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## IR Reform: Choice and Compulsion

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## **IR Reform: Choice and Compulsion**

### **Introduction**

Justice Henry Higgins, the architect of the 1907 Harvester Decision of the Arbitration Court which enshrined the principle of a living wage, defined the scope of the Australian arbitration system as a “new province for law and order”. Almost a century on, John Howard claims that industrial relations reform package *WorkChoices* is “one of the great pieces of unfinished business in the structural transformation of the Australian economy”.

Howard’s reforms are often seen as representing a reversal of the choices made at the time of Federation, and in important respects this is true. The role of the AIRC, successor to the Arbitration Court has been greatly diminished, and the task of determining minimum wages has been handed to a new body, the Fair Pay commission. A central aim of the legislation is to eliminate collective bargaining, mediated by arbitration, in favour of directly-negotiated individual contracts.

In other respects, however, there is an important element of continuity. Far from abandoning the idea that industrial relations is an appropriate sphere for ‘law and order’, the Howard government has created a detailed system of regulation and State intervention, more intrusive, in many respects than the one it is replacing. *WorkChoices* and the associated reforms create a wide range of criminal offences, civil wrongs and prohibitions on various kinds of industrial action

This point was made by a number of commentators when the legislation was being debated. However, since the regulations implementing the program were released on ..., and *WorkChoices* came into effect on ..., previously unobserved features of the package have become apparent. In particular, while the legislation is designed to shift the balance of workplace power in favour of employers, it does so, in large measure by imposing constraints on individual employers, preventing them from reaching agreements seen by the government as contrary to the interests of employers in general. This is consistent with the

pressure applied by the government to its own departments, and to enterprises that deal with governments, such as universities and construction companies, to adopt its preferred model, rather than choose freely from the legally available options.

The paper begins with a schematic survey of the historical background, which provides the context for the changes embodied in *WorkChoices*, briefly described in Section 2. The core of the paper, Section 3, examines the role of choice and constraint in the design of the reforms. This analysis is used to inform an assessment of the likely implications of reform for wages and conditions, and likely effects on inequality. A similar analysis is applied to assess effects on growth, productivity, employment and unemployment. Finally, we consider possible future directions for alternative reform strategies.

## **1. Historical background**

The great strikes of the 1890s demonstrated that a labour relations regime based on the law of master and servant was untenable as a matter of justice. Federation saw the entrenchment of Commonwealth powers to establish institutions to conciliate and arbitrate industrial disputes across state borders. State governments followed suit with their own dispute settling and wage-fixation tribunals.

Distinctive about the Australian arbitral model was its recognition of unions as bargaining parties with legal rights, and wage-fixation on national and industry levels through awards. Awards also comprehensively stipulated employment conditions. The central theme was the idea of the State as an impartial arbiter between two parties, capital and labour, both with legitimate claims to a share of income. The arbitral model struck different balances over time between equity and economic efficiency, but was sufficiently flexible to maintain its standing as part of a public policy consensus.

The combination of Arbitration, tariff protection and the White Australia policy has commonly been referred to as the 'Australian settlement' (Kelly 1992, see also Henderson 1983). However, this set of policies proved inadequate to

manage the economic shocks of the 1920s and the Great Depression, and a new settlement emerged during and after World War II. In this new system, Keynesian macroeconomic management played a central role, and the White Australia Policy was phased out over several decades, ending with the election of the Whitlam government in 1972 (Smyth 1998).

Both macroeconomic management and the arbitral system were highly successful between 1945 and 1970, The system delivered high wages and employment security, and was supported by both the ALP and the Liberal Party and in general by employers (Macintyre & Mitchell 1989).

The political and economic legitimacy of the arbitral model rested on not only a broad consensus among the parties but also on a particular view of Australia's place in the international political economy which was in substance little changed from Federation through to the stagflation crisis of the 1970s. The view that the arbitral model was an integral part of the Australian settlement captures nicely its relationship with protectionism, and a largely primary export driven economy. With full employment and steady growth apparently guaranteed by Keynesian demand management, the arbitral system could focus on the equitable division of the benefits of prosperity.

Dissent from the dominant consensus emerged as early as the 1970s, though the focus was initially on criticism of tariff protection. Economic turbulence in the 1970s, and a shift in the labour share of GDP and increased bargaining power by unionised workers led to a backlash. The Fraser government attempted to reduce the real wage 'overhang' by increasing the power of the Arbitration Commission, and later through a wage-price freeze. Increasingly, however, there was pressure from neoliberal economists (then commonly referred as 'economic rationalists') to abandon the arbitral model in favour of a 'deregulated' labour market (Kasper et al. 1980)

### *The Accord*

The Labor party, however, moved in the opposite direction, seeking a consensus-based resolution of disputes over the division of national income. The

leading advocate of this view, was then Australian Council of Trade Unions (ACTU) leader Bob Hawke, who subsequently led Labor to victory in the 1983 election. Although Hawke envisaged a tripartite arrangement involving government, unions and employer bodies, attempts to involve business in such agreements yielded little success. What emerged instead was the Prices and Incomes Accord negotiated between the government and the ACTU in 1983.

For much of the 1980s, increases in wages arose primarily from annual national wage cases, in which the crucial determinant of the outcome was bargaining between the ACTU and the Hawke Labor government under successive versions of the Accord. This actually represented a re-centralisation of wage determination, and was in many ways a response to perceived and actual “wage breakouts” through over-award collective bargaining in the 1970s and during the resource boom of the early 1980s (Dabscheck 1995).

The avowed aim of the Hawke-Keating governments was to adjust the Australian Settlement model to a globalising economy where flexibility and productivity were seen as key drivers of successful international competitiveness. However, the “managed decentralism” characteristic of the Accord process sought to do this while maintaining consensus among the parties, and to do so while encouraging productivity rather than wage advantages for firms, and for the economy generally (Gruen and Grattan 1993).

Although there is a voluminous literature on the Accord (Bahnisch 2001), for present purposes, the key features of the model can be taken to be a high degree of centralisation and a key role for the ACTU, reform and modernisation of awards, and a generally peaceful industrial climate reflecting the corporatist policy settings at the peak level.

Despite the success of the Accord, centralised wage fixation was subject to increasingly severe criticism during the 1980s. The foundation of the HR Nicholls society in 1986 was a notable example. Demands for the removal of ‘restrictive work practices’ and reassertions of the Australian shibboleth of “management prerogative” became increasingly strident as the 1980s wore on, being incorporated into a distinctly neo-liberal set of policy prescriptions which

reached their apogee with John Hewson's *Fightback* in 1993 (Hewson and Fischer 1991, 1992). In many ways, the ideology embodied in *Fightback* had resonances with international moves towards decentralisation and deregulation in employment relations, particularly in the UK, US, and New Zealand, but in a particularly Australian context, its extreme legalism has translated through into *WorkChoices*.

### *Enterprise bargaining*

As the Accord process came under strain in the late 1980s, individual unions sought to regain a more prominent role in wage bargaining, while policymakers sought to increase flexibility. Initially manifested through limited productivity bargaining still within the framework of the National Wage Case in 1987 and 1988, the outcome in 1991 was the system of enterprise bargaining, in which unions reached agreements with individual employers, and the award system was effectively reduced to a safety net, with diminished capacity by both the AIRC and the parties at peak level to directly influence wage outcomes. Reflecting the political compromise that led to the adoption of enterprise bargaining, unions focused on the bargaining aspect, while employers focused on flexibility and the opportunity to buy out restrictive award conditions.

The take up of enterprise bargaining subsequent to the second AIRC National Wage Case decision in 1991, and more importantly the Keating government's 1993 legislation, was still driven by the parties to the Accord – particularly the government and the ACTU – and the wave of union amalgamations which represented the ACTU's strategic direction ensured that pattern bargaining was the rule rather than the exception.

### *The Howard government*

Shortly after its election in 1996, the Howard government introduced the *Workplace Relations Act*. Despite having its sails trimmed to fit prevailing electoral winds and the necessity of passing the Senate, the *Workplace Relations Act* produced a significant shift in the balance of power in the workplace. The Howard Government swept away much social regulation of the labour market

and of working conditions, while enhancing the power the government and employers have to internally regulate employment and working life.

Although the rhetoric of both the Howard government's pre-election policy and that surrounding the introduction of the Workplace Relations Act claimed that flexibility and choice were key themes, to be achieved by eliminating "third parties" (for which, read the AIRC and unions) from cooperative workplace relations, the reality was that the choices which led to the increased individualisation of wage determination were largely those of employers who were inclined to strategies of deunionisation.

The path was blazed, as a way of setting an example to recalcitrant businesses, by the Federal government itself. Thus the ideologues of individualised employment relations showed that they were concerned to ensure that individual actors in the system – businesses among them – hewed closely to a line set by the big players, the Business Council of Australia and the Government itself.

Significant barriers were placed in the way of employees, and even pluralist employers seeking to foster employee voice through union representation, while the vestiges of compulsory unionism were swept away. The "simplification" of awards to 20 allowable matters foregrounded managerial choice in many aspects of working life and the determination of conditions, and heightened existing trends to casualisation and contracting out of work.

In many respects the *Workplace Relations Act* met the major concerns of employers. Union density declined sharply, despite generally favourable economic conditions. There was a significant increase in the flexibility of employment arrangements available to employers, achieved in large measure by reducing the flexibility available to workers. Work intensity and the working hours of full-time employees increased substantially.

Nevertheless, some counter trends under the Workplace Relations Act led to regular calls from both business lobbies and from within government for a "second wave" of reforms, calls which could find their answer in the unexpected accession of a Senate majority to the Howard government in 2004. The

Australian Industrial Relations Commission proved more interventionist than anticipated, continuing to set new employment standards through test cases (for instance, redundancy payments in small businesses which the government is keen to wind back). Penetration of AWAs was much lower than anticipated, being concentrated within government and mining and telecommunications, and to a lesser degree service industries.

It is not surprising then, that the achievement of a Senate majority led to the introduction of radical new measures, packaged as *WorkChoices*. We now turn to an analysis of these changes.

## **2. Key provisions of Workchoices**

The *WorkChoices* legislation (get actual name of Act) has been discussed in some detail (refs. In this section, we focus primarily on the regulations implementing *WorkChoices*, and on aspects of the legislation that enhance the power of the Commonwealth government and the Minister for Industrial Relations at the expense of State governments, workers and unions and, in some cases, employers.

### *The Fair Pay Commission*

Under *WorkChoices*, responsibility for setting minimum wages is taken away from the Australian Industrial Relations Commissions, and given to a new body, the Fair Pay Commission, modelled on the British Low Pay Commission, which will set a statutory Federal Minimum Wage.

Although it remains to be seen how the Fair Pay Commission will determine minimum wages, the expectation is that minimum wages will be reduced in real value or, at least, that they will decline relative to median wages over time.

### *Contracts and awards*

Minimum conditions will be set by legislation rather than through the awards process. Both enterprise bargaining agreements (EBAs) and Australian Workplace Agreements (AWAs) will be assessed by the OEA and both will

require substantially less scrutiny. Most significantly, the reframing of the no disadvantage test will allow AWAs to undercut award minima, effectively making the award protections optional for employers.

Although the advertising campaign mounted at the time legislation was passed stressed that a wide range of conditions, including public holidays were ‘Protected by Law’, these protections have little substance. They do not apply at all to new employees, who may be offered contracts requiring work on public holidays. The weakening of the no disadvantage test means that such protections can be stripped away more easily during the process of negotiating new EBAs and AWAs.

### *Abolition of state tribunals*

The Commonwealth government does not have constitutional power to legislate for the determination of wages and working conditions generally, only to provide a mechanism for the settlement of inter-state industrial disputes. The Hawke and Keating governments expanded the reach of the Commonwealth into the workplace, with a number of legislative provisions resting on the external affairs power (justified by the adherence of Australia to ILO conventions). In part, this reflected a desire to entrench equal rights for women and other groups in the workplace through anti-discrimination and other equity legislation, but it also represented the frustration of the government and the ACTU with the AIRC over its tardiness in accepting enterprise bargaining. The little used provisions for non-union certified agreements which formed part of the Keating legislation rested on the corporations power.

By contrast, state jurisdiction over employment relations is in theory unrestricted – as state constitutions empower parliaments to make legislation for the “peace, good order and good government” of the state in question. Victoria handed its industrial powers to the Commonwealth under the Kennett government, but other state jurisdictions remain robust in their coverage of workers – particularly those in Queensland and New South Wales.

The *WorkChoices* legislation seeks to abolish state tribunals altogether.

As with the Hawke-Keating government, the extension of Commonwealth power relies on the corporations power. The validity of this application remains to be tested, as does the workability of the system in relation to employers other than corporations.

#### *Prohibited terms in contract*

There are a number of terms which cannot be inserted into an employment contract, whether at the instance of the employer or the employee (and indeed, the Act makes it a criminal offence with substantial penalties for such terms to be put on the table). It is currently unclear how far this constraint on agreement making will extend, as the Minister is at the time of writing yet to table Regulations made under the Act. However, it is open to the Minister to include potentially any condition as a ‘prohibited term’ by regulation.

Most important at this stage is the prohibition on inserting provisions relating to unfair dismissal in contracts. Many common law contracts – for example, those for senior corporate executives and professionals such as the partners of legal firms – include such provisions. In the United States, it is common for employment contracts to nominate an external third party arbitrator to resolve disputes. The intent of this prohibition appears to be to prevent unions from entrenching the abolished protections against unfair dismissal (which are effectively absolutely abolished – given the provision that operational reasons override them where they still exist in organisations with more than 100 employees) in certified agreements.

#### *Limits on strikes and lockouts*

Strikes have been legal during bargaining periods since the Keating legislation, but compared to other countries, were already severely circumscribed. For instance, disputes during the term of an agreement over its interpretation could not legally use a strike as a tactic.

The *Workplace Relations Act* 1996 further circumscribed the range of allowable industrial tactics, and as in *WorkChoices*, one of the few areas where the AIRC was given enhanced powers was in punitive rulings against industrial

action. There was much discussion in business circles over the ensuing decade about the unwillingness of many employers to make use of the harsh penalties available, which is understandable, as it is usually in the interest of an employer to maintain or restore good relations with its bargaining partners. Consequently, WorkChoices takes the choice out of the employer's hands by allowing the Minister to make application to the AIRC by declaring that strike action is "adversely affecting" an employer. Aggrieved "third parties" can also take such action (for instance, customers or suppliers). Other interventions include the introduction of secret ballots for strikes

By contrast, the removal of no-disadvantage tests greatly increases the range of demands employers may legally use as the basis for a lockout. In effect, employers have an almost absolute right to lock out their workers

#### *Discretionary power of minister*

*WorkChoices* confers a wide range of discretionary powers on the Minister, most notably in relation to 'essential services'. These are defined broadly to include any activity where industrial action might cause significant damage to the economy. The Minister can issue Directions to lessen the threat to essential services, including:

- \* terminating all relevant bargaining periods;
- \* requiring employees to lift work bans or return to work; and
- \* requiring the employer to allow employees back onto the worksite in the case of a lockout.

In practice, it seems clear that the power will be used primarily against employees, as has been the case with similar powers in the past.

### **3. Choice and Constraint in WorkChoices**

From the beginning, the arbitral approach has been subject to two kinds of criticism. The first was that the State should not be involved in the operations of labour markets, which should be left to free contract between individual workers and employers. As has become clear, however, the relations between workers and employers are so complex that any attempt to apply standard

contractual law is doomed to failure. In effect, the interpretation of labour contracts inevitably involves intervention. As Buchanan and Callus (1993) observe, deregulation is a furphy in the Australian employment relations debate, the real choice being between external or social regulation and internal or managerial regulation.

The other big problem with this approach relates to the role of unions. The argument would appear to imply that unions should be unregulated, except perhaps for restrictions on violent picketing and similar activities involving actual or threatened use of force. However, most advocates of deregulation seek to preserve a wide range of tort actions ultimately derived not from contract law but from feudal concepts of master-servant relationships.

The second kind of criticism applied to the idea of neutrality. Advocates of both capital and labour have, at different times, argued that the arbitral system was biased against them and that reform was needed to restore the balance, for example by prohibiting 'unfair' actions by the other side, and by removing restrictions on their own activities. So, for example, unions have sought protection against lockouts and strikebreaking, while employers have sought the prohibition of secondary boycotts, 'wildcat' strikes and so on.

The *WorkChoices* legislation is, in large measure, motivated by the desire to tilt the balance in favour of employers and ensure that employment bargains produce outcomes that increase the power of employers and managers as a class. The purpose of the legislation is not deregulation but the use of centralised power to impose the kinds of labour market relationships favoured by the government and the business sector.

Importantly, just as unions have historically sought to prevent employers bargaining separately with non-union workers and therefore reducing the bargaining power of workers as a group, the *WorkChoices* package imposes a wide range of restrictions on employers who might wish to bargain with workers or unions on terms the government considers inappropriate. It is, in part, for this reason that labour economists supportive of deregulation, such as Wooden (2005), have opposed *WorkChoices*.

## *Precursors*

The general pattern of government intervention designed to restrict action by employees, and tilt the balance in favour of employers has been evident ever since the election of the Howard government. The *Workplace Relations Act* and subsequent amending legislation and regulations which enabled the Minister to intervene and bring actions before the AIRC and the Courts. The Commonwealth, and the NFF, also explicitly saw the Waterfront Dispute of 1998 as modelling and exemplifying the preferred strategy of deunionisation. Similarly, the exceptional powers granted to Commonwealth agencies in the building and construction industry represented a fear, that all things being equal, pattern bargaining and effective unionisation would be accepted by employers as a business reality. It is not insignificant that two sectors of prime economic importance during the Howard years, mining and construction, were targets of business and government concern respectively.

The truth of the choices involved for individuals, meanwhile, can be demonstrated by the Commonwealth's effective departure from award enforcement (and regular attempts to make union access more difficult thus placing the responsibility for action squarely back on individual employees) and the one-sidedness of the Office of the Employment Advocate's enforcement of freedom of association provisions contained in the Act. The theme of constraint of employees and unions and choice on the part of employers and management is a much more useful analytical lens through which to view the Howard era of employment relations, as *WorkChoices* amply demonstrates.

## *Centralisation of power*

One important element of flexibility in the Australian arbitral system has been provided by the existence of state and Commonwealth tribunals with potentially overlapping, and therefore competitive, jurisdictions. *WorkChoices* is designed to eliminate this source of competition.

Arguments in favour of the abolition of the state system have been premised on the alleged inefficiency of overlapping jurisdictions. There is some

merit in this argument, though it can be countered. First, it is relatively simple for many employers (and unions) to choose the jurisdiction in which they operate – Coles for instance, though operating Australia wide, operates under state awards in order to capture the benefits of lower wages outside NSW and Victoria. Secondly, the excessive legalism and regulatory proscription involved in WorkChoices hardly provides a solution to inefficiency and excessive complexity. Most importantly, arguments for uniformity fail to take account of the benefits of diversity in allowing competing models to be tested.

As Baird, Ellem & Wright (2005) observe, the Liberal states, to greater and lesser degree, were the path breakers for individualisation of the employment relationship in the 1990s. Since the election of the NSW Labor government in 1995 (and the consequent election of Labor governments in every state and territory subsequently), a number of policy innovations have been enshrined in state legislation, particularly in the important area of gender equity, where experience in one jurisdiction has enabled further refinement of models which are both concerned with fairness and tailored to modern workplace conditions (Bahnisch 2000).

One constitutional advantage of state jurisdictions is the ability to set minimum working conditions (for instance leave entitlements) for all employees, including those who are outside the award system on common law contracts, and to regulate employer moves to contract labour where the intent is not to employ a genuine contractor but place the responsibility for all conditions other than remuneration and some on costs back on the worker. Typically, federalism has been defended as a contributor to good public policy through the ability to innovate in different jurisdictions.

State tribunals are also able to consider differing employment and productivity trends, and are often more accessible to the parties than the AIRC. For instance, the Queensland Commission privileges conciliation, and proceeds in a much less legalistic fashion than the AIRC, which is one of the complaints made by employers and the Commonwealth against the current federal arrangements.

The limits of the Corporations power remain untested, and will be adjudicated on by the High Court in May 2006. Regardless of the outcome, it is evident that *WorkChoices* does not deliver choice in this area.

### *Ministerial power*

As noted above, the changes enhance the power of the Federal government, through the Minister for Employment and Workplace Relations, to intervene directly in the setting of wages and conditions. A range of prescriptive and punitive powers are given to the Minister acting either under extensive personal powers in relation to ‘essential services’ or through the AIRC in relation to routine strike action.

Clearly, one major objective of these powers is to ensure that normal labour market bargaining practices should not apply in sectors regarded by government as strategic, or where, as a result of the time-sensitivity of work or the capital-intensity of the industry, the bargaining power of unions is above average. Previous interventions in the building and waterfront industries set the pattern here.

Another major concern of the government is the desire to prevent ‘pattern bargaining’, in which unions seek to negotiate the same set of outcomes with different employers. On the other hand, there is no restriction on individual employers offering a common contract to all their employees, and, it would appear, nothing to stop groups of employers agreeing on standard terms for AWAs and similar contracts.

The government’s objections on this score might seem surprising, since a competitive labour market would normally be expected to produce precisely the same result as pattern bargaining. However, bargaining theory produces a simple explanation. In a bargaining relations, the ability of a party to determine a salient point relative to which agreement is reached can confer a substantial strategic advantage. Pattern bargaining enables unions to set the salient point. *Workchoices* is designed to ensure that this advantage is transferred to employers.

### *Prohibited terms*

*Workchoices* incorporates a wide range of prohibitions on the inclusion of various kinds of terms in agreements. Such prohibitions are not new in themselves: existing law prohibits various kinds of terms seen as likely to create unsafe working conditions, for example. However, virtually all the new prohibitions refer to terms favoured by unions and disliked by employer groups. The most striking example is that it is impossible to negotiate guarantees against unfair dismissal.

Many larger employers – public or private sector – will wish to maintain formalised procedures for discipline and dismissal as a matter of good human resource practice, but these will no longer be legally enforceable. The absurdity of claiming that legislation protects choice and freedom of bargaining and association is clearly revealed when the Government can arbitrarily stipulate the scope of bargaining.

At the outset of the policy process leading to the introduction of *WorkChoices*, when the Liberal Party's IR policy was released in the lead up to the 1996 election, much was made of the need for employees and employers to bargain absent of the constraint of third parties. This theme has been revived in the selling of *WorkChoices*, with the impression given that employers and employees will achieve mutual accommodation and foster productivity and flexibility through agreement making. In fact, though, it is the Commonwealth government which is now the most powerful third party intervening between employers and employees to reduce their scope for choice.

### *Asymmetry of treatment of strikes and lockouts*

For most of the 20th century, in Australia and other countries, strikes and lockouts were regarded asymmetrically, although the formal statement of the law was largely symmetrical. Strikes were common and, provided standard rules were followed, legitimate parts of the bargaining process by which employees sought to share in the benefits of economic growth. Lockouts were rare, and normally regarded as unfair practices, except in extreme

circumstances.

The balance shifted in the late 20th century as lockouts became more common and employers increasingly sought to rescind benefits that had previously been gained by workers. However, the general pattern of legal symmetry was maintained.

*WorkChoices* produces a situation, not seen since the 19th century, in which lockouts are almost completely unrestricted, while strikes are subject to a wide range of constraints. These include common law penalties derived ultimately from the law of master and servant, restrictions on secondary boycotts under common law, enhanced penal powers for the AIRC (otherwise rendered largely ineffectual) and the option of direct ministerial intervention.

As the submission by A Group of 151 Academics (2005) states:

Other OECD nations either prohibit lockouts or limit them to exceptional circumstances in which employers are considered to suffer from an imbalance of bargaining power. Typically, other OECD nations only permit 'defensive' lockouts in collective bargaining, which respond to strikes. If employers have too ready access to lockouts, lockouts can compromise the right to freedom of association, collective bargaining and to strike. Whereas other OECD nations limit employer access to lockouts relative to strikes to try and maintain bargaining equilibrium and fair agreement-making, the *Bill* will make the use of strikes more difficult, expensive and inflexible, relative to lockouts.

### *Summary*

Any attempt to analyse *WorkChoices* in terms of deregulation is untenable. The only way in which the legislation can be understood is in terms of a systematic reorientation of intervention away from the notion of the state as a neutral arbiter, and a return to the position of the early 19th century, where the state intervened in defence of the rights of masters against the claims of servants.

## **4. Implications for wages and conditions**

Employment relationships are complex, but the outcome of bargaining depends on two factors. The first is the state of the labour market. The second is the balance of bargaining power. Although, the state of the labour market is more important, it is largely determined by exogenous macroeconomic shocks originating not in the labour market but in the financial sector or the world economy.

The reforms proposed by the Howard Government will tilt the balance further in favour of employers. It seems likely therefore, that wage bargains will reflect the preferences of employers.

Observation of employer proposals in enterprise bargaining, and of the terms of AWAs suggest that employers place a high premium on 'the right to manage'. Employer offers in enterprise bargaining typically included increases in real or at least nominal wages, offset by trade-offs involving the removal a range of conditions (stigmatised by employers as 'restrictive trade practices').

The most common single employer demand has been the replacement of wage contracts based on standard hours of employment and overtime payments for extra work by annual salaries in which overtime was unpaid or, at best, compensated by 'time off in lieu' allowed at a time of the employer's choosing. More generally, employers have sought to remove restrictions of all kinds on the organisation of work. Employer claims are summarised in the Agreements Database and Monitor (ADAM) Reports produced by ACIRRT (various dates).

The ability to direct employees to work at any time, and without restrictions on the way in which work is performed. has obvious economic benefits to employers, which would explain a willingness to pay a wage premium. However, it is also important to consider social, psychological and cultural issues.

Most private employers work hard and work long hours, and enjoy doing so. Many consider that their employees should display the same attitude, without considering the fact that their jobs are typically less well-paid and less interesting than those of employers.

Less benignly, 'flexible' working conditions increase the personal power of

employers over employees, and the desire for power over others is a strong motive for human behaviour of many kinds. Conversely, resistance to such power has been one reason why workers have sought to establish unions and impose restrictions on work practices.

The outcomes of the shift towards enterprise bargaining that began in the early 1990s were consistent with this prediction. Average hours of work for full-time employees increased and there was a great deal of anecdotal evidence to suggest that the pace and intensity of work increased. Between 1993-94 and 1998-99 there was strong growth in (measured) labour productivity and also in multi-factor productivity. This growth was hailed as evidence of the success of microeconomic reforms in encouraging Australians to 'work smarter' but it was equally consistent with working harder. Despite generally weak labour market conditions, real wages rose, again consistent with a trade-off along the lines proposed by employers.

From about 2000 onwards these trends were partially reversed. The increase in average hours of full-time work was halted, and there was evidence (again anecdotal) that workers were demanding, and in some cases achieving, changes in working conditions consistent with a more satisfactory work-life balance.

It seems likely that the shift away from work intensification was due primarily to the improvement in labour market conditions, which made workers less fearful of losing their jobs, and more confident of their ability to regain employment.

However, it is important to note that the effects of changing labour market conditions are conditional on a given set of industrial relations conditions. The removal of penalties for unfair dismissal, for example, will make it significantly easier for employers to demand extra effort (such as work on public holidays) at short notice. While rights not to undertake such work are, as the government's advertising campaign stressed 'Protected by Law', such protections are of little value in a context where employers can dismiss workers without any stated cause.

It therefore seems probable that the introduction of *WorkChoices* will lead to a renewed push to break down restrictions of all kinds on the personal power of employers, including restrictions on working hours, requirements for public holidays and restrictions on work practices. Movements in this direction will be constrained as long as the labour market remains relatively tight. In the event of a recession, however, a radical erosion of existing conditions seems likely.

### *Inequality*

In a comparison between neo-liberal labour market institutions and alternatives involving either collective bargaining or centralised wage-fixation, one feature is clearly evident. Neo-liberal institutions produce substantially more unequal outcomes. This is evident both from comparisons over time and from comparisons between countries.

The US, where the labour market has always had most of the main neo-liberal characteristics, displays easily the highest inequality. The reforms undertaken in New Zealand and the UK show up clearly in rising levels of inequality, overtaking European countries that were initially less egalitarian.

In the US, declining rates of unionisation and an even more extreme form of neo-liberalism have produced a dramatic shift in the distribution of income. Low-income families have experienced very little income growth since 1970. Wages for workers with high school education or less have actually fallen. For households whose wage-earners have high school education, the decline in wages has been offset by longer hours of work and increased female participation, but household income has remained broadly stable (Century Foundation 2005). Meanwhile earnings have risen dramatically at the top of the income distribution (Autor, Katz and Kearney 2005).

A number of the reforms embodied in *WorkChoices* will contribute directly to increased inequality. The replacement of the AIRC by the Fair Pay Commission will almost certainly imply a reduction in minimum wages with a flow-on to other award wages at the low end of the pay scale.

However, it seems likely that a range of indirect effects will be even more

significant. In the United States, wage inequality has increased on many different dimensions. Not only have premiums for education and experience increased, but inequality within groups has risen. Equally importantly, the share of income going to wage workers has declined, while capital income has increased and payments to senior managers have risen dramatically (Autor, Katz and Kearney 2005).

*WorkChoices* will not replicate the situation in the United States. Nonetheless, it seems reasonable to say that most of the changes are in the direction of a US-style labour market and that the implications for inequality are likely to be similar.

## **Implications for employment**

One of the major justifications for labour market reform is the claim that it will cause a reduction in unemployment. This claim has three main bases. First, there are claims that restrictions on unfair dismissal discourage employers from hiring new workers. Second, there is the classical argument that unions and the arbitration system set wages above the market-clearing level, leading to an excess of supply over demand. Finally, there are general claims that flexibility will lead to improved economic performance, accompanied by growth in employment.

### *Unemployment and the macro cycle*

First, it is necessary to examine the nature of unemployment in Australia today. Considering the last two decades, it is apparent that macroeconomic conditions have accounted for most variation in unemployment.

The unemployment rate fell to 5.9 per cent at the end of the macroeconomic expansion of the 1980s, when wages and conditions were primarily determined by the highly centralised processes of the Accord between the Australian government and the ACTU. The rate rose to 11 per cent as a result of contractionary monetary policy motivated primarily by concerns about the growth of the current account deficit, and about booming asset prices, particularly in the Sydney housing market. Although some subsequently

discussions have made much of the decline in inflation that arose from the recession, this is merely an *ex post* rationalisation of a policy failure.

Labour market institutions have changed radically since 1990, but without any obvious effect on labour market performance. The centralised wage fixation system of the Accord was abandoned by the government in 1991 in favour of enterprise bargaining, with further supporting legislation introduced in 1992 and 1993, by which time enterprise bargaining had become the dominant pattern (Wailes and Lansbury 2000).

The early stages of the recovery followed a fairly standard pattern, with a period of 'jobless growth' as unused capacity was taken up, being followed by fairly strong employment growth in 1994 and a decline in unemployment rates to around 8 per cent in 1996. The employment recovery was also influenced by the short-lived *Working Nation* program introduced after the 1993 election, but scaled back in the 1995 Budget.

The Howard government, elected in 1996, scrapped the remaining *Working Nation* programs and introduced the *Workplace Relations Act*. Although output growth has been consistently positive throughout the government's ten years in office, reductions in official unemployment have been modest. The ABS unemployment rate fell from 8 per cent in 1996 to 6 per cent in 2003 and has remained between 5 and 6 per cent since then.

Broader measures of labour market employment tell a similar story, suggesting that the performance of the labour market in the current cyclical peak is no better than it was in 1989, and arguably worse. Although the employment/population ratio has risen, full-time employment has declined, particularly for males. Estimates of hidden unemployment and underemployment are generally higher for the current cycle than for that of the 1980s.

On the other hand, the length of the expansion since 1990 raises the possibility that the macroeconomic cycle has been tamed, and that this is due, at least in part, to the greater flexibility of the labour market. Our view, based on Australia's unsustainably large current account deficit, is that a significant

cyclical correction lies ahead. Only when the macroeconomic imbalances have been resolved will it be possible to make a clear judgement.

### *Unfair dismissals*

The political heat surrounding the issue of unfair dismissal reflects the fact that an employment contract contains many implicit terms and commitments. Once both parties have committed to the relationship, each has the opportunity to cheat on these commitments. How this works out depends on institutional rules, the state of the labour market and similar factors. Whatever the rules there are likely to be numerous instances where employers or employees feel that they have been treated unfairly. This may lead to withdrawal from the labour force by employees or unwillingness of employers to take on new workers.

*A priori* arguments about the net effect are inconclusive. Supporters of unfair dismissals laws make the point that, other things being equal, the easier it is to dismiss employees, the higher will be the rate of dismissal, and therefore the higher the level of unemployment. Opponents counter that employers will be unwilling to take on staff if they are unable to dismiss those who turn out to be unsatisfactory.

Freyes and Oslington (2005) assess the impact of unfair dismissal laws by considering them as an effective tax on employment, equal to the expected loss from unjustified severance payments. Since this loss is small in relation to the total wage bill, the implied net employment effect is also small, a net gain of around 6000 jobs.

An alternative, empirical, approach involves econometric comparisons. Initially, the empirical evidence appeared to support relaxation of employment protection laws. Lazear (1990) found strong negative correlations between the strength of employment protection laws, proxied by severance pay, and desirable labour market outcomes, such as employment and participation rates and hours worked. However, Lazear's results have not stood the test of replication with new data. More recent research suggests employment protection laws lower the

variance of employment and unemployment but have no clear effect on average levels (Bertola *et al.* 1999, Addison and Teixeira 2003).

Although experience since the introduction of *WorkChoices* is limited, it gives little support to the view that unfair dismissals laws represent a major obstacle to hiring. On the standard version of this view, there should exist a stock of vacancies, or potential vacancies that employers would be willing to fill in the absence of restrictions. When the law changes, employers should act immediately to fill these vacancies. There is little evidence in employment data to support this view.

Some evidence on the government's beliefs may be obtained from the Budget papers. If *WorkChoices* was expected to lower the unemployment rate consistent with labour market equilibrium, this should be reflected in projections of employment and unemployment over the next few years. In fact, however, no significant decline in unemployment is projected for 2006-07, and projected employment growth in subsequent years is in line with growth in the labour force.

#### *Minimum wages and employment*

A notable feature of enterprise bargaining has been the fact that wage rates obtained under enterprise bargaining and AWAs commonly exceed award rates, though this is offset by changes in working conditions. In these circumstances there is little reason to suppose that award wages in general exceed the market-clearing level. To the extent that this claim has any validity it would be expected to apply only to minimum and near-minimum wages.

The effects of minimum wages on employment in Australia and elsewhere have been debated at length and will not be debated here. Dowrick and Quiggin (2003) summarise the literature, concluding that effects are likely to be modest, while Lewis (1997) presents a contrary view (see also Lewis and MacDonald 2002).

Regardless of the effects of minimum wages the complex interaction between wages, tax and welfare benefits means that reform of the industrial

relations system in isolation is unlikely to produce socially optimal responses to problems of unemployment among low-skilled workers (Wooden 2005). What is needed is a comprehensive response including adjustments to the tax-welfare system and active labour market policies. One proposal along these lines is that of the 'Five Economists' (Dawkins 1999). Regardless of the merits of the particular policies proposed, it seems clear that the integrated approach is more promising than a change in the industrial relations system alone.

### *General effects on productivity and growth*

Available evidence on productivity yields notable counterexamples to claims of a positive correlation between contract-based reform and productivity growth. The deregulated and individualised system in New Zealand has a poor productivity record. Productivity growth in Australia has been unimpressive since the Workplace Relations Act came into force in 1997-98.

In part, weak productivity reflects the creation of low-wage, low productivity jobs, a pattern particularly evident in New Zealand, but also apparent in the Western Australian experiment with contracts. This may be seen as positive outcome, the inverse of the 'Thatcher effect' under which average productivity increased as the least efficient plants were closed down and the least productive workers became unemployed. As has a does not seem to be much net growth in employment. Compared to Australia, New Zealand has performed consistently poorly on all criteria, as is evidenced by the steady flow of migration across the Tasman.

There are important reasons to suppose that *Workchoices* may have negative effects on productivity in the long run. As has been shown above, *Workchoices* will exacerbate the imbalance of power in day to day work life. Yet there is much evidence to show that collective decision making and maximising employee autonomy pays off in both white and blue collar workplaces. Furthermore, in the long run, entrenched earnings inequality leads to a waste of human capital, thereby retarding the skills growth and innovation which provide the basis for sustained productivity growth.

## *Unemployment and power in labour market relations*

As has been discussed above, the main effect of the *WorkChoices* package, and of the earlier *Workplace Relations Act* is not to increase the range of choice available to employers and employees. Rather, the effect is to increase the bargaining power of employers and the range of choices open to them, while reducing the range of choices available to employees.

It would normally be expected that such a shift in bargaining power would lead either to lower wages or to a mixture of wages and conditions that leave workers worse off and employers better off. On standard supply-demand reasoning, it might be expected that this would lead to an increase in employers' demand for labour, and therefore to a reduction in unemployment. However, there are important reasons why the supply-demand story does not appear to be appropriate.

The case of unfair dismissals illustrates the point. It has been argued that removing restrictions on unfair dismissal will increase the willingness of employers to hire new staff. On the other hand, by definition, the effect of the change is to increase the ease with which employers can dismiss staff. Analyses taking account of both effects typically find little net effect on employment.

This point applies more generally to the pattern of changes exhibited in *WorkChoices*. The general effect is to increase the monopsony power of employers, particularly in relation to existing employees, who face significant costs in finding new jobs. But this monopsony power can be exercised only via the possibility of dismissal and can be effective only if this power is actually exercised.

The same point is true more generally. If employers use monopsony power to drive down wages and conditions, employment will be held below the socially optimal level.

## **Where to from here?**

The *WorkChoices* reforms is part of a general trend in developed economies in which unions have generally lost ground, and government action

designed to protect wages and conditions of employment has been wound back. Viewed in this light, it may seem to be an inexorable process, which may be slowed from time to time, but not halted or reversed. This appearance of inevitability is, however, misleading.

It is worth recalling that from the late 19th century to the 1970s, the power and influence of trade unions increased fairly steadily. Seemingly severe setbacks, such as the defeat of the strikes of the 1890s turned out in retrospect to have strengthened the unions by generating political responses such as the establishment of the Labor Party. By the 1970s (and even earlier) it was the apparently untrammelled power of trade unions, and not their weakness, that was seen as a political problem by most Australians. As a result of this, and a more general shift to neoliberal policies, the trend towards increasingly powerful trade unions was reversed.

At least some of the factors that led to the decline of union power are no longer applicable. In particular, the balance of public sentiment has changed. Fewer people now see trade unions as excessively powerful than have the same feeling about employers. More generally, the strong opposition to the government's IR changes, expressed both in protests and in public opinion polls is indicative of possible support for a reassertion of social control over labour markets, and for a renewed role for unions.

However, it will not be possible simply to turn back the clock. Changes such as the increased diversity of the workforce, must be accommodated, and this is unlikely to be achieved through highly prescriptive awards. And changes in the nature of work, with the decline of the kind of workplace where large numbers of workers performed the same or similar tasks implies that old models of union organisation are unlikely to be appropriate

An obvious question is whether the centralisation of power that has taken place under *WorkChoices* can or should be reversed. Under the current legislation, this power is to be used almost exclusively against unions. It is easy, however, to envisage the same powers being used to impose minimum conditions on employers, for example by reducing maximum working hours, or requiring

the provision of parental leave.

## **Conclusion**

*WorkChoices* is commonly described in terms of labour market deregulation. This is an odd description of a piece of legislation more than 600 pages long (with hundreds more pages in supporting material) and replete with new offences and penalties.

*WorkChoices* will have profound effects on the balance of power between employers and employees, and will reshape Australians' day to day experiences of work. The changes represent a shift from a system designed around the setting of pay and conditions by an independent body with encouragement for collective bargaining to a system where Ministerial and managerial discretion are paired with encouragement for individual bargaining.

The macro effects of *WorkChoices* are unlikely to be positive either for the Australian economy or for Australian society. However, what has been under analysed to date is the effect on the lived experience of Australians in the workplace. The combined effect of shifts such as the removal of the Commission and unions from grievance procedures, empowering employers in bargaining, individualisation of the employment relationship and the changes which make flexibility of working time a matter of organisational priorities not employee choice will serve to reinforce a less participatory workplace culture.

*WorkChoices* will reinforce existing negative trends both economically and socially, while increasing the complexity of the system and shifting power from employees further towards employers, and from independent institutions to executive discretion.

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