Work Choices in Overview: Big Bang or Slow Burn?

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Abstract

The Work Choices legislation represents a concerted attempt to tilt the balance of labour regulation in favour of employers. It does this by allowing them to offer agreements that reduce or eliminate award or statutory entitlements, by making it harder for both workers and unions to contest management decisions, and by sidelining the Australian Industrial Relations Commission. It also seeks to 'move towards' a national system of regulation by providing that the majority of employers will be exclusively subject to federal rather than State regulation, at least for some purposes. Yet for all the radical nature of many of the changes, this is not the 'big bang' it might have been. Many features of the old arbitration system have been retained and there are genuine compromises at the heart of some of the changes. It also remains to be seen just how quickly employers will move to exploit the opportunities the new legislation offers, given its complexity, opposition from unions, and indeed the natural pragmatism or conservatism of many managers — and whether this will prompt further intervention by a government that appears uncomfortable with leaving it to employers to make their own choices.

Introduction

In one sense, the *Workplace Relations Amendment (Work Choices) Act* 2005 can be seen as the culmination of a twenty-year campaign by John Howard and his supporters to re-regulate workplace relations.[1] Frustrated

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first by Labor's long period in office, and then after coming to power in 1996 by a lack of numbers in the Senate, the unexpected scale of the Coalition's victory at the 2004 election finally delivered an opportunity to rewrite the rules on the Prime Minister's own terms. Unsurprisingly then, the principal thrust of the *Work Choices Act* is to individualise employment relations and, as a corollary, to reduce the scope for 'third party' intervention by trade unions and industrial tribunals.

Yet at the same time, and for all that some of the changes it introduces are potentially far-reaching in their effect on the determination of employment conditions, the *Work Choices Act* is not the revolution we might have expected. Not only does it amend rather than replace the *Workplace Relations Act* 1996 (itself a renamed version of the Hawke Government's *Industrial Relations Act* 1988), but it retains some of the traditional elements of the old arbitration system. The Australian Industrial Relations Commission survives and there will still be awards — albeit both will have a diminished and increasingly marginalised role to play. Collective bargaining and even industrial action, while hindered in key respects, remain formally recognised.

I will have more to say later on both about the philosophy underlying the Work Choices reforms, and about the government's reasons for not pursuing a programme of more radical and immediate change. Before that, however, I will sketch out the more important elements of the Work Choices amendments, the bulk of which were expected (at least at the time of writing) to be proclaimed to take effect in March 2006.

Three factors complicate any analysis of the legislation. The first is the sheer size and complexity of the *Work Choices Act*, which in its final form runs to a staggering 762 pages. Far from simplifying the *Workplace Relations Act* 1996 (or the *WR Act* as it will be referred to from now on), the amendments have taken what was already an overblown, poorly drafted and needlessly complicated statute (Stewart 2005) — and made it even worse. Large slabs of the amended *WR Act* are virtually unintelligible to all but the most persistent and expert reader, while the haste with which the legislation was rushed through parliament has meant that areas of uncertainty as to the meaning or effect of certain changes have been overlooked or left unresolved. The legislation also teems with new concepts and acronyms, many of them confusingly (and quite unnecessarily) similar. For instance, 'protected conditions' are *not* the same as 'preserved award entitlements', though they *are* similar in effect to 'protected preserved conditions'. It also takes a power of concentration not to mix up the AFPC,

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the AFPCS and APCSs — that is, the Australian Fair Pay Commission, the Australian Fair Pay and Conditions Standard, and Australian Pay and Classification Scales.

Secondly, the legislative process has by no means ended with the *Work Choices Act*. The government has foreshadowed the introduction of a further statute to make changes to the regulation of independent contractors (see eg DEWR 2005). This might conceivably allow a worker to be conclusively designated as an independent contractor merely because they agree to be so labelled, which would effectively permit businesses to contract out of most labour regulation (including the bulk of the *WR Act*) at the stroke of a pen.[2] At the very least, we can expect restrictions to be imposed on the regulation of contract labour under State law, in line with those already imposed (and to be discussed below) in relation to employment laws.

More immediately though, the Work Choices amendments will necessitate a mass of new regulations, not yet released at the date of writing. These regulations will not only need to deal with important transitional issues, but with a large range of substantive matters, such as what constitutes 'prohibited content' for workplace agreements. Indeed the *Work Choices Act* has authorised the making of regulations that actually amend the *WR Act* itself, or other federal statutes. The regulations will need to be laid before parliament, but will operate unless and until formally disallowed.

Thirdly, there is the matter of the constitutional challenge. The States, with support from various union bodies, have asked the High Court to rule that the *Work Choices Act* is wholly or partially unconstitutional. While the balance of opinion at present would suggest that much of the challenge will be dismissed, there are certainly aspects of the legislation that push the boundaries of what the Constitution allows; and the possibility of the High Court adopting a radically narrower view of Commonwealth powers in this area cannot be entirely discounted (Williams 2005). It is to be hoped that the court will produce a decision as swiftly as possible, though it is worth recalling that the last time the States banded together to challenge the validity of a major federal initiative on labour regulation, the outcome was not known until three years after the legislation was enacted.[3] Until a ruling is made there will be a cloud of uncertainty over the new federal system, though in practice parties will have little choice other than to proceed on the assumption that the Work Choices amendments are valid.

One final point to note about the *Work Choices Act* is that it will eventually renumber the entire *WR Act*. The aim — ironically enough, in

light of what has already been said as to its complexity — is to improve the readability of the statute, by removing all the capital letters after section and part numbers. This will spell an end, in other words, to all those 'section 170-somethings'! It now appears that the renumbering will happen on commencement of the main amendments. Accordingly, all references in this article are to the renumbered provisions in the *WR Act*.

Expansion of the Federal System

One of the most significant aspects of the *Work Choices Act* is that it implements the government's objective of 'moving towards' a single, national system of regulation. It does this by expanding the federal system to cover a majority of employers, and then precluding those employers from being subject to State awards or agreements, or certain other State employment laws.

The amended *WR Act* will be based primarily on the power to legislate with respect to corporations granted by s 51(xx) of the Constitution, rather than the conciliation and arbitration power in s 51(xxxv) that has historically been the foundation of Australia's industrial legislation (see Stewart 2001; Ford 2005; Gray 2005; McCallum 2005; Williams 2005). Indeed the only part of the Act to be underpinned by the arbitration power will be the transitional provisions in Schedule 6 for 'excluded employers', as described below.

Under the old arbitration system, whether an employer was covered by federal regulation generally depended on whether that employer (or an organisation to which they belonged) was involved in an interstate industrial dispute — often one deliberately manufactured by a union to establish federal jurisdiction. Since 1996, the use of the corporations power has given corporate employers the option of making agreements under the *WR Act*, irrespective of the existence or threat of an interstate dispute. But the choice remained to make agreements under State law instead.

Now, however, we will move to a clearer demarcation between federal and State regulation. If a business falls within the primary definition of 'employer' in s 6 of the amended *WR Act*, it will be subject to federal regulation whether it wishes that or not.[4] If it does not, then (with certain exceptions) it is excluded from the federal system and left to State regulation. It is convenient to refer to these two classes as 'federal system employers' and 'excluded employers' respectively, although these terms are not used consistently in the legislation itself.[5]

Under s 6, all 'constitutional corporations' — that is, all trading,

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financial and foreign corporations within the meaning of s 51(xx) — will be federal system employers. As presently interpreted by the High Court, a 'trading corporation' is any company, incorporated association or other corporation that engages in trading (which most obviously involves selling goods or services) to a significant extent, which would for instance include universities, councils and many other not-for-profit bodies. It is a body's *activities* that generally determine whether it is a trading corporation, not the *purpose* for which it was formed.[6]

Many State public sector agencies will be captured by the new system, to the extent that they fall within the definition of a trading or financial corporation. However, their position is complicated by the fact that under the Constitution there are certain limitations on the extent to which the employment arrangements of State instrumentalities can be regulated by the Commonwealth (Creighton and Stewart 2005: 113–116). The application of the new arrangements to such employers will accordingly be questioned as part of the States' constitutional challenge.

Because Victoria has referred its industrial relations powers to the Commonwealth, unincorporated employers in that State will also be treated as federal system employers, as will all employers in the Territories and all Commonwealth agencies. These extensions are made possible by the reference power in s 51(xxxvii) of the Constitution, the Territories power in s 122, and a variety of other powers (including s 52(ii)) in the case of Commonwealth agencies. The amended *WR Act* also (as prior to the reforms) uses the trade and commerce power in s 51(i) to catch the employment of flight crew officers, maritime employees or waterside workers, at least where they are engaged in connection with interstate or overseas trade or commerce. These workers would normally in any event be employed by trading corporations.

The employers who will not be covered by the new federal system are those which operate outside Victoria and the Territories and which are unincorporated, such as sole traders, partnerships and State Government departments. Also excluded (again outside Victoria and the Territories) will be incorporated entities that do not have sufficient trading or financial activities to be characterised as constitutional corporations. The Commonwealth has consistently claimed that these excluded employers employ no more than 15% of the workforce, though without revealing the data on which this estimate is based (see eg Australian Government 2005: 11). The Queensland Government, by contrast, has produced analysis suggesting that the new federal system will cover no more than 75% of employees, and less than 60% in Queensland, South Australia and Western

Australia (Queensland Department of Industrial Relations 2005).

The Howard Government has asked all the States to refer their legislative powers to the Commonwealth, so that a genuinely national system can be created, but at this stage no other State has indicated its intention to follow Victoria's example. Whatever their private views as to the savings or efficiencies that might be reaped from a reference of powers, the current Labor governments are locked into opposition of the federal changes. In the short-term, therefore, we are unlikely to see any further references unless there are changes in government at State level — and even then some State oppositions have voiced their disapproval of the Howard Government's strategy of 'hostile takeover'.

What may, of course, increase the coverage of the new federal system will be a push to persuade many small businesses of incorporating, so as to reap the benefits allegedly on offer from federal coverage. As against that though, some States may respond to union pleas to ensure that public sector workers who presently work for State-owned corporations are engaged directly by the Crown, so as to ensure they fall outside the federal system.

Transitional Arrangements

For employers who will be caught by the new system, and who at the date of transition are subject to federal awards or agreements, those instruments will continue to apply. As explained below, however, certain award provisions will cease to be enforceable. It will also be possible for pre-reform certified agreements or AWAs to be replaced by workplace agreements made under the new system, regardless of whether the old agreements have reached their nominal expiry date.

The more significant transitional arrangements are those which appear in Schedule 8 to the amended *WR Act*. These apply to federal system employers who at the date of transition are bound by State instruments.

Where State award conditions apply to a worker or group of workers at the date of transition, and no State-registered agreement applies, the award conditions will become part of a 'notional agreement' that will have the force of federal law. However any 'prohibited content', as prescribed by regulations, will be unenforceable (prohibited content is discussed further below). Notional agreements will also incorporate any 'preserved entitlements' enjoyed by those workers under State legislation. Such entitlements cover most forms of leave (other than long service leave, to which State legislation can continue to apply), together with notice of

termination, redundancy pay, shiftwork or overtime loadings, other penalty rates, and rest breaks.

Despite being titled 'notional agreements preserving State awards', such agreements may indeed arise in relation to *all* types of worker who are not covered by a State-registered agreement, including senior managers, to the extent that they enjoy any of these preserved statutory entitlements. This is so even if the workers concerned have been award-free, or indeed even if they are covered by a federal award.

Notional agreements will operate for a transition period of three years, unless replaced by a workplace agreement under the new federal system or by a federal award. They will apply to any new employees engaged after the date of transition, provided they would otherwise have been covered by the replaced State award or legislation. However they cannot apply at all in relation to any workers covered by a pre-reform federal agreement, at least while that agreement is still in operation. No function or power under the agreement may be performed by a State industrial authority, though if all parties consent the Australian Industrial Relations Commission may do so instead.

If employees were subject to a State-registered agreement at the date of transition, this will continue to operate as a 'preserved State agreement', again with the force of federal law. It will also include any State award conditions or 'preserved' statutory entitlements (as listed above) enjoyed by the workers in question at the date of transition, though again any prohibited content will be unenforceable and functions or powers may not be performed by State authorities. A preserved State agreement may operate indefinitely, unless terminated or replaced.

There are separate transitional arrangements again in Schedule 6 of the amended *WR Act* for excluded employers (principally unincorporated employers outside Victoria and the Territories) who are covered by a federal award at the date the reforms commence.

So long as an excluded employer is not also bound by a State-registered agreement, any federal award that covers them will remain binding as a 'transitional award' for up to five years.[7] The terms of the award are essentially frozen for that period, except for the removal of non-allowable matters and the periodic adjustment of wage rates by the Australian Industrial Relations Commission. That Commission also retains a limited role in settling disputes involving such employers, though in adjusting wages it is required to have regard to any principles set by the new Fair Pay Commission.

An excluded employer can cease to be bound by a transitional award if

they make an agreement under State law. Alternatively, they may apply to the Australian Industrial Relations Commission to be released from the operation of the award, though only if they can show that they have made genuine but unsuccessful attempts to make a State agreement or to settle an industrial dispute. Otherwise the employer will simply 'fall out' of the federal system at the end of the transitional period — unless of course they have incorporated in the meantime, so as to bring themselves fully within the new federal regime.

Exclusion of State and Territory Laws

Under the Work Choices amendments, certain State and Territory employment laws will cease to apply to federal system employers, at least in relation to employees. At this stage State laws that apply to contractors will not generally be affected, though as mentioned earlier the Howard Government has indicated that it will be introducing a separate Independent Contractors Act in 2006.

Section 16 of the amended *WR Act* declares an intention to 'apply to the exclusion of' any State or Territory industrial law or any instrument made under such a law. A 'State or Territory industrial law' is defined in s 4(1) to mean any of the five main State industrial statutes (the *Industrial Relations Acts* in NSW, Queensland, WA and Tasmania, plus the *Fair Work Act* 1994 in SA). The definition also covers any other law that 'applies to employment generally' and that regulates workplace relations, provides for the determination of employment conditions, provides for rights or remedies connected with the termination of employment, or that prohibits conduct relating to membership or non-membership of an industrial association.

Also to be excluded is any other State or Territory law that applies to employment generally and that deals with leave (other than long service leave), together with laws that provide for orders in relation to equal pay, the variation or setting aside of unfair employment contracts or arrangements, or rights of entry for union officials.

A law 'applies to employment generally' by virtue of s 4(1) when it applies (subject to any constitutional limitations) to all employers and employees in the State or Territory, or to all except certain groups. It does not matter that the law also applies to persons other than employers and employees. Laws applicable only to the public sector, or in a particular industry such as construction, would not be laws that apply to employment generally and hence would not (at least for the most part) be caught by s

16.

There are also a number of more specific exceptions. Section 16 disclaims any intention to exclude laws dealing with discrimination or the promotion of equal employment opportunity (except to the extent that those laws are, or are contained in, State or Territory industrial laws), or any laws dealing with 'non-excluded matters'. Among the list of non-excluded matters are workers compensation, occupational health and safety, long service leave, child labour and jury service, together with the regulation of employment conditions for outworkers.

While State or Territory laws on these non-excluded matters will not be automatically overridden, s 18 makes it clear that inconsistency may still arise (within the meaning of s 109 of the Constitution) by virtue of other sections of the *WR Act*. Hence for instance it will be possible for employers to make workplace agreements that exclude or reduce entitlements that would otherwise arise under State or Territory laws, for instance on matters such as long service leave. The only exception to this is that, just as with the pre-reform *WR Act*, federal awards or workplace agreements are to 'operate subject to' State or Territory laws on occupational health or safety, workers compensation or training arrangements (s 17(2)).

Given that the Howard Government has no current plans to take over the fields of workers compensation or health and safety, the continued operation of State and Territory laws in those areas in particular mean that we will still be very far from having a 'unitary' system of labour regulation, even for incorporated employers.

Workplace Agreements

Under Part 8 of the amended Act, it will be much easier to make, vary and terminate 'workplace agreements' (a generic term which now appears throughout the legislation). Such agreements may either be individual Australian Workplace Agreements (AWAs) or 'collective agreements'. Collective agreements, which will replace certified agreements in the new system, may be either 'union collective agreements', 'employee collective agreements', 'multiple-business agreements', or 'greenfields agreements'.

The latter can be used for any new business, project or undertaking established by an employer and will allow an agreement to be made before any employees are actually hired. While it will still be possible for such agreements to be made with a union (a 'union greenfields agreement'), it will also be possible to register an 'employer greenfields agreement', which

is apparently an agreement between an employer and ... itself! In effect, the employer is allowed in this situation to set terms by unilateral declaration. Employer greenfields 'agreements' will have a nominal duration of up to a year, though they will be able to continue past that date unless terminated or replaced. All other types of workplace agreement, including union greenfields agreements, may have a nominal duration of up to five years, rather than three as under the pre-reform Act.

Section 400(6) confirms, as the courts had already more or less established,[8] that it is not duress or coercion for an employer to make an AWA a 'condition of engagement' — in other words, to refuse to hire a person unless they agree to sign an individual agreement on whatever terms the employer is proposing.

All types of workplace agreements will now be lodged with the Office of the Employment Advocate, rather than the Industrial Relations Commission. A streamlined process will mean that agreements can start operating from the point of their lodgement, and with no need for a formal hearing. Indeed with the exception of multiple-business agreements, which as before will only be available if a public interest test is satisfied, there will be no approval process as such. Agreements will be able to come into operation even if there has not been strict compliance with the pre-lodgement procedure. Similar procedures will apply in relation to the consensual variation or termination of an agreement.

There will also be a new unilateral right of termination for any party after an agreement has passed its nominal expiry date. This can be done simply by giving 90 days' notice to the other party or parties, or as little as 14 days notice if the right to terminate has been specified in the agreement itself. However, this will not apply to pre-reform agreements.

A final point to note about the new workplace agreements provisions is the possibility that they might apply to agreements never intended by the parties to have effect under the statute. At present it is not uncommon — especially after the High Court's decision in *Electrolux*[9] that certified agreements may not deal with matters that do not 'pertain' to employment relations — for parties to make unregistered or 'side' agreements, sometimes expressed in deeds. These have legal effect, if at all, as common law contracts. But on a literal interpretation such a written agreement between a union and an employer might be taken to be a 'union collective agreement' within the meaning of s 328. As such it could not have effect unless lodged with the Office of the Employment Advocate. This, like

many other aspects of the legislation, will have to await some kind of test case in the courts.

Prohibited Content

Section 356 of the amended *WR Act* permits regulations to specify certain subject matter to be 'prohibited content' that cannot be included in workplace agreements. On the basis of indications given by the government (Australian Government 2005: 23), it would seem that the list of prohibited content will include any matters that do not 'pertain' to the employment relationship; terms that contravene the freedom of association provisions in Part 16; terms that prohibit or restrict the use of AWAs, or that commit employers to bargaining with a union; any restrictions or conditions on the use of independent contractors or labour-hire arrangements;[10] and various union-related entitlements, including trade union training leave, paid union meetings, mandatory union involvement in dispute resolution, or rights of entry for union officials. Also to be prohibited is anything that would constitute a 'remedy for unfair dismissal'. Astonishingly therefore, it would seem an employer is not to be allowed to commit to treat its employees fairly in determining whether to terminate their services. Promising to be a good and considerate employer, it would seem, is to be outlawed.

Any agreement that contains prohibited content will be void to that extent. The new laws also provide for financial penalties if a party 'recklessly' proposes a term for inclusion in a workplace agreement that contains prohibited content. However, parties will be able to get rulings from the Office of the Employment Advocate as to what is or is not prohibited. While these will not be binding on a court, a party cannot be prosecuted for proposing or including prohibited content if they had relied on such a ruling to give them clearance.

The prohibited content provisions make a mockery of the government's rhetorical commitment to 'freedom' and 'choice' in bargaining. They also reflect a curious reversal of the traditional justification for labour laws — that they are needed to counteract the disadvantage in bargaining power that affects most workers when dealing with employers (Creighton and Stewart 2005: 5–6). In John Howard's world, employers must be protected from being 'forced' by unions to make commitments to collective bargaining or job security. Employers are not to be trusted, it would seem, to make rational decisions in these situations.[11]

Abolition of the No-Disadvantage Test

Since the shift to formalised enterprise bargaining in the early 1990s, federal agreements have been required to satisfy the 'no-disadvantage test'. Under that test, agreements must be rejected if they leave workers worse off on balance than they would have been under a comparator award. While this test has been far from watertight either in its design or its application, especially in the hands of the Office of the Employment Advocate when scrutinising proposed AWAs (Mitchell et al 2005; Senate Employment, Workplace Relations and Education References Committee 2005), it has undoubtedly acted as a brake on the desire of some employers to use agreements to drive conditions below the 'safety net' set by the award system.

As a result of the Work Choices amendments, however, the test will be abolished. Accordingly it will be possible for federal system employers to make agreements, either individual or collective, that significantly reduce or eliminate existing award or statutory entitlements. The only protection for workers is that workplace agreements cannot legally offer less than the minimum entitlements enshrined in the Australian Fair Pay and Conditions Standard (AFPCS), or in a separate standard relating to public holidays. These minimum standards are discussed below.

A workplace agreement may also be deemed to contain certain 'protected conditions'. Under s 354, federal award provisions are 'protected' if they deal with rest breaks and meal breaks, incentive-based payments and bonuses, annual leave loadings, days to be observed as or instead of public holidays, certain allowances, overtime or shift work loadings, penalty rates and outwork. Where workers have been subject to a preserved State agreement or a notional agreement under Schedule 8, a similar list of conditions is taken to be protected. Such 'protected preserved conditions' or 'protected notional conditions' may be drawn either from a State award or from a State or Territory statute that applied to the workers in question.

On the face of it, this seems like an important source of protection for workers, especially where overtime or penalty rates are concerned. In fact, however, these 'protected' conditions will only apply to the extent that an agreement does not say otherwise. Hence the 'protection' can be negated by a single clause in the agreement. The sole exception is that outworker conditions may not be ousted, though only where those conditions are necessary to ensure that outworkers are engaged on a comparable basis to

employees performing the same kind of work at an employer's business premises.

Minimum Standards

Under Part 7 of the amended *WR Act*, the new AFPCS covers wages, ordinary hours of work and three types of leave (annual, personal and parental). It does not merely set benchmarks for workplace agreements, but for awards and indeed for all employees whose employers fall within the new federal system. This would, for example, include senior managers and other award-free workers. The only exclusions are workers who are covered by pre-reform agreements.

The standards that form part of the AFPCS may be displaced by a workplace agreement or by individual contract, but only where the provisions in question are more favourable to employees. What constitutes 'more favourable' treatment is something that will be governed by regulations, but is likely to prove very tricky in practice to ascertain. Existing terms in awards or notional agreements that contain more favourable provisions on annual, personal or parental leave may also still apply.

In relation to wages, employees will be entitled to be paid for each hour they work at a basic rate calculated in accordance either with an applicable Australian Pay and Classification Scale (APCS), or the Federal Minimum Wage (FMW). APCSs will be derived from existing award rates. Where at the date of transition a job is covered by a federal or State award, an APCS will be created for that position that includes an hourly rate of pay and also whatever casual loading may have applied. A workplace agreement will be able to include a lower casual loading than that set by the relevant APCS, but not less than 20%. That will also be the default loading for non-award employees who are engaged as casuals. The standard FMW will start at $12.75 per hour, with variations for juniors, workers with disabilities and trainees.

Adjustment of the FMWs and all APCSs will be the responsibility of a new Australian Fair Pay Commission. This is to consist of a chair and four Commissioners, each of whom are to have limited-term appointments. In making decisions on wage levels, the Fair Pay Commission's general objective must be to promote 'economic prosperity'. While it should continue to provide a 'safety net for the low paid', it must also consider 'the capacity for the unemployed and low paid to obtain and remain in employment', as well as 'employment and competitiveness across the

economy' (s 23). The legislation guarantees that neither basic rates and loadings in APCSs, nor the FMWs, can fall below their commencement figures. But there is no assurance that they will rise, or as to how often they will be updated.

The general expectation is that any increases in minimum wages awarded by the Fair Pay Commission will be lower, and perhaps less frequent, than would have been the case under the Industrial Relations Commission's safety net wage decisions. It is also possible that the Fair Pay Commission may concentrate on increasing only the FMW, not the APCSs, so that over time the FMW will gradually swallow up most of the old award rates and provide a single standard for lower paid workers in the federal system.

As for ordinary hours of work, these will be set at a maximum of 38 per week, but that figure may be averaged over an agreed period of anything up to a year. Employees may also be required or requested to work 'reasonable additional hours', judged according to a range of factors that include both the employee's personal circumstances (including any family responsibilities) and the employer's operational needs. It is hard to see this standard having any meaningful impact in practice, given its flexibility. Significantly too there is no requirement that any overtime or penalty rates be paid for additional or anti-social hours.

The minimum for annual leave will be four weeks' paid leave per year, though some shift workers will be entitled to an extra week. Workplace agreements may provide for the 'cashing out' of up to two of those weeks, but only on written request from a worker.

In terms of personal leave, there will be an annual entitlement to ten days' paid sick leave or carer's leave, plus an extra two days' unpaid carer's leave if needed. An employer must also provide two days' paid compassionate leave whenever a family member dies or the employee needs to spend time with a seriously ill family member.

The core minimum entitlement on parental leave, as under the pre-reform Act, is up to twelve months' unpaid leave. Australia remains no closer to joining most of the rest of the industrialised world in creating a statutory entitlement to *paid* maternity leave (Baird 2004).

Besides the AFPCS, two other new minimum standards have been introduced. Under Division 2 of Part 12 of the amended Act, an employee will have the right to take a day off on public holidays, unless their employer requests them to work and the employee cannot establish reasonable grounds for refusing that request. This would seem to override public

holiday provisions in awards or agreements, even if more favourable to the employee. There is no guaranteed right to payment of penalty rates for public holiday work. Secondly, employees who are not covered by an award or workplace agreement will gain a new statutory right under Division 1 of Part 12 to demand an unpaid meal break of at least 30 minutes after every five hours of continuous work.

Awards

By virtue of Part 10 of the *WR Act*, federal awards will continue to provide a minimum safety net for those not covered by workplace agreements, but will have their permissible content further reduced. Wage rates for basic hours of work, casual loadings and classification standards will be removed, becoming APCSs instead as discussed above. Annual leave, personal leave and parental leave provisions will also go, except where more favourable than the AFPCS. Other matters which will become non-allowable include long service leave, superannuation, jury service, restrictions or conditions on the engagement of contractors or labour hire workers, conversion from casual status, notice of termination, redundancy pay for businesses with fewer than 15 employees, and a range of union 'privileges', including mandatory union involvement in dispute resolution.

Provisions dealing with non-allowable matters will cease to have effect as from the date the Work Choices amendments commence. The Industrial Relations Commission will then be expected to 'simplify' all existing awards by removing non-allowable provisions.

In some cases, however, provisions in pre-reform awards (including State awards that become notional agreements) will be preserved, even if those awards are subsequently rationalised as part of the process described below. Such 'preserved award entitlements' are those relating to annual, personal, parental or long service leave, plus notice of termination, jury service and (but only until 30 June 2008) superannuation. The reason for preserving these conditions is that in many instances existing awards offer entitlements that are in excess of statutory standards. Some workers for instance have award entitlements to six weeks' annual leave, or long service leave in excess of the statutory minimum in each State or Territory. But there will be nothing to stop these preserved conditions being bargained away in workplace agreements.

Once the reforms take effect, the only new awards will be those created as part of a process of 'award rationalisation'. This will in the first instance be the responsibility of an Award Review Taskforce, headed by SDP

O'Callaghan from the Industrial Relations Commission. The Taskforce has been asked to consider how to consolidate the existing range of federal awards so as to minimise their number and prevent overlapping coverage; to provide award coverage for employees (especially those transferring from the State systems) who are not able to reach workplace agreements; and to ensure that awards do not operate by reference to State or Territory boundaries (see Award Review Taskforce 2005a). It will make recommendations to the Minister, who will in turn task the Industrial Relations Commission with implementing whichever of those recommendations are approved, by making an 'award rationalisation request'. Any new awards created through this process will be able to apply either to specified parties or to classes of employers or employees. The Taskforce has also been asked to make recommendations to the Fair Pay Commission as to the rationalisation of pay scales and classifications derived from awards and now to be included in APCSs (see Award Review Taskforce 2005b).

It remains to be seen what award rationalisation will mean in practice. It is impossible to see how the Taskforce can effectively consolidate the broad range of award conditions found in most occupations or industries without either (a) reducing them to the lowest common denominator, which would contradict government assurances that the exercise is not about cutting conditions; (b) settling in each case on the highest standard, which neither business nor the government would wear; or (c) grandfathering a huge number of existing entitlements, which would hardly make for a streamlined system. In any event, it is worth stressing that the amended *WR Act* imposes no requirement to follow the Taskforce's recommendations. It is entirely up to the Minister whether any new federal award is ever made again, and on what terms. This may have particular significance for the many workers formerly subject to State awards, but whose 'notional agreements' will disappear after three years under the new federal system.

The Industrial Relations Commission will also have only a limited power to vary awards. Besides simplifying or rationalising awards, it may act to remove discriminatory provisions or ambiguities, or to make a variation that is 'essential to the maintenance of minimum safety net entitlements'. The Commission may also vary an award to make it binding on a particular employer. But in the absence of an agreement to be bound between the employer and a majority of its employees, it must be shown

that reasonable but unsuccessful efforts have previously been made to negotiate a workplace agreement. Furthermore a union can only make such an application if it is acting on behalf of one or more of the relevant employees. In practice then, it will be much harder for unions to make 'roping-in' applications; although that will cease to matter if awards are eventually rationalised so as to apply by way of common rule rather than on the basis of respondency.

Interaction Between Awards and Agreements

Under the amended *WR Act*, a federal award will have no effect for an employee while a workplace agreement is in operation (s 349). This has previously been the case for AWAs, but will now be extended to collective agreements as well. Indeed, once a workplace agreement under the new system is in place for a given employee or group of employees, they can never again be entirely covered by an award while working for that employer. If an agreement is terminated, any 'protected conditions' (as previously discussed) will apply, but the balance of any otherwise applicable award will not revive (s 399).

The amended *WR Act* also makes it clear that an AWA always overrides an otherwise applicable collective agreement (s 348(2)). Hence even where an employer is bound by a collective agreement, they may at any time offer selected workers individual agreements that provide either superior or inferior conditions. The provision of a capacity to contract out of collectively negotiated conditions is a clear infringement of Australia's obligations under international labour standards — which are already being breached by the pre-reform *WR Act* (CEACR 2004, 2005).

In addition, it is provided that there cannot be more than one workplace agreement applicable to an employee at any given time (s 348(1)). This will end the current practice at some workplaces of having separate agreements on specific issues such as redundancy or superannuation.

Transmission of Business

Significant changes have been made as to the applicability of an award or agreement when a transmission of business occurs: see Part 11 (which also deals with the effect of transmission on entitlements under the AFPCS) and Schedule 9 (which covers pre-reform federal agreements, preserved State agreements and notional agreements). In essence, an award or agreement that was binding on a business (the transmittor) will only bind

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someone who acquires all or part of that business (the transmittee) to the extent that the transmittee hires employees who previously worked for the transmittor. The old instruments will not apply to any new employees the transmittee may hire; and even in relation to transferring employees the old instruments will cease to have effect after 12 months.

Together with the availability of employer greenfields 'agreements', the new transmission of business provisions may provide opportunities for some employers to escape the operation of awards and agreements merely by restructuring their operations and transferring their existing workers to new entities. Employers will still need to be careful in this context not to infringe the freedom of association provisions in Part 16 of the *WR Act*, which have been re-enacted in something close to their previous form. But it is notable that where an employer is alleged to have taken action against a person because of their entitlement to the benefit of an industrial instrument, this must now have been the 'sole or dominant reason' for the action in question, not merely *a* reason (s 792(4)). This is plainly intended to make it harder for unions to bring freedom of association cases against employers who have restructured their operations in a bid to get staff onto individual agreements, rather than collectively negotiated or arbitrated terms. Furthermore while the onus is still on the defendant to show that they did not engage in the alleged conduct for a prohibited reason, this is no longer to apply where the plaintiff is seeking an interim injunction (s 809). Again, this will make it harder for unions to secure orders to prevent or undo a corporate restructure pending trial of a freedom of association complaint, as most famously occurred in the *Patrick* case.[12]

Industrial Action

The Work Choices amendments have added a new Part 9 to the *WR Act* to regulate industrial action. Action will only now be protected (ie, lawful) if it occurs in a bargaining period and is for the purpose of supporting claims made in respect of a proposed collective agreement, or responding to industrial action taken by another party in relation to such an agreement. The concept of 'AWA industrial action' has been abandoned. The Act has also been amended to make it clear that any action by an employer, other than a lockout within 'the ordinary meaning of that expression', cannot be regarded as 'industrial action'.

Where industrial action is taken by employees or a union other than in response to a lockout, there is a new requirement to have it authorised in a secret ballot by a majority of the relevant workers (at least half of whom

must have voted). There are complex, detailed expensive and time-consuming procedures that must be followed in relation to the holding of such a ballot.

There will also be significant new grounds for the suspension or termination of a bargaining period, which in turn will preclude the taking of protected action. These will apply where a union is engaging in 'pattern bargaining', in the sense of trying to achieve 'common wages or conditions' across two or more workplaces; where a 'cooling off' suspension is determined by the Industrial Relations Commission to be appropriate, having regard to factors including the public interest and the duration of any industrial action; or where industrial action is threatening to cause 'significant harm' to a third party. The Minister will also be personally entitled to terminate a bargaining period, without recourse to the Commission, if satisfied that industrial action is threatening to endanger the life, safety, health or welfare of the population or part of it, or otherwise damage the Australian economy or an important part of it in a significant way. This will in turn open the way for the Commission to make a 'workplace determination', which is equivalent to an arbitrated s 170MX award under the pre-reform Act.

The Commission's power to make orders restraining industrial action, now to be found in s 496 of the amended Act (formerly s 127), has also been tightened up so that it *must* make an order against any action that does not appear to be protected. If it cannot decide that within 48 hours of receiving an application, it must make an interim order anyway unless it would be contrary to the public interest to do so.

A further and more general change, which will have particular significance in the context of union officials who organise industrial action, is the inclusion of a general provision (s 728) that will create liability for anyone who is 'involved' in various contraventions of the Act, such as breaching a s 496 order. It is also provided that contravention by a person of a s 496 order, or various other orders made by the Commission, is a criminal offence punishable by 12 months' imprisonment (s 814(3)).

Given the hurdles that must now be overcome by those who wish to take protected action, and the ease with which employers (or affected third parties) may be able to get even lawful action stopped, it remains to be seen how many unions will bother to comply with the Act at all. It is worth recalling that the concept of protected action has only been part of Australian law since 1993. Before then, virtually every stoppage or work ban was illegal and union officials in particular had to live with the constant threat of personal liability — quite apart from the threat to the finances of

the union itself. It is quite conceivable that some unions would be comfortable with a return to the 'old days', especially if it meant no longer having to comply with stringent notice procedures or to confine any action to a negotiation period once every two or three years. Once again, therefore, it may become a matter, as it always was in the past, of whether employers are prepared to use their legal remedies to the full.

Unprotected action will be especially risky in the building industry, where the government's new watchdog, the Australian Building and Construction Commissioner, is able not merely to gather information (on pain of prosecution) about unlawful industrial action, but to seek compensation on behalf of injured parties whether they wish it or not.[13] But elsewhere unions may well figure that most employers will continue to make pragmatic assessments about the value of suing over every work stoppage — and in particular about pursuing compensation long after the relevant dispute has been resolved.

Dispute Resolution

The Work Choices amendments introduce significantly altered dispute resolution processes, with a stated purpose of encouraging parties to resolve their disputes themselves, either at the workplace, or with the assistance of a third party of their choice. These processes are set out in a new Part 13 to the *WR Act*.

The Industrial Relations Commission is to lose its powers of compulsory arbitration, subject to only limited exceptions (including applications to vary awards and the making of 'workplace determinations' where a bargaining period has been terminated). Under the amended *WR Act*, there is no longer any general provision for industrial disputes to be notified to the Commission, other than in relation to excluded employers. Indeed the term 'industrial dispute' is no longer defined in the main part of the Act. Parties will be able to seek assistance from the Commission to resolve a dispute as to the negotiation of a collective agreement, but only where all parties agree. Even then, the Commission may not make any order or otherwise compel a party to do anything, even if the parties have agreed it should have that power.

Parties to a workplace agreement, on the other hand, will be able (as before) to expressly authorise the Commission not just to conciliate or mediate disputes arising under the agreement, but to arbitrate. But in performing that role the Commission will only be able to utilise powers expressly conferred by the parties, rather than automatically being able to

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call upon the general powers conferred by s 111 (a section number that, quite coincidentally, has remained the same as under the pre-reform Act).[14]

A new model dispute resolution process is also to be incorporated into all federal awards, all notional agreements and all preserved State agreements, overriding whatever previously appeared in each instrument. This will also apply by default to any new workplace agreement that fails to specify otherwise, and may be used where there is a dispute as to any of the minimum employment entitlements stipulated under the Act. The model process set out in Division 2 of Part 13 provides for a tiered procedure, commencing at the workplace level, with assisted dispute resolution in the form of mediation, conciliation or (but only if the parties agree) arbitration as a last resort. Parties will have the choice of nominating either the Industrial Relations Commission or another third party to assist their dispute resolution, with the Commission being the default option in the absence of any agreement.

The federal government is establishing a register of private 'ADR providers' whom parties will be able to select if they wish to look outside the Commission. It is unclear at present whether the Commission will be forced to charge for its services when resolving disputes under the model process or under customised provisions in agreements. If it is not, or if the required fees are set at a fairly low level, then it is reasonable to expect that we will continue to see the Commission being the 'provider of choice' under most union agreements at least.[15] One interesting possibility is whether some States may allow members of their own tribunals to offer dispute resolution services at the State's expense — and if they do, whether the federal government might then move to bar parties from nominating such members as 'private' providers.

Termination of Employment

Under the amended Division 4 of Part 12 of the *WR Act*, and subject to the significant exclusions discussed below, all employees of federal system employers will potentially be eligible to bring an unfair dismissal claim in the Industrial Relations Commission under Subdivision B. They will no longer need to be covered by an award or agreement.

By contrast, those who work for excluded employers will now be barred from bringing a federal unfair dismissal claim, even if they are still covered during the transitional period by a federal instrument. Whether such workers can bring a claim under State law instead will depend on the terms of the applicable State legislation and on any arguments of

inconsistency under s 109 of the Constitution.[16]

Returning to federal system employers, the net effect of the changes is to drastically reduce the availability of unfair dismissal claims, because of the addition of new exclusions in s 643 (formerly s 170CE). The major new exclusion, and the focus of much attention in public debate over the Work Choices legislation, is that no claim may be brought against any employer with 100 or fewer employees at the date of termination. In determining how many employees a business has for this purpose, casuals with less than 12 months' service will be disregarded. Companies that are 'related' within the meaning of the *Corporations Act* 2001 (Cth) will be counted together, but no account will be taken of associated but unincorporated entities. The main justification for this reform, that it will generate significant job growth, has been repeatedly shown to rest on unsubstantiated (not to say concocted) assertions (see eg Robbins and Voll 2005; Freyens and Oslington 2005). What cannot be denied though is the message it sends as to the disposability of labour. That alone can be expected to contribute to a greater degree of churning in the labour market, as businesses assert their newfound freedom (as many will perceive it) to hire and fire at will, and employees inevitably come to feel less secure in their jobs.

Even where unfair dismissal rights still apply, employees will now have to serve a qualifying period of six months (up from the previous minimum of three months) before they are eligible to bring a claim. Nor can any claim be made in relation to any dismissal effected 'for genuine operational reasons or for reasons that include genuine operational reasons'. This latter change is apparently intended to prevent retrenched employees complaining, for instance, that they have been unfairly selected for redundancy, or that they had not been properly consulted before being made redundant. But given that 'operational reasons' are defined to include 'reasons of an economic, technological, structural or similar nature', and that such a reason need only be *one* of the factors underlying a dismissal, a broad reading of this exclusion could make it applicable to just about every termination.

None of the reforms affect the right of all employees, whether working for federal system employers or not, to pursue a court claim for unlawful termination under Subdivision C, which would normally be on the basis that they have been dismissed for certain discriminatory reasons in breach of s 659 (formerly s 170CK). (Subdivision C, as with a handful of other provisions in the *WR Act*, is able to apply to *all* employers because it implements treaty obligations and hence is based on the external affairs

power in s 51(xxix) of the Constitution.) The government has announced that it will provide up to $4,000 by way of legal assistance to certain litigants who wish to initiate such proceedings, though no details of this scheme had been published at the date of writing.

The practical effect of the changes is that most Australian employees will now have no right to challenge their dismissals, except on discriminatory grounds (which can be expected to mean a significant increase in the number of complaints lodged under both federal or State anti-discrimination laws). Might the common law fill the gap? At present, it is only higher-paid workers who are dismissed in the middle of fixed-term contracts or without reasonable notice who have much prospect of gaining any significant compensation from an action for wrongful dismissal (see Creighton and Stewart 2005: 443–450). However while the orthodox view is that employees are not entitled at common law to be treated fairly, there is a clear potential to argue that all employers are under an implied contractual obligation to 'act responsibly and good faith' in exercising a right to terminate an employment contract (Creighton and Stewart 2005: 424–426; Riley 2005: ch 3). The expense of court litigation would constitute a significant barrier for most ordinary workers; though it would be open to the States to legislate to permit such actions to be commenced in low-cost tribunals, whether industrial or general.

Registration of Unions and Employer Associations

One of the most uncertain areas of the new system concerns the registration of unions and employer associations. Historically, federal laws dealing with the registration and control of associations were justified by reference to the important role representative bodies (but especially unions) must inevitably play in any system for resolving disputes that extended or threatened to extend beyond the boundaries of a single State. According to the High Court, the regulation of such bodies was necessarily incidental to the establishment of machinery for dealing with such disputes, and hence could validly be based on the arbitration power in s 51(xxxv) of the Constitution.[17] With the constitutional basis of federal regulation shifting to other powers, each concerned with a type of employer (a trading or financial corporation, an employer located in a Territory, etc), it is far less clear that these powers can validly support the provisions that appear in the Registration and Accountability of Organisations Schedule (RAOS) that forms Schedule 1 of the *WR Act* (Stewart 2005: 222–223).

Nevertheless, the RAOS has been retained in the amended Act, but

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with one major change. In order to become or indeed remain registered, unions and employer associations must now satisfy one of two criteria under ss 18A and 18B. The first relates to their members. Employer associations must have a majority of members who are federal system employers. Unions, similarly, must have a majority of members who are employed or engaged by such employers. If this membership requirement cannot be satisfied, then the second possibility is for the association or union itself to be a constitutional corporation. This would require it to have acquired corporate status under some other law — registration under the pre-reform *WR Act* would not be sufficient for this purpose. Unless it had somehow incorporated overseas, the association or union would also need to be characterised as a 'trading' or 'financial' corporation, which on the current test would depend on the extent of its trading or financial activities.[18] Even assuming the RAOS in its amended form is constitutionally valid, the continuing registration of certain associations is likely to be called into question under these new requirements.

Another change made by the Work Choices amendments is to open a further window of opportunity for 'constituent parts' of an amalgamated organisation to seek to withdraw from the amalgamation under Part 3 of Chapter 3 of the RAOS. As from the date the amendments commence, disaffected branches or sections will have three years (in the case of pre-1997 amalgamations) or five years (for more recent mergers) to apply to the Industrial Relations Commission for a withdrawal ballot, though the former period may be extended by regulation. When the original window for disamalgamation was opened in 1997, the only taker was the Victorian Professional Division of the CPSU, which withdrew to form the Professional Officers Association (Victoria). It remains to be seen whether other branches or divisions will now be tempted to seek a divorce.

Rights of Entry

The rights of unions to enter workplaces are significantly narrowed under the rewritten Part 15 of the *WR Act*. There are more stringent requirements for officials who wish to obtain and then maintain an entry permit; while the procedures they must follow when entering workplaces have also been tightened up. Most significantly, officials who wish to investigate a breach of an award or an agreement, or of the *Act* itself, may only do so if the suspected breach affects at least one employee who is a member of the relevant union. Moreover an official will have no right of entry for the purpose of holding discussions with its members, unless the union is bound

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by an award or collective agreement that covers work carried out by those members.

Part 15 will also apply where union officials are seeking to invoke rights of entry granted under State or Territory occupational health and safety laws, at least where federal system employers are concerned. In addition to whatever requirements are stipulated under the relevant State or Territory law, union officials will need to have obtained permits under the *WR Act*, and must also abide by certain procedural restrictions.

Why the Need for Change?

According to the government, the Work Choices reforms are all about creating 'freedom', 'choice' and 'flexibility' for Australian workers and their employers, balanced by a commitment to a 'fair and enforceable' set of minimum employment conditions. As the Prime Minister put it in addressing the House of Representatives on 26 May 2005:

> Australia needs a workplace system geared to the present and the future, not to the past. Under this government, that system will be one of high productivity, rising real wages, choice and flexibility. Our society has changed. The world of work has changed. The aspirations of working men and women are high and rising. Our institutional structures must reflect these realities. A single set of minimum wages, conditions, awards and agreements will provide the long overdue framework to drive future productivity growth, create jobs and increase further the living standards of the working men and women of our nation.

But the assessment of almost every independent commentator is that the reforms are not fair or balanced.[19] They dramatically favour the interests of employers at the expense of employees. The new minimum standards are set at a level that for most workers is well below their current 'safety net' of award or statutory entitlements. Hence employers will be given the green light to offer agreements that reduce key conditions, and in some instances take-home pay. Penalty rates and restrictions on the scheduling of working hours seem likely to come under particular attack. Furthermore the capacity of workers to contest such changes will be reduced by the removal of unfair dismissal remedies, the reduction in the capacity of unions to enter workplaces or take lawful industrial action, and the sidelining of the Industrial Relations Commission — not to mention a social security system which in many instances now denies welfare benefits

to those who refuse to take a job on whatever terms an employer may offer.[20]

Underlying the reform package are two fundamental philosophies. One is a convenient fiction that is typically used to mask the presence of the other. The fiction is that this is all about allowing employers and employees to 'sit down together' and negotiate conditions that suit their mutual needs. The government's stated position has long been that individual workers are quite capable of negotiating with their bosses, and that to suggest otherwise is pure paternalism.

Out in the real world, almost nobody believes this. There are certainly individuals — perhaps a growing number — with the confidence, skills and bargaining power to negotiate on something close to equal terms with potential employers. But for the great majority, the position today is no different to what it was a century or more ago. Without the support of a union, most workers face a simple choice: accept the terms offered, or find another job. Negotiation rarely comes into it. Witness the fact that where AWAs are in place, they are almost always standardised documents that do not vary from worker to worker (van Barneveld and Waring 2002: 110–111; Mitchell and Fetter 2003).

So why the fiction? Because it is politically more palatable than a more substantial reason for the changes, which is simply to shift the balance of power in favour of employers.[21] Underlying John Howard's views on industrial relations, and those of his supporters, is a powerful conviction. It is that Australia will be more productive and prosperous if employers are allowed to get on with running their businesses, without hindrance from trade unions or industrial tribunals, and if they are permitted (with certain basic exceptions) to offer employment on whatever terms workers are prepared to accept. The problem with this view (apart from the fact that it apparently has to be concealed from the general public) is that it is based largely on assertion rather than on any hard economic evidence. In particular, as David Peetz (2006: chs 3–4) has persistently and persuasively argued, while a shift to individualised 'bargaining' may allow businesses to boost their *profitability* by cutting labour costs, there is nothing to suggest that they will do anything to improve *productivity*. And even if we accept (which not all will) that increased profits translate into extra jobs and greater growth in the economy, we must still ask whether this is the road we want to take — and in particular whether it is worth the human costs involved, in a society where so many are struggling to find a balance between work and other commitments (see Pocock 2003).

Why Not the Big Bang?

The government could, if it wished, have adopted a far more radical approach. Had it been entirely true to the ideology it espouses, it might simply have followed the lead set by New Zealand in 1991, and to a lesser extent Victoria in 1992,[1] and simply swept away the existing laws and institutions. A system of purely individual contracting, backed by a limited set of statutory minimum conditions, would have been far simpler to introduce and administer, not to mention giving business groups such as the Australian Chamber of Commerce and Industry and the Australian Mines and Metals Association the freedom they have long been seeking for their members (see ACCI 2002; AMMA 2000). As it is though, there is a peculiar political timidity at the heart of the Work Choices reforms, reflecting an apparent (and in some ways surprising) view that if the government 'came clean' with its reform agenda it would risk electoral defeat.

Now it is true that many of the reassurances offered by the government are so much flim-flam. It constantly refers to 'higher wages' under the new system, knowing that take-home pay can be reduced by the cutting of penalty rates under agreements and that the Fair Pay Commission is unlikely to offer real wage increases to all award-reliant workers. It speaks of preserving collective bargaining and the right to take lawful industrial action, when there is no right to insist on the former and the latter has been rendered virtually meaningless in practice. It trumpets the retention of the award system, knowing that there is nothing in the legislation to guarantee award coverage for the many workers forcibly transferred from the State systems. It claims that certain award conditions will be 'protected by law', when they can removed by a single line in the fine print of an agreement.

Yet at the same time there are genuine compromises in the legislation. Basic wage rates are not to be allowed to fall, and various award entitlements have been preserved (at least for those not on agreements) — both of which will make it hard, not to say impossible, for any quick move towards a single minimum wage or a greatly simplified award system. For all that unfair dismissal protection has been removed, there will still be claims from workers in larger firms — and it will then be up to the Industrial Relations Commission to determine the scope of the 'operational reasons' exception. This is indeed just one area where the Commission is very much still part of the game. Key responsibilities may have gone, but it will still be dealing with a wide range of matters. It may well continue to resolve many disputes in unionised workplaces, both formally and

informally, unless the government deliberately prices it out of the market for ADR services.

What is also striking though about the legislation is the extent to which the government itself is increasingly intruding in the resolution of disputes and the determination of employment conditions. Mention has already been made of the new Ministerial power to end bargaining periods, and more particularly of the remarkable scope of the 'prohibited content' provisions in the *WR Act*, which go well beyond any desire to outlaw discriminatory treatment and actively seek to prevent employers from making the 'wrong' kind of bargains. Even greater intrusion is evident in the building industry, where construction companies must conduct their employment relations strictly in accordance with government guidelines if they wish to bid for publicly funded work;[2] and also in higher education, where institutions will now lose a large slice of funding unless they can satisfy the government that every employee has been offered an AWA and that every single policy or agreement they make complies with the government's views as to how staff should be managed.[3] The 'command and control' mentality evident in these measures (Howe 2005), coupled with the extraordinary (and growing) detail with which each new regulation is framed, suggests that the government has become addicted to the micro-management of workplace relations. Ray Evans, President of the HR Nicholls Society and long time agitator for the abolition of the arbitration system, has gone so far as to accuse the government of perpetuating 'Marxist dogmas', so great is its failure to introduce what he would see as genuine freedom to the labour market (Evans 2005; and see also Moore 2005).

In any event, with an award system still in place, with the Industrial Relations Commission still active in some fields of dispute resolution, with the agreement-making process still fraught with bureaucratic obstacles and hurdles (albeit many fewer than before), and with unions and the media on the lookout for examples of abuse and exploitation, it is reasonable to predict that it may take some time for the Work Choices reforms to 'bite'.

There are also the States to consider. Quite apart from the constitutional challenge, there is quite a lot the current State Labor governments could do to undermine, or at least counter, the effect of the changes. Queensland and Tasmania have already legislated to extend their safety net of statutory entitlements in certain ways.[4] Assuming the Work Choices amendments are valid, State minimum standards will cease to have any direct effect on federal system employers after the reforms commence, other than in relation

to non-excluded matters such as long service leave. Nevertheless, any standards in place as at the date of transition may at least be incorporated into notional agreements that have effect under the *WR Act* for up to the first three years of the new system.

In the longer term, a potentially more effective option is Victoria's establishment of a publicly funded Workplace Rights Advocate to provide advice and assistance to parties (but especially workers) operating within the new federal system.[5] This type of initiative is especially important, given the likelihood of Commonwealth inspection and enforcement services continuing to be woefully under-resourced (see Lee 2005: 219–220). Although the federal government has promised to increase funding to the Office of Workplace Services, the suspicion must be that, as at present, far more time and money will be devoted by federal agencies to investigating and prosecuting unions (especially in the building industry) than employers.

As previously mentioned, the States might in a similar vein consider allowing State Commissioners to act as publicly funded ADR providers, and/or legislate to permit disputes over contractual entitlements to be resolved in low-cost and readily accessible tribunals. It can also be expected that, to some extent at least, the States will require their own agencies to act as 'model employers', even when those agencies are operating within the federal system.[6]

In the end though, the most important factor in determining the speed with which Work Choices impacts on labour market arrangements will be the attitude of employers. More particularly, how many businesses will opt to use their newfound freedom to offer agreements and/or restructure their operations so as to remove award entitlements and reduce their labour costs, and how quickly will they seek to do so?

There are a number of reasons why the initial impact may be muted. For one thing, there are already firms, especially in fiercely competitive sectors such as hospitality and retail, who are employing staff on sub-award conditions, either illegally or on the basis of dubious AWAs.[7] For those employers, agreements under the new system may do little more than formalise or legitimate existing arrangements. Second, the sheer complexity and incomprehensibility of the new legislation is likely to dissuade employers from moving too quickly to exploit the opportunities it offers. For many, it will be all they can do to work out how the new laws impact on them, particularly for the huge number of SMEs formerly covered by State awards. Thirdly, the present skills shortages in certain areas of the labour market will make some employers wary of being seen

to cut conditions, for fear of being unable to attract or retain good staff. Fourthly, many unions have moved to put new agreements in place before the new laws take effect. Anecdotal evidence suggests that a number of firms have been quite happy to go along with this, while using the threat of Work Choices to secure concessions.

This in itself points to a final factor that should never be underestimated — the pragmatism, conservatism, even apathy, of many Australian business owners and managers. Whatever their 'leaders' may say, the reality is that there are still many businesses that have not enthusiastically embraced the notion of enterprise-level bargaining. A substantial number have continued to operate under awards alone. Others have followed the trend to making formal enterprise agreements, but ones that effectively depart from award standards in only a few respects and indeed typically preserve or replicate the operation of many award provisions.[8] Many larger firms are content (or at least resigned) to deal with unions on the basis that it is more efficient, less disruptive and possibly even more productive than 'individualised' bargaining.[9]

At the same time, there will undoubtedly be pacesetters who will seek to make immediate and radical use of the new arrangements. And there will be no lack of business groups, law firms and other 'consultants' aggressively marketing the use of AWAs, employee collective agreements or employer greenfields agreements to cut labour costs. As the uptake of these schemes increases, so other employers may be forced to take the same course. As Chris Briggs (2005: 52) notes:

> [S]ooner or later the competitive advantages gained by employers who do manage to lower their labour cost structures will drive other employers to follow suit. In sectors where small/medium businesses are competing against each other for contracts and customers, especially where margins are thin and labour represents a significant component of their cost structure, once a competitor manages to cut their labour costs by removing penalty rates, loadings etc then others will have little choice to do likewise if they are to survive in the marketplace.

What remains to be seen is how long this process takes — and whether a federal government impatient with the rate of change decides to help things along by requiring firms to adopt the 'right' kind of workplace relations practices if they want access to government benefits of various kinds. This is already the norm in some industries, as we have seen, and nothing in the present government's record (as opposed to its rhetoric)

suggests that it genuinely trusts employers to make their own choices.

Those suggesting that Work Choices is merely the precursor to a more radical package of reforms may yet be proved correct — depending of course on the outcome of the next federal election (and more especially the composition of the Senate). But if the Coalition is still in office, no one should be betting on that package leaving it entirely to parties to make their own decisions.

Notes

1 It is by now axiomatic that calls for the 'deregulation' of workplace relations should be seen as effectively demanding re-regulation — and usually as promoting internal regulation at the expense of external regulation: see Buchanan and Callus 1993; Ellem et al 2005.

2 Cf House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation 2005: 55–66, recommending that the existing common law tests for determining employment status be retained, albeit with some modifications. Under the common law, the 'label' attached by the parties is not determinative of whether they have created a contract of employment or a contract for services: Hollis v Vabu Pty Ltd (2001) 207 CLR 21 at 45. As to the potential nevertheless for the common law tests to be exploited by those who wish to evade employment status, see Stewart 2002.

3 See Victoria v Commonwealth (1996) 187 CLR 416, as to the validity of the Industrial Relations Reform Act 1993 (Cth).

4 Cf the suggestion by the Productivity Commission (2005: 349–355) that the public interest would be better served by retaining dual coverage and giving parties the choice as to the system in which they operate. For further exploration of arguments for and against 'competitive federalism' in this field, see Stewart 2006.

5 The drafters of the Work Choices amendments have chosen to make life thoroughly difficult for the reader of the amended WR Act, by electing for the most part to use the undifferentiated term 'employer' throughout the legislation. By default this is taken to mean an 'employer' as defined in s 6(1), but not if a 'contrary intention' appears from the relevant provision. A list of provisions in which the term is to be given its 'ordinary' or generic meaning is provided by cl 3 of Schedule 2, but this is not intended to be exhaustive. A similar approach is adopted with the terms 'employee' and 'employment' in ss 5 and 7.

6 See R v Federal Court of Australia; Ex parte WA National Football League (1979) 143 CLR 190; Commonwealth v Tasmania (1983) 158 CLR 1. The same is true for financial corporations: State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282.

7 Under Division 2 of Part 2 of Schedule 7, any pre-reform certified agreement binding on an excluded employer will also remain in force for up to five years, unless replaced (after its nominal expiry date) by a State agreement, or terminated in accordance with the provisions of the pre-reform WR Act.

8 See Schanka v Employment National (Administration) Pty Ltd (2000) 97 FCR

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186 at 193; MUA v Burnie Port Corp (2000) 101 IR 435.

9 Electrolux Home Products Pty Ltd v AWU (2004) 78 ALJR 1231; see Creighton and Stewart 2005: 211–214.

10 This would clearly include a 'site rates' provision of the type commonly found in union agreements, committing employers to ensure that any workers hired as or through contractors, or through a labour hire agency, are as far as possible accorded the same rates and conditions as those directly employed. Such a provision will be prohibited even though it has generally been found to satisfy the 'matters pertaining' requirement: see eg Re NUW; Re Agreement with Exel (Australia) Logistics Pty Ltd (2005) 146 IR 334.

11 It is also interesting in this regard to contrast the government's commitment to allow small businesses to engage in 'collective bargaining' with larger concerns, in recognition of the disparities in bargaining power that they may confront: see McCrystal 2006.

12 Patrick Stevedores Operations No 2 Pty Ltd v MUA (1998) 195 CLR 1.

13 See Building and Construction Industry Improvement Act 2005 (Cth) ss 49, 52.

14 Compare the position with 'private arbitration' under s 170LW of the pre-reform Act: see CEPU v Telstra Corp Ltd (2003) 128 IR 385.

15 As to the general level of satisfaction with the Commission's approach to dispute resolution, see Forbes-Mewett et al 2003.

16 See Creighton and Stewart 2005: 467–468. Compare in this regard the approach adopted in cases such as R v Industrial Court of SA: Ex parte General Motors-Holden Pty Ltd (1975) 10 SASR 582 with the recent decision of the NSW Commission in Unions NSW v Carter Holt Harvey Wood Products Australia Pty Ltd [2006] NSWIRComm 2 (30/1/06).

17 See eg Jumbunna Coal Mine, No Liability v Victorian Coal Miners Association (1908) 6 CLR 309; R v Bowen; Ex parte Amalgamated Metal Workers and Shipwrights Union (1980) 144 CLR 462 at 471.

18 The question of whether a union could be a trading corporation was raised but not decided in Rowe v TWU (1998) 160 ALR 6.

19 See in particular the submission by the Group of 151 Australian Industrial Relations, Labour Market and Legal Academics, entitled 'Research Evidence About the Effects of the Work Choices Bill', to the Senate Employment, Workplace Relations and Education Legislation's Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005 (www.aph.gov.au/Senate/committee/eet_ctte/wr_workchoices05/index.htm). See also the various contributions to vol 56 of the Journal of Australian Political Economy (December 2005).

20 As for example under the recently introduced 'Welfare to Work' changes that are aimed at forcing some single parents and disabled workers into paid employment: see Rider 2005.

21 This is not to discount other possible reasons for the changes, including a deep-seated and longstanding antipathy to trade unions on the part of key figures in the government; or indeed a belief on their part that by striking at unions, the Labor Party as the political wing of the labour movement will also be mortally wounded.

22 See Employment Contracts Act 1991 (NZ); Employee Relations Act 1992 (Vic).

23 See Building and Construction Industry Improvement Act 2005 (Cth) Ch 3.
24 See Higher Education Legislation Amendment (Workplace Relations Requirements) Act 2005 (Cth); and for details of the current Higher Education Workplace Relations Requirements (HEWRRs), see www.dest.gov.au/sectors/higher_education/default.htm.
25 See Industrial Relations Amendment Act 2005 (Qld); Industrial Relations Amendment (Fair Conditions) Act 2005 (Tas).
26 See Workplace Rights Advocate Act 2005 (Vic).
27 See eg Public Sector Employment (Award Entitlements) Bill 2006 (Vic), which among other things would require Victorian agencies to submit proposed agreements to the Workplace Rights Advocate to ensure they did not disadvantage workers.
28 See eg the arrangements revealed in Yurong Holdings Pty Ltd v Renella [2005] SAIRC 60 (5/8/05).
29 As to the 'layering' of regulatory instruments, see Fetter and Mitchell 2004; Bray and Waring 2004. For a 'heretical' look at the costs of enterprise bargaining and the possibilities offered by an alternative focus on industry-level arrangements, see Callus 2005.
30 As to the debate over whether there is a positive link between collective bargaining and productivity, see eg Peetz 2006: 68–69.

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