Analysing the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth) No.153* and its likely consequences

Contents

1 INTRODUCTION

On 7 December 2005, the Australian government, led by Prime Minister John Howard, secured passage through the Australian Parliament of the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth) No.153* (WC Act). This piece of legislation, which is likely to come into operation in late March 2006, will profoundly affect the conduct of industrial relations in Australia. In terms of the concepts developed in Bray *et al.* (2005), it will deeply change the way that the 'rules that regulate the employment relationship' in Australia are 'made and enforced'.

A complete analysis of these changes is, of course, not possible at this time (i.e. 1 March 2006). The legislation has not yet come into operation. Indeed, the very important regulations accompanying the Act have not been released. Some of its provisions may be altered as a result of High Court challenges being mounted by several of the Australian States. Many of the parties to rule-making (especially the Australian Fair Pay Commission created by the legislation) will take many months to establish and to begin their activities. Many of the new rule-making processes may even take years to reveal the substantive ways that the Australian system has been transformed.

Nonetheless, students of Australian industrial relations must become familiar with the main provisions of the legislation. They must understand the historical and theoretical significance of the new laws. They need to appreciate the claims and counter-claims about the likely consequences of the legislation. They should be able to follow events as they unfold and participate in debates about the impacts of the legislation. This Supplement assists students in these tasks.

In summary, this Supplement to Bray *et al.* (2005) is designed to:

- provide background to this legislation;
- describe the main features of the legislative changes;
- explore the likely consequences of the legislation for the future operation of industrial relations in Australia;
- analyse these changes, both in terms of the theory and history;
- link the legislation and its analysis to the relevant chapters and sections of Bray *et al.* (2005);
- list some valuable further readings and resources for students and instructors who wish to examine the legislation in more depth.

By the end of this Supplement, students should be able to:

- locate the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth) No. 153* in the historical development of Australian industrial relations;
- describe the main features of the legislation;
- discuss the likely impact of the legislation on various aspects of the conduct of industrial relations in Australia;
- analyse the legislation and its likely consequences through the theoretical framework provided in Bray *et al.* (2005);
- know how to obtain further information necessary to further analyse the legislation and its likely consequences.

2 BACKGROUND

During the campaign leading up to the federal election on 9 October 2004, the main thrust of the industrial relations policies put to the people by the Coalition parties was to advance a number of reform proposals that had previously failed because of the government's lack of numbers in the Senate. Indeed, just 16 out of the 56 industrial relations bills introduced by the Coalition passed into law between 1997 and 2004. Among these were the more iconic attempts to remove small businesses from the purview of unfair dismissal laws and omnibus bills such as the *Workplace Relations (More Jobs Better Pay) Bill*—the so called 'second wave' reforms. The central themes of these and the Coalition's more successful law-making efforts were to target perceived constraints in the pre-existing arbitral model or to close off loopholes and strategies that unions had developed since the *Workplace Relations Act 1996 (Cth)* became law.

There were some more details of the government's industrial relations agenda in its formal statement of policy, entitled 'Flexibility and productivity in the workplace: the key to jobs'. It mentioned moves towards a more 'harmonised' relationship between federal and state industrial relations systems; measures to encourage 'agreement making', especially in small business; mediation, occupational health and safety and other services to small business; the strengthening of secondary boycott laws; clarification of the right of union officials to enter workplaces; reform of the construction industry; and the introduction of special legislation on independent contracts. These proposals, however, were remarkably modest compared to the far-reaching legislation passed in December 2005, and two-thirds of the policy statement was devoted to an historical justification of past government policies and an attack on Labor proposals (see 'Flexibility and productivity in the workplace' 2004).

The Australian Labor Party identified industrial relations as one of the major differences between what it and Howard's government represented. Labor's policy platform, entitled 'Flexibility with fairness for Australia's workplaces', was released in August 2004 and focused on four main themes: improving job security, encouraging family-friendly workplaces, restoring the right to bargain collectively, and assisting parties to avoid and resolve disputes (ALP 2004). The stronger emphases on state regulation and collective regulation were easily apparent and became a source of considerable criticism from government (see 'Flexibility and productivity in the workplace' 2004, Part 3) and business associations like the Business Council of Australia (BCA 2004a; BCA 2004b) and the Australian Chamber of Commerce and Industry (ACCI 2004).

During the campaign, commentators agreed that industrial relations policy was a defining difference between the major parties. However, despite this acknowledgement, industrial relations rarely attained centre stage in the campaign and the respective policy positions were rarely debated either widely or deeply. Underlying this relative neglect was an assumption among politicians and commentators alike that even if the government was returned, they would be unlikely to gain a majority in the Senate and that, given the past voting patterns of the Labor Party and minor parties in the Senate, the government's industrial relations agenda would meet much the same fate as its failed bills during the period between 1997 and 2004. Clearly, this assumption was misplaced because the election produced an unexpected result.

TABLE 1 Timeline of events relevant to the WC Act

Date	Event
6 August 2004	ALP releases its policy on workplace relations, entitled 'Flexibility with fairness for Australia's workplaces'
28 September 2004	Coalition government releases its policy workplace relations, entitled 'Flexibility and productivity in the workplace'
9 October 2004	Federal election delivers the Howard government a majority in both houses of parliament
October–November 2004	Prime Minister and Minister for Workplace Relations make statements denying any push for radical change in Australian industrial relations
November 2004–April 2005	Extensive consultation between business associations and the Howard government over the nature of the reform program
15 March 2005	ACTU launches its *Rights at Work* campaign
26 May 2005	Release of 6-page statement entitled 'A new workplace relations system: a plan for a modern workplace', summarising the government's reform plans
19 June 2005	ACTU launches $8 million radio and television advertising campaign to challenge the federal government's proposed changes
9 October 2005	Release of 67-page 'Work choices' document
2 November 2005	The *Workplace Relations Amendment (Work Choices) Bill 2005* is introduced into the House of Representatives by Minister Andrews. It is 687 pages, with a 565-page 'Explanatory memorandum'
7 December 2005	*Workplace Relations Amendment (Work Choices) Act* passes both houses of federal parliament

'An expression of confidence in the coalition's leadership' was how Prime Minister Howard described the Coalition's remarkable fourth successive election victory on 9 October 2004. The emphatic victory was historic on at least two counts: it cemented the Prime Minister's leadership as one of the country's most successful, and it provided the Coalition with uncommon control over the Senate. In Australia, complete political control of both houses of parliament had proved elusive for the major parties, especially after proportional voting was introduced for the Senate in 1948. Indeed, since 1981, no government has held a majority in the Senate (Singleton 1996, p.2). Instead, much of Australia's political history since federation has been marked by the executive of the day openly declaring its frustration with an upper house unwilling to provide its complete imprimatur to the government's legislative agenda and fulfilling, perhaps, Deakin's' prophesy[1] of the 'irresistible force clashing with the immovable object'. In the realm of industrial relations, comparative scholars have often cited Australia's bicameral system as one of the key reasons why Australia did not fully reproduce New Zealand's radical experiment in labour market deregulation in 1991 (Bray and Walsh 1998).

The Coalition's victory and control of both houses of parliament placed it in a unique position to exercise absolute authority over federal industrial relations. As Treasurer, The Honourable Peter Costello later put it:

[1] Alfred Deakin, the second Prime Minister of Australia, said during the 1897 constitution convention 'We are creating in these two chambers, under our form of government, what you may term an irresistible force on the one side, and what may prove to be an immovable object on the other side' (Australasian Federal Convention 1897).

> *This is now the once-in-a-generation opportunity to enhance individual contracts, to cut down on arbitral matters, to try and get wages linked to productivity improvements and enhance profitability, to get ease of entry, ease of exit in employment situations, to give flexibility in relation to hours, and to improve opportunities for part-time work.*
>
> (Costello 2005)

Initially, the government moved cautiously, at least in public, on the reform possibilities. Prime Minister Howard issued several assurances that his government would take it slowly and not exploit its new found political power (Skulley 2004, p.1). Minister Andrews was restrained in his publicly-stated ambitions. In a speech to the Annual Convention of the Industrial Relations Society later in October, for example, he identified few specific targets. The government, he stated, would introduce:

- *a new 'Independent Contractors Act';*
- *continue to promote a 'flexible workplace relations system;*
- *pursue only incremental improvement progress towards a unitary (as opposed to federalist) system;*
- *introduce a 'Termination of Employment Bill' to establish a national framework for redundancy; and*
- *further lower unemployment by increasing the incentive for those on benefits to participate in the workforce.*

(Andrews 2004a, p.8)

A matter of days later, the Minister stated:

> *We are not planning, can I make it absolutely clear, we are not planning to abolish the IRC or any such thing. The IRC will, I believe, remain a relevant institution in this country.*
>
> (Andrews 2004b)

Despite these assurances, a range of business organisations and conservative commentators pushed publicly and privately to realise the opportunities for measures that went well beyond those contained in the earlier bills (Skulley 2004, p.6). Over the summer of 2004/05, in response to these exhortations, the government's plans then became more ambitious. In February 2005, the Minister explored the question of 'where … we want workplace relations to be in five years time?'. His answer referred explicitly to the statements and arguments of the Business Council of Australia, the Australian Chamber of Commerce and Industry, the Committee for the Economic Development of Australia, and editorials in the Australian Financial Review, and the substance of his answer anticipated major changes to the industrial relations system, including an end to 'third-party intervention' in 'agreement making', thorough efforts to use market forces to increase workforce participation and a new national system (Andrews 2005b). Amidst much media speculation on the outcome, the government continued to consult with business associations.

On 26 May 2005, a brief (six-page) statement outlining the government's general reform proposals was released jointly by the Minister for Workplace Relations, Hon Kevin Andrews, and the Prime Minister John Howard (see Andrews 2005a). It was five more months before the fine details of the government's proposals were released and this gave critics considerable time to gain publicity for their cause. In particular, in June the ACTU embarked upon a large-

scale and remarkably effective advertising campaign, costing $8 million, which left even the government's supporters questioning the strategy and timing of the reform announcements.

The government responded in July with its own $20 million advertising campaign (ABC Online 2005) and then established a 'Taskforce on workplace relations reform' to sell its message to the electorate (Howard 2005). By October, the Prime Minister admitted that the cost of the government's public relations campaign was up to $40 million, although later estimates went as high as $50 million.

On 9 October 2005, a more substantial statement (67 pages) provided the much-awaited detail. The package of reforms was now called 'Work Choices' and it anticipated legislation in November. As will be detailed below, this statement produced further opposition not only from unions and the political opposition, but also from church leaders, community groups and academics.

On 2 November, the bill containing the changes was introduced to the House of Representatives and was passed on 10 November. The Senate briefly referred the bill to a Committee, but it passed with amendments on 22 November. These amendments, which were mostly technical and unchallenging to the fundamentals of the legislation, were accepted by the House of Representatives on 7 December and it received royal assent on 14 December.

3 INITIAL RESPONSES TO THE REFORM PROPOSALS

Great controversy raged through much of 2005 over the government's proposals for industrial relations reform. Broadly, conservative politicians and commentators along with organisations representing employers applauded the government, while Labor politicians, state governments (dominated by Labor), unions and many community groups (such as church leaders) condemned them.

3.1 Union responses

Unions were opposed to the reforms and began a systematic campaign to influence the wider community that the reforms would have adverse outcomes for employees and to apply pressure on the government to withdraw the proposals. The Australian Council of Trade Union's 'Your Rights at Work' campaign (see weblink below) employed sophisticated media techniques and community-based activism to articulate what the ACTU believed would be the effect of the reforms if they were passed. Some commentators believe the campaign was successful in producing public antipathy/opposition towards the reforms. Several polls conducted in early July of 2005 indicated that approximately 60–70 per cent of Australians were opposed to the reforms (*Sydney Morning Herald* 2005). The unions also joined with the Labor Party to mount a High Court challenge the validity of government sponsored advertising in the High Court—a challenge that ultimately failed (*Combet v. Commonwealth of Australia* [2005] HCA 61; see Combet 2005).

In essence, unions believed that the reforms would reduce take home pay and working conditions for employees by enhancing employer power over employees. They cited the abolition of unfair dismissal laws for businesses employing less than 100 employees and the abolition of the 'no disadvantage test' as contributing to a workplace culture where it would be difficult for employees to resist reductions in conditions and wages. Unions were also opposed to a further reduction in the Australian Industrial Relations Commission's powers

and to the transferral of minimum wage determination powers to any new body, which they believed would reduce wages growth for the most vulnerable people.

3.2 Employer responses

Employer associations were largely in favour of the government's reform proposals. Some, such as the Australian Chamber of Commerce and Industry, took a leading role in advocacy of the reforms while at the same time criticising the ACTU's opposing campaign (Hendy 2005).

The National Farmers Federation (2005) argued that the reforms would increase productivity and flexibility, and the Business Council of Australia (2005) has also endorsed the changes, stating that they would help to underpin prosperity. However, the Business Council also indicated that the proposals should have reduced award provisions further. Similarly, the Australian Industry Group and Australian Business Limited also wholeheartedly supported the changes, with Australian Business Limited (2005) called on the NSW government to cede its industrial relations powers to the Commonwealth.

3.3 State government responses

Australian State governments were universal in their opposition to the Howard Government's reform proposals—a perhaps predictable response given that all states are governed by Labor governments. Once the laws were passed, four of the states moved to challenge the constitutional validity of the laws in the High Court, the Chief Justice planning to commence hearing the case on 9 May 2006 (*Sydney Morning Herald* 2006). Queensland also moved to introduce legislation in an attempt to vouchsafe its industrial relations system in the face of the planned takeover by the Commonwealth.

4 AN OVERVIEW OF THE LEGISLATION

The following is drawn from the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth) No.153*, the accompanying 'Explanatory memorandum' and various government and other publications. The changes to Australia's industrial relations system by the legislation, however are extremely deep and wide-ranging, so this overview cannot be comprehensive. Rather, it is more selective and attempts to highlight the key reforms delivered by the Act.

4.1 The unitary system: Work Choices will establish a single Australian industrial relations system potentially covering 85 per cent of the Australian workforce

Perhaps the most remarkable aspect of the legislation is its constitutional ambitions. A central pillar of the WC Act is an attempt to establish a single unitary system of industrial relations in the place of the existing federal system, which involves at least five state industrial relations systems (Victoria previously referred its industrial relations powers to the Commonwealth) in addition to the Commonwealth system. As noted above, the States are opposed to this takeover and will challenge the constitutional validity of the laws later this year. The Howard government believes that establishing a national system will generate efficiencies and cost savings to employers, who presently contend with multiple jurisdictions. The critics of unitary systems, however, believe that the government is simply seeking to extend its industrial relations philosophy.

The legal basis for the extension of the federal jurisdiction is the extensive use of the corporations power (s.51xx) in the Constitution. Most of the amended *Workplace Relations*

Act (1996) Cth now rests upon this constitutional basis. The advantage of using the corporations power to legislate for industrial relations reforms is that all 'constitutional' corporations are covered by the laws, whereas laws made pursuant to the conciliation and arbitration power (s.51xxxv) only cover parties in inter-state disputes (Bray *et al*. 2005, Chapter 4). The government has argued that around 85 per cent of all employees will be covered by the unitary system, excluding those working with some state public sector agencies and within very small businesses, sole traders and partnerships operating outside of Victoria and the Territories.

A critical provision that establishes the extended federal system is the definitions of employer and employee (see. s.4AA and 4AB, WC Act). According to s.4AB, an employer is:

(a) a constitutional corporation;
(b) the Commonwealth;
(c) a Commonwealth authority;
(d) a person or entity who in connection with constitutional trade or commerce, usually employs: (i) a flight crew officer, (ii) a maritime employee, or (iii) a waterside worker;
(e) a body incorporated in a Territory; or
(f) a person or entity that carries out commercial activity in a Territory.

Those employees not employed by the persons, entities or constitutional corporations within the above definition, but who are covered by a federal award, are subject to transitional arrangements in schedule 13 of the WC Act. These transitional arrangements indicate that such federal awards will continue to apply to these employees for a period up to five years. They may be adjusted by the AIRC (see section 6.2). After this transitional period, employees in this category will presumably fall within the jurisdiction of the state systems, unless more states ceded their industrial relations powers to the federal government.

For those employees currently working under state awards, these awards will become part of the federal system, are to be renamed 'notional agreements', and will continue to operate for a further three years until replaced by a workplace agreement or federal award. State agreements are to be described as 'preserved state agreements' that can continue until they are terminated and replaced.

It is also worth noting that the WA Act seeks to 'cover the field' for industrial relations. It does this by excluding the operation of certain State laws previously pertaining to employment issues. Section 7C indicates that the amended act will exclude:

(a) a State or Territory industrial law;
(b) a law that applies generally to employment and deals with leave other than long service leave;
(c) a law providing for a court or tribunal constituted by a law of a State or Territory to make an order in relation to equal remuneration for work of equal value;
(d) a law providing for the variation or setting aside rights and obligations arising under a contract of employment that a court or tribunal finds unfair; and
(e) a law that entitles a representative of a trade union to enter premises.

However, s.7C(2) indicates that laws dealing with discrimination or equal opportunity (so long as these are not contained in State or Territory industrial laws) will not be excluded. Nor will be a range of 'non-excluded' matters dealt with by State laws that include:

(a) superannuation;
(b) workers compensation;
(c) occupational health and safety (including right of entry for OHS purposes);
(d) outworkers (including rights of entry associated with inspecting outworkers conditions);
(e) child labour;
(f) long service leave;
(g) the observance of a public holiday except the applicable rate for working a public holiday;
(h) the method of payment for wages and salaries;
(i) the frequency of payment of wages and salaries;
(j) deductions from payment of wages and salaries;
(k) industrial action affecting essential services;
(l) attendance for service on a jury; or
(m) regulation of (i) associations of employees, (ii) associations of employers, or (iii) members of associations of employees or associations of employers.

4.2 Establishment of the Australian Fair Pay Commission: AFPC to determine minimum wages

A second major change is the introduction of a new entity to determine wages. The Australian Fair Pay Commission (AFPC) is established by s.7G of the WC Act. Unlike most other parts of the WC Act, which do not come into effect until late March 2006, the AFPC came into effect when the WC Act received Royal Assent on 14 December 2005. The AFPC is supported by a separate bureaucracy known as the AFPC secretariat established under s.7ZG, which is designed to assist the AFPC in wage reviews and in publishing its decisions.

The Commission comprises a full-time chair and four part-time commissioners. Under s.7P, the AFPC chair is appointed by the Governor-General for a period of five years upon recommendation and must be a person with high level skills and experience in business or economics (s.7P[3]). This requirement contrasts with the skills and experience of the AIRC President who must have formal legal qualifications. It is also interesting to note that the WC Act does not require the chair to have any experience in industrial relations, or to use the preferred nomenclature of the Howard Government, 'workplace relations'. The first Chair of the AFPC is Professor Ian Harper—an academic economist from the University of Melbourne.

The key functions of the AFPC are to review the Federal Minimum Wage (FMW) from time to time and minimum award wages (Australian Pay Classification Scales) and casual loadings (see s.7H and s.7I). This effectively removes the AIRC's power to regulate minimum wages generally and, more recently, to make safety net adjustments for the low paid (Bray *et al.* 2005, Chapter 4). However, under the transitional arrangements in the legislation, the AIRC will still be responsible for minimum wage adjustments for those employees on Federal Awards and employed by incorporated businesses who fall outside of the AFPC's jurisdiction for up to five years. The AFPC may also undertake any additional functions conferred on it by regulations or by other legislation and it must also undertake activities 'to promote public understanding of matters relevant to wage setting' (s.7H[d]).

Apart from the very direct impact of the AFPC's decisions on the wages of employees covered by the federal minimum wages and awards, the AFPC also has a profoundly important but indirect effect through the new operation of the 'no disadvantages test'. In essence, the wage decisions of the AFPC form the wages of the Australian Fair Pay and Conditions Standard (see below; and Waring *et al.* 2005), which replaces the 'no disadvantage test' as the standard against which workplace agreements are measured and becomes the new and reduced safety net. In this way, the decisions of the AFPC have an importance that stretches beyond regulating the low paid and extends to all those covered by AWAs and various certified collective agreements.

Section 7J of the WC Act establishes the wage setting parameters for the AFPC. Pursuant to this section, the AFPC must perform its wage setting function 'to promote the economic prosperity of the people of Australia having regard to':

1. *the capacity for the unemployed and low paid to obtain and remain in employment;*
2. *employment and competitiveness across the economy;*
3. *proving a safety net for the low paid; and*
4. *providing minimum wages for junior employees, employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.*

4.3 Establishment of the Australian Fair Pay and Conditions Standard (AFPCS): Five minimum conditions replace the 'no disadvantage test'

One of the more controversial reforms in the WC Act concerns the abolition of the 'no disadvantage test'. To those unfamiliar with the operation of the Australian industrial relations system, this possibly appears to be quite narrow and technical, but its implications are profound. Under the *Workplace Relations Act 1996*, AWAs and collective agreements only became legally binding on their 'certification' by the Office of the Employment Advocate (in the case of AWAs) or the AIRC (in the case of certified agreements), and this was contingent on the agreement passing the 'no disadvantage test'; in other words, as a package, the terms of the agreement should not disadvantage the employee/s when compared to the provisions of the relevant award (see Bray *et al.* 2005, pp.278–9, 295).

In the WC Act, the award is replaced as the relevant comparator in the 'no disadvantage test' with a legislative standard known as the Australian Fair Pay and Conditions Standard, which comprises just five minimum conditions of employment:

- parental leave,
- maximum ordinary hours of work,
- annual leave,
- carer's leave, and
- wages provisions.

The first four conditions are, for the first time, determined by federal parliament by statute, while wages provisions are set by the Australian Fair Pay Commission in decision that form part of the Australian Fair Pay and Conditions Standard. In other words, under the new system agreements will only be registered if they provide wages and conditions of employment the same as or superior to the new standard. This benchmark is considerable lower than that previously provided by awards.

It should be noted that the wages contained within the Australian Fair Pay and Conditions Standard will vary according to whether an employee is covered by an award. If the employee is covered by an award, then the AFPCS will incorporate the minimum award pay, which does not include penalties, allowances or bonuses that normally feature in awards. A minimum loading of 20 per cent, however, is applicable in the case of casual employees. Hence, when proposed agreements are compared with the new standard, they are being measured against a lower standard because the AFPCS does not include the totality of award conditions and benefits. If the employee is not covered by an award, the AFPCS will incorporate the Federal Minimum Wage which is currently set at $12.75 per hour or $484.50 per 38-hour week.

4.4 Changes to the powers of the Australian Industrial Relations Commission (AIRC): Compulsory arbitration all but removed

Under the WC Act, the powers of the Australian Industrial Relations Commission (AIRC) have become extremely circumscribed. Indeed, it is only possible for the AIRC to arbitrate when the bargaining period has been suspended or terminated and when adjusting award wages for those employees outside of the jurisdiction of the Australian Fair Pay Commission (see section 4.2). The most notable change is that industrial disputes are no longer referred to the AIRC unless both parties seek the AIRC's assistance in resolving disputes (see also section 6.2). Under Part VIIA of the WC Act, parties are encouraged to resolve their differences at the workplace level or consider using an alternative dispute resolution provider if they cannot resolve the dispute themselves (see s.175, WC Act).

The Commission is also required under s.111 to deal with applications from employers to stop unprotected industrial action within 48 hours that is threatened, probable, impending or happening and will cause damage to a constitutional corporation. If it cannot make a determination within 48 hours, it is compelled to issue interim orders to stop threatened or continuing industrial action.

4.5 Changes to industrial action: Union access to protected industrial action made more difficult

The capacity of unions to undertake protected industrial action in support of claims in enterprise bargaining is made more difficult under the WC Act (see Part VC). Under the reforms, protected industrial action can only be taken after it is approved by a valid majority of employees in a secret ballot. Complex balloting procedures will mean that undertaking protected industrial action will be a difficult and resource-intensive process for many unions. For employers, however, using 'lock-outs' to bring pressure to bear is a comparably easier process.

There are also new parameters for the way in which protected industrial action is to be deployed. For instance, the AIRC may suspend or terminate protected action which it believes is part of a pattern bargaining strategy (see Bray *et al.* 2005, Chapter 8), where it believes it is in the public interest to have 'a cooling off period' or where it is deemed to be causing harm to a 'third person'. The Minister may also apply for suspension or termination of the bargaining period.

4.6 Changes to agreement-making and agreement-termination processes: Reduces procedural requirements for agreement making and provides management with increased power to determine conditions of employment after agreements are terminated

In an effort to reduce the procedural requirements involved when making certified agreements and Australian Workplace Agreements (AWAs), the new act will permit employers to lodge all agreements with the Office of the Employment Advocate (OEA) and for those agreements to take effect from the date of lodgement. Previously, only AWAs were lodged with the OEA and all agreements would only take effect after the AIRC (in the case of certified agreements) and the OEA (in the case of AWAs) was satisfied that they passed the 'no disadvantage test'. It is also intended that agreements will be able to be in force for up to five years, in contrast to the current three-year maximum (see Bray *et al*. 2005, Chapter 8).

It is also worth noting that employers are able to unilaterally determine wages and conditions of employment for new operations/workplaces – these are known as Greenfield agreements. The WC Act also removes any remaining ambiguity concerning the legality of offering employment on the basis of the acceptance of an AWA.

One of the more extraordinary provisions in the WC Act is s.101D, which permits regulations to be made as to what is regarded as 'prohibited content' in AWAs or certified agreements. This means that that the Minister can declare via regulations that certain items which have been agreed by the parties are prohibited and void. The Employment Advocate is then empowered to remove such prohibited contents from agreements. The Work Choices document, released in October 2005, listed a number of the items that are to be declared 'prohibited' as clauses:

- *prohibiting AWAs;*
- *restricting the use of independent contractors or on-hire arrangements;*
- *allowing industrial action during the term of an agreement;*
- *providing for trade union training leave, bargaining fees to trade unions or paid union meetings;*
- *mandating union involvement in dispute resolution; and*
- *providing for unfair dismissal.*

The WC Act also alters the arrangements for terminating agreements and enhances employer power in the process. Under the new rules, either party may terminate agreements that have passed their expiry date but employers are permitted to unilaterally determine wages and conditions of employment that are to apply post-termination so long as these conditions are better to or equal to the Australian Fair Pay and Conditions Standard (see s.103R).

4.7 Termination of employment: Businesses employing less than 100 employees exempt from unfair dismissal laws

A key reform proposal of the government is s.114 of the WC Act, which exempts businesses employing 100 employees or less from unfair dismissal laws (casuals with more than 12 months continuous service will be included in calculations of workforce size) This means that employees of these businesses who are unfairly dismissed will no longer be able to seek a remedy through the Australian Industrial Relations Commission. The WC Act also changes the law to prevent employees of larger businesses pursuing an unfair dismissal remedy during the first six months of their employment.

A further important reform relates to dismissals due to genuine operational reasons including 'reasons of an economic, technological, structural reason' (see s.112). This potentially excludes a great many employees from pursuing an unfair dismissal claim.

It is important, however, to note that these changes will not impact upon a right to a remedy from 'unlawful termination' which is available where termination is for a prohibited reason such as on the basis of national extraction, pregnancy, gender, disability, mental illness and other discriminatory grounds.

4.8 Awards: Further reductions in award provisions

The WC Act further 'simplifies' awards by reducing the number of allowable matters from 20 to 16; more specifically, removing from all awards clauses relating to:

- jury service;
- notice of termination;
- long service leave; and
- superannuation.

Essentially these provisions are covered by statutory provisions, but where some federal awards or state awards (that become notional agreements) provide more generous entitlements for leave arrangements, for instance, these will be deemed 'preserved award entitlements' and will not be removed from awards.

The government has also established a special taskforce, called the Award Review Taskforce, to further examine and report on how to rationalise the number and coverage of awards and award wage classification structures. The Taskforce comprises a Chair, Mr Michael O'Callaghan, and a Reference Group, including representatives from employer and employee backgrounds with technical expertise in award and award classification matters, supported by a Secretariat located within the Department of Employment and Workplace Relations (see Award Review Taskforce 2006). The recommendations of the Taskforce are expected to significantly reduce both the number of awards in the federal system and the number of wage classifications—with potentially major consequences.

4.9 A new hierarchy of industrial instruments: AWAs to override all other instruments

A significant change introduced by the WC Act is the new hierarchy of industrial instruments. In short, AWAs will now prevail over all certified (collective) agreements and awards (see s.100A). Certified agreements continue to prevail over awards and under s.101C, agreements can continue to call up the content of other industrial instruments by specific reference.

This new hierarchy privileges individual contracts and will allow employers to offer AWAs at any time that will prevail over existing certified agreements. The great secrecy surrounding AWAs continues—under s.83BS, a person risks a penalty of up to six months imprisonment for disclosing the identity of a party to an AWA where that party has not given permission to the person.

4.10 Transmission of business: Tighter restrictions on the applicability of industrial instruments during transmission of businesses

Under the WC Act, industrial instruments (awards and agreements) of businesses that are acquired by a purchasing employer will only apply to existing employees that continue to

work for the purchasing employer in the business and not to any new staff that the purchasing employer may choose to employ (see Part VIAA).

4.11 Union right of entry: Tighter restrictions on unions access to workplaces

The WC Act will significantly tighten the access to workplaces of union officials. Under the reforms (see Part IX), officials may only hold discussions with union members where the union is a party to an industrial instrument and can only hold discussions during meal or other breaks. Officials will be required to hold permits and must understand their obligations under the right of entry provisions.

5 IDEOLOGY AND WORK CHOICES

Chapter 1 of Bray *et al.* (2005) is mostly devoted to 'the study of industrial relations'. In other words, it focuses on how different scholars have thought about the subject of industrial relations and the concepts and theories they have developed to describe and explain what happens in industrial relations. It is possible, however, to use some of the ideas discussed in Chapter 1 to analyse the WC Act advanced by the Howard government.

Chapter 1 introduces ideology as a criterion that can be used to distinguish different theories or schools of thought in the study of industrial relations. In this context, 'ideology' involves a particular 'perception' of the employment relationship, a position about what is 'valuable' that reflects 'deeper assumptions about the nature of organisations and society as a whole' (p.10).

However, as acknowledged in Chapter 1, ideology can also be used to 'reveal real differences between the perspectives of rank and file employees, industrial relations practitioners and scholars alike—differences that deeply affect their diagnoses of industrial relations problems and their prescriptions for remedies' (p.11).

What, then, is the ideological perspective underlying the WC Act?

First, it must be noted that Prime Minister Howard and other members of his government have gone to considerable lengths to deny that their policies are 'ideological'. In July 2005, Mr Howard claimed:

> *While these reforms are significant, they are not radical. They are grounded not in ideology but in economic reality. They aim to strengthen our economy but to do so in the Australian way—by advancing prosperity and fairness together.*
>
> (Howard 2005, p.2)

Similarly, when commenting on designing a workplace relations system for the year 2010, for example, Minister Andrews stated:

> *In approaching this task we should remember that this is not about abstract ideological goals but about implementing practical responses to the challenges that Australia faces in achieving great workforce participation, greater productivity and a national workplace relations system that accurately reflects the reality of a national economy.*
>
> (Andrews 2005b, p.7)

These statements, however, rely on a different meaning to the term 'ideology' to that used in Bray *et al.* (2005). These politicians are keen to assure the electorate that they are not driven

by dogma—that their policies, as manifest in the WC Act, are not 'airy fairy' and not 'academic', in the worst meaning of the word. Rather, they are 'practical' and genuine attempts to address Australia's economic problems!

These statements, however, cannot deny that the legislation reflects a set of value judgments—a system of beliefs and assumptions about how the employment relationship works, about the causes of problems that arise in the employment relationship and about how those problems can be solved. Within this meaning of 'ideology', there seems little doubt that the Work Choices legislation is clearly 'unitarist' in its ideological perspective. Following the criteria set out on p.21, the unitarist nature of the reforms can be seen in several of its features:

5.1 General philosophy

Clearly underlying the legislation is the assumption that enterprises and workplaces are normally 'integrated and harmonious' entities that reflect the common interest of employers and employees. The government wants a system 'in which employers and employees are encouraged to determine their own working conditions by looking to their common interests, rather than being stuck in an adversarial system …' (Andrews 2005b, p.7).

The great enthusiasm evident in the provisions of the legislation for individual contracts as a mechanism for regulating the employment relationship reflects a similar ideology. An individual contract between an employee and an employer is seen as a 'meeting of minds' between two equal partners—and agreement only occurs when both sides accept the terms of the agreement. It is assumed that employees will only accept if they are happy with the terms of the contract, while employers should not be forced to accept either a particular form of agreement (e.g. a collective agreement rather than an individual agreement) or substantive terms in the agreement (e.g. through regulation of employment conditions by the state) that they do not want. Employers can be trusted to look after workers because treating workers badly—exploiting them—would be contrary to the interests of employers.

This general philosophy, in contrast to the pluralist perspective, fails to recognise the notion that inequality of power is a central feature of the employment relationship. This is an enduring debate and one that is discussed at length in Bray *et al.* (2005, pp.277–82).

5.2 The role of management

The government actually says little directly or publicly about the role of management within the enterprise—most of their rhetoric relates to what they see as the beneficial economic outcomes of management decisions rather than the management decisions themselves. However, there is no doubting the huge faith that the WC Act stores in the role of management as leader of the enterprise. The widespread withdrawal of state intervention and the further restrictions on the collective power of employees leaves management to make many more decisions unilaterally—the 'choice' of employees is largely whether to accept management's decisions or seek alternative employment. A good articulation of the logic that lies behind the government's faith in the role of management and market forces comes from Des Moore, a conservative commentator with considerable influence within government circles:

> *… although an employer may have the power to hire and fire, it is not in his own interests to ride roughshod over his employees. In modern capitalist societies … all employees have alternative options to obtain employment. Furthermore, unless an*

employer treats his employees fairly, and provides employment conditions that are broadly comparable with other employers, he risks losing workers with profitable knowledge and skills. So employers have a self-interest in retaining 'suitable' employees by treating them decently … [E]mployee cooperation is increasingly seen today as an essential ingredient of business success and employers are obliged to pay close attention to the welfare of their workforces. Otherwise, they will experience high rates of voluntary turnover of employees, absenteeism and sick leave, along with declining customer satisfaction and profit.

(Moore 1998, p.34)

5.3 The role of employees

The government clearly has a view that employees will work closely with management towards common goals provided they are given the right leadership, the right incentives and the opportunities. Prime Minister Howard's notion of the new 'enterprise worker' well illustrates this point:

What unites our enterprise workers, and what has helped lift Australia's economic performance, is an attitude of mind. They [i.e. enterprise workers] recognise the economic logic and fairness of workplaces where initiative, performance and reward are linked together. They understand the need for firms to strive for better ways of doing things; that each workplace has to meet the competitive challenge in its own way. They have a long-term focus, knowing that high wages and good conditions in today's economy are bound up with the productivity and success of the workplace.

(Howard 2005, p.4)

5.4 The role of unions

Unions are considered by advocates of Work Choices to be external parties that interfere and disrupt the natural harmonious and productive relationship between employees and employers; they compete with managers for the loyalty of workers, thereby having no legitimate role to play in the 'modern' organisation. In this way, they are considered 'old fashioned' and now irrelevant part of the old system of industrial relations in Australia:

The majority [of employees in the 'old' system of industrial relations] belonged to trade unions and this afforded unions a mandated and privileged role in the system. Unions behaved as any rational individual or organization would do in such a position and they utilized their power. The problem was that this power led to the institutionalisation of restrictive and unproductive work practices which to this day still impede the Australian economy …

(Andrews 2005b, p.4)

Despite rhetorical concessions to 'freedom of association' and the right of employees to choose to become union members, the substantive content of the WC Act, detailed in section 6.5 below, is clearly designed to limit the role of unions as severely as possible—an approach that contradicts the pluralist recognition that unions play a valuable role in representing the interests of employees in the regulation of the employment relationship.

5.5 The nature and causes of industrial conflict

The statements of senior government ministers and other advocates of Work Choices see conflict in the employment relationship as unnatural and the result of 'third-party

intervention'. The normal harmonious relationship between employers and employees was, according to the government, damaged by outside forces:

> *And we still [in 2005] have a system where third parties of all stripes can insert themselves too easily into processes to the detriment of cooperation between employers and employees.*
>
> (Howard 2005, p.8).

> *The self-indulgent cant of the union movement and the Labor Party ignored the reality of the modern workplace, where employers and employees are not pitted against each other in any battle for supremacy but simply want to ensure their individual skills are fully and fairly utilised.*
>
> (Andrews 2006b)

6 IMPACT ON THE PARTIES AND THE RULE-MAKING PROCESSES

In this section we discuss the likely impact the reforms will have on the principal actors in Australian industrial relations. At this very early stage, we can only tentatively speculate on the effects as:

1. the majority of the legislation is yet to be proclaimed and the WC Act's accompanying regulations have not yet been published;
2. the parties are yet to test the boundaries of the various reforms; and
3. the State's High Court challenge of the reforms is yet to be heard.

6.1 The role of the State

Chapter 3 of Bray *et al.* (2005) presents a set of concepts and an historical analysis that reveals great change in the role of the state generally in Australia over recent years. Despite its long-held reputation for strong state intervention in economic development and social affairs generally, the last 20 years have seen far greater reliance on market forces by government than state regulation. With national competition policy as a catalyst, both state and federal governments have embraced deregulation of product markets, have privatised previously government-owned enterprises, introduced private-sector management practices in remaining public sector organisations, and reduced tariff protection for domestic manufacturing (Bray *et al.* 2005, pp.81–2).

In the more specific role of the state in industrial relations, the WC Act represents the most significant change since the introduction of the compulsory conciliation and arbitration system at the end of the nineteenth century and the beginning of the twentieth century. This can be seen in several ways, although the trends are a little contradictory at times. On the one hand, Work Choices represents a major step towards the triumph of market forces and the 'receding state', as observed in Bray *et al.* (2005, pp.81–2): indeed, the state regulation of employment seems to be receding far more rapidly than ever before. The narrowing of state regulation can especially be seen in the shrinking role of awards and the new modest employment protections offered by the Australian Fair Pay and Conditions Standard, the withdrawal of unfair dismissal provisions for enterprises with 100 employees or less, the reduced powers to intervene given to the AIRC, and the dramatically reduced supports offered

to unions. All these provisions are clearly designed to promote individual contracts negotiated directly between employer and employees based largely on market forces.

On the other hand, and perhaps paradoxically, a great deal of complex state regulation is required to unleash these market forces. Furthermore, despite its name, Work Choices restricts the freedom of employees and employers by dictating many aspects of how they can and cannot behave, and what they can and what they cannot include in their 'voluntary', individual and collective agreements. As we have seen, some matters are prohibited from being included in agreements and the Minister can add to this list by making new regulations. The legislation is also highly interventionist when it comes to privileging individual contracts over collective agreements.

Work Choices is also a radical change in the *form* of state regulation of labour in Australia, especially with respect to a new more direct role for the federal parliament and a new relationship between the respective roles of federal and state governments. Within the federal jurisdiction, the parliament has been heavily restricted in its capacity to directly regulate the employment relationship since 1904 because it was relying on the 'conciliation and arbitration' power in the Constitution (see Bray *et al.* 2005, pp.116–17). Subject to possible reversals from the High Court, the almost complete switch to the 'corporations' power for the Work Choices legislation means that the parliament can directly regulate the wages and working conditions of employees working for corporations; this is most clearly manifest in the Australian Fair Pay and Conditions Standard, which is embodied in legislation of the federal parliament.

Work Choices also ushers in a very different balance between state and federal governments. The federal government is quite explicitly seeking to establish a single, national system rather than the traditional sharing of industrial relations with the state governments. Perhaps 15–20 per cent of the total workforce (i.e. those working in unincorporated entities or in the state public services) will remain in the state jurisdictions after the transitional arrangements contained in Work Choices have expired—again subject to High Court decisions. However, in the meantime, there seems little doubt that the federal government hopes to persuade state governments to cede their remaining powers to the federal government, thereby cementing the single, national system.

6.2 The Federal Tribunal

The Federal Tribunal (the Australian Industrial Relations Commission) has endured many changes throughout its 100 year history, as described in Bray *et al.* (2005, Chapter 4). Aside from changes in name and function, the AIRC has withstood periods of reduced and expanded powers, the emergence and then subsequent abandonment of specialist tribunals and periods of centralisation and decentralisation. In this context, the impact of the Work Choices reforms can be viewed in this broader historical context of continual and sometimes cyclical change, which may swing back again in the future.

This said, the decline in the role and authority of the tribunal under the *Workplace Relations Act 1996*—observed in Bray *et al.* (2005, pp.116–18) and described by Dabscheck (2001) as the 'slow and agonising death' of the Commission—seems to have reached its terminal conclusion. The changes delivered by Work Choices represent the end of compulsory arbitration in Australia (with a few minor exceptions), not just as a method of dispute

settlement, but also as a mechanism by which the employment relationship is regulated. The main evidence for this conclusion are analysed below.

(a) The removal of the AIRC's minimum wage setting powers and the creation of the AFPC

By far the most radical reform to the AIRC's traditional function is the creation of the Australian Fair Pay Commission and the transfer of the AIRC's traditional wage setting powers to the AFPC. The AIRC will no longer make adjustments to the federal minimum wage or to minimum award classification levels as these are now responsibilities of the AFPC (see Waring *et al.* 2006). The AIRC will only be able to adjust wage rates in federal awards covering employees not employed by constitutional corporations and who are not in Victoria or the territories under the transitional arrangements for up to five years, and the AIRC will be required to follow the wage decisions of the Australian Fair Pay Commission in any case.

(b) The removal of the AIRC's powers of compulsory arbitration

A significant historical change is the removal of the AIRC's powers to compulsorily arbitrate industrial disputes. Under Work Choices, there is no mechanism for industrial disputes to be brought before the AIRC for determination. The only exception is the 'workplace determinations' the AIRC is empowered to make if the bargaining period has been suspended or terminated bringing an end to protected industrial action. Trade unions and employers may still ask the AIRC to conciliate or arbitrate disputes, but the AIRC's power to arbitrate is limited by the parties—this is voluntary arbitration, not compulsory arbitration. Indeed, a new model dispute resolution clause to be inserted into all federal awards and state notional agreements will enable the parties to a dispute with the choice of either using a third party mediator or the AIRC to help them resolve their differences.

(c) The extension of the federal jurisdiction to incorporate much of the state's jurisdictions

The development of a unitary system of industrial relations which will incorporate much of the current state jurisdictions is a key plank of Work Choices. While state tribunals may continue to regulate small and micro unincorporated businesses and some state public sector agencies, it seems likely that the AIRC, somewhat paradoxically, will operate within a greatly expanded federal jurisdiction at a time when its functions and powers have become severely circumscribed.

(d) Reducing the unfair dismissal jurisdiction of the AIRC

The AIRC's traditional role in deciding unfair dismissal cases will be reduced with the removal of unfair dismissal rights for those employees employed in businesses with 100 or fewer employees.

(e) Changes to the AIRC's powers to stop unprotected industrial action

Under the reforms, the AIRC is compelled to give orders to stop industrial action that is not protected industrial action, effectively removing its former discretion in this area.

(f) Removing the AIRC's role in registering agreements

The new legislation will reduce the AIRC's traditional role in vetting and certifying collective agreements and AWAs (where the OEA was unsure of whether they met the 'no disadvantage test'). All agreements will be registered with the Office of the Employment Advocate and will take affect from the day of lodgement. Previously, parties to collective agreements were required to lodge their proposed agreements with the AIRC and short public hearings took

place in which the AIRC would examine, inter alia, whether the proposed agreement met the 'no disadvantage test'.

6.3 Rule-making processes

Chapter 8 of Bray *et al.* (2005) argues that the four main forms of rule making in Australia are managerial prerogative, individual contracting, collective bargaining and awards. While the WC Act has hardly yet come into operation and, therefore, its real effects have yet to be revealed, there seems little doubt about the intentions behind the legislation and about its likely impact: managerial prerogative and individual contracting will expand significantly, while collective bargaining and award making will decline.

The reforms favour employers in almost every respect. Most employers will gain significantly enhanced capacity to exercise managerial prerogatives and improved bargaining power in their dealings with employees and unions (see Bray and Waring 2006), although it must be acknowledged that this will vary according to industry and sectoral influences such as the state of industry labour markets. Employers will also gain from reduced procedural requirements, especially in making agreements, although it can be argued that this may be offset by the increasing level of regulatory complexity overall.

These changes in rule-making processes are hardly secret or ambiguous. Members of the government explicitly assert that economic success depends on freeing employers (and apparently employees) from the shackles of the old system:

> *Continued workplace reform is essential to improve productivity and support high levels of employment. The Howard Government wants to continue the shift away from an 'old industrial relations' system where the rights of employers and employees were controlled and could only be changed by industrial tribunals together with lawyers, unions and employer associations.*
>
> (Andrews 2006)

Work Choices carries the fundamental assumption that shifting the balance of power towards employers is necessarily good for the economy and for the capacity of the unemployed to participate in the labour market. By freeing employers from the restrictions of past state regulation, by reducing the power of unions in their negotiation of collective agreements with employers, by promoting the opportunities for employers to negotiate directly with their own employees and by expanding the freedom of employers to manage their enterprises as they wish, the government argues that enterprises will become more efficient, the national economy will become more competitive and jobs will be created. The methods of effecting these changes can be seen in many features of the legislation.

(a) The establishment of the Australian Fair Pay and Conditions Standard (AFPCS) and the Australian Fair Pay Commission

The creation of the AFPCS effectively establishes a lower minimum set of conditions which agreements such as AWAs must now meet. This means that AWAs and certified agreements that would have previously been rejected for failing the 'no disadvantage test' will now be legal so long as they provide wages and conditions that better than or equal to the AFPCS. In highly competitive sectors where union density is low and labour plentiful, overall wages and conditions in agreements may fall to this new minimum. While this may result in reduced

wages and conditions for some, the government has claimed that this is necessary so that the unemployed are not 'priced' out of the labour market.

The ACTU and the union movement generally appear to be largely excluded from minimum wage determination as a result of the establishment of the AFPC. According to Waring *et al.* (2006), this serves to de-legitimise the trade union movement and reduce its influence over wage determination.

(b) The exclusion of employees of businesses employing 100 employees or less from the unfair dismissal jurisdiction

This significant change transfers considerable power to small- and medium-sized employers who are able to terminate their employee's employment for any or no reason without being subject to an unfair dismissal claim. While reducing employer's exposure to the risk of an unfair dismissal claim, it also enhances managerial prerogative since most employees will be reluctant to resist management decisions for fear of being dismissed.

(c) New restrictions on protected and unprotected industrial action

Under the reforms, the AIRC is required to give orders to stop industrial action that is unprotected – there is no discretion on this point. Thus trade unions that persist in such action expose themselves to significant penalties. However, the most significant impact to trade unions result from the altered rules for the taking of protected industrial action during the bargaining period. These new bargaining rules, especially the necessity to hold secret ballots before taking industrial action, will mean that it is more time consuming, resource intensive, and difficult to engage in protected industrial action to support claims at enterprise bargaining. Employers will clearly gain bargaining power and this correspondingly restricts their capacity to persuade employers to bargaining or to grant concessions in the collective bargaining process.

(d) Establishment of a unitary industrial relations system

The main impact of the new single, national system on the processes of rule making flows from the transfer of enterprises (and their employees) from state systems that previously promoted awards and/or collective bargaining as regulatory instruments to the new federal jurisdiction, which strongly favours managerial prerogative and individual contracting.

One example is the New South Wales system under the *Industrial Relations Act 1996*, which promotes collectivism and remains closest of all the state systems to the traditional model of compulsory conciliation and arbitration (Shaw 1997). Another is Queensland, where Lee's conclusion is that:

> *Employees transferred from State jurisdictions to the Work Choices framework stand to lose unfair dismissal rights, award conditions, statutory minimum standards and some conditions in collective agreements. The effects will be felt most harshly by women, and young and indigenous workers. However, bargaining and agreement making will be more difficult for all employees and unions since the proposed legislation will hand employers the overwhelming balance of power.*
>
> (Lee 2005, p.208)

(e) Agreement making and agreement termination

A considerable benefit to employers and a strong encouragement for individual contracting is the reduced procedural requirements for making certified agreements and AWAs. Employers

can make both AWAs (and certified agreements) and lodge these with the Office of the Employment Advocate along with required declarations that employees have been consulted and that statutory minima has not been breached (e.g. Australian Fair Pay and Conditions Standard). The agreements will then take effect from the day of lodgement. There is also capacity under the amended Act for employers of greenfield (new) sites to employ employees directly on unilaterally conceived terms and conditions of employment without any negotiation for a period up to a year. The reforms also clarify (to remove any doubt) that employers may offer employment on the basis of the acceptance of an AWA.

As well, the motivation for cost-cutting employers to use individual contracts is the revised termination of agreement provisions. Under these provisions, either party may apply for an expired agreement to be terminated. In the event of termination, the employer may place its workforce on the Australian Fair Pay and Conditions Standard or unilaterally determined wages and conditions. An employer, seeking concessions from its workforce in bargaining over a new agreement may simply pay the AFPCS until it achieves such concessions. Alternatively, with the termination of an agreement, the employer may decide that the AFPCS will apply indefinitely. The only sanctions open to employees in these circumstances are to exit or engage in protected industrial action.

Trade unions and their capacity to negotiate collective agreements will also be adversely impacted by the altered rules associated with making certain agreements because they favour management unilateralism. For instance, the greenfield agreement rules (noted above) allow management to exclude trade unions by permitting them to unilaterally develop terms and conditions of employment without consulting unions or employees. Further, the agreement termination provisions which permit employers to unilaterally determination 'post-agreement' wages and conditions as low as the AFPC may place enormous pressure on unions and their members in enterprise bargaining.

6.4 Management

There seems little doubt that the WC Act will bring Australian management far greater freedom to manage their enterprises as they see fit—they will be subject to far less state regulation of the employment relationship and they will more rarely be forced by unions to bargain collectively over wages and working conditions.

What will Australian managers do with this new found freedom? The Howard government has had a great deal to say about the outcomes—especially the economic outcomes – of the new regulatory regime. They believe that the new freedom of managers will lead to more efficient enterprises, a more competitive national economy, and more jobs and greater workforce participation in the Australian labour market. However, the government has been far less forthcoming about how they see managers achieving these outcomes—what will managers do differently within their enterprises that will produce these desired outcomes?

The answer to such questions will undoubtedly vary between employers according, amongst other things, to the product markets they confront (Bray *et al.* 2005, pp.163–7) and the business strategies that employers adopt (Bray *et al.* 2005, pp.156–7). Many companies will pursue 'innovation' and/or 'quality-enhancement' business strategies (p.157), developing their employees' capacities and taking advantage of new freedoms to build trusting and inclusive relationships with their employees.

Many employers, however, will adopt very different strategies, focusing more on 'cost reduction', especially in those industries where competition based on price is intense. This is where the critics of Work Choices have been loudest. The reductions in employee protections (through the declining role of awards and the abolition of the 'no disadvantage' test) mean that low-pay employees in competitive, labour-intensive service industries (like retail, hospitality, tourism and personal services) are increasingly vulnerable (see Plowman and Preston 2005). These industries have seen strong reliance on awards (as opposed to collective agreements or even AWAs) and a prevalence of state (rather than federal) award regulation, retaining historic industry-wide standards. The end of industry-wide standards that will flow from Work Choices will mean that employers seeking to survive or gain competitive advantage have an incentive to reduce the cost of labour and thereby reduce their prices in order to attract business. It takes only a small number of employers to adopt such practices and the 'race to the bottom' that the government has been so keen to deny has the potential to become a destructive force.

It remains to be seen what the dominant management strategies will be.

6.5 Unions

Chapter 6 of Bray *et al.* (2005, pp.195–204) traced the historical evolution of unions as a form of employee representation in Australia and found that union membership and the power of trade unions had been in conspicuous decline since around the beginning of the 1990s (see especially pp.203–4). The reasons for this decline were considered to be many, but they included the increasingly hostile role of management and the impact of unsympathetic government policies (see Bray *et al.* 2005, pp.207–14).

On the one hand, it seems likely that the Work Choices reforms will serve to exaggerate the hostility of the environment in which unions operate and thereby continue the process of reducing their membership and power. The elements of the legislation that will contribute to this trend are many and formidable: the tightened restrictions over industrial action, the exclusion of the ACTU from having any role in minimum wage determination, the absence of a legal right to collective bargaining and the further promotion of individual contracting, amongst many others, will make it increasingly difficult for unions to satisfactorily represent their members.

On the other hand, some commentators argue that these harsh circumstances may be conducive to attracting new members and a stimulus to new collective strength. These commentators differ, however, in the strategies that they believe unions must follow in order to realise the potential offered by these circumstances. Mainstream union leaders advocate political and media-based responses as well as stronger workplace organisation (e.g. Combet 2005, Towart 2005), while left-wing critics of the ACTU and mainstream unions support a more radical approach based on mass industrial action (Bramble 2005).

These 'strategic differences' over the union response to Work Choices reflect long-standing differences in ideology within the Australian labour movement, and the labour movements of many countries (see Bray *et al.* 2005, pp.186–90). Only time will reveal where the union movement will go and what the real outcomes will be.

7 Conclusion

The Work Choices reforms are far-reaching. They represent a major break from the past in very many ways. Their constitutional consequences promise to be huge. Despite much rhetoric to the contrary, the reforms appear to spell the end for institutions that have dominated Australian industrial relations for many decades and introduce new institutions. The traditional compulsory arbitration system is largely gone, while unions and collective bargaining are severely threatened. The processes by which the rules of the employment relationship are made in Australia will change, with market forces, individual contracting and managerial prerogative likely to gain a new ascendency.

The Howard government and its business supporters have argued that the reforms are inevitable and necessary to drive a further round of productivity growth, to reduce unemployment, and to guarantee competitiveness. The government's critics deny these claims, questioning the economic claims and protesting what they see as the consequences of the 'reforms' for equity in Australian society. The claims and counter-claims push rhetoric to new heights and challenge the path of rational debate.

At this early stage, any conclusions must remain speculative and uncertain. The laws will be tested vigorously in the courts. Public opinion can be fickle and the political climate can change quickly. The past capacity of the Australian Industrial Relations Commission for adaptation and survival demands that those predicting its demise should exercise great caution. There will inevitably be great variety around the country in the reactions of management within enterprises and in the responses of unions. The outcomes of such movements are rarely certain, if for no other reason than the fact that their effects will take many months, if not years to be revealed. The unfolding of these trends and events will provide a fertile ground for future students of industrial relations.

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Relevant Weblinks

www.workplace.gov.au/workplace/Category/PolicyReviews/WorkplaceRelationsReforms/WorkChoices-anewworkplacerelationssystem.htm

Commonwealth Government's webpages that discuss the reform proposals.

www.actu.asn.au/public/campaigns/work_rights.html

The Australian Council of Trade Union's 'Your Rights at Work Campaign' website.

www.acci.asn.au

Australian Chamber of Commerce and Industry website.

www.accer.asn.au

Australian Catholic Commission for Employment Relations.

www.aph.gov.au/senate/committee/eet_ctte/wr_workchoices05/report/index.htm

Submission of 151 Academics to the Senate Committee Inquiry into the Provisions of the *Workplace Relations Amendment (Work Choices) Bill 2005*.

www.awardreviewtaskforce.gov.au

Award Review Taskforce

www.econ.usyd.edu.au/content.php?pageid=14896

Seventeen of Australia's leading academic researchers in the fields of industrial relations and labour market issues, employed in universities across Australia, have released a series of papers analysing the details of the Howard Government's proposed changes to Australia's industrial relations laws and the likely effects of these changes.

www.comlaw.gov.au

Attorney Generals website which enables one to search for updated Commonwealth legislation.

www.aph.gov.au/senate/committee/eet_ctte/wr_workchoices05/report/index.htm

Final report of the Senate Committee Inquiry into the Work Choices reforms.

www.mcdonald-assocs.com/irreforms/recon.htm

An excellent website and invaluable resource which provides links to media reports and other developments on the reform proposals.

www.fairgo.nsw.gov.au

NSW Government website which offers a critique of the reforms.