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Keeping the Edge

**Australia needs workplace relations reform
to stay in the global game**

 **AUSTRALIAN INDUSTRY GROUP**

October 2005



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Edited version of an article which appeared in
The Australian Financial Review
21st October 2005

If you search the internet for “*WorkChoices*” - a compound word that did not exist until a fortnight ago - you’ll now find more than 360,000 references. Sifting through this barrage of information is not for the feint-hearted but it is nonetheless important that we take the time to step back and consider how the Government’s far-reaching legislative change will affect us both as employees and employers.

Much emotion has greeted these changes. Unions and some church groups see them as an attack on the family and the rights of ordinary working people, particularly the most vulnerable. Business has reinforced the need for further reform and some have even suggested that the latest changes don’t go far enough.

Struggling to be heard in the overall response has been a consideration of what really is needed and wanted by Australians in today’s open and very diverse economy, as opposed to the current system which is rooted in an era when Australia was a closed economy and when the structure of our business and industry was very different.

Employers don’t see workplace relations reform as a zero sum game where one person’s gain is another’s loss. The objective of change must be the closer alignment of the system with the competitive requirements of individual businesses and their employees to the benefit of Australia as a whole. However, there will always be a group of vulnerable employees and this raises important issues and highlights the need for a strong and robust safety net. The safety net proposed by the Government is extensive, covering all the core conditions of work to a higher level than prevails in many like countries, such as the US and the UK. In addition, we have a generous social welfare system to the extent that, for example, a single income family with two children and a dependent spouse earning about two thirds of average male earnings and renting privately receives more than 46 per cent of its net disposable income through family benefits

and other welfare payments.¹ At the same time it is a fact that the proposals make the safety net more flexible, with matters such as penalty rates and allowances negotiable under agreements, although this is under highly prescribed conditions.

It is essential that the debate about workplace relations reform be seen in the context of the extraordinary changes occurring in the global economy and the impact these are having on Australia. These economic pressures pose far more threat to the security of Australian workers than any changes to employment legislation. This was highlighted by the loss of 46,800 mainly low skilled manufacturing jobs in the past year². Yet the changes in the global economy present opportunities for Australian workers if we are agile and skilled enough to take advantage of those opportunities.

The proposed legislation envisages far reaching reform that will ultimately create a national system of employment regulation; it will give the Federal Parliament the right to legislate for employment conditions; and it will end over 100 years of struggle to develop a vibrant industrial system in the face of inadequate constitutional power.

I would like to explore here a number of the important areas that are at the heart of the proposed reforms.

A National Workplace Relations System

To understand the extreme difficulties for business associated with the current system it's helpful to look at how our arcane workplace relations framework evolved. At the time of Federation, the States retained their right to legislate in industrial matters, but the Commonwealth was given a limited constitutional power as to interstate industrial disputes because the States found it difficult to deal with such disputes. This

¹ *The case for increased tax*, Michael Keating, Academy of the Social Sciences 2004

² Based on ABS data in trend terms

power did not allow the Commonwealth Parliament to legislate directly for employee entitlements and in practice only allowed it to establish a tribunal to conciliate and arbitrate disputes.

Surprisingly, a substantial and independent federal system of employment regulation developed. This was achieved, in spite of the apparently minimal constitutional power, by a mix of necessity and the inspiration of members of the High Court in accepting innovative applications of the limited industrial power.

The legacy of this tortured development was our current Federal system, in which a union wanting to obtain award conditions in an industry sends out a letter to multitudes of employers claiming an extravagant set of entitlements so as to create the necessary dispute ambit. Having received mainly no response, the union then goes through an exercise of having the Australian Industrial Relations Commission (AIRC) declare that there is an interstate dispute. Following this, a protracted set of hearings between representative parties eventually arrives at a set of conditions that are supposed to cater for the needs of large numbers of employees. These employees are sometimes spread across the whole continent and generally remain completely ignorant of the proceedings and have little or no input to implement their particular needs.

Over time, many awards have become byzantine in their complexity. Instead of being able to be easily understood on the shop floor, these awards are repositories of problems of interpretation more suited to a cryptic crossword than to providing sensible employment conditions.

On top of this, all but one of the States continued to develop and enhance their own industrial systems. No matter how well many of these systems operate the fact remains that no employer wants to be faced with dealing with six different systems in order to expand its business throughout Australia. The

intermeshing and clash of these systems has nourished generations of industrial lawyers.

The great success story of the Federal system in the modern era was the system of certified agreements that provided the real engine-room of industrial progress until its ability to foster further productivity changes stalled.

Given the debate over the use of the Corporations Power to underpin the new workplace relations system, it is interesting to note that the vast majority of existing certified agreements are made on the constitutional platform of the Corporations Power.

The gradual acceptance by the High Court as to the width of the Corporations Power has given the Government the opportunity to throw off the historical restraints of the contrived artificial industrial disputes system and to take more control of the regulation of employment conditions at the expense of the AIRC's previous dominance in this area. It has also given the Government the opportunity of moving towards a single central industrial system; a concept that the vast majority of Australians would have to agree is a logical step forward.

Industrial Action

It may come as a surprise to people that the right to strike is a comparatively new right in Australian workplace relations. Before we moved to the system of enterprise bargaining in 1993 there was no legal right to strike.

The present system grants rights to impose industrial action during a period when an agreement is being negotiated, but prohibits industrial action at all other times.

Experience has shown that this approach sometimes results in unnecessary loss to employers and employees when negotiations become stalemated.

WorkChoices will give the AIRC the power to order cooling-off periods, both to allow further calm negotiation, and to prevent serious loss to third parties.

Employees will be given the right to decide whether they wish to take strike action in a secret ballot. This will give greater independence to workers and, contrary to union complaints, it will more than justify the delay involved in imposing bans.

It has to be remembered though that a powerful right to industrial action will remain part of our system. It is to be hoped, however, the intended legislation will act as a brake on the volume and length of such action.

Unfair Dismissal

There has been a serious problem evident in the present Federal unfair dismissal regime that has provided growing concern to employers. The emphasis placed on the procedure followed prior to termination, as compared with the real reason for dismissal, has led to employer frustration and a perception that it is often not possible to part with an unsatisfactory employee without making some unjustified payment.

The Australian Industry Group (Ai Group) made many submissions to the Government for moderate reform of the system to improve its workability but opposition parties refused to countenance any reform and our suggestions were ignored.

The practical result of the Government's intention to reform this area will be a two-tier system. Employees of smaller companies will lose all their unfair dismissal rights, while employees of larger companies will retain most of their existing rights. The procedural flaws may continue to exist in the system as it applies to larger companies although the changed qualifying period to six months should bring some relief. Ai Group

believes that there should be further action in terms of dealing with the flaws in the system for larger companies beyond just changing the employment qualifying period.

We anticipate that companies that have good human resources processes which include staff counseling and termination arrangements will keep them in place as they contribute to a motivated workforce and settled workplace relations.

Fair Pay Commission

Ai Group has argued for some time that a broader range of matters needs to be considered in setting minimum wages and that a more research based process should be adopted. In the last Safety Net Review Case award wages were increased by \$17. This cost employers \$22 per employee after on-costs such as superannuation, workers' compensation and payroll tax were met, while a single parent on the minimum wage, for example, received just \$4.55 after welfare and tax adjustments were made. The beneficiary was the Government which saved around \$12, while the job of the employee on the minimum wage became more vulnerable because employers were forced to pay such a large increase. It will be incumbent on the Fair Pay Commission to achieve a smarter balance between minimum wages, social welfare and tax.

Agreement Making

Another much debated issue relates to the agreement-making framework proposed by the Government and whether it will give rise to unfair practices. The proposed system has in fact been tried and tested in that it is not unlike the framework introduced by the Victorian Government in 1993. In that system, individual or collective agreements contained terms and conditions of employment with minimum conditions not dissimilar to those under consideration today. This system continued even after Victoria referred industrial power to the

federal parliament in 1996 - a development greeted with alarm by the union movement, but the system has subsequently operated successfully with few instances of employer abuse.

The foreshadowed agreement making process, however, does place considerable pressures on employers and also assigns a role to the Office of the Employment Advocate (OEA) that will impose a huge strain on the resources of that Office.

The present no disadvantage test, in which an agreement has to contain entitlements generally no less favourable than the relevant award and is registered with the AIRC, will be replaced by a process in which the employer swears a declaration that the agreement lodged for registration with the OEA complies with the legal requirements for agreement making procedure and content. The employer can be liable for penalties if there is any flaw in the declaration or if there is any prohibited content in the agreement.

WorkChoices envisages that the OEA will be available to give advice to both employers and employees, including, for example, assisting non-English speaking employees.

It is vitally important that the enterprise bargaining system is reinvigorated and WorkChoices comprehensively addresses this issue. A key frustration for employers in the current system is the pattern bargaining approach used by some unions and the related industrial action in pursuit of such claims. It has been normal for unions to make a common claim across hundreds of employers with no consideration for the needs of a particular enterprise. In recent times the unions have refused to negotiate productivity improvements during the bargaining processes - which they term "trade-offs" but which are in fact beneficial for the enterprise and all concerned. The intended legislation outlaws industrial action in pursuit of pattern bargaining and will force a more genuine enterprise focus to negotiations. This will be greatly welcomed by employers.

In relation to the new list of matters prohibited for future registered agreements, these essentially codify the matters which emerged from Ai Group's appeal to the High Court in the *Electrolux* case with some exceptions. The High Court upheld Ai Group arguments and limited the matters that can be the subject of industrial action and included in agreements to those which relate to the relationship between the employer and its employees. Subsequent interpretations by the AIRC have failed to give genuine clarity to the issue and the list of matters to be prohibited in registered agreements will assist in providing such clarification.

In assessing the proposed system, we should look at an example of what an Australian worker of today wants from an employment agreement. A worker in the Information Technology business has built up strong experience over several years' employment and has a strong grip on her range of work. She wants to do additional training that will take up some working time. A lot of her work can be done at her home with the computer equipment she has been supplied with. She has a mortgage and would like to trade two weeks' annual leave for payment to reduce the mortgage in preparation for the costs of parenthood. She thinks it fair that she should receive some paid maternity leave if she shows continuing loyalty to the employer.

An employer who recognises the value of this employee will readily consider implementing her requirements so as to retain her skills, and all of these special conditions could be easily arranged under the WorkChoices system.

In contrast, under the current system her needs could not be met. Awards are too rigid to cater for her individual requirements and can only readily accommodate a one size fits all approach.

This example isn't an isolated one but it represents an insight into the reality of the aspirations of the Australian workforce

today. Reliance on unwieldy awards covering large numbers of workers, with little flexibility to recognise and reward individual performance and meet individual needs, should be a thing of the past.

Finally, it's important to make clear that workplace relations reform on its own is not the silver bullet for productivity improvement. It needs to be combined with further investment in skills and training initiatives; greater focus on assisting companies in export markets; a lifting of the regulatory burden on business; more attention to business innovation; greater attention to infrastructure development; more competitive tax and welfare systems and a more coherent division of Federal and State responsibilities.

Australia has introduced a lot of change over the past 15 years or so that has often appeared confronting and demanded a leap of faith. It is now confronting to imagine where Australia would have been if we had not made those changes. This should give us confidence to embrace further reform and confidence that we can make the changes work and operate in a balanced way.

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