WHAT'S GOING ON WITH THE 'NO DISADVANTAGE TEST'? AN ANALYSIS OF OUTCOMES AND PROCESSES UNDER THE *WORKPLACE RELATIONS ACT 1996* (CWLTH)

RICHARD MITCHELL,* REBECCA CAMPBELL,* ANDREW BARNES,*
EMMA BICKNELL,* KATE CREIGHTON,* JOEL FETTER* AND SAMANTHA KORMAN*

This article examines the operation of the 'no disadvantage test' (NDT) as it applies to the approval or certification of certain forms of agreements under the Workplace Relations Act 1996 (Cwlth). The purpose is to make an assessment of the effectiveness of the test in meeting the supposed statutory intention that workers would not be made worse-off as a result of entering into agreements which derogated from award and other legally prescribed conditions of employment. The article reports on research which applied the NDT in detail to 36 agreements, and, more partially, to a further 48 agreements. The general conclusion arrived at, though heavily qualified, was that in certain defined respects, the NDT, as presently constructed and applied, is failing adequately to protect employees from a deterioration in their terms and conditions of employment.

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 for well over a decade, stimulating considerable controversy in political, industrial and academic quarters (see MacDonald *et al.* 2001). Opinions vary on the impact that enterprise bargaining has had on Australian workplaces and Australian workers. For some, enterprise bargaining has enabled Australian workplaces to escape the 'overregulated' and 'rigidified' award system, ushering in a new era of 'creative' and 'dynamic' agreement-making between the parties at workplace level, and resulting in both higher wages for workers and more productive and efficient workplaces for employers. On the other hand many critics of the system have pointed to what they perceive to be a deterioration in levels of pay and

*Centre for Employment and Labour Relations Law, Melbourne Law School, The University of Melbourne, Melbourne, Vic. 3010, Australia. Email: r.mitchell@unimelb.edu.au This article is drawn from the results of research carried out by the Centre for Employment and Labour Relations Law at The University of Melbourne under commission from the State Government of Victoria: see (2004) Protecting the Worker's Interest in Enterprise Bargaining: The 'No Disadvantage Test' in the Australian Federal Industrial Jurisdiction—Final Report. Melbourne: Workplace Innovation Unit, Industrial Relations Victoria. The Report is available on the Industrial Relations Victoria website at www.irv.vic.gov.au. The authors thank Iain Ross and Tim Sharrard for comments on an earlier version of this article, and thank the anonymous referees for their suggestions.

conditions, and a corresponding loss of power or voice for workers in the workplace (see Peetz 1998; ACIRRT 1999; Allan *et al.* 1999; Campling & Gollan 1999; Watson *et al.* 2003; Wooden 2003).

However, it is not the purpose of this article to engage in debate over the virtues and deficiencies of enterprise bargaining at this level of generality. Rather our concern is to shed some light on one aspect of the enterprise bargaining regime, namely the requirement that enterprise agreements should not 'disadvantage' workers (the 'no disadvantage test' (NDT)).

This issue does, of course, bear upon how the outcomes of enterprise bargaining are seen in a general sense, because one of the political and legal conditions for the acceptance of enterprise bargaining into the Australian system was that it would not lead to a deterioration of the working conditions of workers covered by the award system. Consequently the NDT has been one of the key legal concepts in the enterprise bargaining system and it would not be particularly controversial to assert that it has become *the* single most important of the regulatory conditions applying to the enterprise bargaining process as set out in the *Workplace Relations Act 1996* (*WRA*; Cwlth).

Simply put, the NDT requires the regulatory authorities to examine the conditions set down in enterprise agreements to ensure that those conditions do not 'disadvantage' the employees to whom the agreements apply when they are compared with the employees' conditions under previously applying regulations. The main forms of 'enterprise agreements' relevant for these purposes, as set out in the *WRA*, are Australian Workplace Agreements (AWAs) made between individual employers and employees,[1] agreements between groups of employees and employers (s. 170LK agreements),[2] and agreements between trade unions and employers (s. 170LJ agreements).[3] The regulatory authorities charged with the responsibility of applying the NDT are the Office of the Employment Advocate (OEA),[4] which assesses AWAs for compliance with the test,[5] and the Australian Industrial Relations Commission (AIRC), the members of which are responsible for applying the test to AWAs when these are referred on to the AIRC by the OEA, and to s. 170LK and s. 170LJ agreements in the first instance.[6]

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. These include, for example, terms and conditions contained in certified agreements and AWAs. However, even allowing for these regulatory incongruences, the NDT is inherently problematical.[7] It is always a question of interpretation when the removal or reduction of certain employment rights or conditions in return for an increase of some other rights or conditions, or the introduction of new ones, will amount to a 'disadvantage'. And 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' in the NDT calculation, and these will not always be capable of precise quantification, or indeed of quantification at all (Waring & Lewer 2001).

At the political level, the expression 'no disadvantage' was somewhat differently stated by the Prime Minister, in 1996, to convey a message to workers that

they would not be made 'worse-off' under the enterprise bargaining reforms embodied in the government's *WRA* of that year.[8] It is perhaps arguable that the fundamental intent of that promise was 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 provision[9] requires only that the enterprise agreement not 'disadvantage' employees *in relation to their terms and conditions of employment*. Although it is true, as we noted above, that the relevant terms and conditions are circumscribed for the purposes of the NDT, the test nevertheless includes not merely conditions which have some monetary value (such as pay rates, bonuses, paid leave and so on), but also those which have none (such as a limited duties statement, unpaid leave and rights to access a grievance procedure).

Clearly, employees may be 'disadvantaged' in all sorts of ways through the alteration or removal of non-quantifiable conditions and benefits. For example, even if an employee is no worse-off financially as the result of the application of an enterprise agreement to his or her employment, he or she may be worse-off in personal enjoyment terms measured as job satisfaction or engagement with family life.

The application of the NDT depends not merely upon the regulation itself, but also upon the conventions and techniques used by the regulatory authorities. Inevitably much of this assessment is highly subjective in nature, and even if one were able to be in complete command of all of the relevant legislative, economic and workplace specific detail, there would doubtless be widespread disagreement about the outcomes of the NDT application in a high percentage of instances. Furthermore, the combination of statutory regulation and administrative discretion inherent in the NDT means that issue may be taken with the integrity of the test on at least three levels: first, in the legislative construction of the test itself; second, in the decision-making techniques and processes employed by the regulators in applying the NDT; and third, in the accuracy or rectitude of application in each case.

The structure of this article is as follows. The regulatory framework section briefly sets out the regulatory framework for the operation of the NDT as provided for in the terms of the *WRA*. The secondary literature section briefly reviews the critical literature on the purpose, function and implementation of the NDT. In the administrative and determinative approaches in applying the NDT section, we set out the administrative and determinative approaches on the operation of the NDT adopted by the AIRC and the OEA. The research material set out in this section is supported by informal interviews carried out with 15 persons associated with the NDT in some professional capacity. The evidence: methodology and research findings section presents the evidence we have 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. In the analysis: outcomes and processes in implementing the NDT section, we offer an analysis of the operation of the NDT which focuses upon both the decision-making techniques and processes of the regulators and the outcomes of those processes. The last section is a concluding section.

REGULATORY FRAMEWORK

History

Provisions protecting employees from 'disadvantage' in the enterprise-bargaining process were first included, at a federal level, by the Australian Labor government (1983–1996), in the terms of the *Industrial Relations Legislation Amendment Act 1992* (*IRLAA*; Cwlth), amending the *Industrial Relations Act 1988* (Cwlth).[10] Two points should be noted about this test, which remain issues of contention under the current regulation. First, this provision introduced the idea of the dual component NDT by requiring first an examination of whether or not the employee's terms and conditions had been reduced to the employee's disadvantage, and then a consideration of whether or not, in any such case, the certification of the agreement would be contrary to the public interest having regard to the employee's terms and conditions as a whole. This dual structure made it possible for the AIRC to certify an agreement that reduced one or a number of entitlements or rights of the relevant employees providing that it was not contrary to the public interest to do so. Second, it was clear from the responsible Minister's Second Reading Speech that the NDT was aimed specifically, though not exclusively, at the maintenance of broad 'community standards' such as annual leave and standard hours of work, which would not be subject to trading-off in the enterprise-bargaining process.[11]

The provisions of the *IRLAA* were replaced soon after by the amendments contained in the *Industrial Relations Reform Act 1993* (*IRRA*; Cwlth). Although these provisions retained the same general standard as in the previous legislation, one important new condition was imposed. This condition excluded existing enterprise agreements from the NDT standard.[12] The clear effect of this variation was to reduce the substance of the regulatory base for comparison of existing and proposed conditions as part of the NDT. Employees with above-award conditions in existing enterprise agreements would have any proposed new agreement measured only against the (lesser) award standard.[13]

In his Second Reading Speech the responsible Minister reaffirmed that the purpose of the NDT was to continue to protect 'well established' community standards and the working conditions of employees 'taken as a whole'. But on the other hand 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.[14] What emerges most clearly from this is the fact that while the government was clearly expecting the AIRC not to permit the wholesale trading away of fundamental working rights, it was nevertheless indicating to the parties that the trading away of award conditions in return for new or enhanced conditions in agreements was the order of the day. In short, awards were to become a safety-net facility, and workplaces were to be regulated by the parties through enterprise bargaining.[15]

Current regulations

The election of the Liberal/National Party Coalition in 1996 brought with it a heightened emphasis on enterprise bargaining. New forms of agreements were

introduced, including, importantly for present discussion, statutory agreements able to be made between employers and individual employees. This new round of legislation (the *Workplace Relations and Other Legislation Amendment Bill (WROLA Bill)*; *Workplace Relations Bill*) also gave rise to renewed debate over the NDT. However, despite its clear desire to scrap an award-based NDT in favour of measuring agreements against a set of legislative minimum standards, the government was forced into a political compromise whereby awards remained as the minimum regulatory standard and the NDT remained as the regulatory yardstick for change.

The current NDT is contained in Part VIE of the *WRA*. It is not our purpose here to closely examine the legal detail of the NDT. In general terms the present enterprise-bargaining provisions require that for an agreement either to be certified by the AIRC (in the case of a s. 170LJ or a s. 170LK agreement), or approved by the OEA or the AIRC (in the case of an AWA), it must not result in a reduction in the overall terms and conditions of employment of the relevant employees when measured up against the relevant award or other relevant laws.[16]

In keeping with earlier versions of the legislative text, the NDT is still essentially in two parts. The first requires a comparative examination of the award and the agreement to see if the agreement 'disadvantages' the employee. If it does not, the agreement may be formalised under the legislation. If it does 'disadvantage' the employee, within the meaning of the provisions,[17] the agreement may still be approved or certified if it meets the public interest component of the test as noted above.

However, two points can be noted which suggest that the NDT contained in the terms of the *WRA* was weakened when compared with its predecessors. First, the language of the NDT was altered with the inclusion of a requirement that an agreement must 'on balance' result in a reduction of the 'overall' terms and conditions of employment for it to fail, even before its further consideration under the public interest component of the test. One consequence of this changed wording was that the public interest component of the NDT thereafter became relevant only when an agreement had received an adverse 'global' evaluation, rather than whenever there was 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 were required to go through to the 'public interest' phase of the NDT (see Ford 1997).

Second, the government made very clear its attitude that the NDT was not to act as a major obstacle to innovation and change at the workplace level. Any term or condition was negotiable in the process of enterprise bargaining.[18] Coupled with the legislative changes noted above, and other relevant modifications,[19] the way seemed open for the trading away of the community standards that Labor's version of the NDT seemed designed to protect.

It is difficult to assess the response of the AIRC to the remodelled version of the NDT since 1996 without carrying out a thoroughgoing empirical examination of the contents of certified agreements. At the outset it is important to note that while tens of thousands of agreements have been submitted for certification since 1996 (and, in addition, numerous AWAs passed on by the OEA for approval),[20] in only a very small percentage of cases have 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 to assess, on the face of the public record, the process of reasoning (a point to which we return in the administrative and determinative approaches in applying the NDT section) and the rectitude of the outcome.

Some trends are, nevertheless, observable in the decided cases. Most important has been the tendency of AIRC decisions to depart from the notion of protecting so-called 'community standards', though, as we note in the evidence: methodology and research findings section, this departure might not be very extensive at this stage. Before 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 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,[21] as were cases in which public holidays and sick leave were exchanged for cash payments.[22]

However, under the *WRA* the AIRC has permitted the parties to cash out various forms of leave, including annual and sick leave, although departures from such standards are often subject to restrictions on their use.[23] Employers have also been able to obtain significant gains in temporal and functional flexibility, although the AIRC has, on occasion, rejected agreements which specifically provide for excessive working hours.[24]

As was the case under the previous versions of the test, the provision of 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.[25] 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 extra pay rather than time off in lieu of overtime, no longer allowed unpaid leave to count as service for the accrual of benefits, removed three days from the personal leave entitlement, removed the specification of hours for part-time work and eliminated an existing higher duties allowance.[26] The detailed measuring of 36 agreements against the relevant award undertaken for this project (the results of which are discussed in the administrative and determinative approaches in applying the NDT section) indicates that this outcome is by no means unusual.

SECONDARY LITERATURE

Generally speaking academic assessment of the NDT has tended to be negative in outlook (see Goodman 1998; Merlo 2000; Waring & Lewer 2001). 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. The fact is, 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. As we have noted, this will always be a question of subjective judgement or assessment on the part of the regulator, and it is clear that the system cannot strictly safeguard against employee disadvantage in any objective sense.

The first main thrust of criticism in this respect is aimed at the role of the public interest component of the NDT. This clearly anticipates that agreements which do 'disadvantage' employees may still be formalised because they are 'not contrary to the public interest'. As most commentators note, this does not require that the 'disadvantage' to the employees concerned be 'in the public interest', merely that it not be 'contrary' to that interest. 'Public interest' for these purposes is completely undefined, apart from the indicative legislative note tolerating a reduction in employment rights and benefits where the business is suffering a short-term business crisis.[27] Although it appears that most agreements which are formalised notwithstanding the fact that they have failed the first component of the NDT do so on the basis of this 'business-crisis' rationale, it is clear that the public interest component is not limited to this example, and that it extends to broader concerns with employment, local economic conditions and so on.[28]

The second major set of concerns which critics have with the constitution of the NDT is the deteriorating benchmark against which the agreement is measured. There are several intertwined issues of relevance here. The starting point is to note that enterprise agreements are measured not against the *actual* terms and conditions of employment of the relevant employees, but against a set of notional[29] terms and conditions. The principal component of this 'notional' set of conditions are those set down in the relevant awards covering the employee's employment. The *WRA* also authorises 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' to employees.[30] Potentially this addition strengthens the NDT somewhat, but its scope is as yet largely unexplored, and we do not propose to examine the issue further in the context of the present discussion.

However, leaving these issues to one side, the consequence of measuring the employee's agreement against the award, rather than his or her actual employment conditions, is obvious. As most critics have pointed out, in enterprise bargaining employees are not negotiating from a minimum floor of their present 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 (see Waring & Lewer 2001: 73–7). And as most commentators have also pointed out, this position is greatly exacerbated by the fact that awards have been 'simplified' (Bray & Waring 1998: 71–4; Naughton 1999; Merlo 2000: 223–4; Waring & Lewer 2001: 73–5) 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 (see Merlo 2000: 233; Waring & Lewer 2001: 75).

Other concerns with the NDT 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 application to particular sets of circumstances. As we have noted earlier, 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*' (Bennett 1995: 129). There is considerable anecdotal evidence to suggest, not surprisingly, that serious errors may be made in undertaking this comparison (e.g. Merlo 2000: 225, 232–3; Waring & Lewer 2001: 71–3; Senate Estimates Committee (*Workplace Express*, 22 February 2001)). Furthermore, on the evidence gathered for this article, there is considerable room for argument that the complexity of applying the NDT makes it a highly problematical gauge for assessing the security of employee's 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.[31]

In highlighting this problem of application, the critics have pointed to several discrete issues. One of these concerns the difficulty of obtaining the correct information, particularly about which award to apply, and whether the agreement will in fact reduce or enhance the employee's position when measured against the award. The documents required to be lodged with the AIRC in respect of s. 170LJ and s. 170LK agreements require the parties to agreements themselves to identify potential problems, and as both Naughton and Bennett have pointed out, in practice there is considerable reliance by members of the AIRC on this mechanism (Bennett 1995: 144; Naughton 1997: 16). This is an issue to which we return later in this article.

A further set of criticisms focuses more specifically upon the role of the OEA in the process of approving AWAs. At times these criticisms have called into question the very objectivity of the OEA (e.g. Goodman 1998: 10; Merlo 2000: 224). Several commentators here focus upon the secrecy regulations attached to the AWA provisions[32] which 'do not allow for thorough public scrutiny of the formation and implementation' of such agreements, and 'hinder a detailed analysis of AWAs' (Merlo 2000: 225; see also Goodman 1998: 9–10). They also point to the fact that the OEA appears to have a conflict of interest in the approval of AWAs because 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' (Merlo 2000: 225; see also Goodman 1998: 10) against disadvantage.

ADMINISTRATIVE AND DETERMINATIVE APPROACHES IN APPLYING THE NDT[33]

Certified agreements

Applications for the certification of s. 170LJ and s. 170LK agreements (the collective enterprise agreements with which this article is centrally concerned) are

made in accordance with the provisions of the *WRA* and its regulations, rules and forms.[34] 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 various parties seeking the agreement's certification. That fact alone typically places the AIRC and its members at the centre of the investigative process which underlies the NDT.

As we noted earlier, the extent to which the members of the AIRC conduct their own examination of the relative value of the agreement and the award, and the thoroughness with which they do so is unclear from the reported cases in most instances. We also noted that there are inherent difficulties in making appropriate assessments of relative value,[35] and that commentators have suggested that a response to this difficulty has been for regulators to rely substantially on the information and advice provided to them by the parties to the agreement. Generally speaking our informal inquiries[36] more or less bore out these concerns. Unlike the approach of the OEA in relation to the approval of AWAs (which we examine below), the AIRC has not adopted a common set of procedures as a mechanism for ensuring some degree of uniformity in the application of the NDT. This leaves open a range of investigative techniques which inevitably varies according to the degree of intervention considered appropriate by individual members. Accordingly, members' approaches do vary, and there is obvious discomfort felt by some members with the techniques and approaches used in similar deliberations by other members. For example there is a widespread view among many members of the AIRC that the decision of the parties to enter into the agreement (particularly in union-based s. 170LJ agreements) should be the principal guide to the acceptability of the agreement. Others take a more legalistic and exacting outlook in their approach to the NDT.

An indication of this discord may be seen in two recent decisions of the AIRC. In *Re Knightwatch Security Pty Ltd*[37] Lewin C, at first instance, had formed doubts about whether certain agreements submitted to him for certification satisfied the NDT. The Commissioner sought the advice of an academic consultant at a Victorian university 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 would not pass the NDT without certain undertakings.[38] These undertakings were proffered by the employer, but Lewin C refused to certify the agreement because the undertakings had not been voted upon and approved by a valid majority of employees. This decision was appealed by the employer to a Full Bench of the AIRC. The Full Bench set aside the decision of Lewin C on the basis that the *WRA* did not require undertakings to be approved at a ballot. Importantly, in the course of their judgement, the Full Bench criticised the decision of Lewin C to seek outside guidance on the NDT. They expressed the view that although, in applying the NDT, it might be useful for

members to have the benefit of mathematical calculations and other information, such independent advice and guidance should be rendered in the appropriate way, that is, as evidence given in proceedings before the Commission, open to examination as part of the evidentiary process. It also decided that to the extent that applying the NDT required 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 amount to a failure of the statutory process.[39]

The second case, *Re MSA Security Officers Certified Agreement 2003*,[40] illustrates even more strongly the differing outlooks among members of the AIRC. In this case Polites SDP, at first instance, had certified an agreement pursuant to s. 170LK of the *WRA* by relying substantially on the employer's submissions as to how the agreement would be administered, and the fact that the agreement contained a provision which allowed employees to raise an allegation of overall disadvantage in the agreement's application under the agreement's dispute settlement procedure. The Australian Liquor, Hospitality, and Miscellaneous Workers Union appealed against the decision on the ground that although the NDT involved 'a degree of impression and judgement, the test [was] still an objective test, requiring analysis of the corresponding provisions of the award and the agreement'.[41] The union claimed that Polites SDP had erred in accepting the 'generalised statements'[42] of the employer as to the effect of the agreement rather than conducting a 'precise',[43] 'analytical'[44] and 'elaborate'[45] assessment of the benefits and detriments of the agreement weighed up against the award. Because there were no apparent relevant considerations of this type, 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'.[46]

The respondent employer, in reply, submitted that the NDT was not 'a scientific or a precise scientific judgement'.[47] 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 demonstrated that the NDT involved 'a measure of judgement, evaluation and subjectivity'.[48]

A majority of the Full Bench[49] reached the conclusion that Polites SDP had failed properly to exercise the AIRC's jurisdiction and allowed the appeal. In reaching this decision it seems to have endorsed certain 'guiding principles' on the application of the NDT, though without further research it is not possible to say at this stage how pervasive these may be in directing the AIRC's outlook. The first principle adopted by the majority seems to be that the decision-maker must have some rational basis for his or her satisfaction that the agreement passes the NDT 'over and above generalised satisfaction'.[50] Second, in forming the basis for a decision, the majority also seems to have adopted a further principle that the AIRC should not act in reliance on 'the employer's prediction of what the operational circumstances of the business would or might be',[51] nor 'in reliance on the employer's operational intentions',[52] nor on the employer's submissions as to the legal effect of award provisions.[53] 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'.[54] Third, the correct

approach to the NDT 'is by reference to the terms and conditions of the competing instruments (i.e. a 'comparison'[55] or an 'analysis'[56] of such instruments laid side by side).

Such an intrusive approach upon individual discretion was, however, staunchly resisted by Blain DP who 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'.[57] According to Blain DP, the assessment required in the NDT was 'a balancing act which involve[d] subjective judgment and the Commission [was] not, and should not be, compelled to spell out in full detail its reasoning for its conclusion'.[58]

AWAs

In apparent contrast with the AIRC's practices, 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*. These procedures undergo periodic amendment and our comments here are intended only to give a general indication of how the OEA has attempted, over time, to give some structure to the process. In general, the OEA has attempted both to systematise the process of seeking approval for formalising AWAs, and streamlining that process. Relevantly for our purposes it has done this by publicising its policy towards implementing the NDT, by providing the parties with an 'NDT calculator' for quantifying remuneration comparatively between the award and the agreement submitted for approval, and by entering into arrangements with favoured parties whereby approvals might be expedited with less scrutiny than would otherwise be the case.

As is the case with the practice of the AIRC, much of the internal process of approval within the OEA is undisclosed. On the face of it, it would seem that the highly systematised and regularised process adopted by the OEA adds a desirable uniformity to the application of the NDT which is lacking in the AIRC. There are, however, grounds for concern with the OEA's practices that deserve attention.

First, there is considerable uncertainty (if not to say skepticism) among many practising parties over the extent to which the OEA has abrogated its responsibility for applying the NDT.[59] Indeed, from time to time the content of the OEA's *AWA Procedures Guide* has given force to such perceptions, apparently signalling that in certain prescribed circumstances AWAs would be approved without a detailed NDT being carried out.[60] However, the OEA has indicated to the authors that it carries out a complete NDT 'in-house' on all AWAs, whatever the source.[61]

A second major difficulty which we have with the OEA's approach (a difficulty which we also have with the AIRC's approach to the NDT)[62] concerns what we perceive to be a failure to 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 as 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, overtime or casual rates 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 was designed to assign a notional value to these last set of entitlements.

The question here is whether employees are adequately compensated (if at all) for non-monetary benefits (in the award) and, correspondingly, 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 conditions of employment' and, as we noted earlier, this is not necessarily restricted to remuneration considerations, nor to the types of conditions that can be quantified by reference to some financial calculation. This fact has been recognised in the terms of the OEA's procedures themselves. These have specifically authorised the OEA's personnel to approve agreements which, while on their face disadvantaging the employee in purely dollar terms, nevertheless have offered terms and conditions that benefit the employee 'in some other way'.

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 extension of managerial prerogative over job management, or the adoption of practices lessening the enjoyment of working life) upon the employee when compared with the award, and that these, by the same reasoning, should be taken into account in applying the test. These matters are addressed further in the analysis: outcomes and processes in implementing the NDT and the conclusions sections.

EVIDENCE: METHODOLOGY AND RESEARCH FINDINGS

Methodology

The principal purpose of our research was to inquire into the general effectiveness of the NDT as a mechanism for protecting the interests of workers in the enterprise bargaining process. As part of this exercise, we elected to carry out some exercises which would mirror as closely as possible, given our resources, the NDT process.

Our primary database was constructed by carrying out a detailed analysis of 36 enterprise agreements, including s. 170LJ and 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). We selected the s. 170LJ agreements and the s. 170LK agreements by searching the Federal Government's Wagenet database, looking for the most recent agreements that had been certified in our target industries. We chose the first agreements that met our selection criteria. The AWAs we analysed were selected and provided for us by the OEA, based upon our specification of the target industries and relevant awards. All of the AWAs had been approved by the OEA, rather than the AIRC.

The detailed analysis of the 36 agreements involved us undertaking 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. As we have noted earlier, the NDT is not capable of precise mathematical application; it necessarily involves a substantial element of subjective judgement on the part of the person undertaking the assessment. In the Report from which the material in this article is drawn, we presented the outcomes of the award/agreement comparison in simplified tabular form. We also ranked the agreements according to our perceptions of how each agreement measured up against the NDT. The categories in this ranking were as follows: *acceptable* (indicating those agreements we believed passed the NDT clearly); *marginally questionable* (indicating those agreements about which we had some reservations, but reservations which we thought could possibly be alleviated by undertakings regarding hours, rostering and overtime); and *highly questionable* (indicating those agreements with which we would have had serious concerns, regardless of any undertakings that might have been given by the employer).

Our second data source was derived from a more-partial analysis of a further 48 agreements (12 in each of the nominated industries). These were examined with a view to supporting our detailed analysis with some further quantifiable data, and also with the view of focusing more specifically on certain matters of predetermined interest (e.g. issues pertaining to 'community standards' and work/life balance), and matters generated in the process of our own inquiry (e.g. provisions concerning the increase in the employer's discretionary use of labour and/or the decline in employee voice).[63]

Inevitably, given the nature of this research exercise, and the inherent imprecision of the NDT itself, the research generated many questions and issues which we were not able to answer from the agreement analysis and the general public record surrounding the certification or approval of the agreement. As will be clear from our analysis in the following part of this article, our conclusions are, of necessity, conditional in nature. However, 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 of the OEA), lawyers 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.

Analysis of agreements: The substance of exchange

The exchange inherent in contemporary 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 relatively narrow range of matters concerned with pay and working time 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. As we noted earlier of the OEA's practice in approving agreements, in our view these issues, which

concern matters of functional flexibility, job control and employee empowerment, deserve greater attention as part of the bargaining process than they presently attract. This issue is pursued further in the next part of the article.

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

Pay

Pay rates are the primary consideration in deciding whether an agreement passes the NDT. However, it is often extremely difficult to assess the exact position of employees in relation to their take-home pay simply on the face of the agreement, without recourse to the supporting documentation. For this reason, our findings in relation to this issue are highly conditional, and the conclusions which we reach in the analysis: outcomes and processes in implementing the NDT section are expressed as our considered subjective judgement of the value 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 did not necessarily mean that actual pay had increased under every one of these agreements because the higher base rates were in some cases the result of rolling in certain other components of the total remuneration package applying under the award. The degree to which this occurred depended upon both the type of agreement involved, and the industry in which the agreement was made. For example, in the Building and Construction industry, the s. 170LJ agreements only collapsed the 'standard' allowances into the base rate of pay, whereas the s. 170LK agreements also attempted to collapse (at reduced rates) the special disability allowances. The single AWA in our Building and Construction sample simply did away with most allowances without any attempt to compensate these through the base rate of pay.

Variations between industries were also important. For example, although the s. 170LJ agreements in both the Building and Construction, and Food Manufacturing, sectors had significantly above-award rates of pay, those in the Retail Trade sector did not, 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 those agreements. The same conclusion was reached about the s. 170LK agreements across all industries.

Other relevant pay-associated issues included the following:

- Several agreements (five in total: three s. 170LKs and two AWAs) failed to build in wage increases over the life of the agreement.
- Reductions 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 the award in most cases.
- Penalty rates were only of any significance in the case of 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 agreement that we analysed in detail. The extent of the 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.

Span of working hours

One of the noticeable key trends in bargaining was towards an increased span of working hours across all industries and agreement types. Approximately three-quarters of all agreements in our sample provided for an increased span of ordinary hours of work, including all AWAs and all s. 170LKs with one exception only. 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, with the exception of one in each sector, effecting this change.

Three agreements expanded ordinary hours to the point that there was no limit upon them: that is, an employee could be required to work at any hour of the day or night, and on any day of the week, at ordinary hourly rates of pay (two AWAs, one in Building and Construction and one in Retail Trade; and one s. 170LJ agreement in Retail Trade). Most agreements also contained scope for variation in the ordinary hours of work from those set down in the agreement. Where agreements did contain such discretions, these usually expanded the employer's powers and reduced those of the employee to decide the span of working time.

In Building and Construction s. 170LJ agreements, and some agreements in the Automotive Component Manufacturing and Food Manufacturing sectors, the increased span of ordinary hours was traded away for additional (in the case of Building and Construction) or initial (in the case of the other two sectors) paid rostered-days-off per month.

Number of working hours and overtime

The starting point in most awards is that the employer may require reasonable overtime to be worked. Consequently, employees may refuse overtime that is unreasonable. That position is largely maintained in most agreements.

Apart from the Building and Construction sector, which moved to a 36-hour week standard in the process of bargaining away a wider spread of ordinary hours, the 38-hour week was largely preserved in our sample of agreements. In a few instances, however, employees were expected to work more than 38 hours at ordinary rates. For example in at least four agreements (across all types, and across all sectors other than Building and Construction) employees were expected to work up to 40 hours at ordinary rates, and in one case up to 45 hours at ordinary rates. In two further agreements, one s. 170LK agreement in Building and Construction, and one AWA in Food Manufacturing, employees were expected to work between 46 and 58 hours per week without overtime rates for work in excess of the applicable ordinary hours standard.

What this summary indicates, of course, is that work at overtime rates is substantially reduced across all of our sample industries. However, where work *is* performed at overtime rates, most agreements in our sample preserved the penalty rate of pay applicable to such work under the award. Nevertheless, a significant number of AWAs and s. 170LK agreements introduced reduced overtime rates, often, as we have noted, in company with reduced overtime availability.

Functional flexibility

The general trend in our sample agreements, consistent with other research results,[64] was 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 only such duties that 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 the agreements in our sample did not define employee's duties, leaving it open to question as to where the employer's prerogative came to an end. At the same time, about half our sample agreements specifically departed from award classification structures, with about one-quarter providing enterprise-specific classifications, and the other quarter providing only a poorly defined classification structure or none at all. Most of these latter examples were in s. 170LKs or AWAs. 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 a 'mixed' or 'higher' functions rate of pay.

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

For reasons which we have adverted to earlier, and upon which we expand in the analysis: outcomes and processes in implementing the NDT section, we take the issue of functional flexibility to be of importance to a proper assessment of the operation of the NDT. For that reason it is necessary to note that as a threshold issue there is some doubt over the extent to which an award inherently limits the employer's discretion to alter the nature of the employee's job without his or her approval. That being the case, it is by no means certain 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 position we are proceeding from in this article is an assumption that at the very least awards set *some* outer 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 or training'. In our view, these award provisions, at least implicitly, 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.[65]

Job security

The vast majority of our sample agreements provided the standard notice of termination conditions as those set down in the relevant award, in Part VIA of the *WRA*, or in Schedule 1A of the *WRA*, the only exceptions being a few agreements which provided conditions which were superior to those set out in the award and/or the statute. All agreements with the exception of one AWA provided for above-award entitlements to time-off during the notice period to look for work.

Redundancy pay was also an area where employees across all our sample industries and agreement types secured above-award standards, or at least maintained the status quo. More than 50% of our sample agreements provided for above-award entitlements. Most of these were 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 in Building and Construction made limited provision for redundancy payouts to casual employees.

All agreements in the Building and Construction sector (apart from the single AWA analysed in that sector) provided for the employee's redundancy entitlements to be paid into a trust fund to secure them against corporate collapse.

In only two of our sample agreements was the provision of redundancy pay below the award standard. One of these was a s. 170LK agreement which made no provision for any redundancy pay (and which excluded the operation of any underlying award which might have contained such a provision).

Employee empowerment

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, consultation and trade union involvement are common features of s. 170LJ agreements. As we have noted earlier, there is no reason in theory why such matters should not be classed as benefits to employees, but, as is the case with other non-monetary considerations, it is very difficult to gauge the extent to which such matters are taken into account in applying the NDT. We return to a fuller examination of this issue in the analysis: outcomes and processes in implementing the NDT and the conclusions sections.

More than three-quarters of our sample agreements contained provision for consultative mechanisms between the employer and employees in some form. Of the seven agreements which did not do so, three were s. 170LK agreements and four 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 decision-making within 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).

Among s. 170LK agreements and AWAs the picture was quite different. Only one s. 170LK agreement (out of a total of eight analysed) established an ongoing and meaningful consultation process, with the rest of the s. 170LKs and the AWAs establishing weak or single-issue-specific consultation mechanisms.

As might be expected, on the whole the s. 170LJ agreements recognised union involvement in the workplace through the terms of the agreement, including trade union leave for delegates, rights of entry, and union involvement in decision-making and dispute settlement. Most s. 170LJ agreements in the Building and Construction and the Automotive Component Manufacturing sectors contained other union-friendly measures, including the provision of company resources to support union organisation and activities.

Parental leave

Parental leave was not an area where agreements tended to deviate markedly from standards set in the relevant awards or statutory requirements. Most agreements adhered to the minimum standards set down in the terms of the *WRA*, with the exception of four agreements (three s. 170LJ agreements and one s. 170LK) which provided for *paid* maternity leave.

Annual leave and leave loading

As was the case with parental leave, the basic entitlements to annual leave have been left untouched in the enterprise bargaining process; most employees still have the right to four weeks annual leave per year. However, there is a clear tendency among s. 170LK agreements and AWAs towards the cashing in of annual leave. At the most extreme, two agreements, one a s. 170LK agreement in Building and Construction, and the other an AWA in Food Manufacturing, compulsorily cashed in all entitlements to annual leave, in exchange for higher base rates of pay. Three other AWAs and one other 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 rates of pay.

All agreements contained at least some discretion regarding the timing of annual leave; the key difference between the agreements lay in who held the discretion to determine when such leave should 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

discretion to that in the award. Only seven of our sample agreements exhibited a greater discretion in favour of employees in taking annual leave (five s. 170LJ agreements, and, perhaps surprisingly, two AWAs).

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

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 our agreements provided for long service leave entitlements as per the relevant award or legislation. About one-quarter of agreements provided for above award or legislated 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, one a s. 170LJ agreement in Food Manufacturing and the other a s. 170LJ agreement in the Retail Trade sector, contained an option for employees to cash in some or all of their leave entitlement.

Public holidays

Public holidays were also not an area of substantial movement in the enterprise bargaining process. The general position that full-time workers (and part-time workers 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 required that the employees should be paid double time-and-a-half when that occurred. On the other hand one s. 170LK agreement in the Retail Trade sector expressly excluded the operation of some public holidays upon its stores. Only two agreements (both in the Retail Trade sector) unequivocally provided that work on public holidays was entirely at the discretion of the employee.

Community standards

As we have noted in the foregoing discussion, several of our sample agreements contained provisions for the compulsory or optional cashing in of various forms of leave and in some cases the loss of public holidays. The most extreme form of this substitution is seen in one s. 170LK agreement in Building and Constructing which provided for a loaded hourly rate of 50% above award in exchange for the abolition of personal leave, annual leave, 10 paid public holidays per year, overtime payments for Saturday work and several other matters. Apart from this, and one AWA which exchanged annual leave, long service leave, sick leave, bereavement

leave, and carer's leave for a 22% loading on the base rate, most other agreements trading away leave and holiday entitlements were more restrained. Of these further six agreements (four AWAs, one s. 170LK and one s. 170LJ agreement), each provided that the decision to cash in leave was at the employee's discretion, and even then the discretion related only to certain portions of annual leave and sick leave, excess annual leave, or made cash available only in circumstance of pressing domestic necessity. Two agreements provided for the optional cashing in of long service entitlements after a certain period of time.

Family-friendly measures

On the whole it was difficult to find a trend in our sample of enterprise agreements which could be classed as 'family-friendly' in any real developmental sense. In other words there was little to suggest that enterprise bargaining involved the development of 'innovative' agreements designed to forge a new balance between family/private responsibilities and work. For example, only a few of our sample agreements introduced paid maternity or paternity leave, none made provision for child care, either within or outside the workplace, and there were few, if any, family-friendly measures providing the employee with rights to telephone family members during working hours and so on. Although such matters may be accommodated in practice, they are not forming part of a new workplace bargaining strategy.

If there is a general exception to this picture among our group of industry sectors it is in Retail Trade, an industry predominantly staffed by females, a substantial proportion of whom are part-time workers. In this sector, and across all agreement types one can generally find provisions for paid carer's leave (in addition to other personal leave entitlements) and additional unpaid leave where required.

ANALYSIS: OUTCOMES AND PROCESSES IN IMPLEMENTING THE NDT

Substance of the exchange

We commence our analysis with an overriding note of caution. It follows from what we have said earlier about the nature of the NDT that it is extremely difficult to reach conclusions about its application with any degree of certainty. Indeed, the inherent problematical nature of the test itself inevitably makes the exercise quite subjective, and the 'truth' fairly elusive. Consequently our analysis is conditional, and our conclusions open to question.

There can, of course, be no doubt that the NDT fails to protect the interests of some workers in particular instances. 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 in an *overall* sense the NDT is producing a serious and consistent level of 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 interviews of various practising parties in this jurisdiction 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 in the course of enterprise bargaining. 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 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 they suggest that there is at least some scope for a general questioning of the effectiveness of the NDT on several fronts, and that there may be scope for doubting the efficacy of the test judged by its statutory purpose.

Our own evidence, drawn from the 36 agreements examined in detail alongside the award, suggests to us that there should be concerns with the operation of the test, particularly in the case of s. 170LK agreements and AWAs. The agreements were ranked by us according to our perceptions of how they stood up to examination under the NDT. On our analysis of the 36 agreements, we found eight to be in the highly questionable category, 11 to be in the marginally questionable category and 17 to be acceptable. This is a high proportion of dubious outcomes. All of the agreements classed as highly questionable were AWAs or s. 170LK agreements (four in Retail Trade, two in Building and Construction, and one each in Auto Component Manufacturing and Food Manufacturing). Agreements we ranked in the marginally questionable category included a mix of s. 170LJ and s. 170LK agreements and AWAs.

Overwhelmingly, the dubious quality agreements taken together were in Retail Trade (four highly questionable, five marginally questionable) and in Motor Component Manufacturing (one highly questionable, six marginally questionable). With the exception of one s. 170LK agreement and one AWA in Building and Construction, and one AWA in Food Manufacturing, the agreement outcomes in those industries, on the basis of our research findings, were uniformly acceptable.

However, we must add a further note of caution here. Our analysis was based only on the evidence contained in the agreement and documents formally attached to it. Much of the documentation supporting the application of 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. However, this documentation is not available for examination in the case of the OEA's deliberations and, in the case of the AIRC, is only generally accessible by searching the Commission's files. 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 agreement when examined for compliance with the NDT. These extraneous materials were not examined by us in the course of this research.

Consequently, where we categorised agreements as questionable or highly questionable, we did so simply on the basis that *in our judgement* there were reasons to question whether or not the monetary advantage to employees was

adequate in the total picture of the exchange between the parties. Put another way, where agreements were classed by us as either highly questionable or questionable, that ranking usually was made on the basis of there being a substantial number of small concessions being made in the agreements by the employee in exchange for what we assessed as a questionable 'monetary' outcome rather than any major single element in the agreement.

There are many other aspects to the NDT which give rise to concern over the capacity of the test to protect the employment standards of workers.

First, it is well recognised that the NDT is being measured against a benchmark which is constantly losing ground against market standards as a consequence of the conversion of awards to a minimum floor only. This means that it is certain that many workers, particularly those in industries where agreements do not produce good wage outcomes (e.g. industries where unions are relatively weak, or those regulated by non-union agreements) are failing to maintain their employment conditions relative to their position before the NDT commitment. This is something which could be addressed simply enough by legal change to the test, requiring the measurement of the agreement up against the employee's *existing* conditions of employment rather than the relevant award. However, the fundamental issue is one of policy. The purpose of the construction of the NDT in its existing form is presumably to ensure that there is scope for bargaining on a scale which allows either increases or decreases in costs to enterprises according to the capacity of the enterprise to pay. But in giving effect to this policy, the government is not in any real sense meeting the political commitment which lay behind the introduction of the NDT.

Second, 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 in particular, as to how the agreement is to be operationalised after certification or approval. Several of the parties we spoke to saw this as a major problem in securing the efficacy of the NDT. It was noted that failure of the test sometimes arises either because the agreement might not be operationalised in the way that it was anticipated, or because the employer might not adhere to the same plan over the life span of the agreement.

This does appear to present a serious difficulty with securing the outcomes of the enterprise bargaining process, particularly in the case of AWAs and s. 170LK agreements. To what extent can we expect, in the case of the overwhelming proportion of these agreements where no union is involved, that there is sufficient ongoing protection of the interests of employees? Even assuming that employees have copies of the text of the agreement to which they are parties, can it be assumed that they will also be aware of the accompanying material in the form of statutory declarations, undertakings, and other supporting material which, as we have noted, contains the gist of the material exchange inherent in the agreement?

These are more than hypothetical problems. The NDT has only to be satisfied at the time the decision is taken to approve or certify the agreement. 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. Some

members of the AIRC have adopted certain practices to try to protect employees against NDT failure during the life of the agreement. One approach has been to introduce, as part of the agreement, or as an undertaking pursuant to it, a commitment that the employer undertake an audit, at a particular point in the life of the agreement, or on departure from employment of an employee. Under such arrangements the employer is obliged to compare the remuneration actually arising from the agreement as against the award, and make good any deficiencies shown to arise.[66] A second practice requires the employer to report back to the AIRC during the course of the agreement for a review hearing.[67]

A third issue of concern with the NDT is that the test does not necessarily protect the position of every employee covered by the agreement. The legislation only requires that the agreement not 'disadvantage *employees* in relation to their terms and conditions of employment' (emphasis added).[68] Several parties to whom we spoke conceded that some agreements are certified on the basis of a 'generalised' or 'averaged' position of the workforce as a whole and that consequently in such circumstances a small minority of employees may be disadvantaged as a result.

A fourth issue of importance concerns several aspects of the substance of the exchange between the parties to agreements. As our earlier discussion demonstrates, most of the content of the exchange which forms the basis of 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 base rate wage increases and perhaps other improvements in terms and conditions).

However, as we have also 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. Although it is clear enough that employees can obtain benefits from these types of provisions, they nevertheless raise some cause for concern.

One problem with such practice is the fact that it has overtones of the 'truck' system of payment which was outlawed more than a century and a half ago. There is an important issue of principle as to the degree to which it is appropriate to treat employer products or services as part of a remuneration package, even when that arrangement is consensual. Second, evidence put to us by some parties seems to suggest that such benefits may be taken into account in 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 to those employees.

A further example of the kind of matters which might be taken to 'advantage' employees beyond the typical range of conditions are those entirely non-material (some would say lifestyle) rewards such as greater flexibility for employees to organise their own working hours around family and lifestyle considerations. There

is no doubt that the idea of factoring in such advantages to employees as part of the NDT has currency. For example, the OEA's *AWA Procedures Guide* specifically has indicated that '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 . . . may pass an NDT.' However, it would seem that both the AIRC and the OEA are likely to treat these matters very cautiously.[69]

There is, however, a further important aspect to this general argument. If it is appropriate to factor in to the NDT the non-material advantages which employees obtain in the bargain, then it would seem appropriate to do so for non-material detriments at the same time. This seems to be a major area of omission in both the AIRC and the OEA. As we have noted, the substance of the exchange in most agreements concerns issues such as pay and flexible working time. Yet it is also clear that the employee in many agreements (particularly, AWAs and s. 170LK agreements) is also giving up substantial job control and other influence over their working life. These matters do not appear to be being taken into account as part of the NDT.

It may be the case, of course, that these matters do not give rise to a great deal of consideration by the employee and union parties to agreements themselves. These parties are perhaps more readily concerned with directly material conditions. It is also true 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 employer's discretion to control the performance of work have been largely removed. Notwithstanding this, as noted earlier we believe this issue still to have 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 indicative duties statements which expressly or impliedly limit the job function able to be assigned to the employees doing jobs regulated by that award. In short, if non-monetary 'flexibility' benefits are properly part of the NDT equation in evaluating *advantages* to the employee, then we must suppose that equally they should apply to non-monetary *disadvantages* suffered by employees in the exchange.

Process

The terms of the *WRA* provide very little direction on how the NDT is to be applied. The *WRA* 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. However, beyond that, how the authorities exercise their functions is largely a matter for their discretion, always bearing in mind that the rules of natural justice must be complied with. As a result, any opinion or argument put to the AIRC members must be open to some sort of challenge, review or investigation by the other parties to the proceedings, whether that takes place in the form of a public hearing or in the form of other written or

verbal presentations to the AIRC member. The AIRC is also expected 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 *WRA*. Finally, it is important to note that there are only limited opportunities for public review of the AIRC's decision-making process. Intervention in certification applications are only by leave of the AIRC, and the terms of the *WRA* do not permit unions that are not bound to the proposed agreement, or that are not requested to represent a party to a s. 170LK agreement, to intervene in the proceedings.[70] An appeal lies, by leave, against any *refusal* to certify an agreement, but a decision to *approve* an agreement can generally only be reviewed, again by leave, if the decision was made without jurisdiction (see Creighton & Stewart 2005: 240).[71] There is no prospect of an appeal on the merits.

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

In our interviews with a number of practising parties, several issues were raised pertaining to the determinative processes adopted by the AIRC and the OEA which, in our view, raise some questions about the integrity of the NDT process.

First, in respect of the AIRC several points were noted:

- There is great variation in approach to the certification of agreements between different members;
- Some members adopt a highly exacting line-by-line analysis of agreements before 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 award;
- To a considerable degree, members of the AIRC are prone to rely very heavily upon the evidence of the union with respect to the certification of s. 170LJ agreements in particular;
- There is overreliance on the statutory declarations required to be completed by the employer pursuant to the AIRC Rules. 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; and
- There are no uniform attempts made by members to ensure that the objectives of the NDT are being met as the agreement is operationalised throughout its life-course.

Of themselves these kinds of matters may not add up to very much. It is difficult to mount an argument that the NDT is a failing regulatory system or standard based on such anecdotal evidence, when these might amount to only slight differences in emphasis and approach by persons charged with the responsibility of applying what is essentially a subjective assessment. Such concerns do, however, point to a serious underlying tension in the role of the AIRC in applying the terms of the *WRA*. On one view, the AIRC's role in relation to enterprise bargaining is essentially supervisory. The regulation, in the form of agreements, is being designed principally by the parties to those agreements, not by the AIRC. The

key role for the AIRC is to give effect to the wishes of the parties. On the other hand there is the statutory standard of the NDT. This is a difficult and time-consuming standard to apply. At the same time the volume of agreements coming before the AIRC is placing serious time constraints on the capacity of the members to deliberate on matters.[72] The precise question for members of the AIRC is how to balance these functions, one which emphasises efficient regulation, and the other which emphasises legal protection of employees' interests. The differing approaches between members certainly reflects the problems of time constraints, but it also reflects, far more importantly, a clear differing cultural outlook between some AIRC members and others about their function, and ultimately about the core purposes of the *WRA*.

Insofar as the OEA is concerned, it may be argued that its more systematised approach to applying the NDT possibly makes the outcomes of its deliberations on AWAs less prone to the inconsistencies of approach which characterise the practices of AIRC members. Nevertheless, there are aspects of the OEA's process which also give rise to questions about the integrity of the NDT.

As we noted earlier, much of the process leading to the approval of AWAs is externalised to 'industry partners' in various schemes which try to facilitate the making of such agreements. It is possible that these processes might actually *assist* the parties in making better agreements. On the other hand there is, as a consequence of this practice, a perception that the OEA is abrogating its responsibilities. Although the OEA purports to carry out a full NDT on all AWAs, the fact that it is heavily involved in the *promotion* of AWAs, and with assisting parties to prepare them, and the fact that it thus gives the appearance of having a duality, if not a conflict, of functions (as both promoter and regulator), continues to give rise to questions of the OEA's independence.

CONCLUSIONS

For reasons we have touched on throughout, it is difficult to draw a precise picture of how the NDT is operating in practice, and whether it is meeting the purpose for which it was designed. In the first place there is scope for argument about exactly what the NDT is intended to do, and how it should be given effect in what is essentially a scheme of self-regulation at the enterprise level. Second, gathering and analysing evidence of the NDT in operation, and the veracity of its outcomes is also very difficult. Much of the information required to undertake an analysis is not on the public record. The application of the NDT, at the end of the day, is heavily reliant on the subjective judgement of the two bodies charged with its exercise (the AIRC and the OEA). The tasks involved in the application of the test are very complex (as we discovered from our own experience), and, importantly, there is usually very little information on the public record to guide the researcher on the reasoning whereby particular outcomes have been reached.

For these reasons, among others, our findings should be treated with caution, and principally as exposing various areas of concern which require greater exploration in future work. Nevertheless, we have reached a view which we regard as cautious but sound, based on the evidence which we have assembled. It is our

general view that *the NDT, as it is presently constructed and applied, 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 following flow of argument.

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 was made. There are, however, several other factors which need to be taken into account which bear upon this evaluation.

The detailed examination of our primary dataset (36 agreements) reveals that in many instances the difference between the monetary outcomes of the award and the agreement are very thin. This is particularly the case with respect to AWAs and s. 170LK agreements. Where that is so, given the number and nature of non-monetary concessions which employees typically make 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 by the fact that 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 or even relevant 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*. When one looks at the NDT 'on balance' or 'in the round' it is difficult to avoid the conclusion that many 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 consequence to personal and family life. Many have suffered a loss of control over when they can take annual holidays. Many no longer have any 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 brought about a deterioration in the quality of working life of substantial proportions, compensated for, in many instances, by small or non-existent pay increases.

Second, there is the related 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 in our discussion of the agreement outcomes in the analysis: outcomes and processes in implementing the NDT and the conclusions sections, 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 in exchange for the extended managerial discretion, as attaching a 'non-union premium' to the agreement (Peetz 2001). 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.

Finally, there are two points concerning process which we think also seriously affect the integrity of the NDT. First, whether or not the content of the bargain is, on its face, adequate for both parties, it seems clear that the provision of adequate outcomes for employees is highly dependent on the post-approval or post-certification phase of the agreement. Evidence gathered in interviews for this project suggests that in the minds of some practising parties this is a serious matter for concern; that is, 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.

Second, both in the case of the AIRC and the OEA there are identified concerns about process and consistency. These include a lack of follow-up enforcement or supervision element to realise the supposed objectives of the NDT over the life of the agreement, the inconsistent practices of the members of the AIRC, the overreliance on 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, of course, changes which could be made, both to the legal construction of the NDT and to the processes adopted by the authorities. Some of these were canvassed in the Report which formed the basis of this article.[73] However, in the present political climate it seems clear that changes made to the laws on enterprise bargaining in the Federal sphere will almost certainly reduce rather than stiffen the procedures for processing the agreements. In this process the NDT is likely to be reduced in significance rather than strengthened.

ENDNOTES

1. Part VID *WRA*.
2. Section 170LK *WRA*.
3. Section 170LJ *WRA*. For the purposes of the argument in this article, we are not considering Division III agreements which are, for all relevant purposes, functionally equivalent to s. 170LJ agreements.
4. Part IVA *WRA*.
5. Section 170VPB *WRA*.
6. Sections 170VPC(3) and 170LT *WRA*.
7. See, for example, *Shop, Distributive and Allied Employees Association and Bunnings Building Supplies Pty Ltd: s. 170LJ Application for Certification of Agreement* (Print P6024, Whelan C, 21 October 1997); Waring and Lewer (2001).
8. See, for example, *The Australian*, 9th January 1996.
9. Section 170XE *WRA*.
10. Section 134E of the *IRLAA*.
11. *Commonwealth Parliamentary Debates*, Senate, 7 May 1992 (P. Cook, Minister for Industrial Relations), Second Reading Speech, p. 2517 at p. 2519.
12. Sections 170MC(6) and 170NC(3) *IRRA*.
13. An unresolved remaining issue was what relevance terms and conditions contained in the common law contracts of employment of employees would have upon the NDT: see McCarry (1998).
14. *Commonwealth Parliamentary Debates*, House of Representatives, 28 October 1993 (L. Brereton, Minister for Industrial Relations), Second Reading Speech, p. 2777 at pp. 2780 and 2781.

15. The statutory object of ensuring that awards act as a 'safety net', now contained in s. 88A *WRA*, was first introduced by the *IRRA*.
16. Section 170XA *WRA*.
17. *Ibid.*
18. *Commonwealth Parliamentary Debates*, House of Representatives, 21 November 1996 (P. Reith, Minister for Industrial Relations), Amendments Speech, p. 7221.
19. For example, the provision promoting the 'business crisis' criterion to the status of a statutory note: see s. 170LT(4) *WRA*.
20. The OEA is not required to issue decisions giving reasons why it has approved or rejected an AWA.
21. See *Lilianfels Blue Mountains Enterprise Flexibility Agreement* (1995) AILR paras 3-067; *Arrowcrest Group Pty Ltd re Metal Industry Award* (1994) AILR paras 356; *Re Independent Order of Oddfellows of Victoria Friendly Society* (1996) 65 IR 129.
22. For example, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v. Tweed Valley Fruit Processors* (1995) 61 IR 212; affirmed on appeal, *Tweed Valley Fruit Processors Pty Ltd v. Ross and Others* (1996) 137 ALR 70.
23. See *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).
24. *Shop, Distributive and Allied Employees Association and Bunnings Building Supplies Pty Ltd, s. 170LJ Application for Certification of Agreement* (Print P6024, Whelan C, 21 October 1997).
25. *Pacific Access Pty Ltd Application for Certification of Agreement* (Print R2944, Holmes C, 30 March 1999).
26. *Department of Finance and Administration and Others* (Print P8703, Duncan SDP, 10 February 1998).
27. See note 19, above.
28. See, for example, *Australian Workplace Agreements* (Print P5472, Duncan DP, 26 September 1997); *Australian Workplace Agreements 1997* (Print Q7881, Duncan DP, 23 October 1998).
29. Or 'fictitious', see Merlo (2000: 215).
30. Section 170XA(2) *WRA*.
31. This was one of the justifications for the new enterprise bargaining system put forward by the then Minister for Industrial Relations, Peter Reith, in his Second Reading Speech introducing the *Workplace and Other Legislation Amendment Bill 1996* (Cwlth), see *Commonwealth Parliamentary Debates*, House of Representatives, 23 May 1996, p. 1295.
32. Sections 170WHB, 170WHC, 170WHD and also s. 83BS *WRA*.
33. In respect of AWAs, we are only considering those agreements approved by the OEA, and not those referred to the AIRC.
34. These generally require that an agreement submitted to the AIRC for certification must be accompanied by statutory declarations in accordance with forms prescribed under the *Australian Industrial Relations Commission Rules*. The form requires parties to specify the relevant award or, if there is no relevant award, to state whether application has been made for the determination of a designated award. 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 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 identify such reductions, and also specify the terms of the agreement which supposedly result in its satisfying the NDT; see *Rules* 48, 48A, 49; *Forms* R28, R28A, R28B, R30.
35. See, for example, the comments of Whelan C in *Shop, Distributive and Allied Employees Association and Bunnings Building Supplies Pty Ltd* (Print P6024, 21 October 1997); and also the comments of Simmonds C in *Daviesway Pty Ltd Enterprise Agreement 1999* (Print R9030, 14 September 1999).
36. We conducted informal interviews with several members of the AIRC and other relevant parties (including officers of the OEA and lawyers) to seek further information on this point and on other pertinent issues arising from this research.
37. *Re Knightwatch Security Pty Ltd* (PR943374, 6 February 2004, Giudice P, Ross VP and Whelan C).

38. 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 (usually the employer).
39. *Ibid.* [44–46].
40. PR 937654, Watson SDP, Blain DP and Lewin C, 15 September 2003.
41. *Ibid.* [36] (Watson SDP and Lewin C).
42. *Ibid.* [32].
43. *Ibid.* [38].
44. *Ibid.* [37].
45. *Ibid.*
46. *Ibid.* [38]. The expressions in this quoted section of the decision were drawn from *Deloitte Touche Tohmatsu v. Australian Securities Commission* (1996) 136 ALR at 468, pertaining to 'What it means to "take into account" a relevant consideration'; see fn. 13 of the printed decision'.
47. *Ibid.* [46].
48. *Ibid.*
49. Watson SDP and Lewin C. Blain DP dissented from this ruling.
50. *Ibid.* [72].
51. *Ibid.* [82].
52. *Ibid.* [76–79].
53. *Ibid.* [79].
54. *Ibid.* [81].
55. *Ibid.*
56. *Ibid.*
57. *Ibid.* [12] (Blain DP).
58. *Ibid.*
59. Some commentators have gone so far as to question the independence of the OEA: see, for example, 'Is the EA Truly Independent?' (Goodman 1998: 10); 'The Employer Advocate?' (Merlo 2000: 224).
60. These provisions are detailed at Mitchell *et al.* (2004: 27–30).
61. Interview with the OEA and officers, 3 May 2004.
62. See further discussion under 'Analysis: Outcomes and Processes in Implementing the NDT', below.
63. For various reasons that we need not explain here, we only measured the agreements against the award without reference to any other relevant law unless it was specifically mentioned in the text of the agreement. We also did not take into account any relevant undertakings by the employer except where these were obvious in the terms of the agreement or explicitly mentioned in the AIRC's decision. Further, all of the agreements that were analysed were certified without consideration of the second 'public interest' aspect of the NDT.
64. For example, other research carried out by some of the present authors reveals a substantial proportion of AWAs which permit the employer to vary the employee's job duties with no limitations; see Mitchell and Fetter (2003).
65. These and other issues concerning the legal interaction of various industrial instruments are explored in Fetter and Mitchell (2004).
66. See *Lone Star Steakhouse and Saloon Western Australia—Certified Agreement 2002–2005* (PR936265, Watson SDP, 13 August 2003).
67. See *Pancake Parlour (A.C.T.) Certified Agreement with Employees 2001* (PR917175, Watson SDP, 26 April 2002).
68. Section 170XA(1) *WRA*.
69. Interview with Employment Advocate and senior officers, 3rd May 2004. See the decision of Duncan DP in *Re Australian Workplace Agreements* (Print S5352, 28th April 2000).
70. See s. 43 *WRA*.
71. See s. 45 *WRA*.

72. In the previous financial year, 8509 agreements were certified by the AIRC: see AIRC (2003–04: 12).

73. See note 1, above.

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