

## CHANGES TO THE AUSTRALIAN INDUSTRIAL RELATIONS SYSTEM: REFORMS OR SHATTERED ICONS? AN INSIDER'S ASSESSMENT OF THE PROBABLE IMPACT ON EMPLOYERS, EMPLOYEES AND UNIONS

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*This paper discusses the impact of pending changes to Commonwealth and State industrial regulatory systems. It argues that the package is a counter-revolutionary reversal of egalitarian and collectivist values institutionally embedded since Australian Federation. The new Workplace Relations System ('WRS') will compound existing trends away from secure employment and regulated collective agreement-making enforceable by independent third-party industrial dispute settlement procedures. Australian employment patterns already manifest high degrees of flexibility and growing insecurity around work and career. Perceptions of the need for, and effect of, the WRS changes should have been tempered by an understanding of the relative incidence of the forms of employment, the terms of engagement and the pattern of employment growth across industries in Australia. In pursuit of fair-go and collective representation of values, priority should be given to transposing commercial law principles to contracts for work and services; review of union organisational structures and services to better cope with collective representation in boundary-less workplaces; and the establishment of rights concerning work through statutory and judicial machinery.*

### I FROM HATCHING THE WORKCHOICES PLAN THROUGH TO ROYAL ASSENT

In his Prime Ministerial Statement entitled *Workplace Relations* on 26 May 2005, John Howard outlined plans for what he called 'an historic modernisation of Australia's workplace relations system'.<sup>1</sup> The policy proposals were later subtitled by Kevin Andrews, Minister for Employment and Workplace Relations ('the Minister') as the *Howard Government Plan* ('the Plan'). The Plan had not been foreshadowed in 'pre-election commitments' before the October 2004

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1 The Hon John Howard MP, 'Workplace Relations Reform' (Speech delivered to the Parliament of Australia, Canberra, 26 May 2005).

election.<sup>2</sup> That election brought the Government an unexpected majority in the Senate. The Plan was then adopted as a bolder option.<sup>3</sup> The overarching aim of it was the use of regulatory power – in ostensible furtherance of labour force flexibility and productivity objectives – to shape a labour market, the dynamic of which was said to be ‘freedom of choice for individual employees and employers’. Legislation to implement the bulk of the Plan was introduced to the House of Representatives on 2 November 2005,<sup>4</sup> clearing the Lower House on 10 November 2005. The Bill passed all stages in the Senate on 2 December 2005<sup>5</sup> and was adopted without further change by the House of Representatives on 10 December 2005. The timetable enforced in both Houses was extraordinarily tight for original legislation and amendments of such complexity affecting Federal and State regulatory machinery.

The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*‘Amending Act’*) was given Royal Assent on 14 December 2005. It amends and replaces much of the *Workplace Relations Act 1996* (Cth) (*‘old Act’*). The title of the old Act is unchanged by the amendments, but I shall refer to the consolidation of it that will come into force after all necessary proclamations as the *WorkChoices Act*.

Elements of the WorkChoices package came into operation from the date of Assent. The Australian Fair Pay Commission (*‘AFPC’*) was established. It has commenced work on devising the parts of the Australian Fair Pay and Conditions Standard (*‘the AFPC Standard’*) for which it will be responsible.<sup>6</sup> A prohibition on severance benefit payments for a wide class of ‘relevant’ employees engaged by employers with fewer than 15 employees took effect immediately.<sup>7</sup> A revised regulatory regime for school-based apprentices and trainees was instituted.<sup>8</sup> Regulation-making powers were enlivened.<sup>9</sup> The most important changes made by the *Amending Act* await further proclamation at the time of writing. The timing of that proclamation is dependent upon the finalisation of associated Regulations. The already massive statute will balloon into an enormous package when further swollen by a kind of regulatory confetti: subordinate legislation of matching size and unprecedented scope. Responses given on 16 February 2006 to a Senate Legislation Committee hearing about additional budget estimates suggested there would be 600 to 1000 regulations for the Committee to consider

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2 Ibid.

3 See Explanatory Memorandum, Workplace Relations (Work Choices) Amendment Bill 2005 (Cth) 7–30, which outlines and contrasts an ‘Option A’, (maintaining the status quo without introducing ‘further reforms beyond meeting the Government’s election commitments’); and the preferred ‘Option B’ (establishing a more flexible workplace relations framework).

4 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 1–16 (Kevin Andrews, Minister for Workplace Relations). For debate, see Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 4, with debate concluding Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2005, 53. The second reading debate ran over the intervening five sitting days, occupying a total of 24 hours and 21 minutes.

5 Commonwealth, *Parliamentary Debates*, Senate, 2 December 2005, 207.

6 *Workplace Relations Act 1996* (Cth) pt 1A, ss 19–60.

7 *Amending Act* sch 3A.

8 *WorkChoices Act* pt XVII.

9 *Amending Act* sch 4, pt 1.

between mid and late March.<sup>10</sup> The scheme came into operation on 27 March 2006. One initiative of the Plan remains outstanding. The Plan includes removing ‘independent contractors’ from the reach of industrial law remedies but that step will not be implemented until a Bill for an Independent Contractors Act is presented to Parliament.<sup>11</sup>

## II REFORMING FAIRNESS, THE AUSTRALIAN WAY

From the outset, in line with the emerging conventions of contemporary policy change management, the WorkChoices proposals in the Plan were labelled as ‘reforms’ and, later, as evolutionary. By the time of the Second Reading Speech, the Minister told the House:

This is economic reform the Australian way – evolutionary and in a manner that advances prosperity and fairness together. As the Prime Minister has said, these are big reforms, but they are fair reforms.

The reassuring ‘reform’ wording was not appended to the title of the amending legislation. Rather, political spin was given substantive force in the body of the *WorkChoices Act*. Schedule 1 of the *Amending Act* incorporates most of the substantive changes wrought by the WorkChoices scheme. The commencement date for that Schedule is converted in the *WorkChoices Act* to the ‘reform commencement’. Significant changes are articulated around what will be the state of affairs as at that date. For instance, extant federal awards of the Australian Industrial Relations Commission (‘AIRC’) become ‘pre-reform awards’. They are within a class of ‘pre-reform federal wage instruments’, identified by reference to the relevant employer being bound by the particular award at ‘reform commencement’, and so on.<sup>12</sup>

The title of this paper reflects my refusal to accept the legislator’s label that serves to categorise the changes as ‘reform’. The connotation of ‘reform’ is renewal, restoration and re-establishment – conversion into another and better form. Many commentators have powerfully disputed that the changes made are reforms at all. Former Prime Minister Bob Hawke is one of many who have explained why the changes are ‘regressive’; indeed, they are counter-revolutionary in character.<sup>13</sup> In that perception, the changes are driven by market ideology – reprising 19<sup>th</sup> century free-trade employer prerogative antecedents –

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10 Evidence to Senate Employment, Workplace Relations and Education Legislation Committee, Parliament of Australia, 16 February 2006, 120.

11 Kevin Andrews, Minister for Employment and Workplace Relations, Commonwealth Discussion Paper: *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements* (2005) <[http://www.workplace.gov.au/NR/rdonlyres/747F56E8-B067-4BC4-8715-0520306ECE91/0/DP\\_options\\_legisreform\\_ic\\_lh\\_details.pdf](http://www.workplace.gov.au/NR/rdonlyres/747F56E8-B067-4BC4-8715-0520306ECE91/0/DP_options_legisreform_ic_lh_details.pdf)> at 11 April 2006.

12 *WorkChoices Act* ss 4 (definition of reform commencement), 90 B (definitions for purposes of AFPC standard), 90 ZD (deriving preserved APCs from pre-reform wage instruments).

13 Robert Hawke, ‘The Coalition’s Proposed Reform Package’ (Speech delivered at the Workforce Conference Dinner, 22 September 2005). See also Keith Hancock, ‘Obsequies for Industrial Equity’ (2005) *New Matilda* <<http://www.newmatilda.com/policytoolkit/policydetail.asp?policyID=90>> at 19 April 2006; Andrew Stewart, *Submission to Senate Employment, Workplace Relations and Education Committee Inquiry into the Work Choices Bill* (13 November 2005) 5–7.

in an attempt to emulate select features of contemporary free labour market nostrums that have prevailed in the USA.

The assertion that the impending changes are reforms raises important questions. The need for the changes and the effect they will have upon Australia are less open to debate if the Plan is predetermined to be a reform. The iconic reference in the title of this paper contrasts the glib use of the word 'reform' to mask reality. Shattered icons symbolise another form of reformation: 'the hurricane of image smashing which followed Henry VIII's disestablishment of the monasteries, and the puritan fervour of the civil war.'<sup>14</sup> Without wanting to take that analogy too far, this paper reflects the view of a person emerging unfrocked from 18 years in the independent arbitral monastery, looking at the destruction that is being wrought. I am dismayed; this dismay is shared by many who normally represent, reflect and advocate employers' interests and is plainly felt by 151 Australian academics in law and labour market disciplines, who articulated their reasons for it in a submission to the Senate Inquiry about some aspects of the WorkChoices Bill.<sup>15</sup> My own reaction to the Plan was first stimulated by the extraordinarily misleading, unfair and partisan quality of public presentations by proponents of the Plan. It was magnified by legislative measures in the WorkChoices package that I believe to be intemperately ideological in character.

Section 265 of the *WorkChoices Act* prohibits

discrimination, by a person, against another person on the ground that the employment of the second person's employees is or is not covered or is proposed to be covered or not covered by the AFPC Standard, by a particular kind of industrial instrument, or by an industrial instrument made with a particular person.<sup>16</sup>

Breach of the prohibition is sanctioned by a civil penalty of up to \$33,000 for a corporation and \$6,600 for an individual. Remedial damages and injunctive relief may also be granted. In proceedings for recovery of the civil penalty, the burden rests upon the alleged discriminator to establish that the ground averred was not the reason for the discrimination.

The ostensible purpose of that provision is to 'protect freedom of association'. A precedent for part of it can be found in s 45 of the *Building and Construction Industry Improvement Act 2005* (Cth) ('*BCII Act*'). Relevant passages of the Explanatory Memorandum suggest that the prohibited discrimination would be confined to conduct 'on the basis of the particular type of industrial instrument' or standard; or 'on the basis of who the particular agreement is made with, rather than on the basis of anything contained in the agreement'.<sup>17</sup> The Explanatory Memorandum cites three examples of prohibited discriminatory conduct. Each example concerns conduct by a head-contractor or organisation against a

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14 Maev Kennedy, 'New light on a lost world of shattered icons', *The Guardian* (London), 7 October 2002, 24.

15 Submission to the Senate Employment, Workplace Relations and Education Legislation Committee, Parliament of Australia, Canberra, 16 November 2005, 4–7 (A Group of 151 Australian Industrial Relations, Labour Market and Legal Academics).

16 *WorkChoices Act* pt XA, ss 804, 807, 809.

17 See Explanatory Memorandum, above n 3, [2599]–[2600].

subcontractor or employer. In each example, the relevant conduct is based on particular employees or organisations not being party to or covered by a particular collective agreement. Neither the examples nor the text of the Explanatory Memorandum allude to the application of the prohibition to the Standard, or to the extension of the prohibition generally to flesh and blood 'persons'.

The wording and context of s 265 of the *WorkChoices Act* does not reflect the intention stated in the Explanatory Memorandum. Nor does the wording follow the precedent in s 45 of the *BCII Act*. Had it done so, the prohibition might be characterised as a rebalancing of the scales in favour of employers wanting to outsource work. If that were the wording, the provision might be seen as an analogous extension of an existing prohibition against detriment by an employer to an employee for the reason that the employee is entitled to the benefit of an industrial instrument. However, s 265 extends the prohibition to conduct of all persons. The prohibition covers conduct based upon coverage by the AFPC Standard. Discriminatory conduct is in no way restricted to disruptive action related to outsourcing or contracting-out disputes. Moreover, a limitation in s 45(4) of the *BCII Act* is omitted. That subsection restricts the prohibition to an industrial context and requires the discriminating 'first person' to be an 'organisation or a constitutional corporation'. In my view, s 265 of the *WorkChoices Act* moves too far along the spectrum of free market ideological beliefs.

As I understand it, the prohibition would render public recrimination regarding discriminatory conduct unlawful and penalisable by fine. It does not matter if the discrimination is conduct by a citizen or another employer. A person thought to be exploiting low-wage Australian Workplace Agreements ('AWAs') or sham collective agreements; or unilaterally terminating an expired industrial instrument to exploit the opportunity to institute a low pay regime based on the AFPC Standard – an option available under s 103R of the *WorkChoices Act* – is to be shielded from discriminatory conduct. A consumer boycott, a public withdrawal of a trading account from, say, a pharmacy that had discarded a long established State award in favour of a template AWA or the AFPC Standard, would arguably amount to a breach of the prohibition. An employer's expressed unwillingness to be seen to be using services from a supplier undercutting the labour costs of an established high-performance rival might also attract civil penalty proceedings.

Another WorkChoices innovation is the 'employer greenfields 'agreement''. It is likely to inflict on some employers what might be seen as heavy 'friendly fire' from competitors. Section 96D of the *WorkChoices Act* opens the way for an employer to make what is effectively a unilateral workplace 'agreement in writing' for up to a twelve month term. Such 'agreements' may cover 'new business' that the employer proposes to establish, meaning 'new projects and new undertakings, (or in the case of public sector businesses, WorkChoices Activities) which do not yet have employees'.<sup>18</sup> Unilaterally-drawn statements of

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18 Commonwealth of Australia, *WorkChoices: A New Workplace Relations System* (2005) 21 (implemented as ss 323, 330, 333, 352 of the *WorkChoices Act*).

conditions of employment will be converted by statutory legal fiction into collectively binding instruments. In the case of a union greenfields agreement, the collectively-binding conditions must at least be agreed and the agreement must be with an entity whose reason for being is to represent the interests of employees.

The prospect of competitive employer greenfields agreements may challenge the relatively few unions that have made use of greenfield workplace agreements to cover project work, such as site shutdowns or construction and development start-ups. However, established employers with a modicum of commonsense will not wait until they hear the bell toll before the possibilities cause anxiety. Many businesses are vulnerable to underbidding. Strongly competitive contract bidding may be expected from beneficiaries of employer greenfields agreements lodged to cover contingent employment in the event that a new project is secured.

Should the employer greenfields agreement and discriminatory conduct innovations be passed over as just another blunder or excess by opportunist policymakers? I think not. They are simply pointers to the way in which WorkChoices has been made the servant of market ideology and anti-collectivist tendencies: the provisions are among the *WorkChoices Act's* supply of spearheads with which to attack resistance to lowering the labour cost market floor. Their nature and the dearth of explanatory rationale for them attracted attention as soon as the detail of the Plan was fleshed out. The dismay about the WorkChoices scheme expressed by commentators grounded in the institutional values of the Australian industrial relations system was engendered by the character of such provisions.

Mr Howard justified the package of measures first announced in the Prime Ministerial Address of 26 May 2005 as 'article of faith' measures for the Coalition parties.<sup>19</sup> No such appeal to ideology was repeated in the later media campaign by which the government sought to dampen public hostility to the Plan. However, critics of the WorkChoices policies were quick to develop themes about the background ideology. Strident declarations and positions put by Mr Howard between 1983 and 1993 were recycled.<sup>20</sup> In his Address to Parliament, and generally, Mr Howard played down the radical character of the changes, stressed economic objectives and sought to soothe reaction. He attacked the conciliation and arbitration system for its adversarial and 'absurdly' interventionist character, describing it as 'a product of a bygone era', and declared an intention to excise key functions from the AIRC. However, the faithful were warned against false predictions of calamity, claiming that versions

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19 Michelle Grattan, 'New Senate, New Era', *The Age* (Melbourne), 25 June 2005, 1 states 'At Tuesday's Coalition parties meeting, he described industrial relations reform as 'an article of faith for the Coalition parties.' It was, he said, the most important task after July 1.' The statement has also been widely attributed as associated with the content of a speech to the Liberal Party's Federal Council over 25–26 June 2005, by, among others, Federal Labour Leader Kim Beazley: see Kim Beazley, 'The Labour Road to Wealth and Productivity' (2005) *Labour eHerald* <<http://www.alp.org.au/laborherald/index.php>> at 19 April 2006.

20 Paul Munro, 'Radical Change: is it Needed or Loading the Dice? There's a Hole in your Bucket Dear Foxy Loxy, there's a Hole. The New Labour Market Floor is a Designer-holed Bucket' (Paper presented at the ACT IRS Conference, Canberra, 16 June 2005).

of some functions of the AIRC would be transplanted to other or new agencies and the AIRC and awards would not be abolished:

We won't be abolishing awards despite what the union movement says, we won't be abolishing minimum wages, we won't be abolishing the Industrial Relations Commission, we won't be denying people the right of collective bargaining, we won't be preventing people from joining trade unions, we won't be tilting the balance against organised labour, we'll be tilting the balance in favour of the individual worker.<sup>21</sup>

The residual AIRC would be left to a functional 'focus on its key responsibilities of resolving legitimate disputes and further simplification of awards'.<sup>22</sup>

'Fog-fact' is a term coined to describe the use by Executive Government of distortion or confusion of reality in political rhetoric to justify action or inaction. The Howard Government and several of its corporate employer sponsors consistently resorted to fog-fact presentation to promote and justify the WorkChoices package. The approach was supported by tactics that blocked effective communication. For instance, from the outset, an ostensibly mild-mannered but ever-more-virulent Minister issued what became a series of press releases denouncing points of critique as 'more Labour lies'. The manifest accuracy, eventually not disputed, of many points so denounced seemed to present no obstacle to the Ministerial diatribes.<sup>23</sup> That approach constructively denied anyone other than the Howard Government's partisan allies a participant relationship in the assessment and evaluation of the effects of policy and legislative proposals, or in the formulation of options that might better meet common objectives.

### III CONCILIATION AND ARBITRATION: A UNIQUELY AUSTRALIAN PROCESS

The 'modernisation of Australia's workplace relations system' brought about by the *WorkChoices Act* is a radical step, aimed at effacing the industrial umpire and restoring direct and exclusive employer-employee relationships. Our system of intervention by arbitration and conciliation was seen from the outset of last century as a 'revolutionary' measure embedded by the *Australian Constitution* in the Federation.<sup>24</sup> Compulsory conciliation and arbitration for the prevention and settlement of industrial disputes has been an institution integral to societal and

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21 John Howard, 'Closing Address to the Liberal Party Federal Council' (Speech delivered to the Liberal Party Federal Council, Canberra, 26 June 2005).

22 John Howard, above n 1, 3.

23 It may now be difficult to trace and put together the complete series of media releases issued under the title *More Labour Lies*. A later example still to be found on the Minister's web site is the Hon. Kevin Andrews MP, 'More Labour Lies on Public Holidays' (Press Release, 13 October 2005). An earlier example, of which I have a copy, misrepresented the relevance of award provisions concerning entitlements to long service leave.

24 *In Re Clancy* (1903) 3 SR 592, 599–601 (Pring J); and see discussion and cases cited in Paul Munro, above n 20, 13–17.

industrial balance in Australian culture since Federation and more than colloquially associated with 'shaping the political economy according to the national ethos of the fair-go'.<sup>25</sup> Arbitral institutions have been the fulcrum of an industrial system evolved from societal and constitutional acknowledgement of the conflicting interests of participants and their collective organisations. The provision in the Constitution for the prevention and settlement of industrial disputes by conciliation and arbitration proceeds upon an egalitarian value and principle. Literally and by necessary implication, s 51(xxxv) of the Constitution connotes the existence and recognition of participants in disputes, including employers, employees and their respective organisations within industries. By stipulating conciliation and arbitration, the Constitution ordained a relatively well-understood process and associated principles for dealing with the conflicting interests at stake. From that stipulation 'an industrial process that is uniquely Australian' has evolved.<sup>26</sup>

Both before and after Commonwealth Parliament's adoption of institutional conciliation and arbitration, state legislatures established and entrenched institutional counterparts of the Federal tribunal. The state industrial systems have played important and systemically creative roles in the evolution of the Australian arbitral framework, on occasions 'taking the lead'.<sup>27</sup>

Of at least equal importance has been the effectively symbiotic relationship between collective representative organisations and the industrial arbitration systems. Unions in particular, but also organisations of employers to a significant extent, have been shaped and nourished in roles integral to the arbitral institution. Through it, they have pursued and achieved a remarkable array of policy objectives over the past century.<sup>28</sup>

Until WorkChoices, the nearest thing to a fundamental change to the system occurred in 1993. That was when the Keating-Brereton legislative package 'changed the methodology, but not the principle of Australia's approach to industrial relations'.<sup>29</sup> That legislation and subsequent amendments to it consolidated the shift to 'bargaining at the workplace level within a framework of minimum standards *provided by arbitral tribunals*'. The 1996 amending legislation of the Howard-Reith period substantially varied the methodology, but did not abandon the principle. I have emphasised the words 'provided by arbitral

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25 Stuart Macintyre, 'Arbitration' in Graeme Davison, John Hirst and Stuart McIntyre (eds), *The Oxford Companion to Australian History* (2<sup>nd</sup> ed, 2001) 30–32.

26 Tina Crisafulli, 'Conciliation and Arbitration' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 129.

27 Committee of Review into Australian Industrial Relations Law and Systems, Senate, *Australian Industrial Law and Systems* (1985) volume 2, 1–53.

28 Ibid, listing reduction of working hours from 48 to 38 per week; annual leave increase from one to four weeks; equal pay; superannuation as a broad-based award entitlement; long service leave; the concept of a minimum wage; maternity leave and carer's leave; and redundancy pay. See also Keith Hancock and Sue Richardson, 'Economic and Social Effects' in Joe Isaac and Stuart Macintyre (eds), *New Province for Law and Order* (2004) 139; Gillian Whitehouse, 'Justice and Equity: Women and Indigenous Workers' in Joe Isaac and Stuart Macintyre (eds), *New Province for Law and Order* (2004) 207. See also ch 7 and 8, covering unions and employer organisations respectively.

29 Joe Isaac and Stuart Macintyre, *The New Province for Law and Order 100 Years of Australian Industrial Conciliation and Arbitration* (2004) 51.



tribunals' because provision of minimum standards by arbitral tribunals was integral to the principle stated in 1993. In his proselytising for the Howard Plan in 2005, Mr Andrew Robb, MP, on several occasions left out those four words when he quoted the former Prime Minister Mr Paul Keating's speech to the Australian Institute of Directors.<sup>30</sup> The proposition that WorkChoices' removal of the industrial umpire is merely an evolutionary change can be more soothingly posited with those words omitted. It is a clear instance of fog-facting, the principle from which the 'evolution' of WorkChoices can be more plausibly propagandised.

The *Constitution* and particularly s 51(xxxv) is neither old nor new. It is there. To associate what displaces it with New Testament stuff exposes the ease with which corporate predators and crucifiers may put on the sheep's clothing of biblical values. The reaction of state governments and state industrial authorities to unilateral excisions from state industrial jurisdictions and responsibilities has been a manifest disquiet. That disquiet has been expressed through challenges to the constitutional validity of the WorkChoices package by several state governments. The article of faith legislative package in WorkChoices, framed without respect for established consultative and constitutional settings, may yet reap a savage crop from the seeds scattered by its creators.

#### IV PROCESS EXTINCTION BY REGRESSIVE EVOLUTION TO KEY RESPONSIBILITIES

The content of the *WorkChoices Act* establishes a violent displacement of the process, methodology and principle of the State and Federal industrial systems. The overthrow of the pre-existing system by WorkChoices is counter-revolutionary, reprising 'the 19th-century conservative ideal of the employer-employee contract as a relation among equals that is not to be fettered by monopolistic intermediaries'.<sup>31</sup> A fundamental objective of the WorkChoices regime is to foster individualised arrangements, personal work contracts and AWAs. A shift toward individual employer-employee relationships, away from collective arrangements, is generally accepted as being a global phenomenon. That trend is less pronounced in Australia than in the UK, Canada and the United States, although it is markedly less apparent throughout the European Union.<sup>32</sup>

The publication in October 2005 of WorkChoices' detailed proposals for a new WRS demonstrated an intention that the AIRC would be left only with

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30 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 30/188 (Mr Andrew Robb MP). Compare, in the same Debate, the use of the quotation, without the omission of the crucial four words, by Mr Ron Barresi in Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 2005, 86/188 (Mr Ron Barresi MP).

31 Isaac and Macintyre, above n 29, 54. See also Breen Creighton and Andrew Stewart, *Labour Law* (4<sup>th</sup> ed, 2005) [1.19]–[1.20]; [1.55]–[1.57]; [2.57]–[2.61].

32 Paul Munro, 'The WorkChoices Legislation: A Factor in the Rationale for Founding the Australian Institute of Employment Rights' (2005) 11–12. The coverage of collective bargaining in 2004 was around 12.5 per cent of wage and salary earners in the United States; in 2002, around 38.6 per cent in the UK, around 60 per cent in Australia and around 90 per cent in Europe; and, in 2006, around 32.33 per cent in Canada: at 88.

vestigial arbitral determinative powers. It was to have transitional responsibilities for award rationalisations; a simplification and rationalisation function requiring variation of some provisions of existing awards within new statutorily restricted limits; and an 'essential services' or similar 'workplace determinations' power specific to a particular employer.<sup>33</sup> The AIRC's traditional role to hear and determine industrial disputes (the power associated with s 99 of the *Workplace Relations Act 1996* (Cth)) would be terminated and dispute settlement powers under existing awards abruptly reduced to a by-consent-only recommendatory outcome. The jurisdiction of state industrial authorities would be displaced in application to employment by corporate employers transposed to the WorkChoices regime.

The amendments now enacted go beyond the prediction in the Prime Ministerial Statement of 26 May 2005 that the AIRC would be left a residual functional role. The key role of the AIRC has been to first identify an industrial dispute and then seek to resolve it, if necessary by arbitral determination. That role and the role of establishing and maintaining a safety net of fair minimum wages and conditions to underpin collective bargaining have been extinguished. Part VI of the *Workplace Relations Act 1996* (Cth) has been repealed. The repeal effectively demolishes the primary dispute settlement and prevention role and powers of the AIRC. The AFPC supplants the AIRC, divesting it of the functions that gave it responsibility for establishing and maintaining a safety net of minimum standards to underpin collective bargaining.

After the *WorkChoices Act* takes effect, the AIRC award-making function may be broadly summarised by reference to three separate strands: that pertaining to 'pre-reform' awards binding upon corporate employers; that pertaining to 'transitional awards' binding upon non-corporate employers subject to federal awards at the time of commencement of the new regime; and that pertaining to 'notional agreements preserving State awards and preserved State agreements'.

The first role nominally involving an award determination function is the circumscribed award rationalisation function under a newly enacted Part VI. A corruption of the established meaning of 'award' in industrial legal usage is involved. An award properly so called is an arbitral determination between parties to a dispute submitted for settlement by quasi-judicial process.<sup>34</sup> The majority judgments of the High Court in the CFMEU Case were framed around an acceptance that the 1996 legislative amendments were merely withdrawing the legislative effect conferred by the former Act on awards made as the outcome of processes of conciliation and arbitration.<sup>35</sup> There seems no pretence by the *WorkChoices Act* that Part VI 'awards', binding on corporate employers, bear no connection to the conciliation and arbitration power or an industrial dispute. Under the *WorkChoices Act*, 'awards' are to become 'no longer an iterative means of resolving disputes,' but simply a reflection of minimum standards for a

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33 *WorkChoices: A New Workplace Relations System*, above n 18, 29, 39.

34 The conventional use, whether arising out of usage in relation to commercial and industrial arbitration, or out of usage in Australian statute law: Butterworths, *Australian Legal Dictionary* (1997) 101.

35 *Re Pacific Coal P/L; Ex Parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 [6], [28–29] (Gleeson CJ).

reduced list of allowable award matters prescribed in the new s 116.<sup>36</sup> The award rationalisation and simplification process, directed by the *WorkChoices Act*, is labyrinthine. It will be overlaid by rather circular guidance from non-arbital bodies: the Minister making ‘requests’ that specify the principles to be applied;<sup>37</sup> a Ministerial agent; the Award Review Taskforce; and by outcomes from determinations by the AFPC, as well as by directions prescribed by Regulations.

The most relevant provisions are to be found in the *WorkChoices Act* at pt VI div 4 ss 534–547 in relation to the AIRC’s rationalisation and simplification roles respectively. Section 90A requires the AFPC to take account of the Taskforce recommendations. Those provisions are supported by s 115A, ensuring that the AIRC must have regard to, and be consistent with, decisions of the AFPC. Section 116C completes the exclusion by stipulating that matters provided for by the AFPC Standard are not ‘allowable award matters’. The overall list of allowable award matters in s 116 is significantly reduced, especially by the deletion of the matter relating to ‘classifications of employees and skill based career paths’, formerly provided for in s 89A.

Under the *WorkChoices Act*, such an ‘award’ (which might better be dubbed a ‘post-reform rationalised industrial instrument’) will bind those corporate employers and their employees who were covered by currently existing ‘pre-reform’ awards. If the relevant corporate employer was bound at the date of commencement of the amending legislation, the ‘reform commencement’ – by a pre-reform or counterpart award, stripped of some content – applies to bind the employer and employees. No new awards other than those associated with consolidation and rationalisation can be made.<sup>38</sup> The extension of award coverage to new parties beyond that class of employers or organisations bound is circumscribed by regulatory criteria.<sup>39</sup> Other corporate employers may elect to be bound or, subject to the exercise of the tightly condition discretion, may be unilaterally bound by order of the AIRC in case by case proceedings.

Other ‘award’ making functions retained by the AIRC are effectively residual and limited to transitional periods. A period of five years is allowed in relation to ‘transitional awards’, current federal awards as they apply to any employer business entity which is not or which does not become a corporation.<sup>40</sup> During that period, the AIRC may exercise limited powers essentially directed to preventing or settling industrial disputes about an allowable transitional award matter or providing minimum safety net entitlements in such matters.<sup>41</sup> For an employer corporation, bound at ‘reform commencement’ by a state award or industrial agreement, the ‘notional agreements preserving the State award’ may be varied by AIRC to a similarly limited extent.<sup>42</sup> For such instruments, a

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36 Quoting the chairman of the Award Review Task Force, Matthew O’Callaghan: ‘Confusion Over Role of Awards under Work Choices: O’ Callaghan’, *Workforce Daily*, 7 February 2006.

37 *WorkChoices Act* s 118.

38 *WorkChoices Act* ss 118E, 119, sch 13 cl 7(3).

39 *WorkChoices Act* pt VI div 6.

40 *WorkChoices Act* sch 13 (titled ‘Transitional Arrangements for Parties bound by Federal Awards’).

41 *WorkChoices Act* sch 13 cl 29.

42 *WorkChoices Act* sch 15 cls 6, 14, 38A. Schedule 15 is titled ‘Transitional Treatment of State Employment Agreements and State Awards’.

transitional period of three years applies. The AIRC's exercise of those residual and transitional jurisdictions will also be circumscribed by similar directory requirements that parallel those applicable to post reform rationalised industrial instruments. Although sch 13 of the *WorkChoices Act* continues to use the terminology of the old Act in relation to the settlement of industrial disputes for transitional non-corporate employers, the actual functional role that remains for the AIRC is moribund.

Through Part VC, the *WorkChoices Act* leaves a number of things for the AIRC to do. It retains functions relating to restraining industrial action, overseeing secret ballots and bargaining conduct. Jurisdiction in relation to dispute resolution procedures and termination of employment are provided for in Parts VIIA and VIA respectively. It is a matter for conjecture what the AIRC will make of the opportunities available to it.

There is now little doubt that state industrial authorities will continue to assert a more than residual jurisdictional role. The New South Wales Industrial Relations Commission ('NSW IRC') has exercised power in relation to the disputed termination of employment of a 'federal award employee'.<sup>43</sup> It also asserted the availability of dispute settling powers in relation to an industrial dispute within the meaning of the *Industrial Relations Act 1996* (NSW).<sup>44</sup> That assertion was made despite resistance from the employer who pleaded that the relevant employment was covered by a federal award and therefore shielded against the exercise of state jurisdiction. The Full Bench of the NSW IRC held there was no such coverage; a Full Bench of the AIRC fairly quickly held that there was. It applied s 128 of the *old Act* to order the cessation of the proceedings before the NSW IRC.<sup>45</sup> However, under the *WorkChoices Act*, there is perforce only a partial re-enactment of the power applied by the AIRC Full Bench. In the new s 440 (mercifully to be renumbered as s 117) the AIRC has power to restrain a proceeding only if the state industrial authority is dealing with 'a matter that is the subject of a proceeding before the Commission' under the Act. There is no counterpart of the current power to restrain a proceeding in relation to an industrial dispute. Whatever might be made of a post-reform rationalised industrial instrument, it could no longer be plausibly said to be an award made in settlement of an industrial dispute. State tribunal dispute settlement functions are not likely therefore to quickly fade or be 'evolved' away. Several of the state industrial authorities have also indicated an intention to proceed with hearings of state minimum wage cases.<sup>46</sup>

Recently, Anthony Forsyth forcefully argued that the AIRC too will be supported by the more loyal of its industrial parties in weaving a substantive role

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43 *Unions NSW v Carter Holt Harvey Wood Products Australia Pty Ltd* [2006] NSWIRComm 2.

44 *Inquiry into the Boeing Dispute at Williamtown* [2006] NSWIRComm 52. This was a report on Reference by the Minister for Industrial Relations, pursuant to the *Industrial Relations Act 1996* (Cth) s 146(1)(d).

45 *Boeing Australia Ltd v Australian Workers' Union* [2006] AIRC PR 968945 (Giudice P, Lawler VP and Larkin C) [52].

46 See, eg, *Minister for Employment and Workplace Relations and Queensland Council of Unions and the Australian Workers' Union of Employees, Queensland* [2006] QIRComm B/2006/5 (Unreported, VP Linnane, DP Bloomfield and Cmr Asbury, 20 February 2006).

around its dealing with a class of referred disputes.<sup>47</sup> With perseverance and ingenuity, a significant role of that kind and scope could readily enough be derived, perhaps informally, from the interstices of the various powers that have been left to it. I endorse that view but more with hope than conviction. Reference to what the *WorkChoices Act* seeks to make of the AIRC's 'dispute resolution function' may explain my ambivalence.

That function relates to what might be termed 'local disputes', to differentiate them from industrial disputes extending beyond the limits of one state, the constitutional fount of jurisdiction. The AIRC's local dispute settlement role has always been associated with a high degree of informality. The *WorkChoices Act* uses the expressions 'dispute settlement procedure(s)' and the predominant 'dispute resolution process' without terminological distinction that is quickly apparent.<sup>48</sup> More importantly, the *WorkChoices Act* erects some real barriers across the path of any industrial parties who might wish to invoke the services of 'monopolistic intermediaries', or show a tendency to reinforce collectivist tendencies in the workplace.

In relation to dispute resolution, under a new Part VIIA the AIRC will have a role confined to a kind of mediation over a controlled class of what John Howard described as 'legitimate disputes'. That role is given in competition with alternative providers. Directory provisions of the *WorkChoices Act* are weighted against access to the AIRC's procedures.

The scheme of the dispute resolution processes provided for differentiates between three broad paths to access the AIRC function. Primary importance appears to be given to the model dispute resolution process ('MDRP') prescribed in Division 2 of Part VIIA of the *WorkChoices Act*. The MDRP will apply to an array of disputes including disputes about entitlements under the AFPC Standard; disputes arising out of a workplace agreement where the MDRP will be the default process; disputes about the application of a workplace determination, of an award, or of a notional agreement preserving a state award or agreement; and disputes over entitlements to meal breaks, public holidays or parental leave arising from Part VIA.

A party to a dispute at workplace level, to which the MDRP applies, may elect to use 'an alternative dispute resolution process' conducted by a person agreed to by the other party. In the default of agreement, a party to the dispute may notify the Industrial Registrar. That officer is to respond by providing 'prescribed information' to the parties. Presumably that information will be about process and about registered private mediation alternative dispute resolution services. If, within a 'consideration period' of 14 days from that information being given to a party, the parties are unable to agree on who is to conduct the alternative dispute

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47 Anthony Forsyth, 'Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission' (unpublished).

48 *WorkChoices Act* s 101A — 'workplace agreement must include dispute settlement procedures'; s 89B(2) — 'what the outcome is for an employee in a particular respect under the AFPC standards where a workplace agreement operates is to be resolved using the dispute settling procedure included or taken to be included in the agreement'. In each instance, the procedures referred to seem to be dispute resolution processes.

resolution process, a party may apply to the AIRC to have the process conducted by it.

After that relatively tortuous process, Division 3 of Part VIIA then sets out the Commission's powers associated with alternative dispute resolution conducted by it under the MDRP. In the absence of agreement to the contrary there will be no determinative power in the AIRC. The highest the intervening stream may go is to a kind of determination, if that term can be applied to whatever might result from the parties consenting to be bound by a recommendation. In past practice, no greater power has been needed to resolve many referred disputes.

A second alternative dispute resolution process may be used in relation to 'a dispute on a matter that arises in the course of bargaining in relation to a proposed collective agreement'.<sup>49</sup> The only procedural barrier to the AIRC conducting a dispute resolution process in relation to that kind of dispute is that 'all parties to the dispute must agree that the process is to be conducted by the AIRC'. In relation to such disputes, the powers of the Commission are very limited; for instance, it has no power to compel a person to do anything, or to arbitrate, or make an order, even if the parties agree that the Commission 'should do it'.<sup>50</sup> Apart from using its powers of persuasion, which again have often been sufficient, the Commission would be limited to making recommendations about particular aspects of the matter but only if the parties agree to such a recommendation being made.

Since enterprise bargaining was introduced in 1993, the AIRC has provided a useful service in dispute resolution processes associated with collective bargaining. The usefulness of that service to many parties is one basis upon which Forsyth predicts that there will be continued resort to the AIRC to produce similar informal outcomes. My reservation about whether parties will continue to use these dispute resolution services is related to one of the stimuli for such resort. In my experience, vigorous protected industrial action, or at least a plausible possibility of there being such industrial action, has provided the impetus for a party, usually the employer, to seek the AIRC's assistance. The *WorkChoices Act* creates formidable impediments to protected industrial action. Over time, I think it more probable than not that the taking of industrial action at all will be made the issue, not the cessation of it. There is no level playing field for collective bargaining under the *WorkChoices Act*. Sanctions against deliberate or inadvertent inclusion of prohibited content in proposed agreements, and against alleged pattern bargaining, present threshold barriers to effective bargaining periods. Alternative workplace agreement options will be more freely available than ever before. A secret ballot process must be negotiated before protected industrial action may be accessed. Employers under the *WorkChoices Act* will have more abundant opportunities than ever before to pursue strategic attrition against collective bargainers in their workplaces. It is a matter for conjecture whether many employers will continue to look to the AIRC for

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49 *WorkChoices Act* s 176G.

50 *WorkChoices Act* s 176I(5).

services in resolving bargaining disputes. Of course, necessary recourse to any function of the AIRC may provide an opportunity for such services to be offered.

The third path to the dispute resolution process conducted by the AIRC will be through a specific provision in workplace agreements. In relation to that process, the AIRC has functions and powers given to it under the workplace agreement, or as otherwise agreed by the parties.<sup>51</sup> An express process and power may be supplied through a workplace agreement. Under the two other streams there are serious obstacles to the AIRC exercising dispute resolution functions. One is the necessity for agreement – delay will be caused by the need to secure it or to establish the disagreement that is a condition precedent to taking a further step in the process. Then there will be a 14 day ‘consideration period before the MDRP can be conducted by the AIRC’. Compounding those obstacles will be Ministerial and commercial promotion of alternative dispute resolution providers.<sup>52</sup> That emerging profession will be another factor reducing resort to AIRC functions. Finally, the cost burden for alternative dispute resolution may be shuffled around by using regulations to stack the deck against resort to AIRC services.

Thus, when examined in context, the MDRP is calculated to weaken collective representation and third party intervention. Award-based dispute resolution procedures are restricted to the MDRP; it is to be the default arrangement for workplace agreements. The AIRC’s powers are restricted under all forms of dispute resolution procedure. There seems to be no provision for enforcing an outcome from an award-based MDRP process. Only a clearly framed dispute resolution process embodied in a workplace agreement might succeed in bringing about an enforceable outcome from an AIRC recommendation; such a recommendation might be sufficiently associated with the terms of the agreement.<sup>53</sup>

Although a workplace agreement may accord functions and powers in relation to dispute resolution, or such powers may be conceded by the parties to a dispute being dealt with under the workplace agreement procedure, the AIRC will have no express power in the *WorkChoices Act* to make orders. There is to be no formal command of the AIRC competently enforceable in the breach. An aggrieved party might be left to pursue a remedy for breach of whatever contract arises from the reciprocal consent to the dispute resolution process. An exception to that rule should be allowed to cover a form of determination expressly enabled by the dispute settlement clause of a workplace agreement.

The High Court in *Construction, Forestry, Mining and Energy Union v The Australian Industrial Relations Commission* (‘Private Arbitration Case’)

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51 *WorkChoices Act* s 176N.

52 See Phillip Ruddock MP (Speech delivered at the Institute of Arbitrators and Mediators Queensland, Brisbane, 22 November 2005) in which the development of a Register of Providers and promotional measures for result to it was foreshadowed.

53 See *WorkChoices Act* ss 176A–176D in relation to the process to be conducted by the Commission under model dispute resolution processes. See particularly ss 176D(7), 176I(7), 176N(2), in relation to AIRC powers in dispute resolution processes under the model process, the process applied on reference of a dispute in the course of bargaining in relation to a collective agreement, and a process conducted under a workplace agreement, respectively.

reiterated earlier authority to the effect that an expressed determinative power in an arbitrated award is an extension of that instrument and enforceable as though part of it.<sup>54</sup> There would seem no basis to distinguish that reasoning in application to an express power of determination in a workplace agreement. Paragraph 698 of the *WorkChoices Act* includes 'arbitration or other determination of rights' among the procedures of an alternative dispute resolution process under the MDRP. The powers afforded to the AIRC in ss 701 (3)(c), (4) and (5) may be read as intended to contradict the use of those 'procedures' unless, perhaps, the parties agree that the commission 'should do it'. The Explanatory Memorandum was probably correct when it stated:

The combined effect of paragraphs 176D (4) (b)-(c) and 176D (5) is that the AIRC may only arbitrate or determine a matter under the model dispute resolution process if all of the parties to the disputed agreed to it doing so. In all other cases, the AIRC would be prohibited from doing so.<sup>55</sup>

Where there is 'arbitration' in that form, or a 'recommendation by consent', there appears to be nothing in the *WorkChoices Act* that would render the recommendation enforceable as part of the workplace agreement. The amending legislation is silent.

That silence could be overcome by the Regulations. However, changes made to the Board of Reference power contradict the likelihood of any boost being given to formal dispute resolution processes. Section 116K of the *WorkChoices Act* effectively repeals the existing Board of Reference procedures under the former s 131 of the *old Act*. Such procedures have a long and relatively important history and usage as adjuncts to awards. Subsection 116K (4) of the *WorkChoices Act* reads:

A term of an award that appoints, or gives power to appoint, a board of reference ... (b) must not confer upon the board of reference a function of settling or determining disputes about any matter arising under the award.

Consequently, a number of carefully crafted Board of Reference procedures about key industrial issues will impliedly be set aside from reform commencement. Several come readily to mind. The Metal, Engineering and Associated Industries Awards competency classification adjustment procedures allow for a Board of Reference.<sup>56</sup> The power was used in a significant matter on at least one occasion, and was threatened as a means of avoiding disputes on many others. No less significant are the processes established to deal with grievances in relation to excess demands for face-to-face teaching by the State of Victoria in major teaching awards.<sup>57</sup> A similar grievance process was established for determining claims about excessive nursing workloads in several States,

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54 (2001) 203 CLR 645, [27] – [31].

55 Explanatory Memorandum, above n 3, [2324].

56 *Metal, Engineering and Associated Industries Award* cl 5.1.3(g) (providing for a Board of Reference in relation to competency standards implementation).

57 See *AEU v State of Victoria*: Print M, 3409, (11 July 1995), which gives some of the history of a series of proceedings that culminated in the making of an award for a Board of Reference procedure.



including Western Australia and Queensland.<sup>58</sup> Each of those provisions was awarded by a Full Bench. The procedures were framed to allow industry-wide perspectives about training or other considerations to influence outcomes on issues arising in particular workplaces. If any of them were still extant at reform commencement, the *WorkChoices Act* has operated to make them void. Conceivably, for such employers, a workplace agreement might be devised to avoid the loss of a process about which a fair degree of consensus may have been developed. Realistically, there seems little likelihood of such processes surviving *WorkChoices*.

## V DISMISSAL WITHOUT VALID REASON: THE AUSTRALIAN WAY OF REFORMING THE ILO PROHIBITION

The important AIRC jurisdiction over termination of employment will survive *WorkChoices*, albeit with remedial orders less accessible to applicants. In the year ending 30 June 2005, the AIRC dealt with a total of 6707 applications relating to termination of employment.<sup>59</sup> The overall number of applications before both federal and state tribunals for the year ending 30 June 2004 amounted to 15 977. One fog-fact relied upon by the Howard government and its supporters was the conflation of remedies for ‘unfair termination’ of employment with those for ‘unlawful termination’ of employment.<sup>60</sup> A statistic regularly reported upon in the AIRC’s Annual Reports gives a balanced perspective of the relative utility of the two remedies. In the period 1996–2005, only 163 of 63 439 applications lodged in the AIRC have been certificated as relying upon unlawful grounds.<sup>61</sup>

Anyone familiar with the origins of termination of employment jurisdictions, the relatively small scale on which they are now exercised and their nature should be surprised by the compulsive efforts to obliterate or curtail them. Industrial jurisdiction over termination of employment was asserted by industrial tribunals from the time of formation of the state tribunals in the first decade of the 20<sup>th</sup> century.<sup>62</sup> That jurisdiction was expanded in relation to individual applicants as a result of the adoption of the International Labour Organisation’s *Convention Concerning Termination of Employment at the Initiative of the*

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58 *ANF v Minister for Health (WA)* Print R912571 (17 December 2001). In relation to Queensland public sector nurses, see *Queensland Department of Health v ANF* [2003] Print R931289 (16 May 2003).

59 Australian Industrial Relations Commission, *Annual Report of the President of the Australian Industrial Relations Commission 2004–2005* (2005) chart 1, 14.

60 The distinction is crystallised in *WorkChoices Act* s 170CE(1)(a)–(b). A remedy sought on the ground that the termination of employment was harsh, unjust or unreasonable is informally labelled within the class of ‘unfair’. A remedy sought on the ground that a duty prescribed in the Act has been breached, including the duty not to dismiss for a prohibited reason, is within a class of ‘unlawful termination’ established by C of pt VIA.

61 The ‘certificate’ arises from the process required under *WorkChoices Act* s 170CF(2)(a), still required at the conclusion of the conciliation phase before the AIRC. More than 78 per cent of matters are finalised at or before the conciliation stage: Australian Industrial Relations Commission, *Annual Report* (2005) Table 7.

62 David Ross Hall and K F Watson, *Industrial Laws of Queensland* (2<sup>nd</sup> ed, 1989) 55.

*Employer*.<sup>63</sup> From the 1970s onward, first the states and, by 1993, the Commonwealth jurisdictions provided for remedies broadly aligned with that International Labour Organisation ('ILO') standard. Australia is now bound as a signatory to the Convention. That Convention declares an ILO 'standard of general application' and requires in article 4 that:

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.<sup>64</sup>

Three principal changes to the existing regime are to be brought about by WorkChoices. The first is the attempted extinction or transposition of State industrial tribunal jurisdiction over all terminations of employment by corporate employers after reform commencement.<sup>65</sup> There is a consequential subtraction from the remedies available to employees under State industrial systems. Also, it appears that the new s 170CAA, when read with s 170CB(3) as amended, operates to ensure that all Australian employees are eligible to lodge applications alleging unlawful termination of employment in breach of the duties in the WorkChoices Act pt VIA, div C.<sup>66</sup> The corresponding provisions of the former Act probably extended to employees in the ordinary sense but the right of an employee to make an application was obscured by restrictions applicable to eligibility to make an application for a remedy against unfair termination of employment.

The second major change is the removal of an employee's right to make an application for a remedy against unfair termination by an employer with fewer than 100 employees at the date of termination.<sup>67</sup>

The third change operates in relation to all employees within the WorkChoices jurisdiction. The effect of the new s 643 is that an eligible employee is prohibited from lodging an application on grounds of unfair termination 'if the employee's employment was terminated for genuine operational reasons, or for reasons that include genuine operational reasons'. The definition of 'operational reasons' for that purpose means 'reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business'.

It follows that an employee's application is barred on jurisdictional grounds if the reason given for the termination of employment is 'operational'. Notwithstanding an employer's reliance on that jurisdictional bar, an employee may contest the employer's jurisdictional objection by pressing an application. In such circumstances, the AIRC will be obliged to hear and determine the

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63 Still reproduced as *WorkChoices Act* sch 10.

64 *Convention Concerning Termination of Employment at the Initiative of the Employer*, opened for signature 22 June 1982, ILO 158, art 4 (entered into force 23 November 1985).

65 *WorkChoices Act* s 170CAA, as explained in Explanatory Memorandum, above n 3, [2063]. *Amending Act*, sch 4, item 7, titled 'Transitional and Other Provisions' makes clear that the amending legislation applies only in relation to terminations of employment which occur after reform commencement, regardless of the date when the employment commenced. See also Explanatory Memorandum, above n 3, [3818–3819].

66 Explanatory Memorandum, above n 3, [2063].

67 *WorkChoices Act* s 170CE(5E).

jurisdictional question. However, the hearing required under s 170CEA(6) must be about whether ‘the operational reasons relied upon by the respondent were genuine’.

That is a much narrower focus than the question of whether the termination of employment was genuinely made for those reasons. The wide definition of ‘operational reasons’ is to be read together with the jurisdictional prohibition of applications. The jurisdictional test goes to whether ‘the employee’s employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons’. Thus, the crucial issue is the genuineness of the operational reasons alleged by the employer for the dismissal of the employee. The emphasis on that issue contrasts markedly with the focus of the test for redundancy elaborated by the High Court in *Amcor v Construction, Forestry, Mining and Energy Union*.<sup>68</sup> It asked whether ‘the job’ or ‘the position’ was no longer required to be performed by anyone. The definition of operational reasons in the *WorkChoices Act* goes to another, much wider ground. ‘Operational reasons’ imports notions of economic or structural expedience for the undertaking; neither those considerations, nor the genuineness of reasons relying upon them, are linked to cessation of the work being done by, or the job of, the particular employee.

It follows that *WorkChoices* fails to give effect to the ILO Convention’s prohibition of termination of employment without a valid reason for such termination based on the operational requirements of the undertaking. The *WorkChoices Act* creates a barrier to jurisdiction in the tribunal. It substitutes the employer’s ‘operational reasons’ for the ILO’s ‘operational requirements of the undertaking’. It removes the third-party process, available under the former Act, by which the objective existence of a valid reason based on those requirements in application to the particular employment could be tested and determined.

## VI TAKING DOWN THE SAFETY NET AND ‘FAIRNESS’ PRINCIPLES

Of the matters to which I have drawn attention, the most important in my view is the removal of the AIRC from what was its most substantive determinative function – ‘establishing and maintaining a safety net of fair minimum wages and conditions of employment’. An ad hoc agency of hybrid exotic origin, the AFPC, is to adjust the ‘standard Federal Minimum Wage’ (‘FMW’) and set and adjust ‘special FMWs’. The inaugural standard FMW is established by s 90Q at \$12.75 per hour, the hourly rate equivalent of the Minimum Wage for \$484.40 per week determined by the AIRC Safety Net Review to apply after June 2005. By inference, the AFPC will adjust the standard FMW by reference to criteria appropriate to a ‘single adult minimum wage’. It will also adjust classification wage rates, junior and training rates and default casual loadings of 20 per cent.<sup>69</sup>

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68 *Amcor v Construction, Forestry, Mining and Energy Union* (2005) 214 ALR 56.

69 *WorkChoices Act* pt 1A div B, entitled ‘AFPC’s wage-setting function’; pt VA div F, entitled ‘Federal Minimum Wages’ and defining the standard FMW for an employee who is not a junior, trainee, or subject to disability or piece-rate conditions for which a special FMW will be set.

Parliament itself sets directly, by statute, other components of the AFPC Standard. The AFPC Standard 'provides key minimum entitlements of employment of employees to whom it applies' and 'prevails over a workplace agreement or contract of employment to the extent to which it provides a more favourable outcome for the employee'. A term of a workplace agreement or contract has no effect to the extent it purports to exclude the Standard.<sup>70</sup>

The rationale for creating the AFPC should be assessed against the background of s 88B of the *old Act*. The AIRC, with the support and collaboration of state industrial authorities, has developed and maintained a safety net of minimum wages and conditions. It has done so with care and deliberative consideration. The quality of the performance of that function has been ignored or undervalued in the debate about WorkChoices.

For over a century, the relevant tribunals and their predecessors have been engaged in the implementation of variations on a 'fairness principle'. In the public debate about WorkChoices, few seem to be concerned to establish the facts, or even listen to explanations of how that principle has been implemented. The statutory functions and performance of the AIRC and state tribunals in implementing the fairness principle substantively contradict the AFPC's capacity to be accepted as having either the independence or the standing of the arbitral predecessors whose functions it cannibalises. Moreover, there is more than good reason to doubt that it will meet the objectives ostensibly set for it as the factotum of the government which established it.<sup>71</sup>

The substitution of the AIRC with the AFPC will be complemented by other WorkChoices measures. Perhaps the most important is that, as I understand it, WorkChoices effectively eliminates the safety net, although the expression 'safety net' continues to be used. For example, the objects of the *WorkChoices Act* include the promotion of economic prosperity and welfare by providing an 'economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by the Act; and, by ensuring that awards provide minimum safety net entitlements for award reliant employees' consistent with AFPC decisions.<sup>72</sup> WorkChoices 'awards' are to serve the purpose set by s 115 of the *WorkChoices Act*, ensuring that minimum safety net entitlements are protected through enforceable awards.

However, the meaning and use of the term 'safety net' is strained by the application of it in the changed context of the new regulatory system. The usage in the WorkChoices Act is at great variance from the use of the expression in the former Act. The AFPC Standard is mandated by statute as a universally applicable minimum. That Standard ordains minima in respect of wage rates set by the AFPC, leave (annual, personal and parental), casual rates percentage loading and not more than a '38 hour per week averaged over a specified averaging period of no longer than 12 months as ordinary time hours' maximum

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70 *WorkChoices Act* pt VA ss 171–173.

71 Russell Lansbury et al, *The Federal Government's Industrial Relations Policy: Report Card on the Proposed Changes* (2005) University of Sydney <<http://www.econ.usyd.edu.au/wos/IRchangesreportcard/>> at 10 April 2006.

72 *WorkChoices Act* ss 3(c), 3(g).

plus 'reasonable additional hours'.<sup>73</sup> As we have seen, a workplace agreement is void to the extent that it seeks to contract out of the Standard or of certain 'guaranteed' conditions or, if it purports to make provision in less favourable terms, s 318 prohibits an employer from contravening a term of the AFPC Standard in respect of guaranteed maximum ordinary hours, annual leave, personal leave and parental leave. A civil penalty may be recovered for contravention.

No test for reduction in overall terms and conditions of employment against a safety net of fair minimum wages and conditions is to be applied in future. No calculation of the kind currently made to test for disadvantage in relations to terms and conditions of employment for purposes of the workplace agreement approval process will be or need be made by anyone. The 'no disadvantage test' has been done away with by the *WorkChoices Act*. Actual or putative loss of entitlements, attributable to pattern of working time restrictions, loadings and allowances, hitherto embedded by arbitral award as conditions of employment that form part of the safety net, will be relevant only as award minimum entitlement provisions. The bargaining process may result in a protected award condition being 'mentioned' in a resultant workplace agreement. Protected award conditions are terms of an award about the following protected allowable award matters: rest breaks, incentive-based payments and bonuses, annual leave loadings, observance of public holidays, monetary allowances for expenses, skills and disabilities, loadings for working overtime or shifts, penalty rates and outworker conditions.<sup>74</sup> If any such condition is adopted or modified in a workplace agreement, it will operate by force of the agreement as modified. If there is no mention and no specific exclusion, the seven types of award conditions protected 'will continue to apply'.<sup>75</sup> That assertion in *WorkChoices* pamphleteering carries the label 'protected by law'.

The ascertainment of what particular award right is 'protected', in relation to what particular employees, and to what working arrangements of the relevant employer entity sought to be bound, will be problematic. Under the *WorkChoices Act*, there is to be a reshuffle of existing federal awards, State award agreements and a hierarchy of new agreements. The new transmission of business provisions and issues about the application of particular agreements and awards entail contingency.

Certainly, it is a long stretch to apply the term 'safety net' to the processes for which *WorkChoices* employs it. Nor does the adumbration of minimum safety net entitlements, as a policy directive for the AIRC's future adjustment of existing awards, convert the resultant 'award' provision into a safety net. A pre-reform award will become a prescription of minimum entitlement for those who remain bound; the existence and level of such entitlements may provide an

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73 *WorkChoices Act* pt VA s 91C, titled 'Guarantee of maximum ordinary hours of work'.

74 *WorkChoices Act* s 354.

75 *WorkChoices: A New Workplace Relations System*, above n 18, 22; *WorkChoices Act* ss 101B, 101C. See also *WorkChoices Act* s 103R, titled 'Consequence of termination of agreement-application of other industrial instruments'.

incentive for or against a workplace agreement, but they have no function as a safety net for the bargaining outcomes under it.

## VII STREAMLINING FORMATION AND THE OPERATION OF, BUT NOT COLLECTIVE NEGOTIATION FOR, WORKPLACE AGREEMENTS

By a collateral set of amendments, the *WorkChoices Act* will effectively eliminate the ‘approval’ and certification process for workplace agreements. The pre-reform system gave the AIRC overall responsibility for invigilating observance of conditions regulating the formation of a collective workplace agreement and compliance with safety net and other requirements. From reform commencement, a substitute for that function is to be performed by the Office of Employment Advocate (‘OEA’). The OEA is to promote AWAs and accept lodgement of them, along with all other workplace agreements through a process ‘streamlined’ to permit such agreements to operate from lodgement.<sup>76</sup> The relevant employer’s declaration will ordinarily suffice as evidence of compliance with the conditions for entry into an agreement.<sup>77</sup> The conditions precedent to the formation of an agreement have been made significantly less demanding. Seven days notice of the terms of a proposed agreement, less in some circumstances, is now to be required prior to securing approval of it by employees.<sup>78</sup> Section 340 of the *WorkChoices Act* is all that remains of substantive and regulatory direction about the approval of an employee or union collective workplace agreement. It contains virtually no directory provisions about the ascertainment of a valid majority vote or majority decision to approve such an agreement. An employer greenfields ‘agreement’ will be approved by no employee or union.<sup>79</sup> It is made upon lodgement by the employer, whereupon it will have the force of law, binding whatever employees may be recruited if the project to which it applies does commence.

The content of a workplace agreement will also be regulated by the statute, with some content mandatory and some prohibited.<sup>80</sup> The AFPC Standard operates independently of the content of an agreement. As we have seen, the *WorkChoices Act* does not require that an agreement’s content be no less favourable than the AFPC Standard. The Standard prevails over an agreement that fails to match a condition prescribed by it. Confusingly, s 353 does stipulate that a workplace agreement must include procedures for settling disputes; in apparent contradiction it also stipulates that, if it does not, the agreement will be taken to include the model dispute resolution process prescribed in Part VIIA of the *WorkChoices Act*.

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76 *WorkChoices Act* s 83BB(1); *WorkChoices A New Workplace Relations System*, above n 18, 19–24.

77 *WorkChoices Act* s 99B.

78 *WorkChoices Act* s 98.

79 *WorkChoices Act* ss 96D, 96G(e), 100.

80 *WorkChoices Act* pt VB, div 7.

A prohibition of non-pertaining terms was foreshadowed in the Howard Government's publication *WorkChoices: A New Workplace Relations System*.<sup>81</sup> Prohibited content in a workplace agreement is to be a term of art, the content of which will not be fully revealed until the Regulations are promulgated. However, it appears to be the Government's intention that prohibited content will be initially confined to the subject matters listed in *WorkChoices: A New WRS*.<sup>82</sup> Accordingly, the Regulations will probably contain a prohibition of terms that do not pertain to the employment relationship or that is an objectionable provision within the meaning s 810 of part XA, entitled 'Freedom of Association'. The Regulations will also disallow terms that prohibit AWAs; restrict use of independent contractors or labour-hire arrangements; allow for industrial action during the term of an agreement; provide for trade union training leave, bargaining fees to trade unions or paid union meetings; provide that any future agreement must be a union collective agreement; mandate union involvement in dispute resolution; provide a remedy for unfair dismissal; and other matters prescribed by regulation or legislation. The ban on a term that provides a remedy for unfair dismissal should not escape comment. A provision in a workplace agreement for a just cause dismissal and binding determination procedure will be void and prohibited. Such provisions have a long history in various industrial instruments for public sector workers in Australia.

Terms that contain prohibited content may be removed by the OEA; they will be unenforceable and will not render the agreement invalid. However, lodgement of an agreement containing such prohibited content will be unlawful conduct, attracting a civil penalty of up to \$33,000.<sup>83</sup> *WorkChoices* elevates the OEA to the effective position of censor of the content of agreements, an exceptional instance of the new WRS allowing third-party intervention in relationships between employer and employee. The objects of the *WorkChoices Act* ensure that the OEA will live up to an already present perception of that office as a partisan promoter of AWAs. If prohibited content as delineated in the term is expected, the OEA will rule on what he or she thinks pertains or does not pertain to the employment relationship. Fortunately, enforcement of compliance responsibilities associated with breach of agreements or awards have been passed to the Office of Workplace Services, a Ministerial agency.

## VIII TRANSPORTING BUSINESSES, JUDICIAL JURISDICTIONS AND CONTRACTORS

Several other features of the *WorkChoices Act* will add impact and momentum to the changes I have discussed. Since 1914, Commonwealth legislation has extended the binding effect of awards and industrial instruments to follow a

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81 *WorkChoices A New Workplace Relations System*, above n 18.

82 Ibid 23; reiterated by departmental witnesses appearing before a Senate Estimates Hearing: Evidence to Workplace Relations and Education Legislation Committee, Parliament of Australia, Canberra, 16 February 2006, 121.

83 *WorkChoices A New Workplace Relations System*, above n 18, 24.

transmission of business.<sup>84</sup> The application of 'transmission of business' provisions to contemporary awards and workplace agreements has given rise to substantial litigation. Outsourcing, hiving off and organisational restructuring to minimise labour costs has become ubiquitous. The High Court recently narrowed the class of employers bound on a transmission of business.<sup>85</sup> Part VI AA of the *WorkChoices Act* effectively removes the extension of an instrument generally to bind the successor employer in relation to the class of employment covered by the instrument. The binding operation of instruments will become a form of personal right attaching to particular employees of the former employer. The binding effect of an industrial instrument will thereby be restricted to those employees whose employment is transferred to the transmittee employer, and then only for a period of 12 months.<sup>86</sup> That in personam right may prove to be akin to the mark of Cain for an employee who resists absorption after that term. Interpreting and applying the new transmission of business provisions will be among the challenging jurisdictional tasks conferred for the first time on the Federal Magistrates Court ('FMC').<sup>87</sup>

A kind of zero-sum game, if not a perception of the mark of Cain about the Federal Court of Australia, seems to be implicit in the extent to which the FMC has been vested for the first time with jurisdiction partly coextensive with that of the Federal Court. A note to the definition of 'court' in s 4 of the *WorkChoices Act* provides that, for various provisions of the Act, 'court' means the Federal Court or the FMC. This is indicated by definitions that apply for the purposes of those provisions.' Part IX elaborates upon the allocation of powers between the Federal Court and the FMC. The FMC may interpret awards and certified agreements (ss 413 and 413A). Both courts are to be vested with exclusive jurisdiction in relation to proceedings for a pecuniary penalty (s 414). Until 2005, the FMC had virtually no jurisdiction over industrial matters. It is now to have jurisdiction over applications in respect of:

- unlawful termination of employment;<sup>88</sup>
- functions of the court in relation to workplace agreements under Part VB generally, predominantly civil penalty matters relating to coercion and duress, inclusion of prohibited content and avoiding or varying the terms of an agreement;<sup>89</sup>
- civil penalty and remedial provisions including enforcement relating to contravening the AFPC Standard and generally;<sup>90</sup>

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84 *Conciliation and Arbitration Act 1904* (Cth) s 29.

85 Joe Catanzariti, 'Post *Ancor* and *Gribbles*: A New Era for Succession of Business and Redundancy Law?' (2005) 10(2) *Deakin Law Review* 394, 394.

86 The *WorkChoices Act* pt VIAA, entitled 'Transmission of Business Rules', covers the transmission of AWAs, collective agreements awards and parts of ABC Standards binding on particular employees (div 6). Part VIAA is extended by the *WorkChoices Act* to all other classes of industrial instruments that operate after the reform commencement: see, eg, sch 13 ss 94, 101A.

87 *WorkChoices Act* s 579.

88 *WorkChoices Act* s 170CD.

89 *WorkChoices Act* ss 321, 400, 407–411.

90 See, eg, *WorkChoices Act* ss 94ZZC, 129A, 129C, 128.



- applications for various forms of relief in relation to what are likely to be intensively litigated restrictions as a resort to industrial action by unions or employees asserting collective positions.<sup>91</sup>

The impact of the grant of concurrent jurisdiction to the FMC will be considerable, if not monumental. My superficial and incomplete list of new jurisdictions is sufficient to demonstrate that industrial litigants will have more ready access and exposure to judicial remedies through the FMC than has been the case with the Federal Court in the past. The personnel of the FMC will face a steep learning curve about industrial matters. Surprisingly, the Federal Court retains exclusive jurisdiction over unfair contracts (now in the *WorkChoices Act* s 352B). Section 47 of the *BCII Act* invests a concurrent jurisdiction over unfair contracts with building contractors in the FMC. Perhaps the pending legislation for an Independent Contractors Act will address that apparent anomaly.

That pending legislation will introduce another dynamic of the new WRS. The legislation is to be introduced later this year to implement a form of pre-election commitment. The content of the legislation has not been exposed other than through a speculative discussion paper circulated in February 2005 by the Minister.<sup>92</sup> It may properly be inferred from that and related material that the legislation will conclusively exclude from 'industrial regulation' a defined class of independent contractors. The probability is that the bulk of the definition will be supplied by simply but strictly limiting the class caught by the *WorkChoices Act* to any person who is an 'employee within its ordinary meaning'. That would mean only those persons who fall within the common law definition, or perhaps a codified version of it, will be subject to the industrial regulation of the *WorkChoices Act*. Virtually all other contracts for services or work might then be statutorily and conclusively labelled as independent contractors. The effect would widen an existing gap in the application of legislation between employees and the quasi-employment of dependent workers, shepherding them further away from industrial regulation.

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91 *WorkChoices Act* s 106, pt VC, div 6.

92 Kevin Andrews, above n 11. See also Paul Munro, above n 20, [13]–[17].

## IX THE NEW WORKPLACE RELATIONS SYSTEM AS A DYNAMIC IN AUSTRALIA'S LABOUR MARKET

From 2006, collective or individual bargaining will not be within a *framework of a safety net of minimum wages and conditions provided by arbitral tribunals*. The principle that linked fairness and the arbitral award process for over a century will have been jettisoned, along with much of the methodology applied since 1993. Agreement-making will be regulated to constructively require a minimum content consistent with the basic level of the Standard directly legislated, or determined by the AFPC. That Standard will prevail in default of matching benefit under the workplace agreement. For employees who meet resistance in securing an agreement to more than the Standard minimum conditions, the workplace agreement process has been recalibrated to handicap effective collective bargaining. Those changes are to be superimposed on a streamlined process for giving effect to individual, collective or ostensibly collective industrial agreements. Most private sector employment, and a significant proportion of public sector employment also, will be exempted from unfair termination of employment remedies. The AFPC will displace much of the institutional framework associated with the fair minimum wages and conditions provided by arbitral tribunals.

Associated with those and the related WRS changes has been a frank acknowledgement that their purpose and effect will detract from well established fairness principles. The purpose of the AFPC is to make small increases that will be lower and less frequent than if the AIRC had been making the decisions:

Membership of the AFPC will not be for the fainthearted. It will have to recommend wage increases that are lower, or more narrowly based, than would have been granted by the AIRC. If the AFPC does otherwise, then setting it up would have been a pointless exercise.<sup>93</sup>

Other process changes I have described will also serve to eliminate or reduce the emphasis given by Federal and State legislation to 'fair go' principles and process. A departure from fairness standards is manifest in the rhetoric and rationale associated with the proposals overall. The Business Council of Australia (BCA) confidently contends that the achievement of fairness for low-paid workers should not be seen as a function of wage fixation at all. In relation to a recent report commissioned from Access Economics, the BCA pointed out that:

In essence, Australia has focused its workplace relations policies on fairness, rather than prosperity since the Harvester decision in 1907. Yet economists long since agreed that it makes sense for the private sector to create wealth and for the public sector to redistribute it.

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93 Robert Skeffington, 'The fair-pay challenge: If the Government is not careful, the new wage setting Commission will bring more of the same', *Business Review Weekly* (Australia), 11–17 August 2005, 32. See also Paul Munro, 'The future of the AIRC ... and Industrial Relations' (Paper presented at the Workforce Conference, Sydney, 22 September 2005).

Governments usually fail when they impose rules and regulations on employees with the aim of promoting fairness ... Minimum wages do next to nothing in alleviating poverty anyway ... if we want to improve fairness, we should use the tax transfer system – that is its very purpose. Every year the Federal Government collects \$200 billion and redistributes it through our tax and welfare system. If we want to make low income workers in low income families better off, then we shouldn't try to do it by having a high minimum wage. That just prices people out of jobs. Rather, we should follow the path long since blazed by the likes of the UK and the US, with tax and benefit breaks for those who want to move from welfare to work, or to work more hours than they are.<sup>94</sup>

After the 2004 election, the policies advocated by the BCA have inspired – indeed perhaps captured – Mr Howard's coalition government. Discarding the AIRC role in setting the minimum wage entails the overthrow of many other rules and regulations promoting fairness. The euphemistic expression of that purpose in *WorkChoices* was to reduce the number of 'rules and regulations that make it hard for many employees and employers to get together and reach agreement'.<sup>95</sup> Ironically, the *WorkChoices Act* is a raft of new rules and regulations. The re-regulation is framed to undercut the ability of unions to secure and maintain collective agreements, to organise industrial action and to operate as an effective presence and voice for employees in their workplaces.

For a number of reasons, there has been widespread concern across the Australian community about the nature and extent of the effects of *WorkChoices*. Understandably, the focus has been on the likely effects on disposable income of particular employees. Much less attention has been directed to effects likely to be associated with the dismemberment of the aggregate federal system of conciliation and arbitration of industrial disputes. I have placed myself among a number of commentators who have sought to focus public discussion on the institutional effects. In that telling, and I believe it to be accurate, the proposed changes represent a very abrupt step toward what Bob Hawke has deplored as the 'Americanisation of industrial regulation'.<sup>96</sup> Professor Andrew Stewart has identified the step as a rhetorical alignment with the ideology of a free labour market: the beginning of a 'revolution that will take Australia just that much further down the road to a US-style system, in which union agreements stand as islands of collectivism in a sea of individual arrangements'.<sup>97</sup> Accepting that to be so, now more than ever it will become necessary to develop a better understanding of the contemporary model of American labour market regulation. In the meantime, effort would also be well directed to testing and seeking to understand why emulation of it should lead Australia to dismember institutions unique to its polity.

The dynamics of *WorkChoices* will operate upon an Australian industrial regulatory system and labour force which is already relatively flexible and responsive to market pressures. It may be useful to have a snapshot of the current

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94 *Locking in or Losing Prosperity: Australia's choice* (2005) Business Council of Australia <[www.bca.com.au/content.asp?newsID=97546](http://www.bca.com.au/content.asp?newsID=97546)> at 11 April 2006.

95 *WorkChoices A New Workplace Relations System*, above n 18, 7.

96 Robert Hawke, above n 13.

97 Andrew Stewart, 'Workplace Relations: The Revolution Begins Here' (2005) *New Matilda* <<http://www.newmatilda.com/home/articledetail.asp?ArticleID=685>> at 9 April 2006.

system as an aid to establishing that perspective. In one sense, all persons for whom personal service work is performed under some form of direction may be classed as the employer of the service provider. A very wide mix of circumstances is caught within the class: natural persons, corporations, a variety of associations and partnerships and governments and their agencies. To a lesser extent, 'employees' as a class also comprise persons drawn from a diverse array of circumstances. The diversity of employment situations is best approached by having regard to the forms of employment, then overlaying the terms of engagement. An understanding of those categories is important in assessing the impact of the proposed changes upon employers and employees generally. It also throws some light upon the likely benefit of the three and five year term WRS transitional arrangements for an increasingly transient workforce.

As to forms of employment, assorted data sources indicate that at around the turn-of-the-century, 2000 to 2002, 20 per cent of labour was supplied by casual employees, five per cent by fixed term employees and 20 per cent by non-standard employment covering owner-managers, and own-account workers, over half of whom were self-employed 'independent contractors'. Standard workers on full-time or part-time ongoing contracts of employment accounted for around 57 per cent. Labour hire employees constituted around three to four per cent of employment, but that sector has been growing consistently at around 15 per cent per annum. It accounted for about 3.7 million placements annually in mid-2002.<sup>98</sup>

That breakdown shows the relative incidence of standard and non-standard employment and the use of casual and fixed term placement. The data also shows a relatively high degree of direct or indirect reliance on award provisions. About 20 per cent of employees were directly reliant upon awards for pay adjustments; approximately 40 per cent were reliant upon registered or unregistered collective agreements. By reason of the safety net, most employees covered by collective agreements would also have had some continuing dependency upon aspects of existing federal or state awards.

A third parameter is the pattern of employment growth across industries. I have not reviewed recent data, but I doubt that it would show other than that retail, hospitality and service industries account for a high proportion of the growth of low-skilled labour, particularly juniors. In 1999, the Junior Rates Inquiry pointed to a general unanimity to the effect that 'employment for youth is relatively scarce, increasingly casual part-time, fragmented and dependent upon retail and service industries.'<sup>99</sup>

In relation to the labour force generally, Wooden has noted that ABS surveys disclose that in 2004 some 39 per cent of private sector employees had their pay

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98 Paul Munro, 'Forms of Employment' (Paper presented at the Industrial Relations Commission of New South Wales Annual Conference, Sydney, 28 April 2005) [6]–[9], citing Anthony O'Donnell 'Non Standard Workers in Australia: Courts and Controversies' (2004) 17 *Australian Journal of Labour Law* 89, 112–116; John Burgess, Julie Lee and Martin O'Brien, 'The Australian Labour Market in 2003' (2004) 46 *Journal of Industrial Relations* 141, 146–147; Patrick Laplagne, Maurice Glover and Tim Fry, *The Growth of Labour Hire Employment in Australia*, (Staff Working Paper, Productivity Commission, February 2005) X11.

99 Australian Industrial Commission, *Junior Rates Inquiry: Report of the Full Bench Inquiring Under Section 120B of the Workplace Relations Act 1996* (4 June 1999) [5.2.17].

set by unregistered individual agreements.<sup>100</sup> On those figures, around 20 per cent of employees in both public and private sector were reliant on awards for pay rises (24.7 per cent in the private sector). Around 40.9 per cent were reliant on registered or unregistered collective agreements (27.4 per cent in the private sector). Under the pre-WorkChoices system for a safety net underpinning collective bargaining, it follows that around 60 per cent of employees were in some way reliant upon the award safety net, if only because it represented the no-disadvantage test floor for the employee's existing conditions. At that time, about 2.6 per cent of employees were reliant on individual registered agreements, predominantly AWAs.

Against that background, it is manifest that the new WRS will only increase an employer's existing capacity to use certain types of labour more flexibly. Business activities in which peak workloads can be adequately met by just-in-time workers are likely to benefit. It would seem reasonable to expect that there will be increased competitive pressure on businesses that use standard forms of employment. Existing businesses in a position to exploit lower cost or more flexible labour sources will apply that pressure. Marketing pressures from entrepreneurial labour hire and new workplace agreement specialists will magnify it. Such activities will no longer be countered by the AIRC monitoring the formation and content of the various forms of collective agreement.

## **X THE REGULATORY SYSTEMS TARGETED BY THE NEW WRS**

Building on that outline of working patterns and industrial coverage, a snapshot of the operation of current regulatory systems may be supplied by caseload statistics. I have drawn upon and reworked some figures from the AIRC Annual Report for the period 30 June 2003 to 30 June 2004 and the corresponding reports for the State Industrial Authorities. The AIRC Annual Report 2004–2005 shows marginally lower figures overall. AIRC and State Annual Reports tabulate the nature of applications filed under broad headings. The material is at best a form of shorthand, but it points to the type of jurisdictional powers exercised and the relative concentration of them.

The current work of the AIRC can be grouped around five broad headings. The headings do not reflect the weighting of higher function workloads. A significant proportion of certified agreements require no more than relatively routine processing. Some dispute or conciliation matters involve protracted conferencing, not much of which can be caught within a statistical record. Only the West Australian statistics list 'conferences' as a distinct case-load item.

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100 Mark Conlon Wooden, 'Australia's Industrial Relations Reform Agenda' (Paper presented at the 34<sup>th</sup> Conference of Economists, Melbourne, 26 September 2005).

## CASELOADS 2004/5

| Type of matter                                        | AIRC          | (State IRCs)  | Total         |
|-------------------------------------------------------|---------------|---------------|---------------|
| Award matters                                         | 1964          | 1650          | 3614          |
| Agreements                                            | 10 490        | 2032          | 12 522        |
| Dispute resolution                                    | 3494          | 2456          | 5 950         |
| Unfair/unlawful terminations; etc                     | 7044          | 8933          | 15 977        |
| Registered organisations                              | 87            |               |               |
| <b>All types</b> (including miscellaneous not listed) | <b>24 134</b> | <b>17 666</b> | <b>41 800</b> |

Total Certificates issued solely relating to unlawful termination grounds, since 1996, for applications under Section 170CE [163 for 2004–2005 or 0.25 per cent of applications processed].

‘Same type’ comparisons for the State Industrial Authorities are crude extrapolations. The degree of uniformity between respective jurisdictions has been much understated but broad statistical headings may oversimplify and exaggerate the degree of such uniformity. Despite those reservations, the data extracted is sufficient to give a general impression.<sup>101</sup>

## STATE INDUSTRIAL AUTHORITIES

| Matter type            | Qld         | WA          | NSW           | SA          | TAS         |
|------------------------|-------------|-------------|---------------|-------------|-------------|
| Unfair terminations    | 1575        | 1467        | 4589          | 1018        | 284         |
| Award related          | 196         | 189         | 954           | 244         | 67          |
| Agreements             | 1056        | 315         | 349           | 237         | 75          |
| Harsh/Unfair contracts | 29          | N/a         | [713]         | N/a         | N/a         |
| Disputes               | 504         | 425         | 1221          | 117         | 189         |
| <b>All types</b>       | <b>4099</b> | <b>2660</b> | <b>[8385]</b> | <b>1880</b> | <b>4099</b> |

The fuller tables, from which that material is extracted, demonstrate a significant diversity across the federal and State systems. That diversity should have been taken into account in any discussion of national regulatory integration. For instance the ‘unfair contracts’ jurisdictions in New South Wales and

101 Australian Industrial Relations Commission, *Annual Report of the President of the Australian Industrial Relations Commission: 1 July 2003 to 30 June 2004* (2004) 49. The details of state case loads are derived from Annual Reports for 2003–2004 available at the following websites as follows (except for NSW IRC from hard copy): South Australia <<http://www.industrialcourt.sa.gov.au/frameset.php?location=06>>; Western Australia <<http://www.waairc.wa.gov.au/index.cfm?objectId=D2B0CB3B-E29F-40DB-3C01D85A66AA8A2F>>; Queensland <[http://www.qirc.qld.gov.au/aboutus/a\\_report/index.htm](http://www.qirc.qld.gov.au/aboutus/a_report/index.htm)>; Tasmania <[http://www.justice.tas.gov.au/\\_data/assets/pdf\\_file/36504/Justice\\_Report\\_2003-04.pdf](http://www.justice.tas.gov.au/_data/assets/pdf_file/36504/Justice_Report_2003-04.pdf)>.

Queensland are significant jurisdictions. Both are extinguished by WorkChoices in application to employees of corporations.<sup>102</sup>

It might reasonably have been expected that a thorough review and elaboration of the points of complementarity, overlap and divergence between the respective State, federal and Territory systems would have prefaced the Plan's attempt at national regulatory integration in 2005. Genuine issues arise about the benefit and content of a radical change to federal and State tribunals and regulatory systems. Unilateral policy making, sloganising and the oversimplified rhetoric of the WorkChoices campaign has blocked discussion of such issues.

The first premise in WorkChoices, echoed in the propaganda barrage, is that 'Australia has over 4000 different awards ... too many rules and regulations'.<sup>103</sup> Probably true, but the bulk of those awards would be federal awards made in response to employer's initiatives to seek single employer, and later, single site awards. The Business Council of Australia's '50 companies' were in the vanguard of those initiatives. David Plowman gives an account of that development in *The New Province for Law and Order*. His account does not miss the connection between the fragmentation of awards and the rightist ideology of Australia Inc. players. He points out:

In 1975, there were about 340 federal awards, of which only about 30 were single-employer awards. By 1987, there were over 1200 awards, 740 of which were single-employer awards. By 2000, the number of awards had grown to 2300 and the number of single-employer awards to about 1700. At this time, there were 500 multi-employer awards and a number of public sector awards.<sup>104</sup>

Since then, award simplification exercises would have reduced the number of multi-employer awards. Many corporations have a number of single employer, or even single site, awards: one instance, by no means exceptional, is BHP – the named employer respondent to eight single employer awards. The equation of 4000 awards with duplication and confusion is superficial research, lacking honesty. Hollow rhetoric beats up the probably accurate fact that there are 130 different pieces of industrial legislation. When looking down, Australian Business Limited's God would have noticed six States, two Territories and the Commonwealth. All of them have pieces of 'industrial relations legislation'. Counting the pieces of legislation is an idle exercise, if it is divorced from the regulatory context of States, Territories, agencies of government and legislative agendas for long service leave, occupational health and safety, and so on. Alone, the numbers mean nothing.

So far as I am aware, no detailed or objective study of the existing divisions between federal and State regulatory systems has been published since the work done by the Hancock Committee in 1985.<sup>105</sup> Chapter six proceeded from a detailed examination and comparison of the respective systems. It concluded with

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102 *WorkChoices A New Workplace Relations System*, above n 18, 51. State laws that provide a remedy for termination of employment will be overridden, including State and unfair contracts jurisdictions: *WorkChoices Act* s 7C(1)(d).

103 *WorkChoices A New Workplace Relations System*, above n 18, 7.

104 David Plowman, 'Employers' associations and compulsory arbitration' in Joe Isaac and Stuart Macintyre (eds) *The New Province for Law and Order* (2004) 241, 267.

105 Committee of Review into Australian Industrial Relations Law and Systems, above n 27.

a series of recommendations directed to achieving greater coordination, cooperation and consistency within a dual system. The initiatives proposed were aimed at achieving a more coordinated and cohesive system, as a step toward a longer-term goal of more formal integration of the various jurisdictions. That outcome was envisaged and promoted as realisable through a quadripartite consensus.

The reasoning of the Hancock Committee would have repaid closer examination in 2004. The Report's conclusions and recommendations have been productive of worthwhile change. A careful revisitation of the reasoning should have been undertaken before committing to the partial and partisan hostile takeover of the State systems launched by WorkChoices. Allowance might then have been made for the relative success of several initiatives intended to induce a more coordinated and cohesive system. The use since 1993 of the corporations power, contained in s 51(xx) of the Constitution, and the scope for use of it and other heads of Commonwealth constitutional power, intersects but does not invalidate the 1985 analysis. Those factors magnify the degree to which the advocacy in 1985 of a quadripartite consensus still has force. That advocacy stands in contrast with, but also serves to impeach, the contemporary article of faith unilateral legislative package overriding the State regulatory systems.

## **XI POLICY REACTIONS TO THE NEW WRS**

Justice Monica Schmidt of the NSW IRC, and Convenor of the Julian Small Foundation, was prompted by the Plan to pose the following question: 'if fairness is to be discarded, what principle or value should now guide our approach to adjusting market considerations through industrial regulation?' She answered:

Perhaps some of what underpins current concern about the role of fairness in industrial relations is the never-ending problem of the society we would like to have and the one we can afford. A question which we should be facing directly is whether, having acted to ensure fairness in industrial relations for over a century, now that former third world countries are successfully competing with us and working to emulate the success of societies like ours, we no longer see ourselves as able to afford such fairness in our own society? I suggest that the concept of fairness ought not to be swept aside at the beginning of this century, as being incapable of producing economic outcomes which Australia requires in the future, or as no longer necessary or affordable, as the basis of our industrial relations systems.

It is impossible to imagine that an unfair society will deliver Australia either economic success, or the kind of place we would wish upon our children, when they grow up, hopefully to take our place. Nor is it reasonable to expect that the social welfare system can cure unfairness in people's working lives.<sup>106</sup>

Justice Giudice also posed several questions about values that should underpin our industrial relations system. The questions point to priority values that were well served by the function of the AIRC but will be eclipsed by its curtailment.

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106 Justice Monica Schmidt, 'The Way Ahead for Industrial Relations' (Speech delivered at the NSW Chamber of Commerce, Sydney, 9 June 2005).



The condition precedent to the establishment of the AFPC should have been that those values were integral to it. Justice Giudice stated that:

There is no doubt ... these fundamental changes will raise important questions about the nature of any body which is given the power to fix minimum wages, in particular its independence from the executive Government, the criteria which should be applied and the value system underpinning the choice of criteria, and the transparency of its procedure. Just as significant is the proposal to fix the safety net of conditions for the purpose of collective and individual agreements by direct legislation. This will give to the Commonwealth parliament a power which it has never exercised before. A power to fix both the type and the level of the minimum conditions to which all employees of corporations will be entitled will, among other things, require the Parliament to take direct responsibility for its decisions, a responsibility which until now has been shouldered by an independent tribunal which politicians have been able to blame for unpopular decisions.<sup>107</sup>

A response from a different angle was developed from an exposition of Catholic teaching about social justice. The Australian Catholic Commission for Employment Relations ('ACCER') published a Briefing Paper on the Commonwealth Government's Proposals in September 2005. The ACCER is an agency of the Australian Catholic Bishops Conference. It performs an advisory and advocacy role that takes in aspects of the significant employment undertaken within various institutions of the Catholic Church in Australia. The Briefing Paper traced Catholic social teaching on work, rights of workers and responsibilities of governments and economic participants. It then examined in detail the changes proposed to the Australian industrial system. The carefully worded conclusions of the Briefing Paper were that:

An informed discussion about the choices confronting Australia requires careful examination of the economic case for change and a proper consideration of the various means by which that change can be facilitated. Central to this discussion, must be the recognition that social justice must be an explicit goal of government, and that economic growth is an essential requirement for social justice.

The results of our examination of the matters announced by the Government are concerns about particular aspects of the proposals: wage fixing, unfair dismissals, minimum conditions and agreement making and the functions of the AIRC.

ACCER is open to the introduction of a national industrial relations system, provided it is supportive of the essential values and principles necessary for cooperative employment relations.

These values and principles are consistent with the achievement of the economic changes that are necessary to provide a strong economy for future generations. There is a need for balance in the relationship between employers and employees so that the objectives and needs of both are respected and supported through the establishment of a genuine partnership in the workplace. The values of society cannot be separated from the values of the workplace.<sup>108</sup>

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107 Geoffrey Giudice, 'Minimum Wage Fixation 1996–2005' (Speech delivered at the Industrial Relations Society of the Northern Territory, Darwin, 2 September 2005).

108 Australian Catholic Commission for Employment Relations, 'Briefing Paper No 1 on the Commonwealth Government's Proposals to Reform Workplace Relations in Of Australia' (Briefing Paper No 1, ACCER, September 2005).

Values important to our society are reflected in the public interest, the ideal of 'a fair go', independence, due process and transparent operation concerns of the evolved industrial arbitration system. That system is a form of institutionalised cooperation. Questions about independence from the Executive Government, the criteria that should be applied and the value system underpinning the criteria are central to the issues that abound about the future of the AIRC, the AFPC and industrial relations generally.

The implementation of the WRS will establish new dynamics that will not only bring about change; it will force reactions. Pressure for an extension of the *WorkChoices* legislative model is inevitable, but not without its dangers. If the *WorkChoices Act* is eventually characterised by the High Court as a law over constitutional corporations, then – over the legislative horizon – almost nothing is forbidden. In the United States, the United Kingdom, in Europe and already in Australia, pressure exists for legislation enacting enforceable charters of citizen, employment or workers rights. Such measures are seen as the most practicable means of redressing the effects of prevailing free market capital ideology and the practicalities that Stone labelled the 'emerging new employment contract and the boundary-less workplace'.<sup>109</sup> Subject to surviving the High Court challenge, the *WorkChoices Act* will be the most accessible platform on which to build new 'entitlements' of employees.

Defensively, the Queensland government has legislated to 'ensure that Queensland employees continue to enjoy a fair and balanced industrial relations system regardless of developments at the federal level'. The *Industrial Relations Amendment Act 2005* (Qld) was passed on 12 August 2005 and commenced on 1 September 2005. It makes provision for minimum entitlements, protecting workers who may be adversely affected by the *WorkChoices Act*. The amendment is an attempt to preserve for all employees in the State a list of minimum benefits or entitlements including those relating to long service leave, 38 hour ordinary working week in any six consecutive days, paid overtime meal breaks, annual leave loading, casual loadings of 23 per cent, afternoon and night shift loadings weekend penalty rates and redundancy payments. Along broadly comparable lines, the Tasmanian Government last year introduced an Industrial Relations Amendment (Fair Conditions) Bill 2005 (Tas).

Similarly, Professor Ron McCallum has urged for some time the desirability of legislation to ensure an enforceable charter of citizen rights extending to work matters.<sup>110</sup> The active interest shown by several State governments, bodies of lawyers and various community interest groups will lend momentum to the development of policy along those lines and the pursuit of its implementation. A sign of that momentum is the initiative by *New Matilda*, an online magazine to launch a draft Human Rights Bill.<sup>111</sup> Among economic and social rights, the Bill proposes rights in relation to work and an adequate standard of living.

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109 Katherine Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (2004).

110 Ron McCallum, 'Industrial Citizenship' in Joe Issac and Russell Lansbury (eds), *Labour Market Deregulation: Rewriting the Rules – Essays in Honour of Keith Hancock* (2005) 15.

111 'Draft Human Rights Bill' (2006) *New Matilda* <[http://www.humanrightsact.com.au/index.php?option=com\\_content&task=view&id=17&Itemid=48](http://www.humanrightsact.com.au/index.php?option=com_content&task=view&id=17&Itemid=48)> at 19 April 2006. See especially cls 39, 40, 43.

In her work, Professor Katherine Stone analyses what she sees as the tension between individual employment rights and the collective bargaining system in the United States. She observes that over the past 30 years, federal and state employment laws have expanded in number and scope as the extent of the collective bargaining system contracted.<sup>112</sup> Her work contrasts the position and discussion in Europe with that in the United States. In Europe, she discerns the emergence of ‘a new type of social right related to work in general’.<sup>113</sup> Her work identifies a relatively concrete set of policies and programs – aspirational goals – that she hopes an organised constituency in the United States might promote. However, it seems that her hope for an organised constituency of the kind required is founded upon the need for a re-imaged, restructured and resurgent trade union movement being met.<sup>114</sup>

More immediate practical use may be made of the work of Dr Joellen Riley. She has drawn attention to deficits in, and desirable developmental use of, remedies under commercial common law and statutes in application to work relationships in Australia.<sup>115</sup> Her work proposes a kind of road map to shape future developments toward a path that promotes fair dealing at work. Among other topics, she explores ways of overcoming restrictions on employees’ use of human capital accumulated through employment, resort to remedies under the *Trade Practices Act 1974* (Cth) and the application of commercial contract, good faith and fair dealing principles to analogous employment and work issues. She propounds a tentatively affirmative answer to the question of whether private contract law can satisfy demands for a ‘fair go all round’ at work. Riley offers an agenda and a course of action for bringing about what appears to be an alternative and perhaps viable set of protections for employees and dependent workers embedded in general law.

The predicament of Australian workers in coping with a changing employment environment will drive a search for organisational structures capable of influencing outcomes. The Australian union movement is undoubtedly in a healthier state than its US counterpart. It has already converted the setback it faced into an opportunity to recruit new membership. Political campaigning and union membership growth are both valuable. However, structural and service changes will also be necessary if adequate assistance is to be forthcoming for many workers faced with the challenges of boundary-less workplaces and the needs of employability security.

## **XII CONCLUSIONS ABOUT IMPACTS OF THE NEW WRS ON EMPLOYERS, EMPLOYEES, UNIONS AND THE AIRC**

The reaction of unions and employees to the impending changes will vary according to their circumstances and those of the particular employer. Dramatic,

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112 Katherine Stone, *From Widgets to Digits. Employment Regulation for the Changing Workplace* (2004) 122.

113 Ibid 206.

114 Ibid 291.

115 Joellen Riley, *Employee Protection at Common Law* (2005).

major or widespread reaction is unlikely, especially in the services, hospitality and similar low-skill industries. It is in those industries where pressure to treat the increased flexibility as an opportunity to lower labour costs will be most immediate and insistent. An outcome of the implementation of the new WRS over time will be that employers will also be increasingly exposed to court based litigation. Some employers will seek quickly to exploit an increased freedom to dismiss employees.

However, in 2006, Australian employers are operating within a relatively tight labour market in which some skills are in short supply. That constraint will be the most effective barrier to exercising the increased powers available to employers. An employer who maintains a workforce structure that resembles an internal labour market will not opt quickly for labour cost lowering options that reduce individual take-home pay; to my knowledge, many employers have no inclination to abandon what they have established and consider to be fair employment principles; others will be restrained by a fear that premature action may trigger a haemorrhaging of their accumulated human capital. In that respect, worker choice will not be the only choice to be exercised under the new regime. Reasoning by analogy from the circumstances and concepts explained by Stone, larger scale employers will need to choose also between electing for 'lean production' or, for 'team production' models if they are seeking high-performance outcomes. The former would seem more suited to individual contract based engagements and just-in-time working patterns; the latter to collectively agreed working conditions, offering stable employment or at least, employability security. The choice of option also has implications for the employer's relationship with employees and with unions, where they remain relevant.

In attempting to assess overall impacts, I have, since my retirement, read what I could about employment market changes that I believe to be inevitable, regardless of what industrial regulatory system we have in place to try to cope with them. I am particularly indebted to the work of Professor Katherine Stone. The points made about the impacts upon employers are in part derived from her analysis of the way in which American employment has been structured and regulated. I have paraphrased and applied points that Stone made about the different but increasingly analogous milieu of the US labour market. I commend her work, and no less enthusiastically I commend that of several Australian academics developing similar themes here. Such work may be a building block for initiatives that perforce will go beyond mere reaction to implementation of the new WRS in Australia.

As to the impact of the changes on employees, the points to which I give most prominence are:

- The removal of the 'no disadvantage test' and, effectively, the safety net will have a phased and relatively targeted impact on employees. Predominantly it will be employees in less skilled service industries who will come under early pressure, especially in relation to contract renewal, ostensible transmissions of business and greenfield agreements. As pre-reform certified agreements expire, renegotiation to retain protected award

conditions, and other important benefits and conditions not listed by WRS, will expose both unions and employees with collective commitments to unprecedented pressures.

- For individual employees, the identification of an actual protected by law award condition as an entitlement from their current employer will be elusive. Many employees, and often employers, are vague (sometimes deliberately) about what award binds them, especially where a federal or State regime may straddle the job or the employment.
- The impact of exemptions from the unfair termination remedy, plus the new jurisdictional barrier to it, will almost certainly result in employees being and feeling less secure in their jobs. In substance, the jurisdictional change would appear to make selection for a redundancy related to operational requirements entirely a matter for employer discretion. That change will reverse industrial precedents and processes that have prevailed in Australia for more than a quarter of the century.
- Employees and those who represent them will increasingly need to attempt to structure lives, education, experience and working deployments to maximise the employee's own human capital and own employability security.
- Independently of any increased impetus in the shift brought about by the new WRS, a sharper, more constructive policy analysis must be applied to the concept and incidence of personal work relationships. Some antique conceptual premises and principled anachronisms overlay employment-work relationships. The time is ripe to balance those premises with contemporary practicalities. WorkChoices brings about changes that will reinforce what is an already deplorable state of affairs for many lower paid employees and dependent workers in quasi-employments. Those and other practicalities must now be fully taken into account in policy formation by anyone interested to influence outcomes.
- The working environment will inevitably be one in which there is a reduced representative voice for employees.

As to the impact on unions, the points to which I give most prominence are:

- The object of the WRS and result of the implementation of it, will be a marked weakening of union power to collectively bargain and, correspondingly, of any collective organisation or representation of employees in their workplaces.
- The shrinking base for traditional organisation of unions has long been recognised and is unlikely to change.
- Bargaining units related to single enterprises and union coverage patterns represent an obstacle to effective voice and representation.
- The promotion of AWAs and use of independent contractors reflects a strategy to minimise collective pressure on employers and in the labour market generally. Union policies and structures which fail to develop tactics that minimise the effects of that strategy ignore the fundamentals of the emerging boundary-less workplace.

- The new patterns of employment, as well as the obstacles to giving voice to employees in a reregulated labour market, should stimulate a comprehensive review of union bargaining practices and objectives. There is an associated need to re-examine union organisation structures. Existing structures are unduly bound by craft or industry antecedents. Most lack an adequate community-based or geographically dispersed presence appropriate to modern workplaces and individualised terms of engagement.
- Capacity to constructively develop team model production systems is a relatively undervalued and ignored element of the skill repertoire of some Australian unions. Instances of successful union management cooperation should be acknowledged and celebrated as a sound path to enduring high-performance productivity enhancement. Union innovative capacity, not infrequently in my experience, matches or exceeds that available from other resources accessible to particular employers. It can only be unlocked by trust and effective communication at operational levels.

As to the impact on the AIRC, it can be nothing other than profound. In sum, there is to be an effective abolition of the central arbitral award and agreement monitoring functions. That abolition is substantially destructive of the role of conciliation and arbitration for the prevention of industrial disputes. History in Australia has instructed us in the recognition of a fair industrial relations system. We had one. We are about to dismantle key components of it. Lamentably, it seems that, 'in the face of this wretchedness, no gland is disturbed' in its executioners to the point of even one of them wanting to cry with shame.<sup>116</sup>

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116 With apologies to Thea Astley and Kate Grenville, 'Comment', *The Monthly* (Australia), October 2005, 18.