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Chapter 1

The Evolution of Work Choice Legislation in Australia

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Introduction

The passing of the Work Choices reforms by the government-controlled Senate in December 2005 represents the most fundamental revolution in industrial relations since federation (Hall 2006, p.292).

The 2005 amendments to the Workplace Relations Act 1996, known as Work Choices, came into effect in March 2006. Controversy has followed the legislation since its inception, and media coverage has been both extensive and partisan. Political sensibilities have resulted in a series of amendments to Work Choices, despite the legislation being only eighteen months old. As discussed below, although it still too soon for many of the economic ramifications of Work Choices to have been felt, such is the contentious nature of the legislation that Work Choices looks set to become the defining issue over which the 2007 Commonwealth general election will be contested.

In many ways, Work Choices reflects the long-held personal beliefs of Prime Minister John Howard, and indeed, some writers have questioned the justification for Work Choices given the relative health of the national economy and the state of industrial relations in Australia (O'Brien, Denniss & Burgess 2006). Underpinned by an ideological desire to minimize the influence of trade unions and the Australian Industrial Relations Commission (AIRC) (Ford 2006; McCullum 2006), decentralise and deregulate the industrial relations system in Australia, Work Choices has changed IR in six ways (Hall 2006):

- Constitutionally, Work Choices alters the role of the Commonwealth from being based on the powers of conciliation and arbitration to that of corporations,
- While existing awards remain until renegotiated between employers and employees, they have been organised to cover only 13 allowable matters and cannot be altered in the future. New awards cannot be created by the AIRC,
- The procedure by which agreements are made between employers and employees or their representatives has, to an extent, been deregulated, with protection for workers through the No Disadvantage Test (NDT) being
replaced by safeguards in the form the five statutory minima that form the Australian Fair Pay Commission Standards (AFPCS), covering the minimum hourly wage, working week and basic annual- and sick-leave entitlements,

- The power of the AIRC has been curtailed, sidelined from the arbitration process and with the Australian Fair Pay Commission having the power to set the minimum wage,
- Union activities, and the rights of employees to take industrial action, are restricted under Work Choices,
- Employee rights to contest what they see as unfair dismissal have also been curtailed, and removed altogether for workers of organisations with fewer than 100 employees. A clear distinction is drawn between unlawful dismissal (based on race, gender, age, etc.) and unfair dismissal.

One year on, the purpose of this paper is to survey the analysis that accompanied the introduction of Work Choices and present the findings of the research undertaken on the impact of the legislation. Specifically, the focus will be on assessing the impact of Work Choices on human resource management (HRM) in Australian organisations. Topics include the effect of Work Choices on the type, negotiation and content of workplace agreements; the impact of the legislation on employer-employee relations; and changes to the dismissal procedures in small and larger businesses.

Assessing the Impact of Work Choices on Human Resource Management in Australia

The most significant effects of Work Choices are not yet apparent, and may not be for at least another two years (Peetz 2007a, p.v). Indeed, in a survey by the Australian Institute of Management of its Victorian and Tasmanian membership in May-June, 2006, more than 60% of the 1,400 respondents admitted to having little or no understanding of the legislation (AIM 2006, p.4). Perhaps related to this is the more recent finding that only 34% of small and medium enterprises (SMEs – classified respectively as having workforces of fewer than 20, and 20 – 199) actually believe Federal Government policies to be supportive of small business (Sensis 2007, p.18). Conversely, nearly a quarter believed the opposite, with the reasons most frequently given including the belief that Government policy favoured larger organisations; and that the levels of bureaucracy and paperwork required were still excessive (Sensis 2007, p.18). The latter finding is of interest given that one of the stated aims of the Work Choices legislation was to cut red tape, but also reflects, perhaps, the further changes to employers’ record keeping obligations made through further amendments to Work Choices in June, 2006 and March, 2007 (Tobin 2007a). Thus, when asked specifically about the impact of Work Choices, only 21% of respondents felt the legislation would have a positive impact, with 71% believing it would have no real impact, and only one in eight stating that the legislation had stimulated them to make changes (Sensis 2007, p.20).
Having only been in effect since March, 2006, literature on impact of Work Choices on the human resource management practices of Australian organisations is limited, and falls into the following categories:

- Reports by or for State Government bodies, such as the Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers, by the Queensland Industrial Relations Commission (QIRC); and Assessing the Impact of ‘Work Choices’- One Year On, by David Peetz under commission to the Victorian Department of Innovation, Industry and Regional Development (DIIRT),
- Reports by other organisations, including unions and business associations such as the Australian Institute of Management, Sensis, the National Foundation for Australian Women, and the Australian Human Resources Institute (AHRI),
- Books and journal articles,
- Opinion polls conducted for newspapers,
- Data from the Australian Bureau of Statistics (ABS),
- Articles and opinion pieces in newspapers and specialist magazines.

**Work Choices in the Context of the Current Australian Labour Market**

It has been argued that as industrial relations legislation, Work Choices both reflects the international popularity of deregulation in market economies and labour law development in counties such as the UK, New Zealand, Canada and the United States (McCullum 2006, p.99). It was questioned whether Australia would embrace fully the neo-liberal ideology behind Work Choices or would seek greater egalitarianism through a return to the compulsory conciliation of the previous hundred years (McCullum 2006, p.104). Further, it has been suggested that aspects of the Work Choices legislation might actually breach Australia’s international legal obligations to protect the human rights of workers, most notably the Conventions of the International Labour Organisation (ILO) (Fenwick & Landau, 2006, p.128). Particular problems identified with Work Choices include the operation of AWAs; restrictions on the right to bargain collectively and to strike in support of such bargaining; and the lack of protection from unfair dismissal (Fenwick & Landau 2006, pp.128 and 135), both described in greater detail below. Further, attention has been drawn to the vulnerability of particular groups within the labour force, in particular women and indigenous workers (Fenwick & Landau 2006, p.134): *the argument that a tight labour market will protect workers from cuts in pay and conditions does not hold for all workers* (Elton, Bailey, Baird, Charlesworth, Cooper, Ellem, Jefferson, Macdonald, Oliver, Pocock, Preston & Whitehouse 2007, p.8).

In terms of the impact of Work Choices on job creation across the economy as a whole, the Government points to the figure of 276,000 new jobs in Australia in the twelve months to March, 2007 (Daily Telegraph 2006) resulting in an unemployment rate in March 2007 of just 4.5% (ABS 2006). However, of note is
that 230,000 new jobs were created in the year to November, 2005 – four months before the introduction of Work Choices – with the overall and long-term unemployment rates falling to 5.1% and 17.7% respectively (O’Brien et al. 2006, p.309). The question as to the effect of Work Choices on job creation nationally remains, therefore, open to debate, particularly as the Reserve Bank of Australia forecast in November 2005 that labour conditions were likely to remain favourable given high levels of both vacancies and hiring intention (O’Brien et al. 2006). Further, Ian Watson has argued that the employment rate is an overly simplistic measure of true employment that fails to include either hidden unemployment or under-employment (Long 2007). More fundamental, however, is the assertion that, there is very little evidence supporting a linkage between changes in industrial relations arrangements and economic performance (O’Brien et al. 2006, p.311; Stewart 2007, p.2).

Nevertheless, increased flexibility in hiring workers given the limitation of unfair dismissal laws, coupled with the anticipated long-term decline in the real and relative wage of low paid workers, are seen as the means through which Work Choices will generate new jobs (O’Brien et al. 2006, p.313). Further, it has been argued that the policy of creating a more flexible workforce, while benefiting business, has resulted in greater social inequality and insecurity – evidence of which is the fact that almost half of the workforce is now employed on jobs that are temporary, part-time and/or on fixed contracts (Connell & Burgess 2006, p.493).

Of interest given the current discussion on the economic impact of Work Choices are recent labour market trends in Australia and overseas. Domestically, 54% of the additional jobs created in 2005 were taken by women, the share of part-time positions increased and jobs growth was particularly high in retailing, property services, construction and mining (O’Brien et al. 2006). Peetz anticipated, AWAs in industries and occupations with tight labour markets (such as mining) to be quite different to those in industries where labour has limited bargaining power (such as retailing and hospitality) (2007a, p.vi).

Work Choices and Rates of Pay

Prior to the introduction of Work Choices, several writers anticipated an increase in the number of low-paid jobs in Australia with the focus of new Australian Workplace Agreements (AWAs) being on the, managerial approach of boosting profitability through “cost reductions”, rather than productivity enhancement (Peetz, 2006, p.3). Owens suggested that Work Choices, significantly lowered the safety net with profound ramifications not only for workers who work under the minimum conditions of the safety net but for the vast majority of Australian workers given the changes to the process of negotiating agreements described below (2006, p.162). As a result of the diminished safety net, Briggs (2005) argued that as existing awards expire, employees lacking bargaining power would be offered no option but to accept individual AWAs at the minimal levels specified by the AFPCS. La Jeunesse, Mitchell & Watts (2006) contended that even scrupulous employers might be forced to move towards minimum AFPCS conditions in order to remain competitive. It has been suggested that Work Choices, appears to
condone poor management and to encourage the provision of low quality jobs, with the resultant negative impact on the employment relationship actually being to the detriment of the business (Baird, Cooper & Oliver 2007, p.3). As a result, the fact that the Work Choices Act ... contains no measures to steer employers towards high-productivity strategies suggests that the Work Choices Act is doomed to fail to meet its own objectives (Fetter 2006, p.212).

O’Brien et al (2006, p.312) contended that the primary objective of the AFPC would be to link any increases to the minimum wage to the economic impact. This, in addition to the argument that with short-term, Government-appointed membership, the AFPC would be less independent of Government economic policy than was the AIRC (Watts & Mitchell 2006), would mean that increases to the $12.75 minimum hourly wage would be both less frequent and less substantial, and that real wages for vulnerable, relatively high unemployment groups such as disabled and teenage workers, would in all likelihood fall. The Queensland Industrial Relations Commission (QIRC) commented that there is no obligation on the AFPC to conduct wage reviews annually or within any regularized time frame (QIRC 2007, p.26). It was also noted that casual workers would not be fully covered even by the minimum safety net of the AFPCS, including the 20% salary loading set by Work Choices (Owens 2006).

Having been modelled on the Low Pay Commission in the UK, concerns have been expressed that employees will be able to circumvent the supposed minimum pay standards set by the AFPC with the result of effectively decreased pay rates (Owens 2006, p.173). Indeed, there is anecdotal evidence of employers failing to pass on to employees what increases the AFPC has made to the minimum wage, and even where employees are aware of being underpaid, they either, feel there is little scope for recourse or do not know the processes they could use to retrieve pay (Baird et al. 2007, p.20).

Peetz (2007a, p.iv) has estimated that by the end of 2006, AWAs actually covered no more than four per cent of employees – representing an increase since Work Choices was introduced, but not yet a significant one. Nevertheless, Peetz argues that, the rate at which conditions are being removed is substantially higher under Work Choices AWAs than under pre-Work Choices AWAs, in particular overtime and penalty pay rates (2007a, p.v).

Further, it was suggested prior to its introduction that the most significant shorter-term impact of Work Choices would be employers taking advantage of the scope to increase working hours whilst simultaneously removing benefits to extract additional economic benefit from their existing workforce, rather than looking to hire new workers (O’Brien et al. 2006). At least one industry organisation has argued that Work Choices is an important tool to actually assist employers to control the wages bill and in many cases bring it down (QIRC 2007, p.40). More fully exploiting the potential of the existing labour force was, it was argued, unlikely to result in either increased hiring or improved productivity (O’Brien et al. 2006; Stewart 2007). With an apparent emphasis on increasing the number of low paid jobs, the cost minimization strategies by Work Choices appear to be inimical to longer-term workplace investment, including training (O’Brien et al. 2006,
It has been anticipated, however, that some larger employers, recognizing the importance of retaining valued employees, will continue to, make use of collective agreements and have appropriate ethical standards in reaching agreement with their work-forces (NFAW 2007, p.5).

The Negotiation of Workplace Agreements

According to Riley & Sarina (2006), the most significant aspects of the legislation are amendments to both the procedural and substantive aspects of agreement making (2006, p.346), with the shift in power to the employer identified as being of particular significance to human resource management. Agreement-making at the level of the individual worker has proven to be perhaps the most contentious aspect of the Work Choices legislation, with speculation that the new legislation would allow employers to terminate existing workers and force them to return, or their replacements to commence, under individual agreements offering lower pay and worse conditions (Fetter 2006, p.216). Kelly (2006, p.8) argues that, Where awards and agreements are readily accessible and subject to public scrutiny, processes under the WC Act enable secrecy and hidden agendas and clauses. Nevertheless, industry groups such as the Restaurant and Caterers’ Employers Association of Queensland have argued that WorkChoices is a far less intrusive form of workplace bargaining than its counterpart in the State system (QIRC 2007, p.39).

Central to the power shift to employers during the process of negotiating agreements include: the removal of the requirement for employers to inform employees of their right to union representation; the halving to seven days of the period in which employees have access to a new agreement before it is lodged and the removal of the obligation that employers explain the content of new agreements to employers; and the ability of new enterprises to lodge 12-month employer greenfields agreements (EGAs) without first seeking the approval of workers (Riley & Sarina 2006, pp.346–347). It was noted that agreements negotiated between employers and unions had fallen from 85% of those certified in 1997 – 1998 to 73% to 2004 – 2005, and that this trend was likely to be accelerated by Work Choices (Forsyth & Sutherland 2006, p.186) despite – or perhaps because of – evidence that wage increases under union-negotiated agreements are greater than under non-union group agreements (Peetz, 2006, p.4). Nevertheless, it is of interest that more than 40% of the CEOs and senior executives and managers surveyed by the Australian Institute of Management in mid-2006 also disagreed with the Workplace restrictions on unions (AIM 2006, p.12).

Given that the legislation allows for employees to appoint non-union bargaining agents, it was speculated that Work Choices would result in the rise of professional agreement bargaining agents competing with the unions (Forsyth & Sutherland 2006, p.188). In practice, employers might only be required to hold a single meeting with employers or their agents – union or non – to meet the negotiation requirements of Work Choices (Forsyth & Sutherland 2006, p.189). Under Work Choices it would be lawful for an employer to, simply elect not to engage any longer in bargaining with the trade union of which the workers are members (Fenwick & Landau 2006, p.138).
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Such practice is in stark contrast to the strong emphasis under the New Zealand Employment Relations Act 2000 on good faith bargaining for collective agreements with the intent that both sides, approach the bargaining process seriously and with a commitment to entering into a genuine process of negotiation (ERA 2000, p.4). Recent legal cases in New Zealand have focused attention on the need for employers to respect the relationship of a union with its members, with attempts by employers to circumvent a union by, negotiating, or attempting to negotiate, directly or indirectly with staff (Hannan 2007, p.1).

With employers given the freedom to nominate individual AWAs as the preferred form of agreement, the relative weakness of the negotiating power of employees – and the willingness of many employees to accept lower pay and conditions rather than risk losing their job (Fetter 2006, p.211), the expectation was, therefore, that young and vulnerable workers might find themselves being pressured to sign agreements which they may not fully understand but which they may well feel they are not in a position to refuse (Owens 2006, p.181). This was particularly true given that the agreements would no longer be subject to the no disadvantage test (NDT) and which cannot be renegotiated for a period increased from three years to five (Fetter 2006, p.221; Riley & Sarina, 2006, p.348). Many employees will be unaware of the need for, and unable to secure, their own protection during the agreement-making process (Owens 2006, p.181). Thus, since earnings and hours outcomes of particular bargaining arrangements are governed by the degree of bargaining power held by employees (van Wanrooy, Oxenbridge, Buchanan and Jakubauskas 2007, p.vii), Work Choices has extended the reach of individual agreements beyond the realm of the common law contracts that have always existed for highly skilled, high demand employees with undoubted bargaining power, to workers who have always previously had the protection of an award or collective agreement.

New employees may be forced to accept an AWA as a condition of employment, a strategy not deemed to be coercion since at the time of negotiation the worker had no relationship with the organisation (Fenwick & Landau 2006, p.135; Fetter 2006, p.214). Indeed, the Work Choices Act, provides explicitly that an employer can lock out an employee in order to compel them to sign an AWA (Fenwick & Landau 2006, p.137). Union submissions to the South Australian Industrial Relations Commission confirm the, full use by employers of provisions of the WR Act providing that it is not duress if an employer requires an employee to sign an AWA as a condition of engagement (SAIRComm 2007, p.18).

Once an existing agreement expires, both parties have the right to unilaterally terminate it. Ninety days after termination, if a replacement agreement has not been agreed upon, workers fall back under the basic AFPC standards. It has been noted that this clause of the legislation places workers under duress and places the employer in the position of being able to drive conditions down closer to the level of the AFPCS (Fenwick & Landau 2006, p.138).

Further, with workplace agreements to be lodged with the Office of the Employment Advocate (OEA), and with the OEA not required to consider whether even the limited requirements of the legislation have been met with regard either to
due process having occurred in the development process or to the final content of the agreement, serious concerns must arise about the absence of meaningful protection of employees' interests under these new arrangements (Forsyth & Sutherland 2006, pp.189–190). In short, the effect of the reforms is to make it significantly easier for employers to pressure employees (whether legitimately or not) into signing away their rights, existing conditions and their capacity to be effectively represented by a trade union (Fetter 2006, p.210). Legal challenge to certified agreements in breach the requirements of Work Choices appeared to be the sole recourse of employees and their representatives (Forsyth & Sutherland 2006, p.191).

One implication for HRM of the undermining by Work Choices of the structures and processes such as fair grievance procedures which are equitable for all parties is that resistance to a developing culture of workplace bullying will be hampered, whether from within and outside the organisation (Kelly 2006, p.9). Through the imbalance of power, the informalisation of employment relations in order to maximise employer flexibility and the restriction of employee voice, Work Choices evidently enables, rather than prevents, workplace bullying (Kelly 2006, p.10).

Amongst low paid workers, research suggests a sense that, employers have access to increased managerial discretion and ability to hire and fire 'at will' (Baird et al. 2007, p.3). Nevertheless, recent research has found examples of workers actively seeking union representation in the negotiation process, in spite of, in one case, having received a letter from their employer stating their wish for a non-union agreement (Baird et al. 2007, p.38). However, many vulnerable employees perceive a shift in power to management – the rise and rise of managerial prerogative – with few of the workers interviewed able to identify how this shift in power could be addressed (Baird et al. 2007, pp.41-42). In short, Work Choices has created a climate where some employers feel licensed to act with unilateral disdain for workers and their rights (Elton & Pocock 2007, p.5). This change has been attributed in part to the perception that under Work Choices, much of the control and administration of the employment relationship can be moved from the public sphere – open to public scrutiny – to the private sphere where employment arrangements lie outside the purview of open scrutiny, and thus are less transparent (Kelly 2006, p.8).

The Impact of Work Choices on Women

In their discussions with more than 80 low income employees, for example, Masterman-Smith and Elton found that an atmosphere of fear, vulnerability and confusion characterises the working lives of many low paid workers interviewed, affecting their morale, productivity and quality assurance at work (2007, p.3). Focusing on women, it was noted that, the challenges of meeting the multiple responsibilities of paid workforce participation and unpaid household responsibilities have a particularly important impact on women, who continue to perform a disproportionate amount of unpaid work within the Australian economy (WiSER 2006, p.iv). The need of many female employees to balance work and family life makes them vulnerable in the workforce, particularly with regard to the
individualistic process of negotiating an AWA, so that, the changes brought about by Work Choices had a demonstrable knock-on effect beyond the workplace (Baird et al. 2007, p.3).

The National Foundation of Australian Women (NFAW) reports that only one third of young women feel confident to negotiate their own pay and conditions, and that 80% would put up with poorer pay and conditions rather than quit and seek alternative employment (2007, pp.11-12). Further, in their research on the impact of Work Choices on women, Baird et al found that, Not all of the women who were interviewed felt able to negotiate with management, and instead reluctantly accepted what management offered in order to get the job (2007, p.41). For vulnerable groups such as young women, a major concern was the feeling of a loss of dignity and respect in what can be a secretive and divisive bargaining process in which success may depend on the type of self-promotion few vulnerable workers possess (NFAW 2007, p.16).

As argued by Baird et al, for low paid women, the new legislation has served only to diminish their options, at work, at home and in the community (2007, p.4). Two cases have recently been publicised in the media. In the first, a Wollongong restaurant faced prosecution by the Workplace Ombudsman over a range of violations of employee rights regarding AWAs after a young, female employee complained of not having had sufficient access to a draft AWA and that the proposed agreement neither stipulated her core working hours nor guaranteed her the minimum 20 hours of work per fortnight (The Age 2007). In the second, another young female worker was denied legitimate back pay, due to a provision in the federal Workplace Relations Act which states she was not eligible for back pay until she turns 21 (Duffy & Edwards 2007).

Research indicates that, there are links between the size of the gender pay gap and particular wage setting arrangements (WiSER 2006, p.viii). Peetz (2006, p.8) draws on research from 2002 – 2—4, prior to the introduction of Work Choices, that shows that AWAs were in fact the only type of agreement that resulting in a decline in average weekly earnings, in part the result of most AWAs fixing wage levels for the duration of the agreement. Women appear to be especially worse off under individual AWAs than under collective agreements, both in terms of hourly earnings and of the gender pay gap with men – a situation likely to deteriorate further under Work Choices (NFAW 2007, p.4). In fact, male, permanent, full-time employees were the only category of workers who appeared to be better off under individual AWAs than under collective agreements, both in terms of hourly earnings and of the gender pay gap with men – a situation likely to deteriorate further under Work Choices (Peetz 2006, p.12). In contrast, the benefit to wages of a union agreement were greatest amongst part-time, female and casual employees (Peetz 2006, p.14). The concentration of AWAs in particular industries has been noted (Evesson, Buchanan, Bamberry, Frino & Oliver 2007; Peetz 2007b). Drawing on pre-Work Choices statistics, three industries accounted for nearly half of all AWAs approved in 2004-5: retail; accommodation, cafes and restaurants; and property and business services – and each of these industries has a highly feminised workforce (WiSER 2006, p.xii). It is not surprising, therefore, that nearly 60% of the female members of the AIM in Victoria and Tasmania surveyed in mid-2006 disagreed with the new AWA regime under Work Choices.
Transparent bargaining has been seen as central to efforts in pursuit of equal pay for women, and this is undermined by Work Choices (Elton & Pocock 2007, p.6).

The Impact of Work Choices on Other Vulnerable Labour Groups

Women are not the only sector of the labour market to be vulnerable to increased exploitation under Work Choices. The Queensland Industrial Relations Commission (QIRC) Inquiry expressed strong concern over the impact of Work Choices on young workers (QIRC 2007). By placing young workers in the position of having to independently bargain with their employers, Work Choices creates the situation in which the bargaining position between the parties will generally be unequal (QIRC 2007, p.8). Further, the South Australian Industrial Relations Commission received evidence on the negative impact of Work Choices on workers from two different Asian communities (SAIRComm 2007, p.34).

Work Choices, Unions and Industrial Action

Also of importance to the HRM ramifications of Work Choices on the process of negotiating agreements are the restrictions on the right of unions to initiate industrial action to strengthen a negotiation position and the fact that the AIRC can no longer intervene in disputes over agreements without the agreement of both sides (Sutherland 2005; Riley & Sarina 2006). The requirements to be met before employees are able to take industrial action with the protection of the law have been described as lengthy, onerous and restrictive (McCrystal 2006, p.198; SAIRComm 2007, pp.17-18).

It is harder for employees to initiate protected industrial action, and more likely that any action taken will be deemed unlawful (McCrystal 2006, p.202). The right to strike legally is so restricted under Work Choices as to be described as being suppressed, despite the fact that even before the introduction of the legislation, working days lost to strikes were at the lowest level for nearly half a century (White 2006, p.66). For employers, Work Choices has narrowed the definition of industrial action to include lockouts of employees, purposefully excluding both the termination of employment or employer breach of a certified agreement (McCrystal 2006, p.200).

It is noted also that in contrast to the complexity of the process demanded of employees before taking protected industrial action – involving compliance with 45 sections of complex requirements (White 2006, p.71), the ability of employers to initiate a lockout is subject to none of the same conditions (McCrystal 2006, p.204). For example, there is no requirement for directors or shareholders to be balloted prior to a lockout in the way that employees are required to be balloted prior to a strike (White 2006, p.72).

Work Choices has also increased the financial burden on employees of taking industrial action. The legislation expressly prohibits an employer from paying an
employee in relation to periods of industrial action, whether protected or not (QIRC 2007, p.30), and, indeed, employers are required under to deduct at least four hours of pay from any employee who engages in industrial action for up to four hours – further heightening the financial impact on workers taking action for even the shortest period of time (McCrystal 2006, p.202).

While unions and other employee organisations are prohibited from taking industrial action in support of pattern, or industry-wide, bargaining, employers in national and industry associations are free to act together to pursue their interests (White 2006, p.71). It was predicted that Work Choices might, by raising employer power well above the need to ensure a robust system of free and voluntary collective bargaining... all but eliminate protected industrial action by employees in support of employee collective agreements (McCrystal 2006, p.208).

Further, it was suggested that the complexity of the procedural requirements of protected industrial action would result in more frequent legal challenge by employers to strikes in the hope of finding minor technical breaches that would render the action invalid (White 2006, p.72). Finally, the fact that under Work Choices the AIRC has the power to suspend protected industrial action where there is significant harm – such as economic loss – to third parties (White 2006, p.73). It has been argued that all strikes are likely to have such an impact, and that this particular clause in the Work Choices legislation was aimed specifically at the caring professions such as nurses and teachers (White 2006, p.73). Recent examples of successful industrial action by employees are few. The South Australian Industrial Relations Commission refers to a strike by workers at Radio Rentals in 2006 which resulted in the employer backing down from its previous position of refusing to negotiate a new collective agreement (SAIRComm 2007, p.19).

Figures released by the Australian Bureau of Statistics (ABS 2007) show a dramatic decline in the three key indicators of industrial disputes for the year ending March 2007 compared to the year ending March 2006. Total disputes fell from 465 to just 136; the number of employees involved dropped from 242,000 to 107,000 and the number of working days halved from 213,000 to 109,000. Focusing on the March quarter, 2007, and the manufacturing sector accounted for 63% of the total working days lost (ABS 2007), while the greatest year on year falls came in the construction, transport and communications industries: down 86% (Davis 2007a). One example of industrial action within the manufacturing industry is AMWU workers at defence company Thales embarking on rolling stoppages over what the union describes as an aggressive campaign by management to introduce individual contracts with reduced conditions, despite employees being reported as having accepted lower pay in order to safeguard conditions (The Advertiser 2007).

With no protection for industrial action taken during the term of an agreement, and responsibility for the enforcement of the conditions specified under the agreement resting primarily with the employer, scope for action by employees in the case of employer breaches of the agreement are severely limited (Fetter 2006, p.222). Under Work Choices, employees must either apply to the Federal Court for an
injunction and, in some cases, compensation, or complain to the Office of Workplaces Services – a body with just 200 inspectors to cover one million businesses nationally (Fetter 2006, p.223). One commentator has concluded that, *the right to strike, in practical terms, is extinguished by Work Choices* (White 2006, p.76).

Given the curtailing of the ability to take protected industrial action the question has been raised as to the future role of unions in industrial relations in an era of *intensifying class conflict* in which powerful corporations will *intensify their anti-union campaigns* (White 2006, p.77). Research by Baird et al found examples of such anti-union campaigns, including one example of workers organising meetings with union representatives outside working hours due to opposition by their employer to a union presence on site (2007, p.38). However, another interviewee stated that the inability of her union to offer effective assistance under Work Choices led her to cancel her membership (Baird et al. 2007, p.37). The South Australian Industrial Relations Commission also reports three examples of attempts by employers to exclude the Liquor, Hospitality and Miscellaneous Union (LHMU) from representing employers in the bargaining process despite the union in question having been appointed the bargaining agent on behalf of many employees in negotiations with Aboriginal Hostels Limited, Prime One Services and Retirement Care Australia (SAIRComm 2007, pp.19-20).

The Queensland Industrial Relations Commission reports union concerns over the occupation health and safety impact of the Work Choices restrictions on union access to worksites, and employee reticence about raising occupation health and safety issues for fear of being terminated (QIRC 2007, pp.36-37). Further, QIRC itself expressed unease at the removal of *health and safety training provisions from industrial instruments governing the employment of workers* (2007, p.41).

**Work Choices and Unfair Dismissal**

The Industrial Relations Reform Act 1993 provided for the first time at the federal level protection to employees from unfair dismissal. It was beholden on employers to justify termination in terms of the capability or conduct of employees, or of the operational requirements of the organisation (Robbins & Voll 2005, p.239). In the case of disputes, parties went to the AIRC for conciliation and arbitration. The Workplace Relations Act 1996, by introducing the *fair go all round principle*, made it easier for employers to defend unfair dismissal claims (Robbins & Voll 2005, p.240).

Between 1998 and 2003, successive Government ministers argued that the failure to exempt small businesses from the unfair dismissal laws was preventing the creation of anything between 50,000 – 75,000 new jobs, the result of small businesses being unable to fire unsuitable workers, and unwilling to hire new employees they could not later dismiss – although these estimates, and the notion of a relationship between unfair dismissal laws and employment inhibition has been consistently been disputed (Robbins & Voll 2005, pp.241-242). Whatever the accuracy of the claims, the fact that Work Choices defined a *small business* as one
with fewer than 100 employees – when in previous attempts to roll back the unfair dismissal legislation the limit was set at 20 workers – meant that the scope of the changes was substantially increased. Pittard (2006, p.228) cites 2004 figures that show that less than 5,000 businesses in Australia had workforces larger than 200, compared to more than 750,000 with 19 or fewer workers and just over 75,000 with 20-199.

Since the 100 limit was a head count, not full-time equivalent staff, employers with a higher proportion of full-time staff would more easily be able to remain under the threshold, and it was suggested that this would encourage the hiring of full-time rather than ongoing part-time staff (Pittard 2006, p.228). Where part-time staff were required, employers might choose to avoid adding to their head-count by employing short-term casual or contract staff (Pittard 2006, p.229).

Of note is that unincorporated businesses – including many small businesses – have always been exempt from the national unfair dismissal laws (Robbins & Voll 2005, p.243). Further, Ministerial assertions made in favour of releasing small business from the unfair dismissal laws, that the number of claims by employees was excessive, that AIRC proceedings were complex and that outcomes favoured workers, have also been disproved (Robbins & Voll 2005, pp.244–245). Research indicates that the low unionisation of the small business sector meant that even before Work Choices many terminated workers would have lacked the advice on their rights to even launch an unfair dismissal claim, and that even where successful, compensation through the AIRC was usually small (Robbins & Voll 2002, 2004, cited in Robbins & Voll 2005, pp.246 - 247).

Regarding the assertion by those in favour of Work Choices that previous unfair dismissal laws acted as a restriction on the willingness of small business to hire workers, research predating the new legislation was inconclusive, with, no consistent evidence linking unfair dismissal to a reluctance to hire in the small business sector, particularly as casual workers – an important labour group in the small business sector – were already excluded from existing unfair dismissal legislation before the introduction of Work Choices (O’Brien et al. 2006, p.313). Other research of small businesses indicated unfair dismissal laws as being a factor in the hiring decisions of only five per cent of respondents – of greater concern to many of the small businesses surveyed was hiring and retaining suitably skilled staff (Robbins & Voll 2005, p.248), and more recent surveys of small and medium enterprises (SME) confirms this.

The National Salary Survey of 218 small businesses (AIM 2007b), conducted in May, indicates that staff retention is still the most significant issue facing smaller organisations, with voluntary staff turnover up from 10.3% in the twelve months to May, 2006 to 13.6% in the 2007 survey, despite average pay rises increasing over the same period from 4.8% to 5.0% - an average skewed by higher increases in Queensland and WA. Further, the Sensis Business Index for Small and Medium Enterprises also (2007, p.10) found that finding and keeping staff was the single greatest concern, far in excess of employment costs and regulations, and an increasing problem for SMEs (Sensis 2007, p.10). The AIM report concludes that the competitive labour market has restricted the ability of small businesses to take
advantage of the Work Choices legislation to restrict such high wage rises (AIM 2007).

Given that the 100-limit includes workers to be terminated, employers would not be able to sack staff with the purpose of reducing their workforce to below the threshold (Pittard 2006, p.228). However, it was argued that the hiring implications of exempting small businesses from unfair dismissal laws would be limited by businesses seeking to keep their workforces under the 100 threshold specified under Work Choices (Robbins & Voller 2005, p.248).

The exclusion of the right of employees in businesses of any size to file an application for unfair dismissal where dismissal was based on genuine operational reasons is one of the most significant and radical aspects of the Work Choices legislation (Pittard 2006, p.230). With the definition of operational reasons including economic in addition to technological and structural factors, and reasons rather than the previously used requirements, the question was raised as to whether Work Choices would allow employers to dismiss workers and replace them with cheaper labour (Pittard 2006, p.231). The legal outcome of one such case, Cruikshank v Priceline, failed to provide clarification (Tobin 2007b, p.6). In the case of Carter v Village Cinemas, a distinction was made by the AIRC in its decision in favour of the employer between the reason for termination being real without having been valid or defensible (Creed 2007, pp.21-22). The South Australian Industrial Relations Commission cites several examples of employers exploiting what they see as an unfettered right to dismiss (SAIRComm 2007, p.30). The true limit of the definition of economic reasons would, it was argued, have to be set by the Federal courts (Pittard 2006, p.241).

Given the ability of employers to dismiss workers based on operation reasons with immunity from unfair dismissal legislation, and the fact that groups of workers such as short-term casual and contract staff are expressly excluded from coverage by the legislation, the distinction between unfair and unlawful dismissal under Work Choices raised the question as to whether the removal of recourse by employees from small businesses to the former would result in increased claims of the latter (Riley & Sarina 2006; Pittard 2006; QIRC 2007). Further, while the standard probationary period of employment remains three months under Work Choices, employees are not covered by the unfair dismissal laws until the completion of six months employment (Pittard 2006, p.232). This qualifying period exemption has resulted in at least two legal cases through which it has been determined 1) that a change of position by an employee within an organisation does not require a new six month qualifying period, but that 2) employment in the same position by a new employer, such as through the transmission of business, does leave employees in the vulnerable position of having to work through a new six month qualifying period (Tobin 2007, p.5).

The final point raised with relation to the changes to unfair dismissal legislation under Work Choices is that with the return for many Australian workers to the situation that existed prior to the Termination Change and Redundancy case of 1984, would employers once again seek added protection through their contracts of employment – even though this would in practice be limited to peripheral
safeguards such as demanding longer periods of notice (Pittard 2006, p.240). It was speculated that if future developments in contract law emphasised the notion of mutual trust and confidence, whether the number of contract cases brought by dismissed workers might increase (Pittard 2006, p.240).

The issue of unfair dismissal appears to be the aspect of Work Choices causing employees the greatest anxiety, most notably the threat, or perceived threat of dismissal being used in conjunction with demands by employers for cuts in conditions (Peetz 2007a, p.vi). In their interviews with lower paid women, Baird et al. found that, a general sense of insecurity pervaded the responses from a number of interviewees, with all of the women now accepting they could be fired at any time (2007, p.33), evidence supported by data showing that women are overrepresented in complaints of unfair or unlawful termination in Western Australia, with complaints being concentrated in the retail and hospitality industries (Creed 2007, p.14). The Western Australian Fair Employment Advocate, commenting on the growing trend for employers to see themselves as no longer obliged to afford the employee procedural fairness in terminating employment, noted that:

*By removing unfair dismissal protections for any employees, WorkChoices has effectively set a new standard for what is legally considered appropriate conduct by an employer in terminating an employee.* (Creed 2007, p.21)

Finally, the finding by the AIM that workers may actually avoid future employment with small businesses as a result of Work Choices (AIM 2006, p.21) is in clear contradiction to the rationale of the legislation that it would make it easier for small businesses to hire labour.

Under the New Zealand Employment Relations Act 2000, employers are required to carry out a procedurally fair process before reaching a decision impacting on the continuing employment of an employee, with pre-emptive actions such as suspension or the stopping of pay being precluded (Hargreaves 2007). Recent decisions by the Employment Court have emphasised the obligations on the employer to: conduct a fair investigation and consider alternatives to dismissal; and communicate to the employee their rights to representation, to a reasonable period of time in which to consider their response to employer concerns and to the opportunity to comment on the employer’s proposed decision prior to the outcome being confirmed (Hargreaves 2007).

**Work Choices, Flexible Working Conditions and the Fairness Test**

Of significance to employers is the fact that under Work Choices the standard working week is set at 38-hours, plus reasonable additional hours (Tobin 2007b, p.1), but that this is to be averaged over a period of up to one year. While this could allow significantly flexibility in favour of employees seeking to balance work with family and other responsibilities, it could also be exploited by employers...
attempting to align production as efficiently as possible with fluctuating demand (Owens 2006, p.163), to the detriment of working parents seeking to maintain a regular schedule and a stable work-family balance (Fetter 2006, p.211; Masterman-Smith & Elton 2007, p.5). The operating conditions of the organisation are also supposed to be balanced against the needs of employees in the process of ascertaining the number of additional reasonable hours allowed under Work Choices (Owens 2006, p.164). The result of these changes led writers to predict a greater likelihood of working unsocial hours, unpredictability of working hours (Owens, 2006, p.164; NFA W, 2007, pp.5-6) and fluctuating income (Fetter 2006, p.212). The averaging of working hours over a 12-month period also raised the possibility of employers being able to reduce overtime payments by balancing periods of additional hours with periods of under-time hours, with a net loss of income for workers but reduced labour costs for the organisation (Owens 2006, p.165).

It was noted that even before Work Choices came into effect, Qantas and other major employers signalled their intention to reduce allowances for overtime and shift-work in upcoming agreement negotiations (Forsyth & Sutherland 2006, p.191). Through interviews with low paid female employees in the retail, hospitality, and manufacturing industries, Baird et al present examples of the rapid loss of non-protected public holiday entitlements, soon after Work Choices commenced (2007, p.28). The most recent biennial ABS Employment, Earnings and Hours (EEH) Survey, was conducted in May 2006, prior to Work Choices making an impact. However, it found that although workers on individual AWAs were receiving 9% more per week than those under collective agreements, they were working 13% longer hours to do so (Peetz 2007a, p.vii). However, female permanent full-time staff, permanent part-time workers, and casual workers were all worse off under pre-Work Choices AWAs. The next EEH Survey will be conducted in May 2008, nearly two years after the introduction of Work Choices.

A second example of the increased flexibility in working arrangements possible under Work Choices relates to annual leave. Employers, may take account of the operational requirements of the business when deciding whether to approve leave requests (Owens 2006, p.166). Work Choices allows the provision for employees to cash out up to half of their annual leave, and a study of retail and hospitality industry AWAs indicates that more than 80% include such a provision (Evesson et al. 2007). Although employers are banned from exerting undue pressure on employees to cash out leave, doubts were raised as to how such a ban could be enforced in practice (Owens 2006, p.167). Further, examples have been presented of cases in which employers have resisted worker requests to take leave, including sick leave and family leave, to which they were entitled (Baird et al. 2007, p.29). Vulnerable employees - particularly female workers in the retail and hospitality industries - were also perceived to be at risk of being forced to work on public holidays given that an employee refusing to work on such days now has to demonstrate reasonable grounds for so going (Owens 2006, p.170).

Election year Government concern over public perceptions of deteriorating conditions for workers on individual contracts resulted in the introduction in May
The Evolution of Work Choice Legislation in Australia

2007 of a new Fairness Test under which employers are required to provide fair compensation to workers for the removal of conditions including overtime, public holiday and other penalty pay rates (Davis 2007b). The fairness test applies to workers on salaries up to $75,000 per year, and has been introduced alongside improved Government funding for workplace compliance agencies to conduct audits on behalf of the Workplace Ombudsman. The Minister for Workplace Relations has indicated that audits will concentrate initially on industries in which young workers are concentrated, again reflecting public concern over the impact of Work Choices on the most vulnerable groups of employees (Davis 2007b).

However, concern has been voiced with regard to the Fairness Test not providing adequate compensation to workers for conditions lost under Work Choices (Evesson et al. 2007; Stewart 2007; Peetz 2007b). For low income women employees, for example, it has been anticipated that the Fairness Test will make little difference . . . in relation to dismissal, control over working time, and work and family flexibility (Elton et al. 2007, p.8). Fears have also been expressed that rulings by the ombudsmen of the Workplace Authority as to what actually constitutes fair compensation may be inconsistent, with the only formal recourse being for an employee to seek a review by the High Court (Gahan 2007; Stewart 2007). The Government has also responded to the criticism that employees lack an understanding of their rights under Work Choices by requiring employers to distribute a Government fact sheet by the end of September 2007 (Schubert 2007). Nevertheless, the impact on the HRM practices of employers of the new Fairness Test is that it adds yet another layer of legal complexity to the creation of workplace agreements – requiring the Workplace Authority to produce a guide to the Fairness Test that runs to 42 pages (Tobin 2007b).

It was noted that the provision under Work Choices of either party to unilaterally terminate an AWA with 90-days notice once the original expiry date had passed could allow employers take advantage of the fact that without a replacement agreement, conditions of employment would fall back to the bare minimums specified by the AFPCS – and that employees could then use these minimum conditions as the starting point for a new agreement (Forsyth & Sutherland 2006, p.194). Pushed to attempt to bargain even to retain the status quo, employees might then be forced to accept a relatively disadvantageous new agreement rather than continue to work at minimum conditions for the duration of a protracted bargaining process (Forsyth & Sutherland 2006, p.194; Fetter 2006, p.215; SAIRComm 2007, p.19).

The Impact of Work Choices on Human Resource Management

It was mentioned earlier that in surveys of small business prior to the introduction of Work Choices, the hiring and retention of skilled staff was seen as a more pressing issue than unfair dismissal. It has been argued that while Work Choices was written in the name of labour market competitiveness in a global economy, the focus of the legislation is on employee flexibility rather than investment in training
With the decline in lifetime employment there is an increased onus on workers to remain competitive as they move between temporary positions as part of increasingly fragmented and unpredictable careers, but that the responsibility for the re-skilling required has fallen increasingly on the employee rather than the employer as the dominant strategy for many firms appears to be a low level of investment in training where temporary workers are concerned (Connell & Burgess 2006, pp.494 - 495). In terms of human resource management, this raises the question as to the extent to which organisations are taking a short-term, needs-based view of employment based around an increased reliance on temporary workers that both reduces labour costs and reduces employer obligations to workers in areas such as training (Connell & Burgess 2006, p.494). In short, to what extent is it the preference of employers to buy external skills on a short-term basis rather than invest in making skills internally (Connell & Burgess 2006, p.501)? Evidence of this labour without obligation has been provided by ABS statistics on declining opportunities for training amongst casual workers (cited in Connell & Burgess 2006, p.496). Industries at the centre of the current Australian economic boom such as construction and IT face skills shortages and make heavy use of temporary skilled workers to fill those shortages (Connell & Burgess 2006, p.494).

Increasing reliance on temporary labour serves to increase the detachment of the workforce from the employer and reduced organisational identification (Connell & Burgess 2006, p.497), with the potential to outweigh some of the human resource management benefits of recruiting temporary workers, particularly through an agency, such as improved job-skills matching and reduced recruitment time and cost (Connell & Burgess 2006, p.502).

It is argued that the increasingly temporary nature of employment is most damaging to young people who may no longer expect to follow a career ladder but face instead a number of short-term assignments with different organisations (Connell & Burgess 2006, p.498). Another link between the increased use of temporary workers and Work Choices is the suggestion that while organisations might choose to invest in specialist, high-level training, they are unlikely to do so for relatively low skilled positions. The result is that most workers relying on agencies for increasingly precarious employment are low skilled (Connell & Burgess 2006, p.500), the type of workers most vulnerable under Work Choices.

Conclusion

One year after the introduction of the legislation, it has been argued that the practical impact of Work Choices has, in contrast to the political impact, been limited. In his submission to the South Australian Industrial Relations Commission (SAIRComm), Stewart suggests three reasons for this: a) the complexity of the legislation has resulted in many human resource managers being preoccupied merely with understanding organisational obligations; b) a general disinclination to make radical changes to employment relations, especially on the part of managers directly responsible for human resources or industrial relations; and c) fear of negative media exposure if radical changes are attempted (2007, p.3).
Indeed, in its submission to SAIRComm, the Australian Services Union (ASU) stated that:

*Far from providing a simpler system for employers and employees, our experience has been that it [Work Choices] has actually made the system far more complex and confusing for all involved and created a climate in which disputation is more rather than less likely (SAIRComm 2007, p.10)*

The disincentives to engage in good faith bargaining had created delays in reaching agreements, delays to the detriment of both sides (SAIRComm 2007, p.17). However, while some commentators have argued that the prospects for longevity of a robust system of collective determination of workers’ wages and employment have never looked more bleak (Forsyth & Sutherland 2006, p.197), there have been recent media reports of organisations, public and private, abandoning attempts to negotiate AWAs in favour of a return to collective agreements with workers (ABC 2007; Davis 2007c).

A central theme in the research to date is the issue of increased insecurity at work, *In short, Work Choices has made all employment more precarious* (Owens 2006, p.182). Indeed, twelve of the twenty workers interviewed by Elton & Pocock, all from the retail, manufacturing and services industries, had lost their jobs with direct connections to Work Choices (2007, p.6). Rather than enhancing the direct employee/employer relationship as is one of the objectives of Work Choices, it appears from our interviews that Work Choices has created an environment . . . that undermines trust at work. There is no benefit to either party in the relationship (Baird et al. 2007, p.35), with the result that these changes raise serious doubts as to whether this new regulatory environment will achieve its objectives of ‘higher productivity’ and the creation of a ‘fair labour market’ (Riley & Sarina 2006, p.346).

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