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Work Choices: Australia's New Industrial Relations Legislation

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On 14 December 2005, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices Act) received royal assent. The Act will come into force, be proclaimed, when regulations accompanying its operation are published, which is expected in late March 2006. The Act runs to 762 pages. It is a complex piece of legislation, which will be difficult for the layperson, or those uninitiated in the mysteries of industrial relations legislation, to follow.

Constitutional Context

Traditionally, industrial relations legislation at the federal level has relied on the conciliation and arbitration power of the Australian Constitution. Under this power

> The parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to . . . (Section 51, paragraph xxxv) Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.

Two things should be noted about this power. First, it is an indirect power. That is, the federal government could not, subject to other powers in the Constitution, directly intervene in interstate industrial disputes. It was forced to delegate its power to a body charged with powers of conciliation and arbitration, such as the Australian Industrial Relations Commission (AIRC). Second, federal and State governments shared industrial relations powers.

The Work Choices Act is based on the corporations power, Section 51, paragraph xx, of the Constitution. It empowers the federal government to make laws with respect to 'Foreign corporations, and trading or financial corporations found within the limits of the Commonwealth'. This power, so it is argued, can be applied to the internal affairs, such as industrial relations, of 'constitutional corporations'.

This power provides two advantages for the federal government. First, it overcomes restric-

tions placed on its ability to directly legislate on industrial relations matters, per the traditional restrictions of Section 51, paragraph xxxv. For example, under the Work Choices Act, the Howard coalition government is able to bypass and/or direct the AIRC to perform whatever functions the government so desires.

Second, and please note that in making this statement the Work Choices Act is the subject of an appeal to the High Court, the Howard coalition government is able to develop a national system of industrial relations. In other words, the Work Choices Act abolishes State industrial relations systems. It does allow, however, the continuation of State legislation covering such matters as superannuation, occupational health and safety, workers compensation, long service leave and holidays (Section 7 C). The Kennett government in Victoria ceded its industrial relations powers to the federal government in 1996. Under Section 109 of the Constitution 'Where a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

In abolishing state systems, the Work Choices Act contains transitional arrangements for the movement of state workers to the federal system, and for 'non corporate' federal workers (most small businesses, sole traders and many farmers are not incorporated) back to the states. For the former the transition period is three years, the latter five years (Schedule 14). The existence of 'non corporate' workers means that there will be a continuing industrial relations role for the states, unless, like Victoria in 1996, they decide to cede powers to the federal government. This is more likely to occur in the eventuality of the election of Liberal or coalition governments at the state level.

The Australian Fair Pay Commission and The Australian Fair Pay and Conditions Standard

The Work Choices Act has downgraded the role and influence of the AIRC. Undoubtedly, the most dramatic example of this is the creation of the Australian Fair Pay Commission (AFPC). It comprises five persons. The legislation specifies that its Chair must be a person with a high level of skills and experience in business or economics (Section 7P). The other four appointees must have experience in business, economics, community organisations and workplace relations, respectively (Section 7Y). Its major function is to determine minimum terms and conditions of employment, or what the Work Choices Act refers to as an Australian Fair Pay and Conditions Standard (AFPCS) (Sections 7H and 7I). These were functions traditionally performed by the AIRC. The AFPCS are (Section 89 (2))

1. basic rates of pay and casual loadings,

2. maximum ordinary hours of work,
3. annual leave,
4. personal leave, and
5. parental leave and related entitlements.

According to Kevin Andrews (2005, 4), the Minister for Employment and Workplace Relations, this transfer of functions from the AIRC to the AFPC was because 'of the adversarial and legalistic nature' of cases conducted by the AIRC and the AFPC is 'charged with promoting the economic prosperity of the people of Australia'. In making this statement, he is seemingly unaware that the *Workplace Relations Act 1996* (Cth) (Section 89 (2) (b)) required the AIRC, in determining a safety net of fair minimum wages and employment conditions, to have regard to 'economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment'. It is difficult to understand how the AFPC, which can determine its own procedures, can be viewed as more open and transparent than the AIRC, which conducted its proceedings in the public gaze.

In a speech in May 2005, Prime Minister John Howard (2005, 12), foreshadowing the Work Choices Act, 'said the era of the select few making decisions for the many in Australian industrial relations is over'. The role and functions attached to the AFPC are inconsistent with the Prime Minister's statement.

Wages and employment conditions cannot fall below the AFPCS (Section 89 A). In addition, the AIRC is to determine protected allowable award matters (Section 101 B (3)). They are

1. rest breaks,
2. incentive payments,
3. annual leave loadings,
4. public holidays,
5. monetary allowances,
6. overtime or shift work allowances,
7. penalty rates,
8. outworker conditions, and
9. other matters specified by regulation.

Agreement Making

Both John Howard, in his May 2005 speech, and Kevin Andrews, in his Second Reading speech to parliament, in introducing the legislation extol the virtues of the parties making their own

agreements. For example, John Howard (2005, 2 and 4) said

> This Government trusts employers and employees to make the right decisions in the workplace . . . The essence of these reforms is to further promote and facilitate the making of arrangements at the workplace level . . . The Government's aim is to give even greater freedom and flexibility to employers to negotiate at the workplace level.

He also said (Howard 2005, 5), 'Australian workers can be assured that this is not a wage cutting policy'.

For his part, Kevin Andrews (2005, 1 and 10) said, the legislation was moving

> towards a system that trusts Australian men and women to make their own decisions in the workplace and to do so in a way that best suits them . . . Work Choices [will create] a better workplace relations system that allows Australia's employers and employees the freedom and the choice to sit down and work out the arrangements that best suit them.

The championing of employers and employees making their own workplace solutions is based on two assumptions. First, that there is an equivalence of bargaining power between the parties negotiating agreements and, second, that there is no need for third party intervention. Do employees have as much bargaining power as employers? For example, how much power does a bank worker have if a bank decides it wants to move its workforce onto a new employment arrangement, with lower entitlements compared to their previous entitlements? What power do aircraft maintenance workers have if an airline decides to move maintenance work offshore? What power does an unskilled worker have if their employer has not honoured their employment entitlements?

The above quotes from John Howard and Kevin Andrews create an impression that Work Choices promotes agreement making between the parties. However, a closer examination of the legislation contradicts this impression. This can initially be illustrated by noting two objects of the Work Choices Act. They are

> ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level (Section 3 (b)), . . . [and]
> balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action (Section 3 (i)).

In Section 3 (b) note the phrase ‘as far as possible’. This enables regulation of and intervention into employment relations at the enterprise or workplace level, while at one and the same time maintaining that the parties are encouraged and free to make arrangements that best suit them. Section 3 (i) contains two public interests. The first is the right to take ‘legal’ industrial action. The second is to protect the public interest from such action. On the one hand, the legislation champions the rights of ‘insiders’, those who operate at the workplace or enterprise level; in fact, this is the major rhetoric of the Act; while on the other hand, it is concerned with upholding the rights of ‘outsiders’.

An industrial relations policy which trusts, if not encourage, the parties, or ‘insiders’, ‘to make their own decisions in the workplace and to do so in a way that best suits them’ (Andrews 2005, 1) is inconsistent with one that advocates the need to help ‘outsiders’, in the case of Section 3 (i), the general public. The problems of ‘outsiders’ will necessitate intervention, or regulation, by third parties; intervention which will rain on the decision making of ‘insiders’. This tension between ‘insiders’ and ‘outsiders’ is one of the reasons that the Work Choices Act is so lengthy and cumbersome. It constitutes another species in Australia’s long history of industrial relations regulation.

Types of Agreements

The Work Choices Act distinguishes between different types of workplace agreements (Section 96). They are Australian Workplace Agreements (AWA), employee (non-union) collective agreements, union collective agreements, union greenfield agreements and employer greenfield agreements. An AWA is an agreement between an individual worker and an employer. A greenfield agreement is one made by a new business, whether it be a new location or its ‘newness’ results from corporate restructuring.

A union greenfield agreement involves negotiations with unions, while with an employer greenfield agreement involves a situation where an employer makes an agreement with themselves. The Act says that such an agreement can be made before the employment of any person ‘whose employment will be the subject to the agreement’ (Section 96 D (b) (ii)).

An employer making an agreement with themselves defies commonly accepted norms of logic. Nonetheless, its significance should not be underestimated. Section 108 does not allow industrial action during the life of an agreement. Workers, who are unhappy with the terms of the agreement, are unable to take industrial action to seek to have its terms changed. A process whereby an employer can unilaterally determine employment conditions, a situation which is legislatively sanctioned, is the antithesis of one which encourages the parties to negotiate terms and conditions of employment.

The Work Choices Act has a hierarchy of industrial instruments. An AWA takes precedence

over a collective agreement (Section 100 A (2)) and a workplace agreement over an award (Section 100 B).

Transmission of Business and Terminating Employment for Operational Reasons

Section 123 (4) requires an employer to honour employee obligations for a period of twelve months after the transmission of the whole, or part, of a business to another person. Employers can terminate the employment of workers 'for genuine operational reasons or for reasons that include genuine operational reasons' (Section 112 (5 C)). Operational reasons are defined as 'reasons for an economic, technological, structural or similar nature relating to the employer's undertaking, service or business, or to a part [there of]' (Section 112 (5 D)).

Moving To a New Agreement

Either one of the parties to an AWA, or a collective agreement, can unilaterally terminate a workplace agreement, after its expiry date, after having given notice of 90 days to the person, or persons, who are party to the agreement of their intention to so terminate (Section 103 K, Section 103 L). If the employer intending to terminate the agreement does not provide undertakings to employees as to their terms and conditions of employment (Section 103 M), then their terms and conditions will be replaced, or fall, to the AFPCS and allowable award matters determined by the AIRC under Section 101 B (Section 103 R).

Cutting Wages and Conditions-Scenario One

In October 2005, the Howard government released *WorkChoices* (2005), which provided extensive details on its soon to be released legislation. It provided a number of examples of what was regarded as beneficial effects of the impending legislation. One was of Billy, an unemployed worker who is offered an AWA, which 'explicitly removes award conditions' (*WorkChoices,* 2005, 15). The example doesn't countenance the possibility of an AWA being offered, which is lower than the pay and conditions contained in a collective (say union) agreement or an award, which is allowable under the Work Choices Act. The document says (*WorkChoices,* 2005, 15) 'Because Billy wants to get a foothold in the job market he agrees to the AWA and accepts the job offer'.

The way this example is presented, economic welfare is enhanced because Billy has obtained employment. However, if we incorporate into this analysis the situation of Johnny, in combination with Section 112, which allows for the termination of employment for 'genuine operational rea-

sons', it is not so clear that economic welfare, in the sense that no one else is worse off, has been enhanced. The employment of Billy, on lower conditions, on an AWA, may result in the employer deciding to terminate Johnny for 'genuine operational reasons', because of the higher wages and employment conditions he receives under an alternative workplace agreement. Billy's gain is Johnny's loss, with the employer obtaining a rent in the form of the difference between the two's wages and employment conditions.

Cutting Wages and Conditions-Scenario Two

Other sections of the Act enable employers to generalise this rent seeking across a workforce. A workforce is employed on individual or collective agreements of a certain level. Through corporate restructuring the employer creates a greenfield site, and participates in the oxymoron of negotiating a new agreement with itself, per Section 96, and/or transmits their business to a new entity. The workforces' previous wages and conditions are protected for twelve months (Section 123 (4)). At the end of that period, the Act empowers employers to alter their wages and employment conditions, if the employer so desires, to lower levels contained in the employers' greenfield agreement and/or transmitted business.

Once an agreement has expired, and appropriate notice has been provided by the employer, the employer can unilaterally terminate an agreement and unilaterally determine new wages and conditions, which are lower than the previous conditions under which the workforce were employed (Section 103 M). Alternatively, if the employer decides not to take up this option, wages and conditions will revert to the AFPCS and allowable award matters determined by the AIRC (Section 103 R). For workers covered by AWA only the AFPCS applies.

Such procedures will have a 'chilling effect' on bargaining. The employer has little need to enter into negotiations with workers, either individually or collectively. Section 103 enables employers to unilaterally force down wages and conditions. The employer can simply say these are the wages and conditions which are on offer. If you don't accept them, then your wages and conditions will fall to the minima of the AFPCS and the AIRC determined allowable award matters, or you can look for work elsewhere.

Restrictions on Collective Bargaining and Industrial Action

The Act contains other provisions which restrict the ability of workers and unions to take collective action. Section 101 D enables the Minister, by regulation, to specify matters that are prohibited content that cannot be included in agreements. A term of an agreement is void, to the extent, that it contains prohibited content and can be removed by the Employment Advocate (Section 101

F). The inclusion of prohibited content in an agreement carries a penalty of $33,000 (Section 101 E, Section 105 D (2) (k)). Discussions concerning the inclusion of prohibited content in an agreement are subject to penalties of $6,600 for an individual and $33,000 for an organisation (Section 101 M, Section 105 D (2) (n)).

The Act also places restrictions on pattern bargaining. Pattern bargaining is defined as 'seeking common wages or conditions of employment for 2 or more' different workplaces or enterprises (Section 106 B (1)). Pattern bargaining will be deemed to have occurred if it cannot be demonstrated that the negotiations which are occurring have not attempted to 'take into account the individual circumstances' of the different workplaces or enterprises. In saying this however, there is provision in the legislation for employers to apply to the Employment Advocate to make a multiple-business agreement (Section 96 E and Section 96 F).

The upshot of prohibitions on pattern bargaining is that it is difficult for parties, who wish to, to rationalise and co-ordinate negotiations. For example, neighbouring high schools, which perform similar functions and teach to the same curricula, would be unable to conduct cross school bargaining. If they negotiated agreements which were essentially similar they would need to demonstrate that pattern bargaining had not occurred and/or seek permission from the Employment Advocate to make a multiple-business agreement. Having to seek permission from an external agent seems to be a long way from John Howard's (2005, 1) May 2005 statement that his 'Government trusts employers and employees to make the right decision in the workplace'.

The Minister also has power to intervene in negotiations occurring between the parties. The Minister may make a declaration terminating bargaining if there is threatened, impending, probable or actual industrial action, which is, or is likely, to adversely affect those involved in negotiations, or endanger the life, personal safety or health, or welfare of the population or a part of it, or cause significant damage to the Australian economy, or an important part of it (Section 112 (1), also see Section 107 J)).

Sections 107 to 114 place a number of restrictions on industrial action. Section 109 requires the holding of secret ballots before strikes can be held. The effect of these sections is to force unions into a slow and bureaucratic exercise before strikes can be held.

These provisions enable the Minister to intervene and place restrictions on both the issues the parties can negotiate and the manner in which they can be conducted. This will have a 'chilling' effect on negotiations. The parties, especially employers, will have little incentive to bargain, or be experimental and innovative, for fear of Ministerial intervention. Moreover, the Minister can suspend industrial action/negotiations, if unions wish to employ such a tactic. Reducing the ability of unions to pursue industrial action, in turn, reduces their ability to use collective bargaining in pursuing the rights and interests of members.

Summary and Conclusion

The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) is a lengthy and complex piece of legislation. Its operation is based on the corporations power of the Australian Constitution, rather than the conciliation and arbitration power, which has traditionally been the mainstay of federal industrial relations legislation. This Act enables the federal government to dispense with State industrial relations systems (subject to a case before the High Court) and downgrade the role and significance of the AIRC. Important roles performed by the AIRC, such as the establishment of a safety net of minimum terms and conditions of employment, are now the responsibility of the AFPC.

The rhetoric of the Act, per statements of Prime Minister, John Howard, and Employment and Workplace Relations Minister, Kevin Andrews, is one of encouraging the parties, or 'insiders', to be responsible for determining wages and employment conditions themselves. However, lurking within the legislation is a concern for 'outsiders', which qualifies, in a substantial way, the actions and activities of 'insiders'. This problem of 'insiders' and 'outsiders' represents a major contradiction within the Work Choices Act. It contains many provisions which place restrictions on both the content and the way in which negotiations can be conducted by the parties. Moreover, these provisions are weighted in favour of employers, who are enabled, subject to the AFPCS, to unilaterally determine wages and employment conditions.

Given the complexity of the legislation, potential unforeseen constitutional problems, reactions by State governments, unresolved tension between 'insiders' and 'outsiders' and its bias towards employers it is likely that in the not too distant future Australia will embark on another round of industrial relations legislative reform.

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