NEW SOUTH WALES INDUSTRIAL RELATIONS COMMISSION

CITATION : Child Employment Principles Case 2007 [2007] NSWIRComm 110
This decision has been amended. Please see the end of the judgment for a list of the amendments.

FILE NUMBER(S): IRC 3579

HEARING DATE(S): 26 March 2007, 27 March 2007, 4 April 2007, 5 April 2007, 18 April 2007

DATE OF JUDGMENT: 22 May 2007
PARTIES:
Australian Business Industrial
Australian Federation of Employers and Industries and its affiliates
Australian Industry Group
Catholic Commission for Employment Relations
Local Government and Shires Associations of New South Wales
Minister for Industrial Relations
Motor Traders Association of New South Wales
Public Employment Office
Unions NSW

CORAM: Wright J President Walton J Vice-President Schmidt J Sams DP Boland J McLeay C

CATCHWORDS: Child Employment - Summons to show cause issued by Commission - Industrial Relations (Child Employment) Act 2006 - No net detriment - Effect of WorkChoices legislation - Principles for child employment - Proposed principles - Principles established

Statutory Interpretation - Proper construction of Industrial Relations (Child Employment) Act 2006 - Principles established

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CASES CITED: Bolton and another; ex parte Beane, Re (1987) 162 CLR 514
Brooks and Another v Commissioner of Taxation (2000) 100 FCR 117
New South Wales and others v Commonwealth (2006) 231 ALR 1
State Part-Time Work Case (1998) 78 IR 172

LEGISLATION CITED: Annual Holidays Act 1944
Apprenticeship and Traineeship Act 2001
Children (Care and Protection - Child Employment) Regulations 2001
Children and Young Persons (Care and Protection - Child Employment) Regulations 2005
Children and Young Persons (Care and Protection) Act 1998 s 22
Children's Protection Act 1902
Education Act 1990
Employment Protection Act 1982
Industrial Arbitration Act 1940
Industrial Relations (Child Employment) Act 2006 s 3, s 3(1), s 4, s 4(1), s 4(1)(a), s 4(1)(b), s 4(1)(c), s 4(2), s 4(2)(a)), s 4(2)(b), s 4(3), s 4(3)(b), s 4(4). s 4(4)(b), s 5, s 5(1), s 5(2), s 5(2)(d), s 5(3), s 5(3)(b), s 5(4), s 5(5), s 10, s 11, s 12, s 15, s 16, s 16(1)(e)
Industrial Relations Act 1991
Industrial Relations Act 1996 5(4), s 6(1), s 6(2), s 8, s 10, s 35, s 76, s 117, s 118, s 124, s 146, s 371
Long Service Leave (Metalliferous Mining Industry) Act 1963
Long Service Leave Act 1955
Occupational Health and Safety Act 2000
Public Sector Employment and Management Act 2002
Superannuation Guarantee (Administration) Act 1992 (Cth)
Workplace Relations Amendment (WorkChoices) Act 2005 (Cth) s 16(1)

JUDGMENT:

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

FULL BENCH

CORAM: WRIGHT J, President
WALTON J, Vice-President
SCHMIDT J
SAMS DP
BOLAND J
MCLEAY C

Tuesday 22 May 2007

Matter No IRC 3579 of 2006

CHILD EMPLOYMENT PRINCIPLES CASE - 2007

Summons to Show Cause - Commission on its own initiative pursuant to Part 2, section 5(5) of the Industrial Relations (Child Employment) Act 2006

DECISION OF THE COMMISSION
[2007] NSWIRComm 110

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Statement.pdf

INTRODUCTION

1 These proceedings were commenced in December 2006, with a summons to show cause issued by the Commission of its own initiative, in order that consideration be given to the establishment of principles for child employment in this State. The summons followed the enactment of the *Industrial Relations (Child Employment) Act* 2006 ('the *Child Employment Act*'), s 5 of which provides:

> **5 Full Bench of Commission to set no net detriment principles**
>
> (1) A Full Bench of the Commission is required to set principles (the no net detriment principles) to be followed by an industrial court in determining whether or not an affected employer of a child has provided the child with conditions of employment that, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child.
>
> (2) In determining those principles, the Full Bench of the Commission is to have regard, in particular, to the following:
>
> (a) evidence about the kinds of occupations and industries in which children are employed,
>
> (b) the State awards that apply to those occupations and industries,
>
> (c) any industrial relations legislation that may apply generally to the employment of children,
>
> (d) any provisions of any such State awards or industrial relations legislation that operate to provide conditions of employment that are particularly important for ensuring the well-being of children who are employed,
>
> (e) the provision of any other laws of the State that may be relevant to the employment of children or to their well-being while employed (for example, laws dealing with occupational safety, education or child protection).
>
> (3) Without limiting subsection (1) or (2), the Full Bench of the Commission may determine that a particular condition or conditions of employment of the kind referred to in subsection (2) (d) is or are of such importance for ensuring the well-being of children who are employed that a failure to provide that condition or those conditions will of itself result in a net detriment to the child when compared to the minimum conditions of employment for the child.
>
> (4) A Full Bench of the Commission is to review the no net detriment principles at least once every 3 years.
>
> (5) The no net detriment principles may be set or reviewed on the application of the Minister or on the Commission's own initiative.
>
> (6) Industrial organisations are entitled to be notified of any proceedings of a Full Bench under this section and to make submissions on the setting or review of the no net detriment principles.
>
> (7) The Industrial Registrar is to publish the no net detriment principles:
>
> (a) if Part 11 (NSW industrial relations website) of Chapter 4 (as inserted by the Industrial Relations Further Amendment Act 2006) has not commenced—in the Industrial Gazette, or
>
> (b) if that Part has commenced—on the NSW industrial relations website.
>
> (8) The initial no net detriment principles are to be set and published under this section within 6 months after the commencement of this section.

2 A directions hearing for the preparation of the matter occurred before the President on 8 December 2006; at the parties' request the matter was the subject of conciliation which occurred before the Vice-President. Conciliation, however, failed to resolve all of the differences between the parties.

3 Various witnesses gave affidavit evidence and numerous documents were tendered, including principles proposed by the parties.

PRINCIPLES PROPOSED BY PARTIES

4 The principles proposed by the Minister for Industrial Relations were developed as the result of discussions with the other parties and conciliation conferences before the Vice-President. The principles finally proposed by the Minister were:

NO NET DETRIMENT PRINCIPLES

Preamble

These no net detriment principles acknowledge that the principal purpose of the *Industrial Relations (Child Employment) Act* 2006 (the Act) is to provide children in employment with the minimum conditions of employment contained in relevant New South Wales industrial awards and industrial relations legislation. In particular, the Act is designed to protect children employed under the terms of agreements or arrangements which have not undergone a process whereby an industrial tribunal applies to such agreements a statutory no disadvantage/no net detriment test based on a comparison with the relevant award(s).

In assisting in the determination of whether or not an employer has breached section 4(2) of the Act by providing a child with conditions of employment that, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child (as defined by section 4(3) of the Act) the industrial court will apply the following principles.

The no net detriment principles are as follows:

1 If in a particular case the following circumstances have been established, the relevant employer is presumed to have complied with the requirements of s.4(2)(b). These circumstances are:

i) That the conditions of employment have been provided to the child under the terms of a collective agreement applying to the child and the agreement has been formally approved by an industrial tribunal which applied a statutory no disadvantage/no net detriment test to the agreement; or

ii) That the conditions of employment have been provided to the child under the terms of a collective agreement which has replaced an agreement of the kind described in 1(i) and the agreement does not alter to the detriment of the child the employment conditions and total remuneration that were or would have been provided to the child under the terms of the replaced collective agreement.

2 Subject to paragraph 1 above, a net detriment to a child results where:

i) all amounts paid in aggregate under the conditions of employment provided to the child are less than all amounts payable** in aggregate to a child under the comparable state award and industrial relations legislation with the exception of the item listed in 3(i)(a) (re s.4(2)(b)); and/or

ii) any one or more of the following conditions found in the comparable state award or industrial relations legislation is not provided to the child in the conditions of employment of the child (re s.5(3)):

(a) the right to be paid in full;
(b) any special requirements under the comparable award for children, including but not limited to supervisory arrangements;
(c) limitations on work late at night or early in the morning, and late night transport arrangements;
(d) reasonable notice of rosters and changes of shift/working hours;
(e) induction and training clauses, particularly relating to safety and, any clause requiring the provision of safety equipment or otherwise dealing directly with safety;
(f) the entitlement to four weeks annual leave contained in the *Annual Holidays Act* 1944.

3 i) Apart from the mandatory matters dealt with in paragraph 2 above, the industrial court, in determining whether or not a child has suffered on balance a net detriment compared to the minimum conditions of employment must also give significant weight to the extent to which the employer has provided to a child the following conditions of employment where such minimum conditions exist in the comparable state award:

(a) daily minimum engagements;
(b) daily maximum hours;
(c) frequency of payment of wages;
(d) meal breaks, crib breaks and rest breaks;
(e) minimum breaks between shifts;
(f) spread of ordinary hours;
(g) the right to refuse unreasonable overtime;
(h) split shifts;
(i) notification to the employee of terms of employment in particular whether the employee is engaged on a casual, part-time or full-time basis.

ii) In giving weight to the extent to which the employer has provided a child with the conditions of employment set out in paragraph 3(i) above the industrial court will take into account:

(a) the involvement of the child employee and/or their representatives in negotiation processes; and
(b) whether a reasonable effort was made to ensure the child employee had the nature and effect of the conditions of employment explained in a manner appropriate to his or her age; and
(c) the child employee did not enter into the conditions of employment under duress; and
(d) the needs and circumstances of the child; and
(e) the needs and circumstances of the enterprise.

** 'Amounts payable' has the meaning as amount payable under Part 2 of Chapter 7 of the *Industrial Relations Act* 1996.

5 The position of Unions NSW was one of general support for the principles proposed by the Minister, until final submissions were made. That position then altered, with Unions NSW advancing its own principles, which departed in a substantial way from those proposed both by the Minister and by various employers. These principles were:

NO NET DETRIMENT PRINCIPLES

Preamble

These no net detriment principles acknowledge the principle purpose of the Industrial Relations (Child Employment) Act (the Act) is to provide children in employment with the minimum conditions of employment contained in relevant New South Wales industrial awards and industrial relations legislation. In particular, the Act is designed to protect children employed under the terms of agreements or arrangements which have not undergone a process whereby an industrial tribunal applies to such agreements a statutory no disadvantage/no net detriment test based on a comparison with the relevant award(s).

In assisting in the determination of whether or not an employer has breached section 4(2) of the Act by providing a child with conditions of employment that, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child (as defined by section 4(3) of the Act) the industrial court will apply the following principles.

The no net detriment principles are as follows:

1. If in a particular case the following circumstances have been established, the relevant employer is presumed to have complied with the requirements of s4(2)(b). These circumstances are:

    i. That the conditions of employment have been provided to the child under the terms of a collective agreement applying to the child and the agreement has been formally approved by an industrial tribunal which applied a statutory no disadvantage/no net detriment test to the agreement; or

    ii. That the conditions of employment have been provided to the child under the terms of a collective agreement which has replaced an agreement of the kind described in 1(i) and the agreement does not alter to the detriment of the child the employment conditions and total remuneration that were or would have been provided to the child under the terms of the replaced collective agreement.

2. Subject to paragraph 1 above, the Court must consider the following matters in assessing whether or not a child has suffered a net detriment in their employment:

    (i) All amounts paid in aggregate under the conditions of employment provided to the child compared to all amounts payable** in aggregate to a child under the comparable state award and industrial relations legislation with the exception of the item listed in 3(i)(a) (re s.4(2)(b)); and

    (ii) whether any one or more of the following conditions found in the comparable state award or industrial relations legislation is not provided to the child in the conditions of employment of the child (re s.5(3)):

        a) the right to be paid in full;

        b) any special requirements under the comparable award for children, including but not limited to supervisory arrangements;

        c) limitations on work late at night or early in the morning, and late night transport arrangements;

        d) reasonable notice of rosters and changes of shift/working hours;

        e) induction and training clauses, particularly relating to safety and, any clause requiring the provision of safety equipment or otherwise dealing directly with safety;

f) the entitlement to four weeks annual leave contained in the *Annual Holidays Act 1944*.

3 (i) In addition to the mandatory matters dealt with in paragraph 2 above, the industrial court, in determining whether or not a child has suffered on balance a net detriment compared to the minimum conditions of employment must also give significant weight to the extent to which the employer has provided to a child the following conditions of employment where such minimum conditions exist in the comparable state award:

a) daily minimum engagements;

b) daily maximum hours;

c) frequency of payment of wages;

d) meal breaks, crib breaks and rest breaks;

e) minimum breaks between shifts;

f) spread of ordinary hours;

g) the right to refuse unreasonable overtime;

h) split shifts;

i) notification to the employee of terms of employment in particular whether the employee is engaged on a casual, part-time or full-time basis.

j) Any other condition of employment that the court considers relevant

(ii) In giving weight to the extent to which the employer has provided a child with the conditions of employment set out in paragraph 3(i) above the industrial court will take into account:

a) the involvement of the child employee and/or their representatives in negotiation processes; and

b) whether a reasonable effort was made to ensure that the child employee had the nature and effect of the conditions of employment explained in a manner appropriate to his or her age; and

c) the child employee did not enter into the conditions of employment under duress; and

d) the needs and circumstances of the child; and

e) the needs and circumstances of the enterprise.

** 'Amounts payable' has the meaning as amount payable under Part 2 of Chapter 7 of the *Industrial Relations Act 1996*

6 The position of the employers varied. Initially, the Australian Federation of Employers and Industries ('AFEI') opposed the principles which the Minister proposed, but itself proposed no principles. Australian Business Industrial ('ABI') and Australian Industry Group ('AIG') put a joint position. They did not support the enactment of the *Child Employment Act*, opposed the principles which the Minister proposed, but initially themselves did not propose any Principles. This position also altered and the principles finally jointly proposed by AFEI, ABI and AIG were:

PREAMBLE

These no net detriment principles acknowledge that the principal purpose of the Act is to provide children with certain conditions of employment that do not, on balance, result in a net detriment when compared to the minimum conditions of employment for that child.

In assisting in the determination of whether or not an employer has breached section 4(2) of the Act by providing a child with conditions of employment that, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child (as defined by section 4(3) of the Act) the Court will apply the following principles.

The no net detriment principles are as follows:

PRESUMPTION OF COMPLIANCE

1. If in a particular case the following circumstances have been established, the relevant employer is presumed to have complied with the requirements of s 4(2)(b). These circumstances are:

    a) That the conditions of employment have been provided to the child under:

        i. The terms of a collective agreement that has been formally approved by an industrial tribunal which applied a statutory no disadvantage test/no net detriment test to that agreement; or
        ii. The terms of a Notional Agreement Preserving a State Award; or
        iii. The terms of a Pre-Reform Federal Award.

    or;

    b) That the conditions of employment have been provided to the child under the terms of a collective agreement which has replaced an industrial instrument of the kind described in (a) and the agreement does not alter to the detriment of the child the employment conditions and total remuneration that were provided to the child by the replaced industrial instrument.

CONDITIONS WHICH PROVIDE A NET DETRIMENT

2. Subject to paragraph 1 above, a net detriment to a child results where:

    a) The child is employed under the terms of an agreement or other arrangement and is not provided with any one or more of the following as minimum conditions of employment for that child as found in the comparable state award or industrial relations legislation:

        i. The right to be paid in full;
        ii. Any special requirements under the comparable award for children, including but not limited to supervisory arrangements;
        iii. Limitations on work late at night or early in the morning, and late night transport arrangements;
        iv. Reasonable notice of rosters and changes of shift/working hours;

    and/or;

    b) The child is employed under the terms of an agreement or other arrangement that provides for the payment of wages to an employee at a rate that is less than what would be applicable to that child under the comparable state award.

ASSESSING WHETHER THERE IS ON BALANCE A NET DETRIMENT

3. Apart from the mandatory matters dealt with in paragraph 2 above, the Court in determining whether or not a child has suffered on balance a net detriment compared to the minimum conditions of employment must also assess the extent to which the employer has provided to the child the following conditions of employment where such conditions exist in the comparable award

    a) Frequency of payment of wages;
    b) Meal breaks, crib breaks, and rest breaks;
    c) Minimum breaks between shifts;
    d) Spread of ordinary hours including daily maximum hours;
    e) Split shifts;
    f) Notification to the employee of terms of employment in particular whether the employee is engaged on a casual, part-time or full-time basis.

4. In assessing whether or not a child has suffered on balance a net detriment arising out of its conditions compared with those set out in paragraph 3, the Court will take into account:

    a) The involvement of the child employee and/or their nominated representatives in the negotiation process;
    b) Whether a reasonable effort was made to ensure that the child employee had the nature and effect of the conditions of employment explained to them in a manner appropriate to their age;
    c) That the child did not enter into the conditions of employment under duress;
    d) The needs and circumstances of the enterprise of the affected employer;
    e) The aggregate benefits of employment that result generally to both parties;
    f) The minimum conditions of employment for that child (as defined by section 4(3)(a) of the Act) as they existed at the time the agreement or other arrangement first commenced.

7 The Catholic Commission for Employment Relations ('CCER') also opposed the principles which the Minister originally proposed as being so prescriptive as to make it 'virtually impossible for an affected employer to enter into an alternative agreement with a child'. CCER later supported the amended principles proposed by the Minister, however, in final submissions it was announced that CCER supported the principles proposed by Unions NSW.

8 The position of the Local Government Association of NSW and Shires Association of NSW ('LGSA') was one of support for the submissions and evidence led by the Minister.

9 The Motor Traders' Association of New South Wales ('MTA') was concerned about the enactment of s 4 of the *Child Employment Act* and what was submitted to be an apparent ambiguity in the provisions there made. Its case was that without clarity, employers might be faced with claims regarding underpayment of wages 'due to misapplication of the legislation'. The MTA also opposed the principles proposed by the Minister, arguing that elements of s 35 of the *Industrial Relations Act* 1996, dealing with approval of enterprise agreements made under that Act, should be utilised 'as the appropriate no net detriment test'. It supported the principles proposed by the employers.

EVIDENCE

Ms Gillian Calvert

10 Ms Gillian Calvert, the Commissioner for Children and Young People, gave evidence that the NSW Commission for Children and Young People had undertaken a study in 2004 and 2005 on children and their working experiences. The study employed a questionnaire answered by 11,000 children aged 12 to 16 years in

22 schools, who were undertaking years 7 to 10. The resulting *Children at Work Report* was published in June 2005. The study considered the type of work children undertake; the conditions they work under; their satisfaction levels and matters such as work related injuries, harassment and discrimination; and, the impact of work on other aspects of children's lives.

11 On Ms Calvert's evidence, the study revealed that:

- over 56 per cent, of the children in years 7 - 10 had worked in the previous 12 months. (This equates to some 240,000 children when applied to the population).

- a significant proportion of 12 year olds worked. By age 13 the majority of children worked in the informal or formal labour market. The greatest proportion of children who worked were in year 10 at school.

- 61 per cent of participants worked for a formal employer (equating to some 146,400 children across the population). The incidence of formal employment increased with age.

- the most common jobs in the formal labour market were:

  (a) Sales work (37.2 per cent of all formal labour market categories)

  (b) Delivery work (11.7 per cent)

  (c) Babysitting and other care work (10 per cent)

  (d) Agricultural and horticultural work (7.8 per cent)

  (e) Food preparation (7 per cent)

- work for formal employers was generally regular (59.8 per cent). The rest was casual (33.9 per cent) or one off (6.2 per cent)

- most work hours were low - 44.5 per cent worked 0-5 hours per week for a formal employer and 32 per cent worked 6-10 hours. 13.2 per cent worked 11-15 hours and 10.3 per cent over 15 hours
- during school term, 46.3 per cent of those who worked, did so on weekdays and weekends; 22.9 per cent worked weekdays only - a total of 69.2 per cent working on weekdays.

12 The study showed that greater commitment of time was required from work as children got older, but that their wages and conditions improved. 20.5 per cent of children working for a formal employer worked before 7.00 am and 57.8 per cent after 7.00 pm. 40.1 per cent of children sustained a work-related injury and 17.5 per cent required treatment. Four per cent sustained serious injury resulting in hospitalisation, medical treatment or time off work or school for 3 or more days.

13 Ms Calvert's evidence was that the study also dealt with children's attitudes to work and its consequences. It showed that 47.8 per cent of children reported verbal harassment at work and 22.8 per cent reported physical harassment. The likelihood of harassment increased with the number of hours worked and their regularity. Those who worked for informal employers experienced less harassment.

14 The study found working hours of 10 or less with reasonable conditions could be positive for children. Long hours, when combined with early or late working hours, gave rise to cause for concern. Early and late hours alone, did not give rise to concern, but still had some negative impacts.

15 Ms Calvert summarised the main issues affecting children at work as:

(a) The importance of income to job satisfaction, particularly amongst older children, would support the proposition that hourly rates of pay are important and therefore where weekend work is undertaken, the ability to earn greater money for that work is also important.

(b) In relation to the safety of children at work, working odd hours, that is late at night or early in the morning, increases the risk to children. Therefore, any restrictions that exist in relation to such work being performed by children would support their well-being.

(c) The study showed that excessive working hours for children is not consistent with their well-being, either in relation to school or safety. Therefore, any conditions which restrict the numbers of working hours where they may be excessive would be supported.

(d) Working long hours and odd hours such as late evenings and early mornings, while attending school, impacts on the quality of life of a child and becomes a serious developmental risk. This developmental risk relates to education, social interaction, and physical and mental well-being.

16 As a result of the Report, the New South Wales Commission for Children and Young People issued a series of recommendations in December 2006. It is now pursuing consultations with Government and non-government bodies. The recommendations were:

1. It is recommended that the NSW Commission for Children and Young People:

§ *regularly repeat aspects of the Children at Work research to monitor how the working lives of children change over time;*

§ *identify what children learn about work and how they learn it;*

§ *identify the particular skills employers need to manage children as workers.*

2. It is recommended that the NSW Government provide a free information, advisory, education and referral service tailored for children and young people, advising them, their parents and employers on employment, including occupational health and safety matters and that the phone number be widely and continuously promoted to children and young people.

3. It is recommended that employers are supported to extend their understanding of children's employment needs through:

§ *Employer bodies developing a guide for employers on understanding the capabilities and specific needs of children in the workplace (including transport needs), and which provides guidance on the social responsibilities of employers towards them as young workers;*

§ *Developing curriculum for TAFE and other management training courses on managing children and young people who work.*

4. It is recommended that the skills required to prepare all children for work are incorporated into the school curriculum from Year 7.

5. It is recommended that the NSW Commission for Children and Young People develop a guide to assist children working as babysitters, their parents, and the parents employing children to baby-sit.

6. *It is recommended that relevant Commonwealth agencies, such as the Department of Education, Science and Training (DEST) and the Department of Employment and Workplace Relations (DEWR), examine ways in which formal and informal work opportunities for children can be improved in disadvantaged areas.*

7. *It is recommended that employer organisations and associations encourage and support businesses to provide paid vacation jobs for children and young people from disadvantaged areas so that they can gain work-based learning experiences.*

8. *It is recommended that the Ministry of Transport continuously and widely promote the availability of concession cards for children from 12 to 15 years of age with schools, parents and children.*

9. *It is recommended that the Regional Transport Coordination Network develops transport projects in consultation with young people to:*

§ *address issues regarding their access to public transport; and*

§ *provide/facilitate access of children and young people and their parents in rural areas to safe, affordable transport systems (eg, taxi vouchers, petrol subsidies). This could occur by mobilising existing local community networks and service providers and exploring and developing other transport options such as mini-bus services and transport rental schemes.*

Mr Gregory Prior

17 Mr Gregory Prior, the Director, School and Regional Operations, Office of Schools within the Department of Education and Training in New South Wales, gave evidence about the attendance of children at school in this State. With limited exceptions the *Education Act* 1990 requires that children aged between 6 and 15 years must attend school. Between 1998 and 2005, the average retention rate of Government schools students in the State from years 10 - 12, was 68-70 per cent. This figure did not reflect children continuing their schooling at TAFE colleges, at non-government schools or interstate. It also paid no regard to those undertaking apprenticeships.

18 The Department of Education and Training ('DET') has not conducted formal research into the relationship between work and school. Problems flowing from such work are dealt with at local levels, by teachers and principals of schools. The Department is aware that some children experience difficulty in managing work, with the result that they are unable to fulfil course requirements imposed by the Board of Studies for years 10, 11 and 12, with the result that they are not awarded a School Certificate or Higher School Certificate.

Mr Ian Kingsley

19 Mr Ian Kingsley, the Director of Apprenticeships, gave evidence about the system of training contracts which employers, apprentices and trainees in the State are required to sign. Such contracts must be approved by DET, in accordance with the *Apprenticeship and Traineeship Act* 2001. Termination of a full apprenticeship requires the consent of the Vocational Training Tribunal. Trainee apprenticeships may be terminated by the giving of notice under the relevant award.

20 Apprenticeships and traineeships require payment to be made under an appropriate industrial arrangement. They also require a training plan, endorsed by a registered training organisation, which sets out a mix of work and training, with competencies required to be achieved during the school-based component also being identified

21 Vocational Training Orders, which are made by the Commissioner for Vocational Training and which comply with Vocational Training Guidelines, underpin apprenticeships and traineeships. Apprenticeships lead

to recognised occupational classifications, identified by that title in awards. Traineeships do not necessarily lead to such an occupation, but are designed to provide more general training for industries such as retail or hospitality.

22 In February 2006, the Council of Australian Governments agreed on a range of measures to address current skill shortages. Various educational, legislative and industrial barriers were removed to enable part-time school-based apprenticeships to be offered in industries with skill shortages, particularly in the trades of metals, engineering, automotive, building and construction, electro-technology and commercial cookery. Various New South Wales State awards were varied to provided wages and conditions for such apprenticeships, which were implemented in the 2007 school year. An Independent Industry Support Service has been established by DET to support all school-based apprenticeships and traineeships.

23 Employers must commit to employing and training their apprentices for the duration of the training contract. Applications for cancellation and suspension of such contracts must be supported by both parties and are determined by the Vocational Training Tribunal. A school-based apprenticeship is two years' part-time while at school (one day per week) and three years' full-time post-school.

24 A register of apprenticeships and traineeships is maintained. In January 2007, 50,276 apprentices were in training in New South Wales, together with 39,220 existing worker trainees ('EWT') and 48,105 new entrant trainees ('NET'). Of those, 19,862 apprentices were under 18 years of age, as were 266 existing worker trainees and 7,509 new entrant trainees. They were employed in the following main industry areas:

Apprentices

(a) Building and Construction with 5,655 apprentices

(b) Utilities and Electro-technology with 2,563 apprentices

(c) Automotive with 3,972 apprentices

(d) Food with 1,984 apprentices

(e) Manufacturing Engineering with 2,382 apprentices

(f) Retail & Wholesale (Hairdressing & Beauty Therapy) with 2,285 apprentices.

Trainees

(a) Retail & Wholesale with 188 EWTs and 3,905 NETs

(b) Tourism with 21 EWTs and 1,052 NETs.

(c) Finance, Insurance and Business with 7 EWTs and 711 NETs

(d) Primary Industry with 3 EWTs and 302 NETs

(e) Automotive with 2 EWTs and 282 NETs

25 The average age of apprentices has increased from 17.5 years in 1985, to 19 years in 2005, it is understood as the result of increasing school retention rates.

Mr John Watson

26 The evidence of Mr John Watson, the General Manager of the Occupational Health and Safety Division of the WorkCover Authority of New South Wales, was that data maintained by the Authority in relation to the position of children is limited. The Australian Bureau of Statistics ('ABS') maintains data for

young workers aged 15 to 24, which shows that those aged 15 to 19 years have the highest rate of work related injuries in Australia (78 per 1000).

27 It is believed that there is considerable under-reporting of injuries for both children under 18 and young workers aged 15 to 24. A comparison of hospital admissions for 15 to 19 year olds injured at work with workers compensation claims, conducted by the University of NSW Injury Risk Management Research Centre, showed that the proportion of hospital admissions was nearly 6 times (7 per cent) higher than claims (1.2 per cent). It was thought that the casual nature of the work performed by many young workers might influence the low reporting rate. At the time of injury, most children were employed in full-time permanent positions.

28 The greatest number of workers' compensation claims for children under 18 fell into the following industries, in order:

(a) Retail

(b) Manufacturing

(c) Accommodation, Cafes and Restaurants

(d) Construction

(e) Agriculture, Forestry and Fishing.

29 The most common causes of injury of children were:

(a) being hit by moving objects

(b) body stressing

(c) falls, trips, and slips of a person

(d) hitting objects with a part of the body
(e) heat, radiation and electricity.

30 The most common injuries suffered were:

(a) sprains and strains of joints and adjacent muscles

(b) open wound (not involving traumatic amputation)

(c) fractures

(d) contusions with intact skin surface (crushing injury excluding fracture)

(e) burns.

31 Mr Watson referred to research suggesting that children were particularly vulnerable to injury at work, because of factors such as their size and physical and psychological maturity; their behaviour, work experience and training; their lack of confidence in raising problems; their inability to make mature judgments about safety; and; to cope with unexpected and stressful situations. WorkCover Inspectors had identified various risks to which children are particularly vulnerable, with manual handling identified as a particular issue, given children's physical development, making them particularly vulnerable to musculoskeletal injuries.

Ms Kerryn Boland

32 Ms Kerryn Boland, the New South Wales Children's Guardian, gave evidence about the delegation by the Minister for Community Services of her functions in relation to children under the *Children and Young Persons (Care and Protection) Act* 1998, *Children (Care and Protection - Child Employment) Regulations* 2001 and the *Children and Young Persons (Care and Protection - Child Employment) Regulations* 2005. Section 22 of that Act creates the following offence:

> **22 Endangering children in employment**
>
> A person who causes or allows a child to take part in any employment in the course of which the child's physical or emotional well-being is put at risk is guilty of an offence.
>
> Maximum penalty: 200 penalty units.

33 Ms Boland's evidence was that this legislative scheme continued a system of regulation established in 1992. It involved a child-focussed regulatory framework for the employment of children under 15 years of age in prescribed employment. Such frameworks have existed since the *Children's Protection Act* 1902. The legislation presently relates to employment:

§ in an entertainment or exhibition;

§ in a performance which is recorded for use in a subsequent entertainment or exhibition;

§ in a still photographic session; or

§ in offering anything for sale from door-to-door (a prohibition on children under the age of 14 years and 9 months being employed in door-to-door selling was included in the Regulation in 2005).

34 Schedule 1 of the Regulation establishes various minimum conditions for employment in a Code of Practice. The application of these conditions may be varied by the Guardian, having regard to the safety, well-being and welfare of the child concerned. Prescribed employment depends on the Guardian granting an employer's authority. Exemptions apply to various activities such as charitable and fundraising, as well as in cases where the employment is for no more than 10 hours per week and the Code is complied with. Parents and the Department of Community Services ('DOCS') each have a role to play in relation to removal of children from unlawful employment, as does the Guardian.

35 Prior to the current regulatory system, employment of children for up to 12 -13 hours per day, with inadequate supervision, in contravention of compulsory educational requirements, resulted in illness and distress occurring. The current system seeks to balance work and education, especially in industries such as entertainment, where income generated for children and their parents can be high, as well as prestigious. The Regulations reinforces with parents appropriate work conditions for their children. They also seek to minimise risk associated with itinerant work.

36 Some 2,130 children under 15 were notified in 2005/06 to be working in entertainment/exhibition work, with it not being uncommon for these children to work for multiple employers. Their work is covered by a variety of State and some federal awards. There was thought to be under-reporting into the still photography industry. It was also thought that only a minority of children working in door-to-door selling were paid and, therefore, covered by the Children's Guardian.

37 The Code of Practice deals with matters such as keeping employment records; notification of work locations; insurance; hours of not more than four per day on school days, with a 10 minute break each hour and a one hour break every four hours; school attendance requirements; calculation of hours of employment; travel; breaks between shifts; food and drink; toilet facilities; protection from the elements; prohibition of punishment; notification of accidents; parental contact; application of awards and agreements; recreation and dressing rooms

facilities; work directions; times of work; supervision; children under three and babies; presence of nurses; lighting; makeup; handling; and, segregation.

Mr Don Jones

38 Mr Don Jones, Assistant Director-General, Industrial Relations Service Delivery, gave evidence about the role, structure and functions of the Department of Commerce and its New South Wales Office of Industrial Relations. That Office has responsibility for administration of the *Industrial Relations Act* and other industrial legislation, as well as providing information, advisory and enforcement services.

39 The Office has two operating divisions, the Industrial Relations Analysis and Partnerships Division and the Industrial Relations Service Delivery Division. In the Delivery Division about 110 officers, of whom about 100 are Inspectors appointed under the *Industrial Relations Act,* are engaged in compliance activities.

40 In 2006, such compliance activities included investigation of some 12,000 workplaces and 33,000 employees, with some 10,500 breaches of industrial relations laws identified. This included some 1,700 employers underpaying staff and the recovery of some $4.5 million for workers.

41 In 2006, the Minister for Industrial Relations, the Honourable John Della Bosca MLC, requested the NSW Legislative Council Standing Committee on Social Issues to inquire into and report on the impact of the *Workplace Relations Amendment (WorkChoices) Act* 2005 (Cth) ('the *WorkChoices legislation*'), including relevantly:

> i. the ability of workers to genuinely bargain, focussing on groups such as women, youth and casual employees and the impact upon wages, conditions and security of employment …

42 The Report was issued on 28 November 2006 and dealt with the introduction of the *Child Employment Act*. As to children, the Committee concluded at 8.58 - 8.59:

> 8.58 The Committee is concerned about the impact that WorkChoices will have on vulnerable young people. In general terms, young people are more vulnerable to exploitation in the workplace. They also tend to be in a poor bargaining position at work, leaving many young people open to exploitation. The AWA case studies cited in this chapter are stark examples of this. Reducing the wages and conditions of young people places them under greater financial stress to support themselves, to balance work and study and to participate in society. WorkChoices also has the potential to further entrench the marginalisation of those children and young people who are form disadvantaged social groups.
>
> 8.59 Accordingly, the Committee welcomes the announcement of the NSW Government that it will move to protect young people under the age of 18 from the full impact of WorkChoices by exempting them from the bargaining process and requiring that they be no worse off under workplace agreements. However, the Committee remains concerned about the impact of WorkChoices on young people aged 18 or over who generally experience the same disadvantages as their younger counterparts, but to whom the State Government is unable by law to extend such protection.

43 Mr Jones referred to ABS statistics which dealt with the position of children in employment. This information had led the Office of Industrial Relations to initially focus its services on children employed on a part-time or casual basis in entry-level positions in retail and hospitality industries. ABS statistics showed that in these industries, 36 per cent of the 14,000 cafes and restaurants in the State are unincorporated, along with 29 per cent of 10,000 take away food shops, 41 per cent of 9,800 food retailers, 23 per cent of hair and beauty

salons and 53 per cent of clothing retailers. Such employers remain bound by State awards. This left some 60,000 to 90,000 children working in the State for incorporated employers.

44 Mr Jones also referred to a study conducted in 2005 by the Australian Centre for Industrial Relations Research and Training ('ACIRRT'), part of the School of Business of the University of Sydney, into a survey jointly conducted with the Office of Industrial Relations. The study was based on some 5,262 completed surveys. Findings were separated on an age related basis, including in relation to the 12 to 16 and 17 to 20 year old age groups. This survey showed that:

a. 67 per cent of females and 60 per cent of males aged between 12 and 16 years work;

b. 84 per cent of all survey respondents who are working are also studying;

c. 80 per cent of females and 75 per cent of males aged between 12 and 16 years who are working work up to 15 hours per week, while a further 18 per cent of workers in this age cohort work between 15 and 24 hours each week;

d. 78 per cent of all survey respondents reported that they had regular hours of work each week and 76 per cent of all respondents had regular days on which they worked each week; and

e. casual employment was the predominant form of engagement, with 67 per cent of all respondents nominating themselves as a casual employee and 80 per cent of workers describing themselves as having no leave entitlements.

45 The survey also indicated that 34 per cent of those aged 12 to 16 years were employed in the retail industry and 33 per cent in restaurants and hospitality. Sixty six per cent of female workers and 58 per cent of male workers in that age group did not know whether their work was covered by an award, agreement or contract. Forty six per cent of all respondents did not receive documentation from their employer about pay and hours and 26 per cent did not receive a pay slip.

46 The survey indicated that 13 per cent of those aged 12 to 16 years participated in an unpaid period of trial work; 78 per cent were required to work additional hours and there was a widespread incidence of those hours being unpaid.

47 Mr Jones prepared a matrix of award conditions which the Office of Industrial Relations had identified as important to the Commission's consideration of the no net detriment principle. Mr Jones identified as particularly important to children, award conditions dealing with:

a. the level of loadings paid to casual employees in compensation for lack of access to other entitlements, such as annual holidays and sick leave;

b. setting of hours of work of part-time and casual employees, including the alteration of rosters of part-time and casual employees; and

c. arrangements for the conversion of the basis of employment from casual to permanent.

48 Mr Jones analysed some 283 formal complaints dealt with by the Department between 2003 and 2006, made by children under 18 years of age. Problems identified in the 2005 and 2006 workplace compliance programmes regarding employers' arrangements for junior employees were also analysed, as well as the types of telephone enquiries about industrial entitlements received from both employers and children.

49 Mr Jones described the Child Employment Compliance strategy developed by the Office of Industrial Relations. On his evidence the strategy was designed to create a deterrent to non-complying behaviour and to provide assurance that such behaviour will be penalised. The strategy is to be reviewed, after the no net detriment principles are established.

50 Mr Jones described the assistance offered by the Office of Industrial Relations to employers and employees about the *Child Employment Act* and the rights and obligations which it had established, including a computerised remuneration calculator known as 'Check Your Pay'. He also described the approach which Inspectors adopted to their responsibilities under that legislation. In the first instance, Inspectors encourage compliance by the provision of advice and assistance of various kinds. He also described how complaints from children were assessed, and the steps taken, if a complaint was accepted. This included, in the first instance, encouraging an initial resolution process between the child and the employer and prosecution only being pursued if the complaint could not be resolved.

51 A targeted workplace compliance programme involving 600 inspections in 2006/07 was also described by Mr Jones. In 2007/08 this would increase to 2,500 incorporated employers. How an Inspector would approach the question of net detriment was described. This included establishing an appropriate assessment period, the child's classification and comparable award, and a remuneration calculation then being made. A net detriment would be accepted as established if the child's gross remuneration had not exceeded the calculation based on the comparable award.

52 Mr Jones also described a new free service to be offered to employers, which would permit them to provide relevant information, for assessment by an Inspector. If the employer's responsibilities were assessed as having been satisfied, a Statement of Compliance would be issued. Such employers would not be involved in any targeted workplace compliance programmes, although evidence of ongoing compliance would have to be provided periodically.

Mr Gerard Dwyer

53 The evidence of Mr Gerard Dwyer, the Branch Secretary-Treasurer of the Shop Distributive and Allied Employees' Association, New South Wales Branch ('SDA'), was that the vast majority of the Union's 65,000 - 70,000 members were young and/or female, working part-time or casually in retail, fast food, warehousing and distribution, and pharmaceutical manufacturing. In the main they were paid minimum hourly rates, in accordance with applicable awards and agreements.

54 The Union's current membership records showed that 62.6 per cent of the Union's members were female; 16.9 per cent were under the age of 18 years, 32 per cent under 21 and 45.1 per cent under 25. 53.4 per cent of members were employed casually; 24.7 per cent part-time; and, 15.2 per cent full-time.

55 On Mr Dwyer's evidence, by way of comparison with other industries, a high proportion of those working in retail and fast food industries were under 18 years of age and paid a 'junior rate'. Those rates had been established historically, for reasons including young peoples' relative inexperience and lack of skills, as well as exemptions under federal industrial laws relating to age discrimination, for junior rates of pay. The vast majority of these employees were engaged in full or part-time study at secondary and tertiary levels. A significant number were employed in formal apprenticeships and traineeships.

56 The majority of the employers of the Union's members were constitutional corporations, including the three largest national retailers: Coles Group Ltd; Woolworths Ltd; and, Bunnings Group Ltd and other significant national retailers such as Best and Less Stores Pty Ltd and Spotlight Ltd. Other employers were partnerships, sole traders, family trusts, charitable organisations, the public sector and a range of unincorporated entities.

57 The SDA supported the establishment of principles in this State which would protect conditions of employment applicable to children, from being overridden by the Australian Fair Pay and Conditions Standards established by the *WorkChoices legislation*, where applicable State awards and legislation provided more generous entitlements. The SDA also sought to ensure that children had the right to have their representative

organisations refer disputes about their conditions of employment to the Commission, or to the Australian Industrial Relations Commission ('AIRC'), for conciliation and arbitration.

58 In New South Wales, the key award directly or indirectly regulating the employment of shop employees had traditionally been the Shop Employees (State) Award. On Mr Dwyer's unchallenged evidence, prior to the enactment of the *WorkChoices legislation* agreements which had departed from the award provisions reflected packages which had improved employees' wages and conditions, as well as accommodating employers' operational requirements, which included extended trading hours. There had been a general trend to greater flexibility for employers in areas such as rosters, leave arrangements, spread of hours of work and adjustment of penalties, in return for wage increases. These packages of conditions applied to child employees and, in Mr Dwyer's view, elements of these packages could not be removed and considered in isolation from other conditions.

59 Under the *WorkChoices legislation*, industrial instruments, such as Australian Workplace Agreements ('AWAs'), employer greenfields agreements and collective agreements, no longer had to satisfy a 'no disadvantage test' and were not subject to any independent vetting or approval process before State award provisions were overridden.

60 An analysis was undertaken of the 'Subway Maroubra Employer Greenfield's Agreement 2006-2007' ('the Subway Maroubra Agreement'), available on the website of the Office of the Employment Advocate ('OEA'). It was compared to the Howchi Pty Ltd Certified Agreement 2005-2008 ('the Howchi Agreement'), an agreement subject to the former 'no disadvantage test' and earlier certified by the AIRC. The agreements both bound the same employer. The analysis showed that:

- the Howchi agreement 'cashed out' certain penalties, loadings allowances and other award entitlements

- the Subway Maroubra Agreement retained the structure of the Howchi agreement, but provided no compensation for the loss of award conditions and reduced the hourly rate to the minimum provided by the *Shop Employees (State) Award*, as at the date of enactment of the *WorkChoices legislation*

- both agreements provided for highly flexible part time employment, with limited or no rostering conditions, thereby negating the need for casual employment, which attracted either an award loading of 24 per cent or the *WorkChoices legislation* statutory minimum of 20 per cent.

61 Similar analyses were conducted in relation to other agreements and reference was also made to the Spotlight Ltd Australian Workplace Agreement, which was offered to new employees after the enactment of the *WorkChoices legislation*, as a condition of employment. This agreement removed award conditions including penalties, loadings, allowances, rostering rights, rest pauses, public holiday entitlements and the right to refer disputes to the Commission or AIRC. This AWA increased award minimum rates by two cents per hour.

Ms Amber Oswald

62 The evidence of Ms Amber Oswald, who was 17 years of age, was that she had been employed as a casual by Pulp Juice Bars Operations Pty Ltd, as a 16 year old. She worked at the Warriewood Square store. She was told on commencement by her supervisor that her rate would be $9.52 on weekdays, with a 25 per cent penalty for Saturday work and 50 per cent on Sundays. She was given an induction booklet and a letter of offer, which confirmed this advice. These rates were consistent with the Pulp Juice Bars Operations Pty Ltd Enterprise Agreement 2004 - 2005, which also provided for meal and rest breaks, minimum 3-hour shifts and a rate of $19.83 for work on public holidays. After a probationary period, her rate was to increase to $10.05.

63 Pulp Juice Bars Operations Pty Ltd ceased operating at this store in March 2006, when a new owner, Pow Juice Pty Ltd trading as Pulp Juice Bar, commenced operating. Amber was not given any notice of these developments, but discovered what had occurred when she went to work. While there was a meeting to give advice of the change to employees, it took place while she was at school, so she could not attend.

64 Amber's father made enquiries as to her employment conditions, after she heard from other employees that they had altered. He was informed that the new rate was $8.57 per hour. Amber's father unsuccessfully made further enquiries as to whether there were other rates for Saturday and Sunday work and why the rates had been changed. Amber was then given a blank employment letter, which made no reference to an hourly rate and an AWA to sign. It provided that $8.57 was the flat rate for all hours worked, with no additional payment for overtime and a minimum shift of one hour, rather than three. No wage increases were guaranteed, unlike under her previous conditions.

65 She signed neither document and approached her union, the SDA, for assistance. Proceedings were taken before the AIRC in which Pow Juice Pty Ltd conceded that Amber's employment was covered by an enterprise agreement and undertook to provide wages and conditions in accordance with that agreement.

66 Amber had usually worked on Sundays, to fit in with her school commitments. The AWA offered significantly reduced pay and conditions, without any increased benefit for her. On her evidence, Amber found it difficult to challenge the circumstances with which she was confronted and would have been unable to do so, without the support of her father and the union. Other young people also employed with her were treated similarly. Amber thought it important for young people to be protected from such treatment; that they deserved fair and reasonable conditions of employment and that protections should be put in place to ensure that they received them.

Mr Christopher James

67 The evidence of Mr Christopher James, who was 17 years of age, was that in November 2006 he was employed by Sia Services Pty Ltd trading as Subway Winston Hills, as a part-time employee. It was his first paid employment. He took the job in order to save for a trip and for Christmas. The shifts advertised fitted in with his school commitments.

68 He was given an AWA, described as his 'contract' by the proprietor, and told he would have to sign it, in order to start work, but received no documentation from the Tax Office. He was given no explanation of the document. He also received an unsigned document called an 'Undertaking in Relation to Australian Workplace Agreement(s)' and took both documents to his mother and father. Neither he nor they could understand the documents. Rates of pay had been struck out and other rates had been inserted. He wanted the job and so he signed the documents. He later asked for a copy of the AWA and received only an unsigned version.

69 Christopher was later told that he would have to work about 10 hours for 'training purposes', over three shifts, for which he would not be paid. He worked three shifts, on a Sunday, Wednesday and Thursday, totalling 11 hours, for which he was not paid and during which the only training provided was being briefly shown how to make sandwiches and other products from the menu. After repeated enquiries about payment, he was told that they were training shifts, which were unpaid.

70 Christopher was informed that records of the hours he worked were maintained by his employer by use of a PIN number, keyed into the register at the commencement and conclusion of a shift. He was never given such a PIN number and maintained his own records of the hours which he worked. After repeated enquiries about the PIN number, on 23 December 2006 he was told to write his hours on any spare page of a journal and to sign it. Since being given that instruction, he had received no further work. He had by that stage worked a further three shifts of four hours each, but had not been paid for any of his work.

71 During his shift on 23 December, Christopher's mother came to the store and spoke to the manager about his payment. She was told that in order to be paid, he would have to return his uniform shirt. On 24 December, Christopher went to the store with his father to return the shirt and to collect his pay. The manager asked him how many hours he had worked and she paid him $78.00, for 12 hours, at the 'FT trainee' rate of $6.50 per hour. The undertaking document had provided for a rate of $8.11 per hour for a part-time level 1 employee. Christopher was unsure of his level, but he was sure that he had not been employed as a trainee.

72 Christopher was given no rostered hours while employed, but was told that he would be called when he was needed. Communication was made with him by mobile telephone. There were no minimum shifts and he had to ask the manager on duty as to when he could end his shift while at work, which was disruptive for his parents, who he relied on for transport.

73 Christopher's mother made enquiries about the payment he received with the Commission, the Office of Workplace Services ('OWS') and the OEA. He also received advice from the union and himself contacted the OEA to enquire whether the AWA he had signed had ever been lodged with the OEA. He had received no advice that it had been registered and now understood that his employment may have been covered by the Shop Employees Notional Agreement Preserving a State Award. Under this instrument, Christopher understood that he would have had various entitlements such as a 12-hour minimum per week as a part-time employee; as well as an entitlement to certain penalty rates and roster conditions.

74 Christopher was very upset over his treatment, believing that he had unfairly been taken advantage of. His experience had shown him that young people such as he were vulnerable and required protection.

Mrs Jocelyn James

75 Mrs Jocelyn Marie James, Christopher's mother, a part-time primary school teacher, gave evidence corroborating that given by Christopher. She explained that she did not understand the AWA he was given and could not believe that he could work without being paid. That matter was not dealt with in the AWA. From discussion with work colleagues she learned that other children had encountered such arrangements and assumed that it was a choice available to employers under the *WorkChoices legislation*, but was upset and confused about the matter.

76 When Christopher had still been paid nothing for any of his work by Christmas, some six weeks after starting, Mrs James spoke to his manager, who informed her that Christopher could not be paid until the owner had returned from overseas. The manager confirmed that no one was paid for training. Christopher was paid the next day, after Mrs James had made further enquiries with his manager. She was still dissatisfied with what he had been paid and contacted the Subway head office, to be advised that all stores were independently owned and that rates varied drastically between stores.

77 Mrs James pursued her enquiry with the Commission, the AIRC, the OEA and the OWS. She was very unhappy with the manner in which her complaint was dealt with by the OEA, but the OWS gave her some advice about drafting a letter of demand. She then sought to establish whether the AWA had been registered, but that was information which the OEA could not provide to her because of privacy considerations. Christopher was later advised by the OEA that if he did not hear further from the OEA, it was because the AWA was not registered.

78 Mrs James found this experience frustrating and confusing as an adult and could not understand how a young person could deal with such a situation. She thought it unfair that Christopher had to go to such trouble to be paid and did not wish other young people to be placed in such a position.

Mr Sean Marshall

79 Mr Sean Marshall, an industrial officer employed by the Construction, Forestry, Mining and Energy Union (New South Wales Branch) gave evidence about apprentices employed under the Building & Construction Industry (State) Award. That award became a Notional Agreement Preserving State Award

('NAPSA') for apprentices employed by constitutional corporations, with the enactment of the *WorkChoices legislation*.

80 In December 2006 a Full Bench of this Commission awarded significant increases to such apprentices - two increases of four per cent ($23.90) of the CW3 trades rate for junior apprentices and an additional four per cent of that rate ($71.70 in total) for 3rd and 4th year apprentices. The first increase was payable on 1 February 2007, the second is due in February 2008 and the third in November 2008. There were also increases in various allowances.

81 These increases will apply to apprentices employed by employers who are not constitutional corporations. For those employed by a constitutional corporation, their rates have been frozen by the NAPSA, which contains rates provided by the State Award in March 2007. Such employees will only receive increases flowing from decisions of the Australian Fair Pay Commission ('AFPC') under the *WorkChoices legislation*, which deals with base rates, not allowances.

82 On Mr Marshall's evidence, apprentices employed under the NAPSA are already worse off by comparison to those employed under the State Award, by amounts ranging from $21.64 to $25.16 per week, as well as being behind on allowances - $5.00 per week in the case of the travel allowance, for example.

83 Mr Marshall's evidence was that these differences would increase over time, with the impact of any increases granted in State Wage Case decisions in 2007 and 2008, for example. On his evidence, this situation made a comparison between an apprentice's conditions of employment with those provided by a NAPSA, rather than with the State Award, an inappropriate one for the proposed net detriment principles.

Mr Kenneth Saville

84 Mr Kenneth Saville, the deputy general manager of the Master Plumbers & Mechanical Contractors Association of New South Wales, gave evidence about the apprenticeship scheme operated by the Association for plumbers, through Master Plumbers Apprentices Ltd. On his evidence, the Plumbers & Gasfitters (State) Award applies to such apprentices, as well as tradesman plumbers, drainers and gasfitters. For incorporated employers, the State Award now operates as a NAPSA. There is also a Federal Plumbing Industry (NSW) Award, to which a number of the Association's members are respondent.

85 Mr Saville explained the Association's concern that the *Child Employment Act* would introduce a further level of complexity into the employment of juniors and would act as a disincentive to young people being employed as plumbers. It was his view that the principles which the Commission established should be easy to understand, 'given the apparent confusion as a result of the introduction of *WorkChoices'*. The intention of the legislation 'to limit the potential for employers to engage juniors on arrangements that may reduce entitlements that may otherwise be available under a state award', was recognised and supported. That recognition was given, however, on the basis of 'the exclusion of pre-reform federal awards or NAPSAs, from the *Child Employment Act.*'

86 On Mr Saville's evidence, clarity regarding the scope and purpose of the *Child Employment Act* was required in the principles, to preclude 'unintended consequences', where an employer was a respondent to a federal award with comprehensive junior and apprentice arrangements in place.

Professor Philip Lewis

87 Professor Philip Lewis, Professor of Economics and Director of the Centre for Labour Market Research at the University of Canberra, gave evidence in relation to economic matters. He referred to ABS statistics kept in relation to 'young workers' in the 15 to 19 year age group, a group he said for most purposes, was fairly

representative of the group to be considered in these proceedings. He also referred to the *NSW Commission for Children and Young People Survey*.

88 ABS 2006 statistics showed 27.6 per cent of young participants in the labour market were employed full-time, 57.2 per cent part-time and 15.7 per cent were looking for work (or unemployed). These statistics included casual employment defined as not attracting annual or sick leave. In New South Wales, there were almost 105,000 15-17 year olds in employment, 88,000 of those being employed part-time.

89 Professor Lewis' opinion was that part-time and casual work had grown since 2000, because the flexibility of work arrangements suited employees, given deregulated shopping hours and periods of peak demand experienced by some industries. He described those in the teenage labour market making employment decisions in the context of family considerations, as well as for the individual's 'skill formation long term career objectives.' He summarised the characteristics of this labour market as having:

§ a lower participation rate than the general population, mainly due to attendance at educational institutions by young people
§ a predominance of part time employment
§ a predominance of casual employment.

90 Professor Lewis also described youth making labour supply decisions as strongly influenced by 'education alternatives', with 80.1 per cent of all part-time employed teenagers being in full-time education. Secondary school retention rates had increased significantly in the past two decades, now at over 70 per cent for males and 80 per cent for females. Some 4.1 per cent of this population was assessed as being 'a problem', because of a lack of availability of full-time employment, but also a reluctance to participate in education.

91 Youth employment had reversed in full to part-time employment ratios since 1988. In 1988, 62.8 per cent of teenagers were in full-time employment. By 2006, the figure was 29 per cent. In the same period part-time and casual employment had grown.

92 Professor Lewis pointed to a 2004 study by the Department of Employment and Workplace Relations, *the Sustainability of Outcomes*, as demonstrating that availability of work was extremely important for transition to full-time work, for those not going on to TAFE or University education. Given the overall lesser number of hours now worked by teenagers, in Professor Lewis' opinion it could be deduced that the demand for youth labour had declined significantly over time.

93 Long working hours was not a feature of the youth labour market. The Professor concluded that 'application of award conditions to restrict long hours at times when required will mean that workers under 18 will not be considered for these jobs.'

94 The Professor also expressed the view that developments in retailing had made casual employees particularly attractive to employers. Over 80 per cent of young casuals were students, which had been an important factor 'in financing the growth of tertiary education in Australia'. Professor Lewis concluded that there was no evidence that casual employment was less precarious than full-time employment and that introducing permanency for casuals was likely to lead employers to terminate casual employment before qualifying periods were reached. This was likely to increase turnover and to decrease the duration of employment for young workers.

95 The Professor referred to ABS statistics showing that 24 per cent of all employees in the retail industry are casuals and that this industry employs 50 per cent of all teenagers in employment, with restaurants and hospitality accounting for 15 per cent and 10 per cent respectively. The ACIRRT *Young People at Work Survey* showed estimates of 34 per cent of 12-16 year olds employed in retailing and 33 per cent in hospitality. It followed that increased regulation was most likely to affect these children.

96 The Professor also dealt with the cost of hiring being the major factor affecting the demand for labour. Fixed costs were similar for teenage and adult employees. It followed that it was likely that employers would have a bias for employing adults, given that teenagers had higher turnover, due to those who resigned or were dismissed when unsuitable.

97 Professor Lewis assessed that the concentration of teenage employees in retail had resulted from institutional factors relating to extended trading hours, which had increased demand for casual and part-time labour. Technological change had adversely affected teenagers, because they were generally low skilled and, because of their time of entry into the workforce, their experience and productivity also tended to be lower. It followed that teenagers tended to be employed in occupations not requiring extensive formal training and high productivity. This, as well as their lack of maturity, explained why they commanded lower wages in comparison to adults. It followed that wage levels had a crucial role to play in the demand for youth labour.

98 It was Professor Lewis' opinion that high teenage unemployment was likely to reflect that their labour was overpriced. Imposing wages above the market rate was likely to result in the employment of older teenagers, which tended to redistribute jobs from the less educated, 'who probably come from low income households' to the better educated, 'often middle class, students'. It followed that the imposition of above market rates involve an undesirable redistribution.

99 As well as the difficulties flowing from such worker substitution, Professor Lewis dealt with 'truncation', which depended on how high above the market rates wages were set and 'leakage' - the extent to which employers could avoid regulated rates. It was Professor Lewis' opinion that the 'best estimates suggest that a one per cent increase in youth wages would lead to a decrease in youth employment of two-five per cent in industries employing a relatively high proportion of youth.'

100 Professor Lewis also dealt with compliance costs for small businesses, which suffered a disproportionate impact of such costs, because they reflected a higher percentage of turnover. While market conditions would always be the 'prime determinant of employment', 'regardless of prevailing demand conditions, business income now has to reach a far higher level before the decision to employ is made'. It followed that employment decisions regarding pay, hours of work and conditions were a result of both demand and supply factors. Ordinarily it would be expected that the labour market results in outcomes that meet the needs of both employers and employees. Care needed to be taken that in framing restrictions on flexibility, employment opportunities for children were not lost.

101 Professor Lewis also gave evidence about the vulnerability of the New South Wales economy to reduced labour market flexibility, which would make it uncompetitive with importers and rival firms in other States. His evidence was that there were presently widespread shortages of many types of labour, but expressed concern about the consequences of an economic downturn, most likely to be suffered by workers who have the highest cost of employment.

Ms Julie Owen

102 Ms Julie Owen, the Employee Relations Manager for the Australian Retailers' Association gave evidence about the retail industry, estimating that in Australia, there were some 220,000 retail businesses employing some 15 per cent of all Australian workers, with 90 per cent employing fewer than 20 employees.

103 On Ms Owen's evidence, retail work is often a child's point of entry into employment, with the industry providing them with skill development, training and assistance in building core skills and responsibilities. A common pattern of entry was through casual work, with flexible hours which did not interfere with study. Previous experience was not required and training was provided on the job. Customer service skills obtained through such employment was highly marketable and young people often pursued careers in other industries as a result. In this State the major industrial instrument covering the industry was the federal Notional Agreement Preserving the Shop Employees (State) Award.

104 Ms Owen's evidence was that the industry also had a high uptake of individual and collective agreements, with agreements covering 113,000 employees lodged between October and December 2006. In her opinion, this reflected that often awards did not provide an effective way of meeting the needs of both employers and employees. Often agreements involved the SDA, including those made with large and significant employers such as David Jones, Target, K-Mart, Just Jeans and Franklins. Those agreements were in evidence.

105 Three of those agreements provided for a two-hour minimum shift engagement, a shift arrangement in Ms Owen's experience often requested by schoolchildren seeking after-school work. None of these agreements provided for casual conversion to part-time work, an arrangement not necessarily appropriate for children in her experience, given their other, often inflexible, commitments to school, sport, family, social and educational commitments unique to children. This meant that children predominantly worked on Saturdays, Sundays and after school. Trading hours, which for many retailers commenced at 9.00 am and ceased at 5.00 to 6.00 pm, curtailed the hours during which children could be offered work. Often children could not be offered shifts during the week, unless the shifts were of less than three hours' duration, particularly in communities where larger retailers do not operate.

106 Ms Owen observed that casual rates were higher than part-time rates, an important consideration for children seeking to earn money. Casual work also provided flexibility when exams and sporting finals were on. Often children preferred to work odd hours, which were not attractive to adult workers. She also observed that the requirement to pay penalty rates on weekends could act as a barrier to children's employment, so that smaller retailers could not offer them such work. Allowing penalty rates to be treated differently by agreement, permitted employment to occur in such situations in ways which suited both employers and employees.

107 Ms Owen was concerned about the original principles proposed by the Minister, expressing the opinion that the principles should only refer to conditions which are of particular importance to children.

Mr James Tinslay

108 Mr James Tinslay, Secretary of the Electrical Contractors Association of New South Wales, gave evidence about the Electrical, Electronic and Communications Contracting Industry (State) Award and the Metals, Engineering and Associated Industries (State) Award, common rule awards which applied to the Association's members. On his evidence, those awards both continue to apply, since enactment of the *WorkChoices legislation,* in the form of a NAPSA.

109 On Mr Tinslay's evidence, about 25 per cent of the Association's members have entered certified enterprise agreements or have made collective agreements directly with their employees. Less than two per cent have made agreements with the Electrical Trades Union of Australia (NSW Branch) and less than 20 members have entered AWAs with individual employees. Around 70 per cent of members operate under the awards.

110 Some 30,000 employees are employed by the Association's members, with some 4,000 apprentices or trainees, of whom some 1,000 are under 18 years of age. As apprentices and trainees in this State must be employed on a permanent basis, casual employment of children is almost non-existent in this industry, on Mr Tinslay's evidence amounting to no more than 20 employees.

111 Mr Tinslay referred to the National Code of Practice developed by the Australian Procurement & Construction Council, a branch of the federal Department of Workplace Relations & Small Business in 1997. This document was revised in 2005, in the aftermath of the Cole Royal Commission, with the publication of the Implementation Guidelines for the National Code of Practice for the Construction Industry, which was further revised in 2006.

112 The Guidelines apply to publicly and privately funded 'entities that receive Australian Government funded, or partly funded, construction contracts'. As a result, on Mr Tinslay's evidence, practically all contractors in the industry are affected by the Guidelines. This is because head contractors require subcontractors to comply with the Code on their privately funded works, because when tendering for projects which include even some level of Australian Government funding, the Guidelines oblige contractors to also apply the Code to their privately funded work.

113 Mr Tinslay's evidence was that since the introduction of the Guidelines, on average two members per week had reported being refused work or being 'thrown off' a construction site, because they did not comply with the Code. Amongst other things, in order to comply with the Code, an entity must comply with its industrial instruments, defined in section 8.1.1 as:

> *"an award or agreement, however designated, that:*
>
> * *is made under or recognised by an industrial law; and*
> * *concerns the relationship between an employer and the employer's employees."*

114 In November 2006, the Association had enquired of the federal Department of Employment and Workplace Relations ('DEWR') as to whether the Electrical, Electronic and Communications Contracting Industry (State) Award complied with the Code and Guidelines. The advice given in December 2006 was that the casual provisions of the Award breached the Guidelines, because they restricted an employer's use of casuals, inconsistently with the Code and Guidelines, as did the Award provision prohibiting piecework in contracts for labour only. The union picnic day provision was also found to breach the Code.

115 The result of this advice was to preclude the Association's members from tendering for any work with any entity which had obtained Australian Government funded construction contracts. The Association then advised its members of the need to remove themselves from coverage of the Award, in order to be able to tender for such work. The result had been some 200 members, employing some 3,000 employees, making collective agreements assessed to be compliant with the Code and Guidelines.

116 Mr Tinslay also expressed concern about the Minister's originally proposed principles. In the context of this industry, they seemed to him to have the effect of automatically rendering employers bound to apply the provisions of the Electrical, Electronic and Communications Contracting Industry (State) Award to children, non-compliant with the Code. Potentially, this put at risk the employment of some 1,000 apprentices, which would only exacerbate an existing skill shortage. We observe at this point that the parties later sought to address this concern in the revised principles which they each proposed.

Documentary evidence

117 Numerous documents were tendered, including a range of agreements made by incorporated employers which departed from award conditions. Some agreements had been made by major employers in the retail industry with the SDA. Some employee collective agreements (that is, agreements between employees and their employer without union involvement) had been obtained from the website of the Office of the Employment Advocate ('OEA'). Other agreements which had not been registered as AWAs, but which departed substantially from award conditions, were also in evidence. The parties advanced various analyses of these agreements and their consequences for children. In some cases this evidence showed that provisions in the agreement in question resulted in very substantial detriment for the children to whom they applied, without any offsetting conditions in favour of the child. It was clearly demonstrated that in some cases, adherence to the minima provided by these agreements would involve an employer failing to meet the obligations imposed by the *Child Employment Act* if it were found that such obligations existed in relation to those agreements.

118 By way of example, there were in evidence agreements made in the retail industry which provided rates lower than the base award rate provided by the Shop Employees (State) Award for children. The agreements

also did not provide for higher rates when work was performed outside ordinary working hours, or on overtime, a further departure from the requirements of the Award. There were no offsetting benefits provided by these agreements. Many of them also removed award conditions in relation to rest breaks, incentive pay and bonuses and public holidays. On any view, such agreements would fail to meet the no net detriment test established by the *Child Employment Act*.

119 Unions NSW produced an unchallenged analysis of such an agreement where the employer was J & C Holdings (Aust) Pty Ltd trading as Subway Rosehill. It provided, for example, not only hourly rates of pay lower than those fixed by the Shop Employees (State) Award during ordinary hours of work, it also removed weekend penalties and reduced casual loadings which the Award provides for employees under 21 years of age working on Saturdays. The analysis showed that a 15 year old working a 3-hour shift on Thursday, Friday and Saturday, would for example, be $8.58 worse off, having earned $61.74. A 17 year old working 3-hour shifts on Thursday, Friday and Sunday, would be $20.96 worse off, having earned $85.70. Such sums might be small, but for children commanding very low base rates of pay for their work, on the evidence they are significant.

THE PARTIES' CASES

The Minister

120 The Minister submitted that these proceedings were unique, being the direct result of the impact of the enactment of the *WorkChoices legislation* upon the State system of awards and agreements, regulated by the *Industrial Relations Act* 1996. Given the High Court's judgment in *New South Wales and others v Commonwealth* (2006) 231 ALR 1, the result was that over time, employees of constitutional corporations would lose the benefit of award protections and entitlements provided under State legislation.

121 The *Child Employment Act* had been enacted to ameliorate some consequences of the *WorkChoices legislation*, in the case of vulnerable young people. No new obligations were sought to be imposed on employers by the enactment of the *Child Employment Act*. What was sought to be preserved were benefits formerly available to young people under State awards and legislation.

122 The *Child Employment Act* required the establishment of principles to be used by an industrial court in determining whether an employer had provided a child with conditions of employment that would result in a net detriment, compared with the conditions applicable if the child had been employed under a comparable State award.

123 The proposed principles would affect only those parts of the public sector to whom the *WorkChoices legislation* now applied. Those employed under the *Public Sector Employment and Management Act* 2002, continued to be covered by the State system. For affected public sector organisations, the view of the PEO, the employer, was that the proposed principles were appropriate.

124 The Minister was concerned that under the *WorkChoices legislation*, children as well as other workers would lose the benefit of numerous award protections and that there would be no independent assessment of agreements entered into that displaced awards. Reference was made to the Second Reading Speech, where it was said:

> ... The New South Wales Government has drafted the Industrial Relations (Child Employment) Bill 2006 to provide a safety net of minimum conditions to protect children from substandard wages and conditions if and when they enter into workplace agreements or other arrangements. The Bill also gives children who are unfairly dismissed remedies that are no longer available under the Workplace Relations Act 1996.
>
> ..... The problem that this bill seeks to remedy is that the Federal Workplace Relations Act 1996 generally applies to children employed by a constitutional corporation. If the New

> South Wales Government had not used its initiative to propose these new child labour laws those children would remain in the wilderness of Work Choices without the safety net of properly maintained award conditions.
>
> Employees under 18 years of age are likely to lack the knowledge, skills and ability to directly negotiate their wages and conditions of employment with an employer. The only safeguard that Work Choices offers a child when confronted with a take it or leave it individual workplace agreement is that their parent or guardian must authorise the agreement ...

125 The *Child Employment Act* introduced a safety net, requiring employers to ensure children under 18 years of age do not suffer a net detriment, as compared to relevant State award conditions, and by giving them access to a system of remedies for unfair dismissal, which does not arise for consideration in these proceedings.

126 The scheme was submitted to be different to that established by s 35 of the *Industrial Relations Act*, for approval of enterprise agreements. It did not impose an approval process by a tribunal, but required a court to consider a comparison between actual conditions of employment and the provisions of a State award and statutory entitlements applying, as if the State award covered the child. The State award and statutory entitlements constituted the relevant 'minimum conditions of employment', which were to be provided to child employees. The process required the court to determine if the child had received those minimum conditions and, if not, whether there was a net detriment to the child. Such proceedings followed upon the issuing of a compliance notice to an employer and either an appeal by the employer, or a prosecution by an inspector.

127 The *Child Employment Act* thus established a compliance and enforcement system, creating offences for failure to comply with a compliance notice (ss 15 and 16), together with an employer appeal process (s 12).

128 It followed, it was submitted, that the *Child Employment Act* intended that:

§ The Commission is to establish principles for industrial courts to apply in considering whether there has been compliance with the Act. In other words, the principles will form part of the enforcement mechanism under the Act. This makes this case very different from the case which established principles (including no net detriment principles) for the approval of enterprise agreements. The Child Employment Act contains no approval mechanism for agreements for the engagement of child employees. It merely requires that where any child is employed, the child shall suffer no net detriment as compared to what they would be entitled to under a comparable state award.

§ The aim is to provide guidance on how to determine whether or not a particular child has, on balance, suffered a net detriment in his or her conditions of employment. The words ‘on balance’ indicate that there will be some fine judgments involved in determining whether, overall, the child is better or worse off than they would have been if employed under state award conditions.

§ In particular, the Commission is asked to identify whether there are specific award provisions or award provisions of a specific type which assist to ensure the well-being of children at work, and to consider whether failure to provide these particular conditions would of itself result in a relevant child suffering a net detriment.

§ This indicates that the Act does not contemplate a simple, global test of remuneration outcomes. In other words, the Act suggests that determination of net detriment will not be limited to the calculation of whether the child received payments sufficient to balance any loss or reduction of conditions. In response to this legislative scheme, this submission proposes that the Commission adopts a two part no net detriment test ...

§ The proceedings are not award variation proceedings. The objective is to identify whether there are existing provisions of actual awards applying to the kinds of work that children undertake that have a beneficial or protective effect. These proceedings must take awards as they are. It is for the parties to seek variation of their awards by the usual means if they are of the view that particular terms require amendment or that any new terms are required to be inserted in order to further promote the well-being of children at work. Whether any

such variations should be reflected in the no net detriment principles may be a question for consideration at a future review of the principles.

§ Similarly, the proceedings are not designed to identify general legislative provisions which should be given some special status as industrial obligations. Provisions of general laws about education, occupational health and safety, apprenticeship and training, and child protection will continue to operate on their own terms. The reference to such legislation in section 5(2)(e) of the Act is intended to ensure that the Commission is appraised of the range of general legislation that already relates to children at work so that it is able to make its decision on what the contents of the principles should be in a well-informed way.

§ In a similar vein, the remaining subparagraphs of section 5(2) are intended to ensure that the Commission is as fully informed as possible of the circumstances in which children are employed. Thus evidence is provided to the Commission about the industries and occupations in which children work, about the awards that apply to such work, and about the various laws which affect children's rights and well-being at work (including laws which are not in themselves work-related, but affect children in ways that might affect their capacity to engage in work). This information will assist the Commission to develop meaningful no net detriment principles.

§ Thus the proceedings should not be seen as a general inquiry into the welfare of children in NSW. Rather, accepting that large numbers of children in the state undertake employment, the Commission is charged to consider the particular issues that arise for children in their employment and existing award conditions that may promote the well-being of those children.

129 Detailed submissions were advanced in relation to the evidence led as to the considerations arising under s 5 of the *Child Employment Act*. In summary, it was submitted that the ABS data and other data maintained by Government agencies showed that:

§ Workers aged between 15 and 19 years are generally employed in occupations which are less skilled, reflecting their lower levels of work experience and educational attainment.

§ Children's employment is concentrated in the retail trade and in the accommodation, cafes and restaurants industries, although many work in other industries including manufacturing and construction depending on their employment category.

§ The majority of young workers are employed on a part-time or casual basis (predominantly casual).

§ The occupational profile of young workers changes considerably depending on whether employment is full-time or part-time, with full-time young workers in occupations that generally lead to skill or further qualification attainment.

§ The majority of young workers worked less than 15 hours per week, usually due to their participation in education.

§ Large numbers of young workers work on both weekdays and weekends and significant numbers also work at odd hours, particularly in the evening.

130 The most likely 'comparable State awards' (s 4(1) of the *Child Employment Act*), were identified as:

1. Shop Employees (State) Award
2. Restaurant Employees (State Award
3. Clerical and Administrative Employees (State) Award
4. Motels, Accommodation and Resorts (State) Award
5. Hairdressers (State) Award
6. Miscellaneous Workers General Service (State) Award

7. Building and Construction Industry (State) Award
8. Pastoral Employees (State) Award
9. Health, Fitness and Indoor Sports Centres (State) Award
10. Pharmacy Assistants (State) Award
11. Miscellaneous Workers Kindergartens and Child Care Centres (State) Award
12. Metal, Engineering and Associated Industries (State) Award
13. Strappers and Stable Hands (State) Award
14. Coachmakers, &c. Road Perambulator Manufacturers (State) Award.

131 It was noted that the exclusion of persons employed by their parents or spouse from the definition of employee in s 5(4) of the *Industrial Relations Act* also applied to the *Child Employment Act* (s 3(1)). Given the definitions of 'employer', 'employee' and 'employment' in this legislation, it was also observed that the legislation was not directed to voluntary work or independent contracting relationships, unless deemed to be employment by other provisions of the *Industrial Relations Act.*

132 It was noted that unlike other States, New South Wales had to date not regulated questions such as where, when and how children of various ages might work, with limited exceptions. Detailed submissions were advanced as to the impact of various general legislation upon children at work, school and other types of education and training, as well as child protection laws.

133 It was observed that Australia had not yet ratified the International Labour Organisation Minimum Age Convention, which sought, amongst other things, to ensure that the minimum age for employment became 15 years, except for employment likely to jeopardise the health, safety, or morals of young persons, in which case the minimum age for employment was 18. Reference was also made to the United Nations Convention on the Rights of the Child (1989), which requires in Article 32 that parties to the Convention:

> 'recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'.

134 It was noted that the Article goes on to require parties to take appropriate action to provide for appropriate ages for admission to employment, regulation of hours and conditions, and effective compliance regimes. It was submitted that the range of legislation and policies in place in New South Wales, including the *Child Employment Act* and the principles now being considered by the Commission, are a contribution to Australia's obligations under this Convention.

135 The impact of child labour legislation in other States was also outlined.

136 It was submitted, with these matters as background, that provisions of State awards and industrial relations legislation relating to matters of particular relevance to young workers and their well-being, which required the Commission's consideration (ss 5(2) and (3)), were:

- occupational health and safety risks, to which young workers were especially vulnerable, including bullying, inadequate training and suitable supervision, unsafe plant and systems of work
- the hazards flowing from exposure to shift work; psychological stress caused by a work environment and lack of breaks

- work/life balance where children have to mix work, study, family life and other social interaction
- the incidence of unpaid trial work by employees, which was submitted to be illegal in NSW, as was other unpaid work, including unpaid overtime
- children have particular difficulty with transport, given their resources.

137 It was also submitted that children were poorly placed to be able to bargain with adult employers and were unlikely to be in a position to negotiate conditions which achieved above-award outcomes, ensured safety and appropriate training. It was argued that in other aspects of their lives children were required to be subordinate to adults and their communication skills were not fully formed. As a consequence, they were in no position to engage in 'reasoned argument' at the bargaining table with their employers.

138 It was further submitted that the evidence showed frequent poor treatment of children by employers. A quarter of formally employed children did not receive pay slips; their understanding of the basis of their employment was often poor; and they were provided with little written information about their conditions or entitlements. Most relied on their employer as their source of information. Recent research had indicated that workers aged 14 - 17 years were twice as likely to be employed under AWAs under the *WorkChoices legislation* than the survey average. AWAs are not subject to any 'no disadvantage test'. Information provided to the Senate Estimates hearing in May 2006, (Senate Employment, Workplace Relations and Education Legislation Committee), showed that from a sample of AWAs filed in one month, each AWA removed at least one award condition protected under the *WorkChoices legislation* and 16 per cent expressly removed all protected award conditions.

139 It was submitted that award conditions which were particularly important to be maintained for children were:

- remuneration - a 'cash test' should be established
- provisions dealing with payment of wages, to exclude exploitation
- provisions dealing with induction
- conditions dealing with spread of hours, maximum and minimum hours, breaks between shifts, split shifts and restrictions on children working at night - minimum notice of roster and working hour changes
- late night transport provisions
- any provisions specifically directed to children, such as supervisory arrangements
- regular meal and rest breaks, protective equipment and training
- secure employment test case provisions
- prohibitions on cashing out annual leave.

140 The proposed principles were explained to proceed on the basis of a two-tier test. First, a 'cash test' or 'amounts payable' test, to determine whether the child's conditions of employment leave the child no worse off than award remuneration and secondly, an identification of conditions which must be complied with.

141 The principles proposed were submitted to have the attraction of simplicity and to accord with the provisions and spirit of the *Child Employment Act,* being necessary for the protection of the well-being of children and giving simple recognition to the fact that children are generally less capable than adults to make rational, well informed decisions about what is in their best interests.

142 In final submissions it was observed that the evidence showed the majority of children were employed as casual or part-timers in clerical/sales/service areas, in low skilled work, receiving low pay. The evidence

showed children's lack of understanding of their conditions of employment and their particular vulnerability at work. The proposed cash test addressed children's susceptibility to exploitation in bargaining situations. It was submitted that the principles should ensure that children received the money benefits of their work, which the Act intended.

143 This was submitted to be consistent with s 5(3) of the *Child Employment Act.* It was submitted to be important that the principles clearly identify what the minimum obligations might be, so that the principles would be of practical assistance in the resolution of difficulties, without recourse to an industrial court. That was why it was proposed that the principles contain a cash test, dealing with remuneration on a broader basis than simply base rates of pay, as the employers proposed. The Commission was obliged to accept State awards as presumptively providing fair conditions of employment, against which the question of net detriment was to be tested. The evidence showed the importance of remuneration to children. The principles ought clearly to deal with that issue.

144 The Minister also explained the rebuttable presumption proposed in the principles so that 'rollovers' of pre-WorkChoices agreements, which had been subject to a 'no net detriment' test, met the principles, but not NAPSAs or federal awards, which had very different characteristics. It was accepted that as time progressed, such a presumption would become easier to rebut.

145 It was also explained that it was proposed that unpaid work trials would be identified as amounting to a net detriment, consistently with ss 117 and 118 of the *Industrial Relations Act*.

Unions NSW

146 Unions NSW initially supported the submissions and principles proposed by the Minister. In addition, reference was made to evidence led as to particular circumstances which were submitted to illustrate difficulties encountered by children when taking up employment. It was argued that such examples were not uncommon, highlighting the lack of knowledge, understanding and bargaining power of young people, as to their employment conditions.

147 Attention was drawn to the removal of the federal 'no disadvantage test' by the *WorkChoices legislation*. It was argued that the evidence showed that in many cases children are offered employment on a 'take it or leave it' basis. Experience in the retail industry demonstrated that in the past, when award conditions were not contained in agreements, because of the 'no disadvantage test' or no net detriment test applied by industrial tribunals when considering the approval of agreements which departed from award conditions, the agreements provided money compensation for the loss of such conditions. That situation no longer prevailed.

148 It was submitted that the principles needed to take account of the fact that State awards reflected the particular circumstances of differing industries and occupations. Some awards contained particular provisions directed at the employment of children, provisions important to ensuring their welfare, as s 5(3) of the *Child Employment Act* contemplated. Attention should also be paid to whether a child had received professional advice from a union or other advocate, as to a workplace agreement or arrangement.

149 In final submissions, it was argued that the evidence supported the making of the principles which Unions NSW then proposed. It was explained that the principles reflected the proper construction of the *Child Employment Act*, which provided an industrial court with a discretion as to whether or not any departures from conditions provided by awards and industrial legislation, on balance resulted in a net detriment for the child. The view taken by Unions NSW was that, despite the provisions made in s 5(3), the Commission in these proceedings could not devise principles which bound an industrial court in the exercise of that discretion.

150 Reference was made to the evidence of the treatment of children employed under AWAs in particular, it being argued that this should lead to the conclusion that total remuneration must be considered in

determining whether or not a child suffered a net detriment. The base hourly rate of pay was not the only consideration relevant to such an assessment.

151 In considering the statutory regime, the reference in the definition of minimum conditions of employment in s 4(3) of the *Child Employment Act* to conditions of employment 'for which provision is made from time to time in the comparable State award' could not be overlooked. The test established by s 5(1) was an 'on balance' test. It followed that a child's total package of employment conditions would have to be considered when a comparison was made with the comparable State award. This did not permit limiting such a consideration to the child's base rate of pay.

152 The revised principles which the Minister proposed in Principle 1 included a presumption that the requirements of s 4(2) were satisfied if the child was employed under a collective agreement that had 'satisfied a statutory no-disadvantage/no net detriment test by an industrial tribunal, or the conditions of employment provided'. This was supported as a practical approach. In final oral submissions it was argued that an analysis of various agreements in evidence showed that children were significantly worse off under such agreements, than by comparison with the comparable State award. Those agreements provided no balancing conditions to be taken into account when assessing net detriment. It followed that the principles ought to make express reference to total remuneration, when net detriment was being assessed. The Commission would also have regard to the evidence of the use of 'template' agreements in the retail industry and the exploitation of children which these agreements evidenced.

153 As to NAPSAs and pre-reform federal awards, it was submitted that they had departed significantly from State awards, so that compliance with such instruments could not properly lead to a presumption of compliance with the net detriment principles. It was accepted that such a presumption was appropriate in the case of agreements made prior to the enactment of the *WorkChoices legislation*.

Australian Federation of Employers and Industries

154 The AFEI attacked the basis of the enactment of the *Child Employment Act* as 'not out of any genuine or pressing need to protect the employment conditions of children, rather as a direct response to the perceived erosion of State Industrial Relations conditions of employment'.

155 It was submitted that there were other 'adequate regulatory measures to protect the welfare of children at work', although what measures were being referred to was not specified. It was also argued that in establishing principles in these proceedings, the Commission should not impose obligations on employers, which they would not otherwise have under the New South Wales system.

156 In this respect, it was submitted to be relevant that in a practical sense most employers were no longer covered by that system and, therefore, the *Child Employment Act* did impose new and different obligations on employers from those which applied under the *WorkChoices legislation* immediately before the enactment of the *Child Employment Act*. Employers of children in New South Wales were now obliged to operate under a dual system of labour regulation. It was argued that this would act as a disincentive to employ children. It followed that the Commission should take 'great care' in framing further restrictions on flexibility in the labour market, in order to ensure that opportunities for the employment of children were not lost.

157 It was also submitted that the Parliament had not required principles to be imposed which simply required award conditions to be mirrored. Section 5(2)(d) of the Act, which permitted the Commission to determine that a particular condition was of such importance that a failure to provide that condition would itself amount to a net detriment, required the Commission to assess whether a certain term in an award was 'pivotal', to ensure the well being of a child. This did not envisage, however, the establishment of principles which required the acceptance of all or many award conditions as pivotal.

158 It followed that the Commission should vest a discretion in industrial courts to determine 'on a case by case basis' the many different balancing factors in a child's employment which might affect a child's well-being.

159 The principles proposed by the Minister were opposed, as they departed from what had been envisaged by s 5(3), namely, a limited number of award conditions falling within the no net detriment principles. The principles needed to accommodate changing employer and child employee needs, which will vary as between individual employees and their employers.

160 It was urged that the Commission would not 'be persuaded to adopt a no net detriment principle which will have the effect of significantly turning back the clock on the gains that employers and employees have achieved in adopting flexible employment arrangements for the benefit of employees, their employers and the economy of New South Wales as a whole'.

161 In final oral submissions, it was argued that in fixing the principles, the Commission would have regard to the meaning of the phrase 'net detriment', which it was submitted comprehended something different to the simple arithmetical exercise comprehended in the Minister's principles. The *Child Employment Act* required an industrial court to conduct a balancing exercise having regard to all conditions of employment provided to a child, not just how remuneration was dealt with. It followed that the Minister's cash test approach would not be accepted.

162 The term 'conditions of employment' was a broad one which, it was submitted, should be interpreted in its broadest sense. It was accepted, for instance, that it would include rights of the kind created by s 124 of the *Industrial Relations Act* in relation to choice of superannuation fund.

163 It was also argued that an industrial court was obliged to conduct a balancing exercise whenever there was a departure from the conditions of employment provided by a State award and industrial legislation. In conducting that exercise, the industrial court was obliged to consider the principles and any other relevant matter. It was initially submitted that it followed that, even if there was a net detriment, s 4(4)(b) of the *Child Employment Act* gave the industrial court a discretion to take such matters into account 'to override or to subsume either part or all of a failure by an employer to provide conditions that do not meet the no net detriment principles.' This was explained on the basis that s 4(4)(b) must be read so as to 'override an effect of s 5(3) when net detriment was being assessed'.

164 In further submissions it was explained, however, that it was accepted that the industrial court was bound to consider both the principles and other relevant matters in assessing whether or not there was a net detriment. If there was a net detriment, there was no compliance with the statutory obligation and the industrial court had no further discretion to 'exclude non compliance on some other basis'.

165 It was also submitted that the principles ought to make no reference to safety matters, given the obligations imposed by the *Occupational Health and Safety Act* 2000, which are exhaustive. It was argued that there ought to be no element of 'double jeopardy' created.

166 As to annual leave, it was submitted that the principles ought not to deal with that matter, because the need for a holiday from work was not a matter which arose particularly in the case of children, so as to require identification in the principles. This was particularly so given that 80 per cent of children were in full-time education and employed only as casuals, working less than 10 hours per week.

167 As to remuneration other than base rates, it was submitted that s 5(2)(d) directed the Commission to particular conditions of employment. It was accepted that base rates of pay and casual loadings were particularly important to children. It was argued, however, that the section did not envisage the principles specifying an exhaustive list of award conditions, such as all conditions resulting in additional remuneration, as being of particular importance to the well-being of children.

168 Reference was made to the evidence led, it being submitted that certain of the agreements in evidence showed that application of the Minister's proposed principles would have the result that even agreements entered between a child's union and its employer, would involve a net detriment for the child. It was argued that, in conducting the balancing task required by the *Child Employment Act*, an industrial court was bound to take into account whether such an agreement had been freely entered by an employer and a union, when determining whether a net detriment exists.

Australian Business Industrial and Australian Industry Group

169 ABI and AIG did not view the *Child Employment Act* as 'enhancing the prospects for employment of young people' and perceived its effect to be the creation of a disincentive to the employment of young people, so as in some circumstances 'to be almost unworkable'. One result of the Act was submitted to be to penalise constitutional corporations for their corporate status and to expose them to unfair competition.

170 The requirements imposed on employers who had rationally employed young people under federal awards, meant that they faced requirements which had never before applied to the employment of children. ABI and AIG conducted a survey of its members, but received only limited responses.

171 It was argued, nevertheless, that the Commission would approach its task with caution, accepting that the *Child Employment Act* had not introduced a new award making power directed towards young people. The provisions of s 35 of the *Industrial Relations Act*, which established a 'no net detriment test' for approval of enterprise agreements and the 'conditions which apply in pre-27 March agreements', were submitted to be relevant to a determination of the principles to be established in these proceedings.

172 It was also argued that where a corporate employer continued to employ a young person under an agreement approved by the Commission or other tribunal prior to 27 March 2006, there should be a presumption that the conditions of employment provided in the agreement satisfied the 'no net detriment' test. The approach adopted by the Minister departed fundamentally from such an acceptance and should be rejected. It also departed from minimum conditions imposed by the *WorkChoices legislation* in relation to an employee's right to reasonably refuse overtime. Similarly, the approach adopted in relation to annual leave departed from longstanding federal award conditions for trainees and ought not to be accepted.

173 In a further submission filed after various conciliation proceedings before the Vice-President, it was submitted that, while no agreement had been reached, differences between the parties in relation to the principles and the operation of the *Child Employment Act* had been identified. As a result, the principles proposed by AFEI were supported.

174 In final submissions, it was argued that the evidence did not show that employment was detrimental to young people, rather that it could be positive, especially where there were short periods of employment. The *Child Employment Act* was not intended to operate in a way which would make such employment less likely. It was important to have regard to the fact that the legislation did not regulate the employment of all young people in the State and that what it required was essentially a flow back to what existing industrial legislation provided generally.

175 As to the scope of the legislation, it was submitted that not every contract of employment entered by a constitutional corporation with a child after March 2006 would attract the obligations imposed by the *Child Employment Act*. It was rather concerned with conditions of employment and so would not, for example, apply to conditions which had been assessed by a tribunal against a no disadvantage test, or which reflected the benefits of an award. A broad reading of the phrase 'agreement or arrangement' used in s 4(1) of the Act was necessary, to avoid unlikely results. The Act was concerned to prevent detriment to an individual child. Conditions of employment which were acceptable prior to 27 March 2006, could not be unacceptable when they were entered after that date.

Catholic Commission for Employment Relations

176 The CCER accepted that some people entered the labour market disadvantaged, not possessing the ability to negotiate better conditions and that the creation of a 'safety net' was needed to ameliorate some of the effects of an unrestrained labour market, to ensure that employers are fair in their dealings with employees. It also acknowledged that young workers occupied a particularly vulnerable position in the labour market, tending to be unskilled and inexperienced, with no grounds upon which to bargain for better conditions.

177 The CCER referred to the purpose of the *Child Employment Act* as being to militate against unfair bargaining outcomes for workers under 18 years of age, to whom the *WorkChoices* system applied. It supported the legislative purpose, and the evidence led by the Minister, but expressed the concern that the principles first proposed by the Minister were so prescriptive as to make it 'virtually impossible for an affected employer to enter into any alternative agreement with a child.'

178 CCER rejected the concept that a failure to meet the Minister's proposed 'cash test' and/or to provide even one of the identified award provisions, must in every case lead to a net detriment for a child. It was argued that the principles needed to leave a court a discretion to apply a 'proper balance' test, under which all relevant factors would be considered, including whether an agreement had been entered at the request of a child and whether it would provide clear benefits to the child.

179 In its final written submissions, the CCER explained its initial acceptance of the revised principles proposed by the Minister, as the result of conciliation, because they addressed various of the CCER's concerns.

180 CCER supported that part of the principles which provided that 'collective agreements that have already passed a statutory no disadvantage/no net detriment test will be presumed to comply, as will collective agreements replacing those agreements and which do not alter to the detriment of the child their remuneration or conditions.' This was thought to be an important concession in Principle 1 for employers currently employing staff under collective agreements 'benchmarked against the terms and conditions of relevant federal or State awards and which do not disturb these arrangements'.

181 In Principle 2 the net detriment test reflecting hours worked was thought to be important as a 'common sense approach', rather than on daily award minimum hours. It was submitted that 'in the majority of cases, individual child workers have struck mutually acceptable arrangements for relatively short work engagements'. The mandatory nature of the test was also supported.

182 It was submitted that Principles 2 and 3 reflected that not all employment conditions were of the same importance for ensuring the well-being of children. The distinction between 'sacrosanct' and 'tradable' conditions were submitted to be consistent with the structure of s 5 of the *Child Employment Act*.

183 As to the principles ultimately proposed by Unions NSW, it was explained in final oral submissions that CCER had determined to support those principles, rather than those proposed by the Minister, as being a closer reflection of its own views of the proper operation of the *Child Employment Act*. The Act, it was submitted, required that a determination of whether there was a net detriment be left, in every case, to an industrial court to be determined 'on balance'. CCER did not support the Commission identifying in any case, what would amount to a net detriment, as s 5(3) of the *Child Employment Act* envisaged, even though it agreed that a failure to pay award minimum rates, or to pay for all work performed, would inevitably amount to a net detriment.

184 The CCER drew attention to the evidence of agreements which stripped away a child's entitlements, reduced wages and provided little or no offsetting benefits. It supported principles which differentiated between such minimalist agreements offered to vulnerable young workers and fair collective agreements

negotiated between responsible employers and employee associations. It was argued that the principles ought not to preclude the latter, but should prevent the former.

185 The evidence of Ms Owen and Mr Dwyer as to sensible and fair collective agreements was referred to, in order to support such agreements being recognised in the principles.

Local Government Association and Shires Associations of NSW

186 The LGSA submitted that their members, who were not constitutional corporations, were not affected by the enactment of the *Child Employment Act.* For those that were, the comparable State award was presently the Local Government (State) Award 2004. It provides for junior employment, trainees and apprentices, including school based apprentices. The LGSA was committed to the establishment of appropriate principles, to ensure the well-being of children. The two-tier approach proposed by the Minister only affected local government in part, but was supported, as was the Unions' proposal in relation to professional advisers, where a child nominated that it required assistance.

The Motor Traders' Association of New South Wales

187 The MTA was concerned at the level of complexity introduced by the *Child Employment Act* in relation to the employment of juniors in its industry, most of whom are employed under federal industrial instruments, so as to introduce a disincentive for their employment. It relied on the Second Reading Speech to submit that s 4(1)(a) of the Act 'appears to exclude federal award covered employees.' It submitted that the principles needed to reflect that they did not apply to employers covered by federal awards.

188 Similar submissions were advanced in relation to other industrial instruments provided for by the *WorkChoices legislation*, as well as those awards and instruments which might be made in future. It was submitted that the principles should be expressed clearly to show that they did not apply to such awards and instruments.

189 MTA recognised the purpose of the legislation to "protect vulnerable junior employees when they are put into a position where they need to 'bargain'." It was submitted, however, that the principles should protect against unintended consequences, whereas federal awards already contained comprehensive junior and apprentice arrangements.

190 MTA opposed the Minister's two-part no net detriment test. It was argued that relevant elements of the provisions of s 35 of the *Industrial Relations Act* should be used as the appropriate test. It was argued that the result of the Minister's approach was to 'practically eliminate the making of Australian Workplace Agreements (AWAs) for children.' The legislation was designed to introduce a safety net for children. The Minister's approach effectively removed an employer's right to offer conditions of employment different to those of a comparable State award. In final submissions, MTA supported the principles proposed by AFEI.

CONSIDERATION

Key findings

191 The State Parliament enacted the *Child Employment Act* in November 2006, as a response to the consequences of the Commonwealth Parliament's enactment of the *WorkChoices legislation* in March 2006. That legislation provided for the making of agreements, such as AWAs, which supplanted the terms of awards and agreements made or approved under federal and State legislation.

192 Section 16(1) of the *WorkChoices legislation* had the effect that constitutional corporations were no longer bound by State industrial instruments such as awards and enterprise agreements, which had formerly applied to them and their employees, including child employees. So far as corporate employers to whom State awards applied were concerned, for example, on 26 March 2006 the State awards became 'NAPSAs' under the *WorkChoices legislation*.

193 Sections 16(2) and (3) of the *WorkChoices legislation*, however, preserve State and Territory laws dealing with child labour so that they might operate concurrently with the relevant Commonwealth law subject to the provisions of s 109 of the *Constitution*. There is no question that the *Child Employment Act* is such a law and that it operates in relation to the employment of children in this State.

194 Despite initial submissions by AFEI that the *Child Employment Act* was merely designed to retain or restore aspects of the State industrial system of awards, all of the parties to these proceedings ultimately came to support the important social purpose underpinning the enactment of the *Child Employment Act*, namely, the protection of children from exploitation during their first experiences of working life.

195 The evidence in this case starkly demonstrated why it was that the State Parliament moved to enact this legislation and why the parties' support for the legislation was forthcoming. There can be no doubt on that evidence that children employed by some corporate employers in this State are presently being exploited in a most unconscionable way. Not only are some children being paid rates which fall below those providing fair and reasonable compensation for the work they agree to perform, but also some children are being employed to perform work for which they receive no payment at all. There was evidence of children being required to work for no pay during 'training' shifts, as well as being required to perform unpaid overtime. Other conditions of employment designed to ensure the health and well-being of children while at work, are also no longer being provided by some corporate employers.

196 The evidence demonstrated that such exploitation had arisen from a departure from State award conditions by the making of an agreement between the affected child and his/her employer under the *WorkChoices legislation*. Often the child lacked access to information or advice and was acting under a vastly disadvantageous bargaining position. The agreement was given effect, without any scrutiny by any independent agency as to any detriment suffered by the child. In some cases such agreements had not even been registered as AWAs. The evidence also demonstrated that a number of employee collective agreements were, in fact, in the nature of pattern agreements that were imposed upon the child and registered by the relevant federal agency, even without a signature of the child appearing on the document.

197 There was evidence that there is a 'template' agreement being utilised by some employers to exploit children by severely undercutting their wages and working conditions compared to what they would otherwise have been entitled to. The employers include some of those operating such franchises as Oporto, Civic Video, Baskin-Robbins and others. That is to say, a particular organisation, Enterprise Initiatives Pty Ltd, has devised a standard form of agreement that has been provided to employers and the employers have simply adopted it and applied it to their workforce. Such an approach belies any suggestion that these agreements, which have been registered with the OEA as employee collective agreements, are the product of genuine negotiations delivering outcomes in the interests of both employers and children. The template agreement provides for a low hourly rate of pay (for example, $8.57 per hour for a 17-year old permanent employee) and expressly removes any obligation on employers to provide:

§ rest breaks
§ incentive based payments and bonuses
§ annual leave loading
§ State and Territory specific public holidays
§ allowances
§ loadings for overtime and shift work and
§ penalty rates.

198 The agreements also provide the employer with the maximum discretion to fix working hours on any day of the week in any of the 24 hours of the day, without the payment of any additional loading or allowance. They also provide no benefits offsetting the reductions in conditions of employment. The agreements are made for five years and do not provide for any wage increase except, of course, where it might become necessary to adjust wages as a consequence of decisions by the Australian Fair Pay Commission ('AFPC') adjusting the federal Minimum Wage. On the evidence, long working hours are of particular detriment to children, especially at certain times of the day. The discretions given by this template agreement are thus of potential real detriment to the affected children.

199 It should also be observed that the provider of the template, Enterprise Initiatives, has built into the agreements a role for itself in resolving disputes that arise under the agreements. EI Legal, an organisation that appears to be associated with Enterprise Initiatives, is also to provide advice about any dispute that may arise under the agreement.

200 It is apparent that these agreements have been designed to serve a singular purpose: to reduce wages and working conditions under the *WorkChoices legislation* and that they give rise to real detriment for children to whom they apply.

201 The evidence demonstrated that most children work at some stage during their childhood, putting the necessity for the enactment of the protective provisions of the *Child Employment Act* beyond any argument.

202 The *Child Employment Act* is directed to children, defined in s 3 as "any person who is under the age of 18 years" who are employed by constitutional corporations. That definition reflects the evidence in this case, that even babies are employed on occasions, with most children taking up employment at some time after 12 years of age. The legislation was enacted in circumstances which have not previously arisen in this State, whereby constitutional corporations may now lawfully offer employment to children on terms which are in the corporations' commercial interests, but are to the significant detriment of the child. That situation is not one which is compatible with society's interest in ensuring the well-being of its children and so the legislature acted to deal with the problem which had arisen.

203 The *Child Employment Act* is concerned with the protection of children, when they are employed by constitutional corporations. "Constitutional corporation" is defined in the *WorkChoices legislation* as a "corporation to which paragraph 51(xx) of the Constitution applies". Section 51(xx) of the Constitution refers to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. It may be accepted that most employers that are incorporated are trading or financial corporations, but there are significant exceptions.

204 Children in this State who are employed by employers that are not constitutional corporations continue to enjoy the protection provided by the State system of industrial regulation and hence do not require the benefit of this legislative initiative.

205 The *Child Employment Act* was enacted some eight months after the enactment of the federal *WorkChoices legislation*, which, for the first time, made it lawful for certain employers in this State, being constitutional corporations, to offer employment on the basis that the work in question would attract less than the minimum rates of pay fixed by awards made by this Commission or by the Australian Industrial Relations Commission ('AIRC') for such work, without first satisfying the relevant tribunal that there was no resulting detriment or disadvantage suffered by the child. Other conditions formerly required to be observed by award provisions and various State legislation, are now also no longer required to be provided to children.

206 Those award rates and conditions reflected the value of the work in question, as well as the conditions under which the work was performed by children. The Commission, for instance, was required by s 10 of the *Industrial Relations Act* to make awards 'setting fair and reasonable conditions of employment for employees'. Commonly, such awards reflected agreements reached by award parties. In some cases parties had entered into enterprise agreements, which departed from award conditions. Such agreements required the prior approval of the Commission, upon satisfaction of a no net detriment test provided in s 35 of that Act. There was a similar

mechanism under the federal system, where a 'no disadvantage' test operated. Other conditions were prescribed by various State legislation, which reflected the Parliament's view of conditions that employers should be legally required to provide to their employees.

207 The evidence showed that rates of pay fixed by awards and agreements for children are generally significantly lower than those fixed by awards and agreements for adult employees, reflecting children's skills and experience. In the Shop Employees (State) Award, for example, junior rates presently range from 40 per cent of the adult rate at 15 years of age - as little as $5.92 per hour - to 60 per cent, or $8.89 per hour, at 17 years of age.

208 Despite these very low base rates of pay, the evidence showed that since the enactment of the *WorkChoices legislation*, some corporate employers have acted on the opportunity now available to employ children on even lower rates of pay, while providing no offsetting conditions for this detriment. In addition, the evidence showed other detrimental changes in the conditions which such employers offer children whom they employ, with the removal of provisions such as rest breaks, incentive based payments and bonuses, annual leave loading, public holidays, allowances, loading for overtime, shift work and penalty rates.

209 This situation also arises because the *WorkChoices legislation* ironically allows agreements to remove the so-called 'protected conditions' under the *Workplace Relations Act*. We received evidence of many examples of such practices.

210 Coincidently, this approach is, of course, also to the considerable disadvantage of the non-corporate competitors of such employers, who may not lawfully engage in such exploitation of children. This, no doubt, helps explain why no party to these proceedings, including employers, advanced the view that such exploitation of children should be permitted in this State.

211 As we earlier remarked, the parties disagreed with each other, as to the proper construction of aspects of the *Child Employment Act* and how the principles which we must establish should be framed, having regard to the legislative scheme. It is necessary to deal with these issues before turning to the question of the principles to be established in these proceedings. Nevertheless, it should be appreciated that there was no question that it is the exploitation of children which the *Child Employment Act* seeks to address and with which the principles are to be concerned. That purpose must be steadily borne in mind in resolving the various issues which arose for consideration in these proceedings.

To which constitutional corporations does the *Child Employment Act* apply*?*

212 Various employer witnesses gave evidence about their understanding of the operation of the Act and the concerns which this understanding had generated. That evidence and the submissions which various employer parties advanced were not accepted by the Minister, or by Unions NSW and CCER. It is necessary, therefore, to give some consideration to the question of which employers the *Child Employment Act* binds.

213 Section 4 of the *Child Employment Act* is the provision which identifies those employers upon whom the Act imposes new obligations. That section is also crucial to an understanding of the obligation imposed on the Commission by s 5 of the Act, to establish 'no net detriment principles' for the employment of children in this State. Section 4 provides:

> **4 Employer to ensure at least minimum conditions provided**
>
> (1) This section applies to the employment of a child by an employer if:
>
> (a) the child is employed under an agreement or other arrangement entered into on or after 27 March 2006, and

(b) the employer of the child is a constitutional corporation that is not bound by a State industrial instrument with respect to the employment of the child, and

(c) a State award is in force that covers employees performing similar work to that performed by the child (a comparable State award) and that award does not bind the employer in respect of the employment of the child.

(2) An employer of a child to whose employment this section applies (an affected employer) must ensure that:

(a) the child is provided with the same conditions of employment as the minimum conditions of employment for the child, or

(b) if the conditions of employment provided to the child are different to the minimum conditions of employment for the child—the conditions of employment provided to the child do not, on balance, result in a net detriment to the child when compared to the minimum conditions of employment.

Note. A contravention of this section by an affected employer of a child may expose the employer to a civil penalty under section 15.

(3) The minimum conditions of employment for a child are:

(a) the conditions of employment for employees performing similar work to that performed by the child for which provision is made from time to time in the comparable State award, and

(b) such other conditions of employment for which the industrial relations legislation makes provision that would have applied to the employment of the child if the employer of the child were bound by the comparable State award.

(4) In determining whether or not an affected employer of a child has provided the child with conditions of employment that, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child, an industrial court is to take into account the following matters:

(a) the no net detriment principles set by the Commission from time to time,

(b) any other matter that the court considers relevant.

(5) For the avoidance of doubt, nothing in this section requires an affected employer of a child to provide a condition of employment to the child if the employer is already required to provide the same condition by or under another law of the State.

214 The statutory obligation imposed upon employers by s 4(2) is clear:

- either to ensure that children are provided with the 'same conditions of employment as the minimum conditions of employment for the child'(s 4(2)(a)), or

- if other conditions of employment are provided, that they 'do not, on balance, result in a net detriment to the child when compared to the minimum conditions of employment' (s 4(2)(b)).

215 The parties were not agreed, however, about which employers were bound by the obligation.

216 We are satisfied that the section specifies with clarity that the employers upon whom this statutory obligation is imposed are those specified in s 4(1)(b) and (c). They are 'constitutional corporations' that are:

- 'not bound by a State industrial instrument with respect to the employment' of a child, (s4(1)(b)),

where

- 'a State award is in force that covers employees performing similar work to that performed by the child (a comparable State award) and that award does not bind the employer in respect of the employment of the child' (s4(1)(c).

217 The term 'constitutional corporations' is not defined in the *Child Employment Act* and, as does the definition in the *WorkChoices legislation*, depends upon the *Constitution* for its meaning as we earlier explained. The term 'industrial instruments', referred to in s 4(1)(b), is defined in s 3 of the *Child Employment Act* as:

> ***State industrial instrument*** means an industrial instrument within the meaning of the *Industrial Relations Act* 1996.

218 Industrial instruments are defined in s 8 of the *Industrial Relations Act* as:

> an award, an enterprise agreement, a public sector industrial agreement, a former industrial agreement, a contract determination or a contract agreement.

219 Constitutional corporations have not generally been bound by State industrial instruments since the *WorkChoices legislation* commenced operation on 26 March 2006. The *Child Employment Act* commenced operation in November 2006. It follows that, thereafter, in every case where there is a State award in force for work which a child is employed to perform, employers which are constitutional corporations may attract the obligations imposed by the *Child Employment Act*. The statutory obligation may arise whenever such employers, in the words of s 4(1)(a), employ a child:

> 'under an agreement or other arrangement entered into on or after 27 March 2006'.

220 It follows that from November 2006 all constitutional corporations who were no longer bound by the various types of industrial instruments provided for under the *Industrial Relations Act*, following the enactment of the *WorkChoices legislation*, are, subject to any constitutional inconsistency that may be found to exist, caught by the obligations which the *Child Employment Act* imposes in relation to agreements or other arrangements to employ a child, entered into on or after 26 March 2006. The obligation is not imposed in relation to agreements and arrangements entered into before 26 March 2006.

221 Our approach to the meaning of the expression 'agreements or arrangements' is provided in the context of our discussion of 'Industrial Instruments under the *WorkChoices legislation*' - see [243] onwards.

What are 'conditions of employment' under the *Child Employment Act*?

222 Section 4 of the *Child Employment Act* is concerned with a comparison between the conditions of employment provided to a child under an agreement or arrangement made with the child, and those provided by State awards and industrial legislation. Section 3 of the *Child Employment Act* defines 'conditions of employment' as:

> ***conditions of employment*** has the same meaning as it has in the *Industrial Relations Act* 1996.

223 The term is defined in the Dictionary to the *Industrial Relations Act* as:

conditions of employment includes any provisions about an industrial matter.

224 'Industrial matters' are defined in s 6(1) of the *Industrial Relations Act* as:

> (1) **General definition**
>
> In this Act, ***industrial matters*** means matters or things affecting or relating to work done or to be done in any industry, or the privileges, rights, duties or obligations of employers or employees in any industry.

225 Various examples of industrial matters are given in s 6(2):

> (2) **Examples**
>
> Examples of industrial matters are as follows:
>
> (a) the employment of persons in any industry (including the employment of minors, trainees, apprentices and other classes of employees),
>
> (b) the remuneration (including rates of pay, rates for piece-work and allowances) for employees in any industry,
>
> (c) the conditions of employment in any industry (including hours of employment, qualifications of employees, manner of work and quantity of work to be done),
>
> (d) part-time or casual employment (including part-time work agreements),
>
> (e) the termination of employment of (or the refusal to employ) any person or class of persons in any industry,
>
> (f) discrimination in employment in any industry (including in remuneration or other conditions of employment) on a ground to which the *Anti-Discrimination Act* 1977 applies,
>
> (g) procedures for the resolution of industrial disputes,
>
> (h) the established customs in any industry,
>
> (i) the authorised remittance by employers of membership fees of industrial organisations of employees,
>
> (j) the surveillance of employees in the workplace,
>
> (k) the mode, terms and conditions under which work is given out, whether directly or indirectly, to be performed by outworkers in the clothing trades.

226 It was accepted by the parties, and it is a view with which we agree, that given this broad definition, provisions in the *Industrial Relations Act* which give employees various rights, being 'provisions about an industrial matter', are 'conditions of employment' for the purposes of the *Child Employment Act*. An example of such a condition, to which we will return later, is the right given to employees by s 124 of the *Industrial Relations Act*, to nominate a superannuation fund, despite any contrary provision made by an industrial instrument. Another such right is the right to be paid in money in full, given by ss 117 and 118 of that Act.

227 We have approached the task of devising the No Net Detriment principles on this basis.

Children whose conditions of employment reflect the terms of a State enterprise agreement

228 It was the case advanced for AFEI that children whose conditions of employment reflect the provisions of a State enterprise agreement, approved by the Commission under s 35 of the *Industrial Relations Act*, could not be found to have suffered any net detriment, as the result of any departure from the provisions of a

comparable award. This followed, it was submitted, because such agreements formed part of the child's 'minimum conditions of employment' defined in s 4(3)(b) of the *Child Employment Act* to include:

> (b) such other conditions of employment for which the industrial relations legislation makes provision that would have applied to the employment of the child if the employer of the child were bound by the comparable State award.

229 It was argued that given the definition of 'industrial relations legislation' included the *Industrial Relations Act* 1996, agreements approved by the Commission pursuant to s 35 of that Act also fell within s 4(3)(b). There is an obvious attraction to the argument advanced, given that such an enterprise agreement would only have been approved by the Commission if it satisfied the no net detriment test provided by s 35. We are satisfied, however, that as a matter of the proper construction of the *Child Employment Act*, the argument should not be accepted.

230 The term 'industrial relations legislation' is defined in s 3 of the *Child Employment Act* as:

> **industrial relations legislation** has the same meaning as it has in the Industrial Relations Act 1996

231 The definition of 'the industrial relations legislation' comes from the Dictionary to the *Industrial Relations Act* itself. The term is defined as meaning:

> ... any of the following Acts and the regulations made under any such Act:
>
> this Act
>
> *Annual Holidays Act* 1944
> *Employment Protection Act* 1982
> *Long Service Leave Act* 1955
> *Long Service Leave (Metalliferous Mining Industry) Act* 1963.

232 It should be noted that while the definition expressly extends to regulations made under these Acts, in its terms it does not extend to awards, agreements or other industrial instruments made under the *Industrial Relations Act*. It follows that were the definition to be construed as including enterprise agreements provided for by that Act, it would also have to be read as including other industrial instruments, including awards. That approach would have very curious results for the operation of the *Child Employment Act*. It would, for example, make entirely otiose the provisions of paragraph (a) of the definition of 'minimum conditions of employment' in s 4(3), if award conditions were also encompassed by the reference to 'such other conditions of employment for which the industrial relations legislation makes provision' in paragraph (b). Section 4(3) provides:

> The minimum conditions of employment for a child are:
>
> (a) the conditions of employment for employees performing similar work to that performed by the child for which provision is made from time to time in the comparable State award, and
>
> (b) such other conditions of employment for which the industrial relations legislation makes provision that would have applied to the employment of the child if the employer of the child were bound by the comparable State award.

233 Such a construction would also be a curious result, given that s 4(1)(b) of the Act provides:

(b) the employer of the child is a constitutional corporation that is not bound by a State industrial instrument with respect to the employment of the child

234 'State industrial instrument' is defined in s 3 of the *Child Employment Act* to mean 'an industrial instrument within the meaning of the *Industrial Relations Act'*. The term is defined in s 8 of the *Industrial Relations Act* as:

> an award, an enterprise agreement, a public sector industrial agreement, a former industrial agreement, a contract determination or a contract agreement.

235 The result of the approach urged would be that, for example, even a 'former industrial instrument', would fall within the definition of 'the industrial relations legislation'. That would be a very curious result, given that this term is defined in clause 6(1) of Schedule 4 to the *Industrial Relations Act* as:

> (1) Any enterprise agreement registered (or taken to be registered) under the 1991 Act and in force immediately before the repeal of that Act (a ***former enterprise agreement***) is taken to be an enterprise agreement approved under this Act.

236 It would follow that if an enterprise agreement provided for by the *Industrial Relations Act* was a condition of employment provided for by that legislation, so too, would be an industrial agreement made under the *Industrial Arbitration Act* 1940, given the provisions of the *Industrial Relations Act* 1991 and the *Industrial Relations Act* 1996, which together had the effect of continuing such agreements in force, until rescinded. So understood, it is difficult to see that it could properly be concluded that the *Industrial Relations Act* 1996 makes 'provision for' conditions of employment contained in enterprise agreements and other industrial instruments. In the case of enterprise agreements, that Act permits parties to such agreements to seek the Commission's approval of their terms, once made. If approved, the parties may thereby be relieved of the obligations imposed upon them by an award made by the Commission, which would otherwise bind those parties. In the case of former industrial agreements, the legislation creates an ongoing enforcement mechanism. The legislation also creates a system of award-making.

237 That the Parliament would have drafted the *Child Employment Act* by reference only to 'minimum conditions of employment' provided by a comparable State award and by 'industrial legislation', rather than by reference to other types of industrial instruments, is not surprising. A conclusion under s 35 of the *Industrial Relations Act*, for example, that an enterprise agreement does not impose a net detriment upon the employees of an enterprise, is not necessarily conclusive of the question of whether the terms of such an agreement impose a net detriment on a particular child, at a later point in time. Approval of an enterprise agreement involves the no net detriment test established by s 35 being applied in the context of the award conditions as they stand when the Commission's approval of the agreement is sought. The *Child Employment Act* requires consideration of net detriment at a later time, when, potentially the conditions provided by the comparable State award may have altered significantly; indeed, the comparison then required to be made might be with an entirely different award. The comparison of a child's conditions of employment with the 'minimum conditions of employment' required by s 4(3) of the *Child Employment Act* is with the provisions 'made from time to time in the comparable State award'. Such award conditions may have altered significantly since the time of approval of any enterprise agreement.

238 It follows that while it may be entirely likely that the conclusion that there is no net detriment will be reached if a child's conditions of employment reflect the terms of an enterprise agreement approved under the New South Wales Act, if such a situation came before an industrial court for consideration, such an assessment must remain to be made by the industrial court, in the particular circumstances of the child concerned, given the consequences of any departure from award conditions as they stand at the time the comparison arises to be made. This approach is reflected in the principles which we propose to establish.

239 The above conclusion is further reinforced by consideration of the fact that constitutional corporations cannot have 'entered into' State enterprise agreements after 26 March 2006, as s 4(1) of the Act contemplates. At that date, any such enterprise agreements which were binding on a constitutional corporation became

industrial instruments provided for by the *WorkChoices legislation*, save as to certain provisions, which were deleted by operation of that legislation (see Schedule 8). After that date, constitutional corporations no longer had the right to enter into State enterprise agreements and were no longer bound by them.

240 Finally, it should not be overlooked that the *Child Employment Act* does not permit the Commission in these proceedings to direct an industrial court on questions of what will ***not*** amount to a net detriment in a particular case. Section 5(3) permits the Commission to determine that 'a particular condition or conditions of employment of the kind referred to in subsection (2)(d) is or are of such importance for ensuring the well-being of children who are employed that a failure to provide that condition or those conditions will of itself result in a net detriment to the child when compared to the minimum conditions of employment for the child.' The Act does not permit the reverse - a determination that adherence to any particular employment conditions, other than those provided by a comparable State award and industrial legislation, will ***not*** result in a net detriment to a child.

241 Section 4(2) of the *Child Employment Act* obliges a constitutional corporation to provide the conditions of employment of a comparable State Award and industrial legislation to a child, or if there is a departure from those conditions, to ensure that the child suffers no net detriment. The Act also establishes an enforcement mechanism, with resort to an industrial court in the way described below, in the event that a question of an employer's compliance with that obligation arises. There is a civil penalty imposed if the obligation is breached. The Act makes no reference at all to enterprise agreements. Accordingly, it follows that if the provisions of such an agreement are applied to a child employee, the *Child Employment Act*, nevertheless, requires the employer to ensure that the child suffers no net detriment as a result.

242 Having reached that conclusion, however, the Minister may wish to give consideration to seeking the amendment of s 35 of the *Industrial Relations Act* so as to provide that the Commission may, in the course of considering the approval of an enterprise agreement under that section, determine whether the agreement satisfied the requirements of the no net detriment principles which we will fix pursuant to s 5(1) of the *Child Employment Act*. We would envisage that, in such circumstances the approval of the enterprise agreement in this fashion would presumptively satisfy the requirements of the *Child Employment Act*.

Industrial instruments under the *WorkChoices legislation*

243 The view advanced by some employers was that the *Child Employment Act* did not apply to employers bound by federal awards and certain federal agreements.

244 MTA and other employers' representatives argued, for example, that subsection 4(1)(a) of the *Child Employment Act* 'appears to exclude federal award covered employees'. In advancing this submission the MTA, relied on what was said in the Second Reading Speech by the Hon. Henry Tsang MLC:

> Nor does the Bill apply to child employees covered by federal awards, pre-WorkChoices agreements, 'notional agreements preserving State awards' or 'preserved State agreements' under WorkChoices. All of those instruments were tested against a 'no disadvantage' or 'no net detriment' test before they came into operation. We do not seek to interfere with their continued application to employer/employee relationships."

245 We are satisfied that such a view is one which cannot be accepted as reflecting a proper construction of the *Child Employment Act.* In its terms, that Act does not concern itself with the various types of industrial instruments which the *WorkChoices legislation* provides for, or indeed, even whether or not any such instrument applies to a particular child's employment at all. The obligations imposed by the Act arise even if a child's employment is only regulated by a common law contract of employment. So long as a child is employed by a constitutional corporation in the circumstances specified in s 4(1), the obligations imposed by s 4(2) may fall upon the employer.

246 Despite what was said in the Second Reading Speech, there is no reference made to federal awards or agreements or other federal instruments such as NAPSAs in the *Child Employment Act*. While interpretation of statutes involves a proper consideration of the purpose of the statute, even in cases where, as here, there is no ambiguity in the language of the statute itself and while reference to an extrinsic aid, such as a Second Reading Speech, may assist in that process, the High Court has made it clear that 'the words of a Minister must not be substituted for the text of the law': *Re Bolton and another; ex parte Beane* (1987) 162 CLR 514 at 518. Extrinsic material may also contain incorrect statements of the law (see *Brooks and Another v Commissioner of Taxation* (2000) 100 FCR 117 at 136). In this case, for example, contrary to what was said in the Second Reading Speech, it is clear that NAPSAs were not 'tested against a 'no disadvantage' or 'no net detriment' test before they came into operation'. To the contrary, NAPSAs had removed from them provisions which were established by the Commission as part of the 'fair and reasonable' conditions of employment provided by the State award, by operation of the *WorkChoices legislation* itself, even where such provisions reflected an agreement made by the award parties.

247 The submission also overlooks that s 4(1) of the *Child Employment Act* is concerned only with agreements and arrangements entered on or after 26 March 2006. While agreements might be made after that date under the *WorkChoices legislation*, the circumstances in which the AIRC might make a new award are extremely limited, other than in relation to the award rationalisation exercise which that legislation contemplates, whereby, in future, many federal awards may cease to exist at all. In its express terms, s 4(1) is not concerned with agreements or arrangements made before 26 March 2006.

248 We are satisfied that the plain words of the section do not permit the construction advanced. Subsection 4(1)(a) is concerned with children who are 'employed under an agreement or other arrangement entered into on or after 27 March 2006'. Neither the word 'agreement' nor 'arrangement' is defined in the Act. They must accordingly be given their ordinary meaning, which cannot be read as comprehending a federal award. The words are defined in the 2nd Edition of the *Oxford Dictionary* as:

> **agreement** - **5.** *Law*. A contract duly executed and legally binding on the parties making it
>
> **arrangement** - **4.** *concr.* A structure or combination of things arranged in a particular way or for any purpose; hence loosely, like *affair*, *concern*, *production*. **6.** A settlement of mutual relations or claims between parties; an adjustment of disputed or debatable matters; a settlement by agreement.

249 A federal award made by the AIRC falls within neither definition. Nor do employers or children 'enter' into such awards or other industrial instruments created by operation of the *WorkChoices legislation* itself, such as a NAPSA, for example. They enter into contracts of employment, which might then attract the provisions of such an instrument. They might also enter into agreements - an AWA - for example, which might then be registered under the *WorkChoices legislation.* Such contracts and agreements, if made after 26 March 2006, all fall within the words of s 4(1)(a). Other industrial instruments provided for by the *WorkChoices legislation,* which the employer and the employee do not themselves 'enter into ' plainly do not.

250 As was conceded by AFEI, an employment contract is an 'agreement or arrangement' caught by s 4(1). It follows that once an employment contract is entered into by a constitutional corporation, then the provisions of the *Child Employment Act* apply, even if the contract also attracts the provisions of a federal award or some other industrial instrument. Some children may also perform work under arrangements less formal than an employment contract. Had it been intended to exclude from the obligations imposed by the *Child Employment Act* those employers to whom federal industrial instruments such as awards made by the AIRC or NAPSAs apply when they employ children, the Act could have said so expressly. It did not.

251 It follows that contrary to the submissions advanced, it must be concluded that s 4(1)(a) is not concerned with the issue of whether a federal award or some other type of industrial instrument provided for under the *WorkChoices legislation*, regulates the employment of a child. It is rather concerned with employment 'agreements and arrangements' entered into by constitutional corporations with children after 27 March 2006. The phrase is wide enough to include situations where a child performs work under something

less formal than an employment contract. It is in relation to all such agreements and arrangements that the obligations imposed by s 4(2) arise for employers who may be affected.

252 It is also convenient at this point to deal with the concern of AFEI and ABI as to the impact of the principles, given the Federal Building Industry Code, especially as to the employment of apprentices and trainees in the building industry. That concern was accepted by the other parties and was sought to be addressed by the way in which the principles which they proposed were framed. We, too, have had regard to that concern in drafting the principles, accepting as we do that the *Child Employment Act* is concerned with the removal of opportunities for the exploitation of children, not precluding their employment in an industry.

Our approach to the Principles

253 The foregoing observations are made by way of background to our task in these proceedings - establishing principles that industrial courts are to take into account when called upon to determine whether or not a particular child has suffered a net detriment. It must be accepted that nothing that the Commission is obliged or permitted to do in these proceedings could diminish the statutory obligations imposed upon corporate employers from the time of the enactment of the *Child Employment Act* in December 2006.

254 The Commission's task is to establish the principles which will be 'taken into account' by an industrial court in determining whether or not a corporate employer's obligations to the children it employs have been met. In such proceedings an industrial court may also consider 'any other matter that the court considers relevant' (s 4(4)).

255 We accept, as various of the parties submitted, that in exercising this function we are obliged by s 146 of the *Industrial Relations Act*, to have regard to the public interest, given the functions imposed upon the Commission by the *Child Employment Act*. This section relevantly provides:

> **146 General functions of Commission**
>
> (1) The Commission has the following functions:
>
> .....
>
> (e) functions conferred on it by this or any other Act or law.
>
> (2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:
>
> (a) the objects of this Act, and
>
> (b) the state of the economy of New South Wales and the likely effect of its decisions on that economy.
>
> This subsection does not apply to proceedings before the Commission in Court Session that are criminal proceedings or that it determines are not appropriate.

256 The statute provides that proceedings under the *Child Employment Act* may come before an industrial court, in one of three ways. First, if an Inspector has issued an employer with a compliance notice, having formed the opinion that the employer has not met its statutory obligations, the employer may appeal to the Industrial Court of New South Wales, which may confirm, vary or revoke the notice (see s 12). Secondly, if an employer refuses or fails to comply with a requirement imposed by a compliance notice, without reasonable excuse, the employer may be charged with an offence (see s 11). Such proceedings are taken before an industrial court (see s 15). Thirdly, recovery proceedings may be taken under s 16(1)(e) of the *Child*

Employment Act. Once such recovery proceedings are taken before an industrial court the requirements of s 371 of the *Industrial Relations Act* will come into operation:

> **371 Conciliation to be attempted before order made**
>
> (1) The industrial court is not to make an order under this Part until it has brought, or has used its best endeavours to bring, the parties to the application for the order to a settlement acceptable to those parties.
>
> (2) If such a settlement is made, the industrial court is required to make an order that, to the extent authorised by this Act, gives effect to the terms of the settlement.

257 In our view, it follows that another important role which the principles will inevitably play in practice, is to guide employers, children, their parents and Inspectors, as to how the obligations imposed by the *Child Employment Act* will operate and be applied by an industrial court. It is thus important that we attempt to ensure that the principles are clear, given that they will operate until the review required by s 5(4) of the Act, within the next 3 years. It also follows that the principles should be framed in a way which assists in ensuring that recourse to an industrial court for a determination of what will amount to a net detriment in a particular case is kept to a minimum and in the presumably small number of cases where it becomes necessary, conciliation proceedings, if they are required, are facilitated. In this regard, we observe that the obligation to conciliate does not arise in proceedings brought by employers before the Industrial Court of New South Wales when challenging a compliance notice. Given the Court's power to confirm, vary or revoke such a notice, the Minister may also wish to give consideration to seeking the amendment of the *Child Employment* Act, so as to provide for such conciliation.

258 Section 5(2) of the *Child Employment Act* specifies the matters to which the Commission is to have regard in these proceedings in establishing the principles. The matters specified are:

> (a) evidence about the kinds of occupations and industries in which children are employed,
>
> (b) the State awards that apply to those occupations and industries,
>
> (c) any industrial relations legislation that may apply generally to the employment of children,
>
> (d) any provisions of any such State awards or industrial relations legislation that operate to provide conditions of employment that are particularly important for ensuring the well-being of children who are employed,
>
> (e) the provision of any other laws of the State that may be relevant to the employment of children or to their well-being while employed (for example, laws dealing with occupational safety, education or child protection).

259 We have earlier reviewed the evidence led in these proceedings in some detail, given these obligations. That evidence has been important in the conclusions which we have reached, both as to the form and content of the principles which we propose to establish.

260 It is convenient to observe at this point that the cases advanced by some employer parties urged the Commission to adopt principles which required an industrial court to have regard to the needs and concerns of employers, in assessing whether a child's conditions of employment 'result in a net detriment to the child when compared to the minimum conditions of employment'. We have concluded that the adoption of such an approach would not be consistent with the statutory scheme.

261 We have reached this conclusion having in mind that none of the matters to which s 5(2) of the *Child Employment Act* directs attention, nor the concept of a 'net detriment to the child' itself, concern themselves with the concerns or needs of the corporate employers to whom the legislation is directed. To the contrary, the legislation plainly proceeds on the assumption that corporate employers have employed children on terms

which suit their business needs. The circumstances in which such employment is agreed will certainly be relevant and that is a matter to which the principles refer.

262 The *Child Employment Act* is concerned with the welfare of children who are in paid employment and seeks to exclude their exploitation by corporate employers. This statutory purpose may be achieved by requiring that when children are employed by a corporate employer, they either receive conditions of employment that are the same provisions as of a comparable State award and industrial legislation, or, if there is a departure from those provisions, that there is no net detriment to the child.

263 It follows that the *Child Employment Act* is premised on the basis that not every departure from the conditions of employment for which comparable awards and industrial legislation make provision, will result in a net detriment to a child. That is entirely logical. Awards themselves make differing, albeit fair provisions for employees, including children, even when applying to employment in the same industry. Often such awards reflect agreements which the parties have themselves reached and the Commission has approved. Additionally, the *Industrial Relations Act* itself contemplates agreed departures from such conditions, in enterprise agreements which satisfy the no net detriment test provided by s 35, or in part-time work agreements, made by employers and employees in accordance with the requirements of s 76 of the *Industrial Relations Act*.

264 It is apparent that the statutory scheme established by the *Child Employment Act* has regard to the framework of minimum conditions of employment established by awards made under the *Industrial Relations Act*, or by 'industrial legislation' enacted by the Parliament. The Commission's awards provide minimum conditions of employment, in order to establish 'fair and reasonable conditions of employment for employees' (s 10), so as to meet the statutory object in s 3 of the Act, which includes:

> (a) to provide a framework for the conduct of industrial relations that is fair and just,

265 The vast majority of awards in this State themselves reflect agreements which award parties have reached in the past and which the Commission has approved. Undoubtedly, the Parliament also enacted various 'industrial relations legislation', for similar reasons, namely to establish fair minimum conditions, in relation to the specific matters with which such legislation deals.

266 The no net detriment test imposed by s 4 of the *Child Employment Act*, like the provision made in s 35 of the *Industrial Relations Act*, envisages agreed departures from award conditions. Unlike enterprise agreements, however, which require the Commission's prior satisfaction that the no net detriment test is satisfied by the agreement before a State award can be displaced, under the *Child Employment Act* corporate employers are free to offer children conditions of employment which differ from both State awards and industrial legislation, without any approval mechanism first being engaged, so long as they do not result in a net detriment to the child.

267 No doubt the Parliament adopted this approach, as a response to the opportunity for exploitation which the *WorkChoices legislation* appears to have provided. In order to protect children, when entering into an employment contract, the *Child Employment Act* seeks to impose an obligation on all employers who are constitutional corporations in an endeavour to ensure that the child suffers no net detriment under the conditions of employment which the employer provides, if the employer departs from the provisions of the relevant State award and industrial legislation. It follows that the legislation does not preclude corporate employers from entering AWAs with children under the *WorkChoices legislation*. It rather seeks to protect children from exploitation, if such agreements are offered.

268 While various employers expressed concerns about the enactment of the *Child Employment Act* and its consequences for corporate employers in the State, in our view the legislation is unlikely to have the consequences which some employer parties said were feared.

269 It is the Commission's experience that employers in this State, whether they be corporate employers or not, do not generally seek to exploit children who they employ, or offer children other than fair conditions of

employment. The statutory scheme reflects the Parliament's confidence that the majority of corporate employers in this State will continue to act in this way. The Parliament could have adopted a different approach. The *Child Employment Act*, however, provides a mechanism whereby employers who fail in this obligation may have the failure brought to their attention by an Inspector, so that it may be remedied voluntarily. In the case of dispute, an Inspector's notice may be challenged by an employer. It is only as a last resort that prosecution is provided for. In cases where recovery proceedings are pursued, an industrial court is obliged to assist the parties to reach an agreed settlement in conciliation proceedings before proceeding to deal with the prosecution.

270 As far as competitive disadvantage is concerned, a matter raised in some employers' submissions, it cannot be overlooked that employers in this State who are not corporations themselves have ongoing award and statutory obligations, of which the enactment of the *WorkChoices legislation* has not relieved them. It follows that the enactment of the *Child Employment Act* is unlikely to put corporate employers at any competitive disadvantage, when it seeks to require them to ensure that children suffer no net detriment as the result of the employment conditions they are offered. Indeed, their non-corporate competitors still do not have a capacity to depart from award conditions and industrial legislation, in the way in which corporate employers may, unless they enter enterprise agreements that the Commission first approves. Even then, a no disadvantage test must be satisfied. It should also be added that the higher award rates of pay non-corporate employers may be required to provide may, of course, actually attract labour to that sector and result in varying outcomes depending upon demand and supply factors.

271 Having in mind the evidence of the agreements which various corporate employers have made with children since the enactment of the *WorkChoices legislation*, it is apparent that there are some employers who are prepared to exploit child workers. There was also evidence of corporate employers who have not pursued a 'low wage' strategy, even when making agreements that depart from minimum award conditions contained in State awards. It follows that the *Child Employment Act* may have the obvious benefit of removing from exploitative employers a competitive advantage that employers concerned with the welfare of children would refrain from utilising.

272 Whilst the *Child Employment Act* does not exclude from its operation employers who are bound by awards made by the AIRC, or agreements approved by that Commission prior to the enactment of the *WorkChoices legislation*, we accept that while perhaps different to the provisions made in a relevant State award, such awards and agreements may, nevertheless, not result in a net detriment, if applied to a child. Such a circumstance will, no doubt, be readily apparent on a comparison of the comparable State award and industrial relations legislation, with the child's conditions of employment. This is reflected in the principles we propose to establish.

The economic evidence

273 It is also convenient to deal with the economic evidence led at this point. We accept that it is relevant to have regard to that evidence, given the requirement to take into account the public interest in the exercise of the Commission's functions. Indeed, the public interest in the welfare of children while at work, lies at the heart of the *Child Employment Act.* We also accept that it is not the intention of that legislation that children be placed in a position where their employment is jeopardised. We do not accept, however, that the public interest would permit exploitation of children which the *Child Employment Act* seeks to preclude in order to retain existing exploitative employment, or to produce increased employment of that kind.

274 Obviously, whether or not employers offer children employment will depend on many things, including the rates of pay which employers are obliged to pay them. Both the *Child Employment Act* and the *WorkChoices legislation* are, however, predicated on the basis that market forces alone should not determine what rates employers should be legally obliged to pay children whom they employ. They each provide for minimum rates of pay. Additionally, when enacting the *WorkChoices legislation* the Commonwealth Parliament took the view that the States should be free to make laws dealing with child labour - clearly it contemplated that the need to deal with the situation of children when in employment might arise in future and that the right of the States and Territories to make laws to prevent child exploitation should be preserved.

275 In this State, before the enactment of the *Child Employment Act*, given the State and federal legislative schemes and how they interacted, market rates for the employment of children were interfered with in differing ways, depending on whether or not the employer was a constitutional corporation. So far as employers are concerned, a consequence of the enactment of the *Child Employment Act* has been to potentially ameliorate a competitive advantage which the *WorkChoices legislation* had given such corporate employers. That legislation had reduced the minimum rate which employers were legally obliged to pay employees including children, from minima imposed by applicable awards, to the (usually) lower statutory minimum rates determined from time to time by the AFPC. As a result of the enactment of the *Child Employment Act*, while corporate employers in New South Wales remain free to offer children conditions of employment different to those provided by State awards and industrial legislation, the Act seeks to ensure that children suffer no net detriment as a result. Thus, in seeking to prevent the exploitation of children, the aim of the legislation is to return such corporate employers to a position more akin to that in which non-corporate employers remain in this State, so far as market rates of pay are concerned.

276 On the evidence led, there can be no doubt that before the enactment of the *WorkChoices legislation*, employers were able to employ children while still making sufficient profits necessary for their enterprises to prosper. This was put beyond question by the evidence of the substantial growth in the part-time and casual work of children in recent decades, at the same time as their participation rates in education grew and the incidence of full-time employment of children fell. That picture emerged while employers were obliged to provide children with minimum conditions and rates of pay fixed by State awards and other industrial instruments and industrial legislation, or by industrial instruments made or approved by the AIRC. The economic evidence led in this case provided no proper basis for any concern that the enactment of the *Child Employment Act*, or the principles which we propose to establish, would lead to any diminution in employment opportunities for children in this State.

277 Given the evidence of the industries in which children are principally employed - such as retail and hospitality - the suggestion that the enactment of the *Child Employment Act* will give rise to the risk that pressures will result, which will make the State economy uncompetitive with importers and rival firms in other States, seems far fetched. The evidence suggested that many children are employed on a part-time or casual basis at times which are unattractive to adults. They also command considerably lower rates of pay, even when paid at award rates. Undoubtedly, if an economic downturn eventuates, children in the workforce, like other employees, will be affected. Even with the enactment of the *Child Employment Act*, however, the cost of employing children will remain relatively low by comparison to adult employees. We can see no basis for the possibility of child employment declining in this State as the result of the principles which we propose to set.

278 It is against that background that we turn to consider the cases which the parties advanced in relation to the establishment of the principles.

The Principles

279 In resolving the competing principles advanced in the context of the provisions of the *Child Employment Act* and the evidence and the debate between the parties, we have concluded that the principles should reflect the language of the Act to identify to whom the Act applies and the circumstances in which the principles will operate. We have also taken the view that the principles should commence by stating clearly those conditions which, in the terms of s 5(3) "are of such importance for ensuring the well-being of children who are employed that a failure to provide that condition or those conditions will of itself result in a net detriment to the child when compared to the minimum conditions of employment for the child".

280 We have adopted that approach, accepting as we do the construction of s 5 of the *Child Employment Act* advanced by the Minister and the employers other than CCER and rejecting that advanced by Unions NSW and CCER. We are satisfied that s 5(3) is unambiguous and as it plainly states, permits the Commission in these proceedings to determine that:

> particular condition or conditions of employment of the kind referred to in subsection (2) (d) is or are of such importance for ensuring the well-being of children who are employed that a failure to provide that condition or those conditions will of itself result in a net detriment to the child when compared to the minimum conditions of employment for the child

281 The matters specified in s 5(2)(d) are:

> any provisions of any such State awards or industrial relations legislation that operate to provide conditions of employment that are particularly important for ensuring the well-being of children who are employed

282 The principles adopt various of the matters proposed by the Minister and by the employers other than CCER, as falling within s 5(2)(d), including that there will be a net detriment if a child's conditions of employment provide for unpaid work; and for other than payment in full and in money. We are satisfied both that the conditions we have specified are particularly important for ensuring the well-being of children, given the evidence we have earlier outlined; and that it is appropriate to clearly specify these conditions of employment as resulting in a net detriment in the principles.

283 We have taken account of the evidence that some children are employed on the basis that they will be 'trained', during periods of work for which they receive no payment at all and that unpaid overtime is being required of some children. We are satisfied that such arrangements involve exploitation which the principles cannot permit, consistently with the requirements and statutory purpose of the *Child Employment Act*. In fixing this provision we have also had regard to the provisions of Part 10 Payment of Remuneration of Chapter 2, Employment, of the *Industrial Relations Act*, which creates rights designed to ensure that such arrangements are precluded.

284 The principles also reflect what is entirely self evident, consistent with the evidence and what the parties all agreed - that unless a child's conditions of employment require that they are paid at least the minimum award base rate of pay, the child suffers a net detriment. We have reached the same view in relation to wage related allowances. On the evidence, pay is of particular significance to children given: their circumstances; how work impacts upon them; and the low rates of pay which their work typically commands. We have reached the same conclusion in relation to award provisions as to:

> (i) special requirements for the employment of children, including but not limited to supervisory arrangements
>
> (ii) limitations on work late at night or early in the morning and late transportation arrangements
>
> (iii) reasonable notice of rosters and changes of shift/working hours
>
> (iv) entitlements to annual leave and other forms of leave
>
> (v) occupational, health and safety.

285 We are satisfied that these, too, are each conditions of particular importance to the well-being of children. A failure to provide children with these conditions is such an obvious and significant detriment on the evidence that, in our view, the negotiation of the loss of such provisions may not properly be left to children, without leaving them vulnerable to exploitation. The evidence established beyond doubt the disadvantage which children suffer in having to negotiate conditions of employment with their employer, even when assisted by their parents. Indeed, the evidence demonstrated that children are very frequently subjected to both verbal and physical harassment while at work, further reflective of their vulnerable position.

286 There is also a significant body of State legislation dealing with child labour which recognises that children are not the best judges of what is required for their well-being. The evidence of experts such as Ms Calvert, Mr Prior and Mr Watson, makes it clear that in some areas children require the express protection which s 5(3) of the *Child Employment Act* contemplates. In most other aspects of their lives children must subordinate themselves to the direction and control of adults. They cannot sensibly be expected to be left to fend for themselves in negotiating conditions of employment such as these, without risking what is agreed would be to their overall detriment and to that of society as a whole.

287 We do not accept that in doing so the principles introduce a risk of double jeopardy, given the obligations imposed by the *Occupational Health and Safety Act*. There are award conditions which deal specifically with safety - the provision of safety equipment, for example. In our view, if a child's conditions of employment remove such protective conditions, a net detriment plainly results, given the evidence as to children's peculiar vulnerability to injury at work.

288 Given the evidence about children's work, its effect upon them and its importance to them, particularly when pursuing education, there can be no doubt of their vulnerability in these areas and that they require the protection which the *Child Employment Act* envisages in relation to these conditions of employment, which we are satisfied are important to their well-being. The principles specify that a failure to provide these conditions will lead to a net detriment in every case.

289 There was also a dispute between the parties as to whether other departures from the remuneration provided for by an award, other than by reduction of the base rate of pay, could result in a net detriment which should be dealt with in the principles at all, or whether such departures should also lead automatically to the conclusion that there was a net detriment to the child. We have concluded that the controversy must be resolved in a logical way, with the result that the principles depart somewhat from the various proposals advanced by the parties.

290 The phrase 'net detriment' is not defined in the *Child Employment Act*. We are satisfied, however, that the meaning of the phrase is quite clear. It is unarguable that if a child is paid less total remuneration under his or her conditions of employment, than would be payable under the comparable award and industrial legislation, then the child suffers a detriment. Whether or not there is a 'net detriment' to a child in a particular case, will depend upon an assessment of all of the child's conditions of employment and whether or not the child is worse off under the agreed conditions of employment than under the comparable award and industrial legislation.

291 It is obvious, for example, that if an award provides for higher rates of pay if work is performed at certain times of the day, or at weekends, or during overtime and the child's conditions of employment provide for lower rates, then the child will be paid less overall, when work is performed at those times, than if the award provisions were applied. This results in a loss to the child, clearly a 'detriment'. Unless there is some offsetting benefit provided, there will be a net detriment to the child flowing from the departure from the award and statutory conditions. It follows that if all of the child's conditions of employment, including those which are of benefit to the child, are considered and it is concluded that the child is still worse off than the child would be if provided with the conditions of the award and industrial relations legislation, then the conclusion that there is a 'net detriment' must follow.

292 We are satisfied, therefore, that the principles should deal expressly with the question of total pay, but not in the way proposed by any of the parties. The principles require an industrial court to have regard to the child's total pay. If it is less than what would have been earned under the applicable award and industrial relations legislation, there will be a net detriment, although the employer will have the opportunity of demonstrating that, overall, there is no net detriment to the child. Such a consideration will include penalty rates, loadings and other remuneration provided by the comparable award.

293 In coming to this conclusion, we have had regard to the evidence as to rates of pay (including wage related allowances), which generally apply to children under State awards. Such rates are usually significantly less than those applying to adults, reflective of an acceptance that children usually possess lesser skills and

experience levels than adults. This is reflected in award rates fixed for apprentices, trainees and juniors. Additionally, the evidence showed that children's hours of work are frequently on a part-time or casual basis, other than in the case of apprentices and trainees, who are generally employed full-time. These factors tend to result in children having relatively small levels of income. Most children work while still at school - on the evidence, children as young as 10 years of age are in employment, and even babies are employed in certain circumstances. The evidence demonstrated that what children earn is particularly important to them and their welfare.

294 In our view, it follows that it is important that conditions of employment which provide for lower total remuneration for a child than that provided by the comparable award and industrial legislation, must be carefully considered by an industrial court. The principles permit the employer to demonstrate that when considered in conjunction with the child's other conditions of employment, the child suffers no net detriment. Lower pay, without the employer demonstrating other beneficial offsetting conditions, so that the child is not left worse off overall, will lead to the conclusion that there is a net detriment.

295 Conversely, we do not accept that there are no circumstances in which total remuneration different to what an award prescribes might be offered, without a net detriment being suffered. Two simple examples will suffice to illustrate the point. An employer may accept a child's request for a three hour shift commencing at 3.30 pm, because the child is only available to work that time due to school and sporting commitments. The result of such an agreement would be one hour's less pay than would be payable under a comparable award, if the award provided for a four hour minimum shift. While it might properly be concluded that there was a 'detriment' to the child, in receiving an hour's less pay than if the award was applied, it would plainly be open to an industrial court to conclude in the circumstances that there was no 'net detriment' to the child in the employer meeting the child's request for a shorter shift.

296 In coming to this conclusion, we have taken into account that such an agreement would be permitted under the part-time work principles (see *State Part-Time Work Case* (1998) 78 IR 172 at 220). By way of contrast, such a conclusion may not be available if an employer provided a child only a fifteen-minute shift, so that the child received three and a quarter hours' less pay than the award minimum required.

297 Similarly, a child who asked for a salary sacrifice arrangement permitted by an enterprise agreement, but not under an award might, as a result, receive lower remuneration than would be payable under the award. In such a case it would plainly be open to an industrial court to conclude that there was no net detriment for the child.

298 Apart from those matters which we have specified as giving rise to a net detriment, our approach in the principles has been to take the view that the no net detriment principles ought not be too prescriptive. As with s 35 of the *Industrial Relations Act*, the statutory no net detriment test provided by s 4 of the *Child Employment Act* is a flexible one, understandably given the very many different circumstances in which children may be employed and the myriad of conditions of employment which might be offered by employers. The legislation is directed to the situation of individual children, as revealed by the wide discretion which industrial courts have been granted by s 4(4)(b) to consider 'any other matter that the court considers relevant.

299 We have accepted the approach proposed by the parties by identifying in the principles particular conditions of employment which an industrial court should be required to consider, when an employer departs from the provisions of an award and the industrial relations legislation, in conditions of employment offered, other than rates of pay.

300 Whilst industrial courts should receive guidance as to matters relevant to a consideration of whether a child suffers a net detriment, what might, in fact, amount to a net detriment in a particular case must remain a matter for judgment on the evidence led. This is reflected in the principles.

301 We have adopted particular award conditions which the parties identified as being relevant to children's welfare and thus to the industrial court's consideration of net detriment - provisions such as those relating to

hours of work, overtime, rosters, shift breaks and so on. We have also added the right to specify a superannuation fund as being relevant to the welfare of children. On the evidence, some agreements remove a child's right to make an election about the fund into which the child's superannuation entitlements will be paid, dealt with in s 124 of the *Industrial Relations Act* and Part 3A of Division 4 of the federal *Superannuation Guarantee (Administration) Act* 1992 (Cth). Inevitably, any superannuation contributions which children generate by their employment will be small, even if they remain with the one employer throughout their childhood, quite an unusual working pattern for any child. It is important that children retain the right to nominate a suitable fund for their contributions, so that any superannuation benefits which their work generates, are not effectively lost to them.

302 In establishing the principles we have paid particular attention to the evidence Ms Calvert and the findings of the Children at Work Report, as to the negative impact which long working hours have on children. This was supported by the evidence of Mr Prior, that some children have agreed to working arrangements which have resulted in them being unable to fulfil course requirements for years 10, 11 and 12, with the result that they are not awarded a School Certificate or the Higher School Certificate. Further support came from the evidence of Mr Watson, as to the particular vulnerability of children to injury at work, given their size and stature, their lack of mature judgment, and their inability to cope with unexpected and stressful situations. Workplace injuries for children are also significantly under-reported, even though children fall into the age group with the highest rate of workplace injuries in the statistics maintained by the Australian Bureau of Statistics.

303 Given the evidence of the particular vulnerability of children, especially those still pursuing education, we have also determined to specify in the principles matters which industrial courts should take into account when assessing net detriment. The principles identify various obvious matters to which regard should be had by an industrial court, in considering whether or not there is a net detriment in a particular case. These include a child's age, whether the child is involved in education, the hours worked and the work performed, how their conditions of employment were negotiated, whether there was any duress and whether the conditions reflected the terms of any industrial instrument made or approved by the Commission, or by the AIRC before 26 March 2006.

304 These matters may affect the determination of the question of net detriment in a particular case. We accept that circumstances can readily be envisaged where conditions of employment agreed by a 12 year old, who is attending year 7 in high school, may breach the no net detriment test, but where a different conclusion might be reached if those same conditions were agreed by a 17 year old, not pursuing education, who is engaged in full-time employment as an apprentice.

305 Under s 4(4)(b) of the *Child Employment Act* an industrial court may take into account other relevant matters, in assessing net detriment. Reference is made to this provision in the principles and an example given - other legislation applicable to the employment of the child, such as the *Children and Young Person's (Care and Protection) Act* 1998. Ms Boland gave extensive evidence about that legislation and the Code of Practice established by Regulation, which requires employers to obtain an employer's authority and to provide certain conditions of employment, designed to minimise risk associated with work of even very young children, in industries such as entertainment. The importance of these provisions for the well-being of affected children is apparent and an important matter to be taken into account by an industrial court if a particular child is affected by the provisions of such legislation.

306 It will, of course, be a matter for the parties to particular proceedings where appropriate to adduce evidence about the matters identified in the principles, in order that an industrial court might consider the statutory test, consistently with the principles which we hereby establish. Under the *Child Employment Act* such proceedings remain adversarial and do not involve an independent inquiry by a court.

DURATION OF THE PRINCIPLES

307 Section 5(4) of the *Child Employment Act* requires the Commission to review the principles at least once every three years. However, on 4 May 2007, after we reserved our decision in this matter, the Prime Minister made an announcement of "A Stronger Safety Net for Working Australians". This involves a:

> Fairness Test to protect all workers who would have otherwise been entitled to the benefit of protected award conditions such as penalty rates in an industrial award and are paid under $75,000 a year. The Fairness Test will apply to agreements lodged on or after 7 May 2007.

308 The details of this test do not appear to have been fully elaborated, although it is reasonably clear that the test does not have a focus on children and does not apply to existing agreements. It also appears that the test is limited only to protected award conditions and has some significant exemptions. It would not appear then, that the creation of this test would warrant any alteration to the principles we intend to announce. However, the parties to these proceedings have not been heard on that aspect and we, therefore, make no comment on that matter and give liberty to apply to any party who considers that any aspect of the "Fairness Test" warrants a re-listing of this matter, provided such liberty is exercised within a reasonable time.

ORDERS

309 For the reasons given, we order the adoption of the following principles. The principles will operate from the date of this decision until further order of the Commission.

310 The principles are to be followed by an industrial court in any proceedings brought under the *Child Employment Act*.

THE PRINCIPLES

The No Net Detriment Principles
applicable to Child Employment
made pursuant to the
***Industrial Relations (Child Employment) Act* 2006**
May 2007

1. Preamble

These are the principles set by the Industrial Relations Commission of New South Wales to be followed by an industrial court in determining whether or not an affected employer has provided a child with conditions of employment which, on balance, result in a net detriment to the child, when compared to the minimum conditions of employment, as required by s 4(2) of the *Industrial Relations (Child Employment) Act* 2006.

2. When do the Principles apply?

These principles apply in circumstances where:

(a) a child under 18 years of age is employed under an agreement or other arrangement entered into on or after 26 March 2006, and

(b) the employer of the child is a constitutional corporation that is not bound by a State industrial instrument with respect to the employment of the child, and

(c) a State award is in force that covers employees performing similar work to that performed by the child and that award does not bind the employer in respect of the employment of the child, and

(d) the child is not provided with the same conditions of employment as the minimum conditions of employment for the child.

3. What are the minimum conditions of employment?

The minimum conditions of employment for the child are:

(a) the conditions of employment for employees performing similar work to that performed by the child for which provision is made from time to time in the comparable State award, and

(b) such other conditions of employment for which the industrial relations legislation makes provision that would have applied to the employment of the child if the employer of the child were bound by the comparable State award.

The '**industrial relations legislation**' means and includes any of the following Acts and the Regulations made under any such Act:

Industrial Relations Act 1996

Annual Holidays Act 1944

Employment Protection Act 1982

Long Service Leave Act 1955

Long Service Leave (Metalliferous Mining Industry) Act 1963

4. What is a net detriment?

A child suffers a net detriment when, by comparison with the minimum conditions of employment, the child is worse off overall under the conditions of employment provided by his or her employer or the employer does not provide the conditions specified in Principle [1] of the following principles.

5. The Principles

In determining whether or not an employer has provided a child with conditions of employment that, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child, the following principles apply:

[1] Cases where there will be a net detriment (s 5(3)(b))

The following provisions of State awards and industrial legislation are of such importance for ensuring the well-being of children who are employed, that a failure to provide any of those conditions will result in a net detriment to the child:

- provisions which require payment for all work performed, including during training or probationary periods and overtime
- provisions which require regular payment in full, in money and without deduction, such as deductions for breakages, shortages, or deductions for goods or services supplied by the employer
- provisions which require payment at the base rate of pay and payment of wage related allowances
- provisions relating to:
    - (i) special requirements for the employment of children, including but not limited to supervisory arrangements
    - (ii) limitations on work late at night, early in the morning or late transportation arrangements
    - (iii) reasonable notice of rosters and changes of shift/working hours
    - (iv) entitlements to annual leave and other forms of leave
    - (v) occupational health and safety.

[2] How net detriment is to be assessed in other cases

2.1 Remuneration

(i) Subject to (ii), where the total amount payable** to the child under the child's conditions of employment is less than the total amount which would be payable to the child under the comparable State award or industrial relations legislation, a net detriment will result.

(ii) An employer of a child may demonstrate that, having regard to the totality of the child's conditions of employment under an agreement or other arrangement, the child has not, on balance, suffered a net detriment.

2.2 Other conditions of employment

If the child's conditions of employment otherwise differ from the provisions of a comparable State award or industrial legislation, consideration must be given to the nature of the differences and their consequences for the child in determining whether or not the child's conditions of employment, on balance, result in a net detriment to the child.

2.3 Matters to be considered in determining net detriment

(i) In considering whether or not there is, on balance, a net detriment to a child, the industrial court must have particular regard to how the child's conditions of employment differ from the provisions of the comparable State award or industrial legislation in relation to:

- hours of work, including daily maximum and minimum hours of work
- spread of hours of work
- minimum breaks between shifts and split shifts
- overtime
- meal breaks, crib breaks and rest breaks
- notification of whether the employment is full-time, part-time or casual
- the right to elect the fund into which the child's superannuation benefits will be paid.

(ii) The industrial court must also have regard to:

- the child's age
- whether or not the child is engaged in full or part-time education.
- the work which the child is employed to perform
- when the work is required to be performed
- the circumstances in which the child's conditions of employment were agreed, including:

  (i) the involvement of the child and/or the child's representative in the negotiation process;

(ii) whether a reasonable effort was made to ensure that the nature and effect of the child's conditions of employment were explained in a manner appropriate to the child's age;

(iii) whether the child agreed to the conditions of employment under duress; and

(iv) whether the child's conditions of employment reflect the terms of an industrial instrument made or approved by the Commission, or by the Australian Industrial Relations Commission, before 26 March 2007.

[3] Other matters

The industrial court may have regard to any other matter that the court considers relevant in a particular case, including whether the child's work attracts the provisions of other legislation such as the *Children and Young Person's (Care and Protection) Act* 1998 and, if it does, whether the minimum conditions of employment established by the Code of Practice prescribed by the Regulations made under that Act, have been adhered to.

Note: ** ***'amount payable'*** means:

(a) remuneration payable to a child for work done, including allowances, penalty rates and loadings, or

(b) commission or other amount payable to a child in the circumstances (other than remuneration for work done), or

(c) an amount for which a child is required to be reimbursed or compensated for an expense incurred or loss sustained by the child.

AMENDMENTS:

23/07/2007 - Misplaced word sentence read "such deductions as for breakages"
It should have read "such as deductions for breakages" - Paragraph(s) Principle no 1. - Cases where there will be a net detriment (s 5(3)(b)) - Point 2 Line 2

LAST UPDATED: 23 July 2007