The Otemon Journal of Australian Studies, vol. 33, pp. 201–206, 2007


# Work Choices: An Update

Braham Dabscheck

*Senior Fellow, Faculty of Law, University of Melbourne*

In December 2005, the Howard government passed the *Workplace Relations Amendment (Work Choices) Act 2005* (Cwlth), which ushered in major changes to the operation of Australian industrial relations. The Act came into force on 27 March 2006. Major features of the legislation were presented in the May 2006 issue of Ecodate (see Dabscheck, 2006).

Possibly, the most significant change is the Commonwealth government taking over state industrial relations systems (Victoria had ceded such powers to the Commonwealth in 1996). *Work Choices* contains transition provisions for the movement of state workers to the federal system of three years, and of Commonwealth workers, who fall outside the jurisdiction of *Work Choices,* moving to the states within five years; in the absence of the states ceding power to the Commonwealth. More generally, movement will occur when the terms of existing agreements expire and/or workers enter into new agreements. It will probably take another three to four years before we will be able to assess the impact of *Work Choices.* Change, at the moment, is incremental.

## Is *Work Choices* Constitutional?

*Work Choices* is based on the corporations power contained in 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, placitum xx). . . Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.

Traditionally, the major industrial relations power that had been relied upon was the conciliation and arbitration power; Section 51, placitum xxxv, of the Constitution. It empowers parliament to make laws with respect to 'Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state'. Placitum xxxv involved state and Commonwealth governments sharing industrial relations responsibilities (interstate disputes for the Commonwealth and intrastate disputes for the states), and the Commonwealth government's power being indirect, in that it was forced to delegate the responsibility for resolving interstate disputes to independent third parties who utilised conciliation and/or arbitration.

State governments and some unions challenged the constitutionality of *Work Choices* before the High Court. The states were fearful that the use of the corporations power, as contained in *Work Choices,* had the potential to severely reduce the scope of the functions that they could perform and upset the federal balance. If *Work Choices* was valid, all a future Commonwealth government would need to do, if it wanted to further erode the powers and functions of the states, and reduce them to little more than political facades, would be to enact legislation connected to the activities of corporations. *Work Choices,* while of obvious interest to those concerned with industrial relations is of greater significance in terms of the constitutional issues that it raises and its impact on the governance of Australia.

On 14 November 2006, the High Court handed down its decision. It ruled 5 to 2 in favour of the legislation. The majority, Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan adopted a broad interpretation of the reach of Section 51, placitum xx. They found that the power extended into the internal affairs of corporations, encompassing all of the issues contained in *Work Choices.*

Justices Kirby and Callinan, in separate decisions, rejected such reasoning. First, they maintained that the Constitution should not be read so that one placitum contained in Section 51 could obliterate another placitum. Placitum xx needed to be read alongside placitum xxxv. In particular, they drew attention to the phrase 'subject to this Constitution', contained in Section 51. In other words, while it was clear that the Commonwealth could introduce legislation concerning corporations, and, in this case, concerning their internal operation and relationships between employers and employees, such matters were subject to placitum xxxv.

Second, they contended that the object of *Work Choices,* and they both drew attention to the objects of the Act, was concerned with regulating workplace relations (also note the title of the Act!) not corporations, and hence be subject to placitum xxxv. Irrespective of the logic of their reasoning, the High Court found *Work Choices* to be constitutional.

## Australian Fair Pay Commission and the Federal Minimum Wage

*Work Choices* created the Australian Fair Pay Commission (AFPC) to determine a federal minimum wage. For almost a century this had been a function undertaken by the Australian Industrial Relations Commission (AIRC). In late 2005, Kevin Andrews, the Minister for Employment and Workplace Relations, indicated that he did not expect the AFPC's first minimum wage decision to be handed down until the latter part of 2006 (Andrews, 2005). In addition, *Work Choices* required the AIRC to convene a case to 'flow on' the decision of the AFPC to workers under the federal system not employed by constitutional corporations.

## The States Don't Wait

In determining minimum wages the practice had developed where the AIRC passed down a national decision, which was invariably followed by the respective state industrial relations commissions in state minimum wage cases. The creation of the AFPC and the decision to announce its first decision in the latter part of 2006 departed from this arrangement and the 'normal' calendar for the determination of wage minima.

Unions, in the various states, mounted minimum wage cases. The Howard government made representations before the respective state tribunals to defer such cases until the decision of the AFPC. The state tribunals declined such a request. Amongst other things, they maintained that *Work Choices* so changed the status quo that to not proceed would prevent them from discharging the requirements of the legislation which governed their operation.

On 26 June, both the Industrial Relations Commissions of New South Wales and Western Australia increased their respective state minimum wages by $20 a week–from $484.40 to $504.40. The South Australian Industrial Relations Commission, on 5 July, granted an increase of $17 per week for those receiving up to and including $570 per week, and by $18 for those over $570 per week. The Tasmanian Commission, on 27 July 2006, granted $20 and the Queensland Commission, on 1 September 2006, granted $19.40.

## The Australian Fair Pay Commission's Decision

The AIRC in determining minimum or national wage cases, since the depression of the 1930s, had traditionally applied the 'capacity to pay' principle. In reviewed general indicators concerning the macroeconomic health of Australia and made changes to the minimum wage on factors essentially connected with the demand for labour. The AFPC adopted a different approach. It was concerned with analysing factors connected with both the demand for and supply of labour. And with respect to the latter, it examined issues associated with taxation and income/welfare transfers.

The AFPC found there was general agreement across submissions that minimum wages should provide incentives for unemployed persons to take up paid work, For this reason, in contradiction to the usual practice that had been followed by the AIRC, it rejected the proposition that any increase it might grant should be discounted for reductions in tax or increases in income transfers. It wanted to provide an increase in the federal minimum wage which would provide a real increase in the income of the low paid. In words that bear a striking resemblance to the 'frugal comfort' notion developed in the famous 1907 *Harvester* case, the AFPC said 'There is general agreement that minimum wages should, in combination with cash transfers, provide an income "well above pov-

erty"' (page 96).

The AFPC decided to grant an increase of $27.36 a week for those earning up to and including $700 per week, and $22.04 for those earning over $700, operative from the 1 December 2006. Its decision, to take effect almost eighteen months after the last National Wage Case of the AIRC, has the appearance of flowing on and being proportional to the annual decisions of the respective state tribunals. The AFPC makes no reference to the state determinations in its decision. It flagged that its next determination will occur in mid 2007. This may enable it to be the first cab off the rank in the next round of minimum wage determinations and assert a leadership role in the game of tribunal regulation. The AIRC flowed on the AFPC's determination on 8 December 2006.

## Impact of *Work Choices*: Preliminary Findings

*Work Choices* created an Australian Fair Pay and Conditions Standard of five items, below which conditions for workers covered by Australian Workplace Agreements (AWAs) cannot fall. It also abolished the 'no disadvantage' test for agreement making and enabled dismissal for operational reasons (see Dabscheck, 2006). Prior to *Work Choices,* awards contained twenty allowable matters. The critics of *Work Choices* maintain that it reduces the bargaining power of workers, particularly those with low skills, and that such workers are offered AWAs on a take or leave it basis– that is accept what employers offer or look for employment elsewhere.

Since the legislation became operative there have been regular reports in the media highlighting the negative impact of *Work Choices* on 'vulnerable' workers. In April 2006, an abattoir in Cowra sacked 29 workers for 'operational reasons', offering some of them employment on lower rates of pay. Also in April 2006, there was a report of teenager working for a fruit juice outlet having her wage similarly reduced. More recently, the car parts manufacturer Tristar has been in the news for not making workers redundant, even though, according to their union, there is no work available for them, so that the company can pay lower levels of redundancy once the existing agreement expires, and availing themselves of the less generous rules under *Work Choices.* Also a mineworker achieved an out of court settlement with a company because, following her dismissal for refusing to sign an AWA, which contained a provision of being fined $200 for not giving twelve hours notice for taking sick leave.

In May 2006, the Office of the Employment Advocate provided statistics on reduction in the loss of protected award conditions in AWAs in April 2006, after *Work Choices* became operative. All AWAs removed at least one condition, with 16% excluding all protected award conditions. The survey also revealed that 51% abolished overtime pay, 63% penalty rates, 64% annual leave loadings, 52% shiftwork loadings, 46% public holiday payments, 48% allowances and 46% incentive payments. In addition, 22% contained no provision for wage increases during the life of the agree-

ment. Following criticisms of *Work Choices* based on this survey, the Employment Advocate terminated the release of future information because of problems associated with their interpretation (See Peetz 2007a for details).

Peetz (2007a, 2007b), in examining the first six months operation of *Work Choices,* has found that workers covered by union collective agreements obtain higher levels of wage increases and loose less of their entitlements than workers not covered by such agreements. He has also found that women are at a disadvantage under *Work Choices* compared to men, there has been a decline in productivity growth and the employment growth that has occurred since the legislation's passage is due to strong demand in the economy.

## More Recent Developments

Following continuing criticisms of *Work Choices,* especially over reports of the cutting back of conditions for workers employed on AWAs, and, most importantly, following a spate of poor polls, the Howard government decided to introduce legislative changes to 'soften' the impact of *Work Choices.*

On 28 May 2007, Joe Hockey, the Minister for Employment and Workplace Relations, introduced the *Workplace Relations Amendment (A Stronger Safety Net) Bill, 2007.* The major change contained in this legislation is the introduction of a 'fairness test', which will be applied to AWAs and collective agreements lodged after 7 May 2007 for employees with a gross basic salary of less than $75,000 per annum. In the case of AWAs, the fairness test is defined as 'fair compensation to the employee whose employment is subject to the AWA in lieu of the exclusion or modification of protected award conditions that apply to the employee' (Section 346 M(1)). Employers experiencing a 'short term crisis' can seek exclusion from this test to help enhance the survival of their businesses.

The 'fairness test will be undertaken by a new administrative body (note not the AIRC which prior to *Work Choices* performed such functions), the Workplace Authority, formerly the Office of the Workplace Advocate. In addition, a new body entitled the Workplace Ombudsman, formerly the Office of Workplace Services, will carry out random checks of employers to ensure that they are complying with the legislation. The Howard government had indicated that an extra $370 million will be provided to the Workplace Authority and the Workplace Ombudsman, over the next four years, involving the employment of approximately 600 extra staff, to perform these extra functions.

## Summary and Conclusion

*Work Choices* has been in operation for a year. The legislation survived a constitutional challenge by the states and unions before the High Court. The AFPC was caught out by the decision to delay the determination of a Federal Minimum Wage. State tribunals were not prepared to wait for it, before they handed down their respective decisions. The AFPC found itself playing catch up with the state tribunals. It has adopted a supply and demand approach to wage determination in comparison to the capacity to pay approach traditionally employed by the AIRC. More broadly based evidence, concerning the determination of wages and conditions, appears to confirm criticisms levelled at *Work Choices* concerning its negative impact on those with limited bargaining power. In response to this, the Howard government, on 28 May 2007, amended *Work Choices* in introducing a bill which provided a 'fairness test' for changes in the working conditions of workers earning less than $75,000 per annum, to be administered and policed by new regulatory agencies.

**References**

Andrews, Kevin, 2005, 'Workchoices and Welfare to Work Bills', Doorstop Interview, Parliament House, Canberra, 7 December.

Australian Fair Pay Commission, Wage Setting Decision and Reasons for Decision, October 2006.

Australian Industrial Relations Commission, Wages and Allowances Review 2006, PR 002006, 8 December 2006.

Dabscheck, Braham, 2006, 'Work Choices: Australia's New Industrial Relations Legislation', *The Otemon Journal of Australian Studies,* December, pp. 83–91.

*Ex Parte H. V. Mckay (Harvester* case), 2 CAR 1.

Hockey, Joe, 2007, *Workplace Relations Amendment (A Stronger Safety Net) Bill, 2007,* Second Reading Speech, House of Representatives, Canberra, 28 May.

Industrial Relations Commission of New South Wales, State Wage Case 2006, Matter No IRC 5778 of 2005, 26 June 2006.

*New South Wales v Commonwealth of Australia* [2006] HCA 52 (14 November 2006).

Peetz, David, 2007a, 'Brave New *Work Choices*: What is the Story So Far?', Divergent Employment Relations in Australia and New Zealand?, 24th Conference of the Association of Industrial Relations Academics of Australia and New Zealand, Auckland New Zealand, 9 February.

Peetz, David, 2007b, 'Collateral Damage: Women and the Workchoices Battlefield', Divergent Employment Relations in Australia and New Zealand?, 24th Conference of the Association of Industrial Relations Academics of Australia and New Zealand, Auckland New Zealand, 8 February.

Queensland Industrial Relations Commission, State Wage Case 2006, (B/2005/1197), 27 July 2006.

South Australian Industrial Relations Commission, General Application to Review Award Wages July 2006 [2006] SAIRComm 18, 5 July 2006.

Tasmanian Industrial Commission, State Wage Case 2006, T 12395, 27 July 2006.

Western Australian Industrial Relations Commission, General Order to Vary All Award Rates and Allowances, 2006 WAIRC 04608, 26 June 2006.

*Workplace Relations Amendment (A Stronger Safety Net) Bill, 2007.*