

GAZING OVER ROUGH TERRAIN: A REVIEW OF AUSTRALIA'S NEW INDUSTRIAL RELATIONS LANDSCAPE

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INTRODUCTION

Australia's industrial relations system, like the New Zealand system, for much of the twentieth century has been operating under the 'arbitral' model, that is the arbitration institution "played a central role in determining outcomes where the parties were unable to determine them themselves or where the outcomes determined by the parties would be against the public interest" (Peetz 2005b). This system is in contrary to the 'bargaining' system employed by most other industrialised nations (Peetz 2005b). In the 1990s, with increasing demands and pressures for Australia to maintain its competitive advantage on the global scale, it was deemed necessary to readapt the industrial relations systems and deregulate the labour market. These changes were considered necessary if Australia was to shift and develop into a more 'flexible' and productive nation. This new movement of industrial relations reforms came initially in 1996, with the *Workplace Relations Act 1996* (WR Act). The WR Act involved some compromise between the Coalition government and the Democrats. It introduced registered individual contracts in the forms of Australian Workplace Agreements (AWAs). These AWAs were to be subjected to the 'no disadvantage' test (NDT) which was to be applied by the new statutory authority known as Office of the Employment Advocate (OEA). The intention of the NDT was to ensure that AWAs leave employees no worse off than what they would be under their current relevant award.

The changes were designed to alter the balance of power in employer/employee relations through individualisation of employment relations – from the pluralist to a unitarist system of organisational management (Roan, Bramble and Lafferty 2001). Previous experiences in New Zealand, Victoria and Western Australia however all indicate that the path of market deregulation and individual contracting is not so favourable for employees at the lower end of the labour market. What is more, it indicates that market deregulation and individual contracting will increase inequalities in wages, result in a lack of 'choice' and 'flexibility' in individual contracts and be of detriment to the union movement (McLaughlin 2000; Plowman and Preston 2005; Rasmussen, McLaughlin and Boxall 2000; Watson 2001).

Initially, AWAs were forecast to cover up to six to seven per cent of the Australian Workforce (IRM 1998). However, data from the Australian Bureau of Statistics (ABS) in 2001 showed a different picture, with only 2.4 per cent of the Australian Workforce actually being covered. The ABS data does not take into consideration factors such as turnovers, company liquidations and the renewal of AWAs. The movement forecast by the Coalition government never actually transpired. By 2005 following another re-election victory and this time also with the Senate majority, the Howard government was able to push for further radical changes to the WR Act, this came in the form of *Workplace Relations Amendment (WorkChoices) Act 2005*. According to Prime Minister and the Minister of Employment, *WorkChoices* will 'drive the productivity improvements necessary for creating more jobs and increasing the standard of living for all Australian workers' (Howard and Andrews 2005). Nevertheless, it seems *WorkChoices* is basically a renewed version of *Jobsback* (The schema of John Howard, the opposition spokesperson on industrial relations).

The key elements of *WorkChoices* are: “unifying labour law; limiting the reach and influence of labour and the award system by encouraging commercial contract, ‘corporatising’ labour law and constructing exit routes for businesses to become award-free; transforming the Australian Industrial Relations Commission (AIRC) from a Dispute-Settling body to an institution which enforces labour law on unions; and centralising IR authority from the AIRC to the Executive and Parliament” (Briggs 2005). The government have suggested that AWAs enhance the “flexibility” and “choice” of employees, allowing them the freedom to meet their specific needs. It also claims that employers who use AWAs will promote Total Quality Management (TQM) and strive for strategic Human Resource Management (HRM) philosophies of the ‘soft’ perspective – that is encouraging ‘high trust’, ‘common purpose’ and the path to pluralistic organisational management (Waring 1999). However, the majority of researches clearly paint a very different picture, that is, organisations tend to exploit AWAs as a method of minimising labour costs, encouraging numerical flexibilities, intensifying managerial control and profit-maximisation. These are all characteristics of the ‘hard’ perspectives of strategic HRM - is typified by managerial prerogative, ‘bottom line’ success and employees as passive factors of production (Roan et al. 2001). This paper explores the new industrial relations landscape with particular relevance given to the implications of the roughed terrain ahead for both employers and employees. This is achieved by examining previous empirical and analytical research in the field of IR within Australia and New Zealand.

BACKGROUND OF THE AUSTRALIAN INDUSTRIAL RELATIONS SYSTEM

The Australian and New Zealand, industrial relations systems for much of the twentieth century had operated under an ‘arbitral model’, that is the arbitration institution “played a central role in determining outcomes where the parties were unable to determine them themselves or where the outcomes determined by the parties would be against the public interest” (Peetz 2005b). Most other industrialised nations have been operating under a ‘bargaining model’ of industrial relations, in which industrial relations outcomes were bargained between the parties subject to various procedural requirements and minimum standards set by state institutions (Peetz 2005b).

During the 1990s, the Australian and New Zealand government introduced changes which shifted the industrial relations systems towards the bargaining model, to diminish the role of the arbitral institution and with the emphasis placed on the parties handling their own industrial relations, thus reducing state interference and therefore aiming at increasing productivity and hence national welfare. The objective of this movement from an arbitral to a bargaining model was also to change the balance of power in employer/employee relations through individualisation of employment relations and Australian Workplace Agreements (AWAs) (Peetz 2005b). In 1996, following the federal election victory the Coalition government under John Howard immediately introduced the *Workplace Relations Act 1996* (WR Act), though some amendments were compromised to satisfy the Democrats to enable the passing of the legislation through the Senate.

Under the WR Act, registered individual contracts came through Australian Workplace Agreements (AWAs). AWAs were to be subjected to the ‘no disadvantage’ test (NDT) by the new statutory authority known as Office of the Employment Advocate (OEA), which restricted the awards to twenty allowable matters. The NDT was supposed to ensure that under the terms and conditions of AWAs, employees were no worse off than under the awards. The WR Act also “narrowed the circumstances in which industrial action was legal, introduced stern sanctions for unions breaching restrictions on industrial action, abolished the limited ‘good faith’ bargaining provisions that existed, prohibited compulsory unionism and union preference, and encouraged non-union certified agreements by restricting potential union involvement in certification hearings”(Peetz 2005b). According to the Coalition government, Australia required change if it was to be competitive and increase economic prosperity in the global context.

By 2004, the federal government was the only conservative government left in all of Australia, hence no further amendments to the WR Act were allowed in the 1997-2004 periods for fear it could endanger future re-election. When the Howard government faced the polls in October 2004 the election took a dramatic turn. Not only was the Government successfully re-elected for a fourth term, but it also, gained a Senate majority. This was an historic victory as only Malcolm Fraser in the mid 1970's and before him Sir Robert Menzies in the 1950's had ever controlled both houses of parliament (National Archives of Australia, 2002).

Having a majority in both houses simplified the process for further radical extensions to the WR Act – in the form of *Workplace Relations Amendment (Work Choices) Bill 2005*. These sweeping changes reflected some of the failed 1992 policy agenda, “*Jobsback*” or as it was less affectionately know *Jobsack!* The *Jobsback* policy was developed by John Howard as the Opposition spokesman on industrial relations for the 1993 federal election and was basically an amendment of the Kennett Government’s *Employee Relations Act 1992* policy of Victoria. The new amendments also seek to take over forcibly the state jurisdiction – however, this aspect of the legislation still remains unclear, due to the fact that, the states are challenging this in the High Court in May 2006 (Peetz 2005b).

According to the government, *WorkChoices*, is supposed to ‘drive the productivity improvements necessary for creating more jobs and increasing the standard of living for all Australian workers’ (Howard and Andrews 2005). The key dimensions of changes are: “unifying labour law; limiting the reach and influence of labour and the award system by encouraging commercial contract, ‘corporatising’ labour law and constructing exit routes for businesses to become award-free; tilting labour law in favour of employers by regulating unions and deregulating employers; transforming the AIRC [Australian Industrial Relations Commission] from a Dispute-Settling body to an institution which enforces labour law on unions; and centralising IR authority from the AIRC to the Executive and Parliament.” (Briggs 2005). Contrary to what the government are suggesting, previous experiences such as Victoria, Western Australia and New Zealand have all opposed the projected outcome. In fact the evidence points out that, by dismantling the award safety nets in favour of agreement-making contracts it will result in agreements which focus narrowly on wages and working hours flexibility; the widespread loss of penalty/overtime rates and the growth of low-pay jobs and wage inequality, especially for women, young people and low-skilled employees. Internationally, nations with deregulated labour markets such as the United States and the United Kingdom are also characterised by a large low-wage sector and wage inequality (Briggs 2005).

PREVIOUS EXPERIENCES

New Zealand, Victoria and Western Australia are three jurisdictions which anticipated the Australian government’s industrial relations reforms. The evidence from these previous scenarios demonstrate the path Australia’s industrial relations system will follow. In 1991, under the conservative New Zealand government, the Employment Contract Act (ECA) was brought in to bring about industrial reforms. The ECA abolished industrial awards, ended official recognition of unions, prohibited compulsory unionism, and installed a system for the creation and enforcement of ‘individual contracts’ and ‘collective contracts’ (Peetz 2005b). The ramifications of these reforms are best summarised by Rasmussen and Deeks (1997: 294):

‘rapid acceleration of the move to individual employment contract, marked by the growth of individual employment contracts (IECs) and the reduction in collective employment contracts (CECs); the reduced role for union in bargaining, particularly in the private sector; the decline in union membership and in union density; and the greater use of legal remedies in employment disputes and grievance resolution’ (Rasmussen and Deeks 1997)

Rasmussen and Deeks (1997) also highlighted cuts in penalty rates and overtime rates amongst those in low-wage areas. Colm McLaughlin (2000) reported the impacts ECA on retail workers as:

“retail employees had very little ‘freedom of choice’, and flexibility primarily suits the needs of employer...In relation to flexible hours of work, most respondents were required to work flexible hours and days but unable to exercise much influence over those hours and days of work...[and] the absence of overtime rates, weekend rates, and allowances was widespread...respondents reported having no choice but to accept the contract offered by their employer” (McLaughlin 2000)

McLaughlin proposed labour market protection to ensure equitable bargaining procedures and outcomes for low-paid employees (McLaughlin 2000). McLaughlin also joined with Rasmussen and Boxall (2000) in research which analysed the areas of contract structure, bargaining process, conditions of employment and employee opinions of the ECA. The results from this inquiry were:

“bargaining structures are predominantly decided by employers...employees characterised by part-time or casual employment, in low-skill occupations and on low incomes often have bargaining structures and employment conditions decided without their input. A significant proportion of workers in the secondary labour market find their income level inadequate. While needing the benefits of union representation, including improved awareness and advocacy of their rights, they are less likely to have access to it” (Rasmussen et al. 2000)

As mentioned previously the current *WorkChoices* legislation is a reflection of *Jobsback*, the industrial relations policy campaigned for in 1993 by John Howard, which is equivalent to the Kennett Government’s *Employment Relations Act 1992* (ERA) of Victoria. The ERA was the death of the Victorian awards in 1993, and for employees who continued with the same employer, conditions were just rolled over onto the new legislation. The ERA “established a set of minimum terms and conditions of employment in its Schedule 1” (Watson 2001). However, “in late 1996 the Kennett Government referred various industrial law matters to the Commonwealth Government”(Watson 2001). This referral saw the Schedule 1 provisions incorporated into the Commonwealth Government’s own WRA 1996 as “Schedule 1A”. Watson (2001) claims that “Schedule 1A employees comes closest to the goal pursued by deregulationists: a workforce largely subject to managerial prerogative in which ‘external interference’ surfaces only in the form of a minimalist legislative safety net” (Watson 2001) – the fundamental ideas of *WorkChoices*. The consequences of the industrial relations changes in Victoria were a “dual system of protective regulation, in which one group of workers experiences only minimal prescription concerning their earnings and employment conditions, while another group of workers experienced a more comprehensive range of protections” (Watson 2001). The dilemma manifested in the two-tiered workforce, that is, wages and conditions among Schedule 1A workers were systematically inferior to those workers with Federal coverage (Watson 2001). Watson’s (2001) working paper which compared earnings and employment conditions of Schedule 1A workers with those who came under Federal jurisdiction. The adverse effects of ‘deregulating’ an industrial relations system were revealed:

“Schedule 1A workers in vulnerable industries like agriculture and hospitality, in vulnerable locations such as non-metropolitan Victoria, or in vulnerable demographic groups fared very badly in comparison with their Federal counterparts ...workers located in the deregulated sector faced significantly greater earnings inequalities than those in the more protected sector...[and] For those who are already well positioned in the labour market, this process enhances their circumstances...[and ultimately]labour market deregulation poses a serious threat to a society’s long term future. In this sense, ‘social protection’ is also shorthand for the protection of society itself” (Watson 2001).

Western Australia, under the Court Liberal government in 1993, also proceeded in the same direction with *Workplace Agreements Act 1993* (WAA), registered 'Work Place Agreements' (WPAs) which could be 'collective' or individual. However, following the demise of this legislation in 2003, workers formerly on WPAs progressed onto AWAs, one of the reasons for the overstated statistical growth of AWAs in 2004. However, Western Australia provides the ideal "litmus test for what might happen to employment conditions for the vulnerable under *WorkChoices*" (Plowman and Preston 2005). Prior to the *Workplace Agreements Act*, the WA industrial relations system had the Western Australian Industrial Relations Commission (WAIRC) in charge of conciliation and arbitration powers. Under the Act, "workplace agreements could be negotiated between employers and their employees. Both parties could be assisted by bargaining agents who could be an individual, a union or some other body. Once signed by the parties, the agreements could be registered by the commissioner for Workplace agreements. Limited tests applied to the registration of workplace agreements. Once registered, agreements displaced any awards and the jurisdiction of the WAIRC." (Plowman and Preston 2005). Plowman and Preston (2005) stated that a:

"large number of IWAs [Individual Workplace Agreements] did not provide for any wage increases during their currency, a period that could extend beyond five years ...IWAs provided for ordinary hours to operate between Monday to Sunday, in effect removing Sunday penalty rates...Most agreements provided for working time arrangements to be determined on the basis of management discretion"(Plowman and Preston 2005)

The article concluded by confirming the lack of safeguards in the WA experience demonstrated that relative earnings of the lowly paid will sharply decline as employers exploit market conditions to decrease labour costs. In fact, this will not create greater employment but rather initiate a new form of labour pool characterised by low paid, low skill and high turnover (Plowman and Preston 2005).

Plainly, New Zealand, Victoria and Western Australia, have all shown that the path of market deregulations and individual contracting will have dire effects for the young, the low-skilled, and the low paid. In New Zealand, the ECA resulted in a large growth of individual contracting; a decline in unionism in the private sectors and the secondary labour market was exploited by employers to reduce labour cost to increase productivity. The 'freedom of choice' advocated by the government in terms of individual contract negotiations was merely rhetoric. In reality, employers initiated individual contracts without the workers' knowledge, and thus workers are forced into the 'take it or leave' scenario without any real negotiation. In Victoria, Schedule 1A employees in industries like agriculture and hospitality faced deteriorating wages compared to employees under the federal system, creating a growing wage gap. Western Australia, which offers the closest representation of the model for the current *WorkChoices*, demonstrates that IWAs provisions of ordinary hours are misused by employers to abolish penalty and overtime rates. The significant trend to individual contracts and market deregulation favours managerial prerogatives.

POSSIBLE IMPLICATIONS OF WORKCHOICES

The implications of *WorkChoices* can be categorised into three different areas. Firstly, a shift to a low-wage sector strategy is apparent. There will be increases in the number of AWAs. Secondly, there are uncertainties for employers with new risks, complexities and costs – i.e. with unlawful dismissal, discrimination and breach of contract cases - fewer claims but those that proceed will be lengthier and more costly. Lastly there are social implications for the overall community including the individualisation of Australian society (Briggs 2005).

First there is the abolition of the 'no disadvantage' test (NDT) with a "fair pay and conditions standard" (Peetz 2005a). Under this new scheme, AWAs are only required to satisfy just six

statutory minimum standards to be legally valid: the minimum award wage, four leave entitlements (personal/carers, unpaid parental, compassionate and annual leave) and ordinary hours (Briggs 2005). Additionally, AWAs takes effect from the time of lodgement rather than waiting for OEA approval. Similarly, certified agreements must be lodged with the OEA instead of the AIRC commencing upon lodgement (Briggs 2005). According to David Peetz (2005) the major consequences of the abolition of the NDT for AWAs will be cutting of overtime rates and/or penalty rates, widening the spread of 'standard' hours or replacing wages with 'annualised salaries' (Cole, Callus and van Barneveld 2001). On top of this, under the new 'fair' standards, there will be no need for increases in base wage rates, thus an overall decrease in real earnings for employees over time. This will effectively leave a widening distribution in average real wage, with expected growth for strong unionized sectors and managerial/professional employees, despite the declining position of AWA employees.

The other dire effect of the abolition of the NDT will be the expected increase in the numbers of registered individual agreement-making with the simplicity of the new requirements and process for employers to undercut award conditions on payments for working time and even make the award irrelevant. Indeed, AWAs are predicted to be just one or two pages in the future, with sample templates downloadable via the OEA website (Peetz 2005b). Lastly, the move of wage fixing from the AIRC to the Australian Fair Pay Commission (AFPC) could mean nominal minimum wages may virtually freeze (i.e., reduce real minimum wages) in an ostensible attempt to increase employment amongst the low paid. What is even more disconcerting is that, no assurances have been made about minimum wages rises (Peetz 2005b) – only that they 'will not fall below the level set after inclusion of any increase determined by the 2005 Safety Net Review' (Howard 2005a). The fact that AFPC will be appointed with individuals who are associated with HR Nicholls Society and other pro-corporate think tanks clearly indicates the position and direction of the government about the minimum award wages – that is, stagnant or even declining minimum award wages to increase organisational productivity and lower unemployment.

Furthermore, the removal of Unfair Dismissal Protection provision will create new risks, complexities and costs for employers. Even though there will probably be fewer claims, "those claims will be lengthier, more costly and proceed under legal rules where the onus of proof is placed on the employer" (Briggs 2005). The intention of these changes is to allow employers the confidence, flexibility and power to employ people without the insecurity of having to face Unfair Dismissal claims every time they remove someone, thus increasing the growth in the overall national level of employment (Peetz 2005b). With the new provision, larger organisations could divide themselves into smaller companies with fewer than one hundred workers to avoid claims of Unfair Dismissal. In fact this will oppose the envisaged growth of employment predicted by the government. Conversely, the Unlawful Dismissal provision will create complexities and risks for employers, since "the onus of proof is reversed so employers have to prove they did not dismiss an employee for an unlawful reason... the process will be longer, legal costs will be higher and where employers are found to have unlawfully dismissed an employee, the penalties and compensation will be greater" (Briggs 2005). In addition to this, employers are exposed to dismissal based on unlawful discrimination – these cases tend to bring damaging negative publicity as well as the risk of a financial penalty.

Last of all, the new *WorkChoices* laws will have adverse social consequences for work-life balance, loss of quality family time, and individualisation of Australian society. The move to more flexible working time will result in "lengthening hours for full-timers, less standard and more irregular hours and increased work at 'family unfriendly' hours" (Briggs 2005) which will in effect damage "the quality of family, parenting, relationships and health – ...because of ... 'work-life collision'" (Pocock 2003). This is evident in the New Zealand experience with the "average full-time worker is now employed for 'five and a half' days per week" (Rasmussen et al. 2000) – that is an average of 44.8 hours per week. Unsurprisingly, the manifestations of longer working hours are increased stress, negative impacts on family time and quality of life.

It involves the erosion of the traditional weekend and is harmful for family life (Rasmussen et al. 2000). As Buchanan & Thornthwaite (2001: 12) note: "in the international comparative literature we did not find any references that ...delivered superior outcomes in terms of the general choices for workers or the quality of care for children" (Buchanan and Thornwaite 2001). The Australian perspective will inevitably be no different. According to the ex-Director of the Australian Institute of Family Studies, Don Edgar (2005), the "proposed new industrial relations laws are likely to damage the fabric of family life and make it even more difficult for Australia's parents to raise their children to become competent, confident citizen's in a globalising future" (Edgar 2005). The evidence implies dire social consequences resulting from these reforms.

Therefore, it is not unreasonable to suggest that the new *WorkChoices* regime will lead to a low-paid and disadvantaged sector. This is the direct ramification of labour market deregulation. The move from unfair dismissal to unlawful dismissal for organisations with fewer than one hundred employees will heighten confusion amongst employers, with new complexities and risks confronting them. Though there will be fewer cases of unfair dismissal, the cases for unlawful dismissal will be more costly and will result in bad publicity for the organisation. Finally, the decline of unions will foster individualism in the workplace and Australian communities as well as having social implications around work-life balance and family time.

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