: *Fair Work Act* s 193(7).

<sup>100</sup> This might be, for example, when an employer has agreed to bargain or initiates bargaining, or a majority support determination (an indication of majority support for bargaining from employees) comes into operation: *Fair Work Act* s 173(2).

<sup>101</sup> *Fair Work Act* s 174(2).

<sup>102</sup> This is the union that is entitled to represent the industrial interests of the employee in relation to work to be performed under the agreement: *Fair Work Act* s 174(3).

An employer can no longer refuse to participate in collective negotiations as was the case under the Work Choices model, and unions are granted a significant role in the bargaining process. The *Fair Work Act* has been described as a ‘compulsory bargaining system’, in contrast with the ‘voluntary bargaining system’ that existed between 1994 and 2009.

Bargaining representatives engaged in the bargaining negotiations are subject to what the legislation terms ‘good faith bargaining requirements’ from the notification time.<sup>103</sup> These good faith bargaining requirements include attending and participating in meetings, disclosing relevant information, responding to proposals, and refraining from capricious and unfair conduct that undermines freedom of association and collective bargaining.<sup>104</sup> The ongoing bargaining activities are supervised by FWC and ‘there is capacity for the regulator to intervene and make orders compelling behaviour on bargaining parties at different stages in the bargaining process’.<sup>105</sup> The ‘facilitative’ role invested in FWC is a significant change from the provisions under the *Work Choices* legislation, where the Commission had few formal powers to resolve bargaining disputes.<sup>106</sup>

FWC now operates in a similar way to the (pre-*Work Choices*) Commission.<sup>107</sup> The tribunal has a more important role reviewing agreements than was the case in the *Work Choices* period, and it has been invested with a range of powers to *facilitate good faith bargaining, and the making of agreements*. These functions restore the significant role of the statutory industrial tribunal in the federal industrial system.<sup>108</sup> In fact FWC has a broad range of powers, except for making awards in settlement of *industrial disputes*. It may deal with bargaining disputes in many cases at the request of just one party.<sup>109</sup> It has power to make, renew and vary modern awards; to supervise the bargaining process, including industrial action; and resolve unfair dismissal claims.

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<sup>103</sup> *Fair Work Act* s 230(2).

<sup>104</sup> *Ibid* s 228(1); see, for detailed discussion of the application of the good faith bargaining provisions, Anthony Forsyth, ‘“Exit Stage Left”, Now “Centre Stage”: Collective Bargaining under Work Choices’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work — The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009).

<sup>105</sup> Cooper, above n 87, 267.

<sup>106</sup> Andrew Stewart, ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3, 34; Richard Naughton, ‘The Role of Fair Work Australia in Facilitating Collective Bargaining’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012).

<sup>107</sup> Stewart, above n 106, 14.

<sup>108</sup> Jill Murray, ‘Labour Standards, Safety Nets and Minimum Conditions’ (2008) 18(2) *Economic and Labour Relations Review* 43; see also John Buchanan, ‘Labour Market Efficiency and Fairness: Agreements and the Independent Resolution of Difference’ (2008) 18(2) *Economic and Labour Relations Review* 85.

<sup>109</sup> Creighton and Stewart, above n 51, 129.

Unlike the circumstances imposed on the Commission under *Work Choices*, FWC has increased powers of arbitration (or to issue a workplace determination), particularly in the case of industrial action causing harm to the national economy, or to the parties involved<sup>110</sup> and in the case of ‘low paid workers’ who have previously been excluded from the enterprise bargaining stream, or had difficulty achieving enterprise outcomes.

The *Fair Work Act* is regarded as a strengthening of the safety net and an attempt to undo changes fixed in place by *Work Choices*. Consequently, the legislation is an example of the ‘protecting of the weak’ element of the traditional compulsory arbitration system. It is the NES together with modern awards that comprise the new safety net, with the NES stated to be ‘a proper safety net of legislated conditions’.<sup>111</sup> The NES include certain additions to the Australian Fair Pay and Conditions Standards floor of rights that existed under the *Work Choices* legislation. These are: the right to request flexible working arrangements, the right to extend parental leave by periods of up to 12 months, community service leave, notice of termination and redundancy pay entitlements, and the provision of an information statement on rights and entitlements. Of these, it is the right to request flexible working hours and the ability to ‘cash-out’ certain forms of leave that are new benefits.<sup>112</sup>

The new-style awards are no longer the outcome of an adversary process. Modern award making is a ‘top down process’, where a Full Bench of FWC is given the task of developing an award framework, which together with the NES constitutes a safety net of terms and conditions.<sup>113</sup>

In spite of these comments and the different delivery mechanism for minimum standards under the *Fair Work Act*, the ‘safety net’ requirements signify the ongoing importance of ‘protecting the weak’ under the Australian industrial system. Another aspect of the *Fair Work Act* is that it establishes the Minimum Wages Panel (comprising certain of its members) that is required to establish a safety net of ‘fair minimum wages’, having regard to various matters that comprise the ‘Minimum Wages Objective’; these include ‘promoting social inclusion through increased work participation’, and ‘relative living standards and the needs of the low paid’.<sup>114</sup> The role played by the Minimum Wages Panel and its considerations in performing that role differ markedly from those of the AFPC under *Work Choices*.

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<sup>110</sup> *Fair Work Act* pt 3-3 div 6; see also, an order stopping industrial action at Qantas: *Application by Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444 (31 October 2011).

<sup>111</sup> Australian Labour Party, *Australian Labor Party National Platform and Constitution* (2007), cited in Jill Murray and Rosemary Owens, ‘The Safety Net: Labour Standards in the New Era’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work, The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 40.

<sup>112</sup> Some of these NES were already in previous legislation — they have been gathered together, though, in the bundle of legislated standards called NES: see also Pittard, above n 20.

<sup>113</sup> Modern awards cannot generally exclude the NES, although they may contain terms that are ancillary or incidental to the NES: *Fair Work Act* s 55.

<sup>114</sup> *Fair Work Act* s 284.

*B Practical Steps to Protect the ‘Voice’ of Vulnerable Employees*

Under the ‘Equal Pay’ provisions appearing in pt 2-7 of the *Fair Work Act*, FWC has power to make an order ‘for work of equal or comparable value’.<sup>115</sup> The provisions have now been utilised in a case maintained by the Australian Services Union and four other unions in the social, community and disability services sector, where the tribunal found that work undertaken by social and community workers was undervalued under the new provisions.<sup>116</sup>

The low-paid bargaining provisions in pt 2-4 div 9 of the *Fair Work Act* raise the prospect of multi-employer or industry-wide bargaining in certain low-paid sectors.<sup>117</sup> Arguably, at least, these provisions enable workers who have traditionally been deprived of the benefits of enterprise bargaining to enter the enterprise bargaining stream.<sup>118</sup> In some circumstances these provisions may also invest FWC with general powers of arbitration in relation to classes of low paid employee.

The underlying elements of compulsory arbitration are relevant in these requirements. A low-paid authorisation (or special low-paid workplace determination) is available to a low-paid employee,<sup>119</sup> the orders are made by FWC, with any application typically being made at the instigation of a union party,<sup>120</sup> and FWC’s ability to make such an order depends on it being satisfied that it is in the public interest to make an authorisation or subsequent determination (having regard to matters such as the history of bargaining in the industry and the relative strength of the parties).<sup>121</sup> The provisions are an exception to the general expectation that collective bargaining under the *Fair Work Act* takes place at enterprise level.<sup>122</sup>

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<sup>115</sup> Ibid s 302; the reference to work of equal or comparable value is stated to mean ‘equal remuneration for men and women workers for work of equal or comparable value’: *Fair Work Act* s 302(2).

<sup>116</sup> *Equal Remuneration Case* [2011] FWAFB 2700 (16 May 2011); *Equal Remuneration Case* [2012] FWAFB 1000 (1 February 2012).

<sup>117</sup> *Fair Work Act* s 241(b).

<sup>118</sup> Ibid s 241(d).

<sup>119</sup> Perhaps oddly, the provisions do not contain a definition of what is meant by ‘low paid’. The Explanatory Memorandum accompanying the legislation refers to classes of employees eg ‘certain employees in community services sector and cleaning and child care industries’: Explanatory Memorandum, Fair Work Bill 2008 (Cth) [992]; in the *Aged Care Case* [2010] FWAFB 4000 (3 June 2010) the FWA Full Bench suggested that it refers to employees ‘paid at around the award rate of pay, and at the lower classification levels’: at [237].

<sup>120</sup> *Fair Work Act* s 242.

<sup>121</sup> Ibid ss 243(1)(b), 262(5).

<sup>122</sup> See *Fair Work Act* ss 3(f), 171(a); an ‘enterprise’ is defined as ‘a business, activity, project or undertaking’: *Fair Work Act* s 12. The other exception to the legislative requirement concerning enterprise-level bargaining arises in the cases of two or more employers making a multi-enterprise agreement: *Fair Work Act* s 186(2)(b).

FWC's involvement is a two-step process. In cases where a low paid authorisation is granted the provisions enable FWC to 'facilitate' the making of a 'multi-enterprise' agreement covering two or more employers.<sup>123</sup> If bargaining towards such an agreement subsequently breaks down it is possible for FWC to then impose a workplace determination upon parties in specified circumstances (which may mean imposing an 'agreement' or determination which applies across an industry). On its face, the process appears to be a form of 'compulsory arbitration', allowing for 'pattern bargaining' claims, otherwise outside the scheme of the *Fair Work Act*.

Notwithstanding the legislature's best intentions it is arguable that the complex requirements of the low-paid bargaining 'scheme' mean that it is too difficult for parties to reach a satisfactory 'outcome'. In the *Aged Care* case<sup>124</sup> (presently the only case where an authorisation has been obtained), a Full Bench of Fair Work Australia ('FWA'), as it was then still called, excluded employees covered by existing enterprise agreements from future bargaining under the provisions (even though the legislation allowed FWA to grant an authorisation that covers employees who faced 'substantial difficulty bargaining at the enterprise level').<sup>125</sup> It is not limited to cases where employees have never been covered by an enterprise agreement.

To date, a special low-paid workplace determination has not been issued. For such a determination to be made the FWC Full Bench must be satisfied that bargaining representatives are 'genuinely unable to reach agreement on the terms that should be included in the agreement'; that 'there is no reasonable prospect of agreement being reached'; and that it is in the public interest for the determination to be made (ie, for there to be an arbitrated outcome imposed on the parties).<sup>126</sup> FWC must also consider whether making the determination will promote future bargaining for enterprise agreements to cover the employers and employees, and enhances productivity and efficiency in the enterprises. Further, it must have regard to the interests of employers and employees to be covered by the determination, 'including ensuring that the employers are able to remain competitive'.<sup>127</sup> Even though the provisions are extremely complex in nature,<sup>128</sup> they nevertheless reconsider some of the underlying features of the Australian compulsory arbitration system, and provide an example of legislators being willing to take account of 'employee voice'.

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<sup>123</sup> Under these FWC powers of facilitation the tribunal has power to direct a third party with substantial control over the employees' terms and conditions of employment to attend conferences: *Fair Work Act* ss 246(2), (3).

<sup>124</sup> *Aged Care Case* [2010] FWAFB 4000 (3 June 2010) [237].

<sup>125</sup> *Fair Work Act* s 243(2)(a).

<sup>126</sup> *Ibid* s 262(2), (5). While a consent low-paid workplace determination may only be made by a Full Bench of FWC, there is no requirement that the workplace determination is in the public interest.

<sup>127</sup> *Fair Work Act* s 275(b).

<sup>128</sup> Richard Naughton, 'The Low Paid Bargaining Scheme — An Interesting Idea, But Can it Work?' (2011) 22 *Australian Journal of Labour Law* 214.

## V LEGISLATED STANDARDS VERSUS AWARDS: PARLIAMENT AS LEGISLATURE VERSUS THE TRIBUNAL AS SETTER OF STANDARDS

The NES mechanism in the *Fair Work Act* embodies, inter alia, the previous Australian Fair Pay and Conditions Standards (without wages) and in turn the standards hark back to their derivations in the Test Cases of the Commission as we have discussed. The Commission's legacy, then, is the standards it set which are now enshrined in the NES — but how can these standards be changed? Have the unions now a weakened voice? Have the interests of the vulnerable workers and low paid now been relegated to reliance on the statutory minima for which they have virtually no voice or mechanism to effect, or initiate change?

Change must now be effected through amendment to the legislation. For the stronger groups the statutory minima have less meaning because they can negotiate for a shorter working week through the bargaining process; for better parental leave conditions; for rights to flexible work, rather than simply the rights to request flexible work. The government of the day may have evidence that changes are needed and consequently initiate a bill to enact the amendments to the NES. A private member's bill is another option. Lobbying of governments and members of parliament by unions and employers may bring about change. Other relevant bodies may also agitate for change. But there is no systemic or enshrined right to seek and request such change, let alone ensure that it actually occurs. Consultation may be discretionary so that unions may, or may not, be consulted about the need for legislative changes. The freedom of unions to make claims for changes in standard conditions through the Test Case process has been eroded dramatically by the switch to the legislated conditions. Of course, unions then had to make the case for change, but the opportunity existed to enable that case to be made: there was a process and their voices could be heard.

This lacuna for reviewing legislated standards can be contrasted to the current process for reviewing awards. FWC has been conferred with the responsibility for reviewing all modern award terms every four years, except in the case of wages which must be reviewed annually.

The body charged with the responsibility for fixing minimum standards has also changed. Tribunal members offered a wide range of relevant diverse expertise and backgrounds, from economics to industrial relations, and brought that expertise to bear on evaluating and testing out the submissions made about the proposed changes in standard working conditions. Parliament has other strengths — generally parliamentarians come from truly diverse backgrounds and may be heavily reliant on departmental advice or a working party to make recommendations for change. Such a process, though, does not guarantee the weak or vulnerable groups of workers a voice. Perhaps individually, or collectively through their unions, the case could be put to governments or working groups, but it is not a requirement of the legislature that there be such consultation. At worst, the decisions may be made on political considerations and/or reflect the wishes of government to be re-elected.

Pressures, too, may exist for diminution of the basic legislated conditions through overseas trade and other global considerations that go beyond the interests of the employees. Placing the agenda for effecting change well and truly in the political arena is fraught with hazards which were not typically present when the tribunal acted independently of government, on the one hand, and the political environment, on the other hand, to make the change for cogent and articulated reasons which were published and disseminated in the public domain.

## VI CONCLUSION

Historically, various mechanisms or processes have existed to protect the weak (or low paid). This was essentially part of the rationale for the establishment of a compulsory arbitration system, continuing for the duration of the traditional system. The weak arguably received greater protection and enjoyed greater opportunity for their voices to be heard as the federal system developed in the tradition of the *Harvester* case and the test case mechanism for determining minimum standards.

The guaranteed level of protection or granting of ‘employee voice’ for low paid and vulnerable workers was typified by the role of the Commission (the independent statutory tribunal) in fixing minimum standards by reference to the ‘public interest’. That background continued, even when Australia adopted a bargaining system, because agreements were required to meet a range of minimum standards reviewed by an independent statutory tribunal, and this was regarded as being in the nature of a default public interest test. The only apparent challenge to this argument is the *Work Choices* period (an apparent aberration) — when the role of the statutory tribunal reviewing agreements and fixing minimum standards was marginalised and job security was largely non-existent — and consequently the voices of these workers were considerably weakened.

The provisions of the *Fair Work Act* appear on their face to provide considerable protection and support for the vulnerable and low paid (and thereby ensure that these workers are guaranteed a ‘voice’ under the current legislation). There are, of course, criticisms which could be, and have been, made of the content of the minimum standards, and how adequate those protections are. However, generally the award system, the legislated standards, the BOOT, unfair dismissal protection and a dedicated low paid bargaining stream confer a stronger voice to the weaker workers, returning to similar protection which existed prior to *Work Choices*. Our main concern, nevertheless, is that minimum standards in the NES are now fixed by statute, which has the undesirable consequence that these ‘entitlements’ may stagnate and are not subject to regular review — and thus may not be as effective as minimum standards developed under the previous Test Case process.

