The National Legal Eagle

Volume 12
Issue 2 *Spring 2006*

Article 4

10-1-2006

WorkChoices- Bashing unions or helping business?

Joel Butler
Bond University, Joel_Butler@bond.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/nle

Recommended Citation
Butler, Joel (2006) "WorkChoices- Bashing unions or helping business?," *The National Legal Eagle*: Vol. 12: Iss. 2, Article 4.
Available at: http://epublications.bond.edu.au/nle/vol12/iss2/4

This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in The National Legal Eagle by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

WorkChoices – Bashing Unions or Helping Business?

Joel Butler
Postgraduate Fellow
Faculty of Law
Bond University

Earlier this year the Federal Government introduced controversial new laws that changed Australia's approach to industrial relations. The laws were widely criticised by unions, academics and the opposition Labor party as 'an attack on workers' rights'. The Government justified the changes by saying they were needed to provide the flexibility necessary to ensure Australian businesses remain competitive into the next century.

Just what were the changes and what do they achieve? Are they 'anti-worker'? Do they really mean that the working lives of Australians will be harder and their rights at work reduced? Will the changes really help business – and, if so, how? We look at some of the major changes below.

The main changes in a nutshell

The main changes introduced by the Government further 'individualise' employment relations – a trend begun now more than a decade ago. This trend gives employers more flexibility in the terms and conditions that they can offer to workers. To understand why this is significant, it is necessary to look at a little of the history of industrial relations (IR) in Australia – which we'll do below.

Other changes that the news laws make reduce the role that the Australian Industrial Relations Commission (AIRC) has in the IR system, make it more difficult for unions to play a role in IR, and reduce the ability of workers to bring unfair dismissal claims against employers.

The laws also create a new national institution – the Australian Fair Pay Commission – that has been given the role of setting minimum wages across the country. We'll look at this in a bit more detail below too.

A history of industrial relations

Australia has historically had a unique system for dealing with IR issues. Because of the rather odd way IR powers are distributed among the federal and state governments (a result of the drafting of the constitution in 1900), Australia has 'multiple' and overlapping systems of IR. For instance, some workers in a state – say, Queensland, New South Wales or Victoria – will traditionally be covered by state laws, while some will be covered by federal laws. This has sometimes meant that employers (and workers) are not altogether sure what laws cover what workers. (In fact some employees in *a single business* might be covered by federal laws and some by state ones . . . that's how confusing the system can get!)

Another unique aspect of the Australian IR system is the process of 'conciliation and arbitration' for settling workplace IR disputes. The system works like this: when an industrial dispute arises, the employer or a worker (or more usually a union) takes the matter to the state or federal IR commission (the names of these bodies often change –currently at a federal level it is the AIRC, as mentioned above). The Commission will then sit both parties down in a 'conciliation' hearing. This is not like a court trial; instead, the Commissioner attempts to get the parties to work out the dispute between themselves – so it is more like a mediation than anything else. The Commissioner can bully, cajole and suggest solutions or approaches, but at this stage cannot force the parties to do anything to resolve the issue. If conciliation is unsuccessful, the Commission then moves to 'arbitration'. This is more like the trial process that everyone would be familiar with: the Commission hears evidence, listens to the parties arguments, and then makes a binding ruling as to the rights of the parties in relation to the dispute.

As noted above, the Australian system is a little odd in the way it distributes powers between the federal and state governments. Traditionally, the federal government only had jurisdiction in relation to IR disputes that involved workers in more than one state. This led to a system where unions used to manufacture 'paper' disputes to get a dispute before the federal commission. So, for example, although a dispute might exist between an employer and workers in, say, a factory in Sydney, about their pay, the unions would get workers in other states who worked in similar factories to bring claims against their employers too. The union would then be able to claim it had an 'interstate dispute' and call upon the AIRC to adjudicate.

This shows how important a role unions have generally played in Australian IR. Many employers criticised unions, saying that they could 'hold employers to ransom' with their 'artificial' claims.

The AIRC solved disputes before it by making 'awards'. The award system has for many years underpinned the wages and conditions of Australian workers. Using the process described above, unions would bring claims against employers to establish minimum wages and conditions for everyone working in a particular industry or working in a particular job type in that industry. The AIRC would hear the arguments of the employers and unions as to what the workers should receive, and then set the minimum wages and conditions for those workers in an award.

The award would then apply to, say, all bank clerks in all banks across Australia, or all steel workers across Australia – regardless of where they worked or who their employer was.

Employers complained that this was unfair. They argued, for example, that a particular steel mill in Newcastle might not be as able to afford the award wage as another steel mill in Western Australia or Queensland, where costs might be lower. They might not even be as able to afford the award wage as the next door steel mill in the same city. In other words, the system was inflexible.

Unions, on the other hand, argued that if there was no award system, and if unions were prevented from negotiating for groups and categories of employees, this would lead to lower wages and worse conditions for employees as employers tried to play the employees off against each other to force them to take lower wages and worse conditions.

Unions were, in other words, the only protection that employees had against unscrupulous employers.

Recent debate

This was the background against which the recent IR debate took place. Basically, many employers argued that the system was entirely lacking in flexibility. They argued that the AIRC was biased in favour of employees when it came to conciliation and arbitration, and they argued that unions had too much power in the system. Too often unions had their own agenda which much of the time was not even in employees' interests.

Employers argued that there should be more flexibility in the system allowing employers and employees to negotiate on an individual basis about what work arrangements best suited them, instead of having a complex and detailed union negotiated agreement forced on them. This is what 'individualisation means – where work conditions are worked out on an individual rather than a 'collective' basis.

The WorkChoices laws – new versus old

The old system (ie, the pre-WorkChoices system) covered a limited number of employees and employers. This was another result of the constitutional arrangements put in place at the beginning of last century. The new system will cover a much greater number of employers and employees – possibly up to 80% of all employees across Australia. The WorkChoices legislation achieves this outcome by using the 'corporations power' in the Australian Constitution, meaning that any employer which is a 'trading corporation' will be covered. This also takes away the need for there to be an 'interstate dispute' in order to be covered by the federal system.

For any businesses that are now covered by the federal system, the state IR system no longer applies. This solves the problem where one employer may have had different employees who were covered by different IR rules.

Although the new laws have also retained an award system, this system is significantly simpler than before. Whereas under the old system there were literally thousands of awards, the number of these will now be very much reduced.

Importantly, the new system makes it much easier for employers to negotiate individual employee's terms and conditions of employment. Under the old system the two parties had some flexibility to negotiate, but whatever was finally agreed to could not contradict the terms and conditions of the award that applied to the employee.

Let's look at an example. Under the old system most awards set the number of days' leave that an employee was to be given. The employee had to take this amount of holidays, and the employer had to allow the employee to take that amount of time off. Under the new system, this is negotiable. It might be the case that some employees would prefer to work more, earn more, and have less time off, whereas for others longer periods of holidays are preferable. The WorkChoices system allows employees to agree to fewer holidays in return for higher pay (or other benefits) – and the ability to do this is not restricted by an award.

This process of 'individualisation' has also meant that under the new system there is a much reduced role for trade unions. Although an individual employee can appoint a 'bargaining agent' to negotiate with their employer about the terms and conditions of their employment, it is much harder under the new system for a union to compel an employer to negotiate collectively with the union for a collective agreement covering all the employer's employees.

There still exists the capability for employers to have 'collective' agreements with employers. Many employers have still taken up this option since the introduction of the changes, but many have adopted the more individualised approach using Australian Workplace Agreements (AWAs) as the form of agreement with their employees.

Most AWAs last for a fixed term after which they can be renegotiated. There are also rules about when employees can go on strike in relation to their employment agreements. In the past, one of the main tools used by employees – and especially by unions – to force employers to adhere to their demands for increased pay or better conditions was the strike. Basically, workers would refuse to work until their demands for better conditions were met. This was a particularly effective tool in a highly unionised workplace. In a situation where, for instance, all the steelworkers belonged to the union, it was impossible for an employer to sack the striking workers and hire replacements. Since every worker was in the union, 'worker solidarity' meant that if the workers were fired no-one would apply for their jobs to replace them. Workers in other businesses (not necessarily even just steelworkers) might also go on strike in support of the sacked workers – bringing the employer's business, and sometimes the whole economy, to a standstill.

The legality of strikes has slowly been eroded over the past ten or so years. Now a worker is only allowed to go on strike in a certain 'bargaining period' when their current agreement has expired, and only after giving a certain amount of notice. The strike as an 'industrial weapon' has therefore been further blunted by the recent changes.

Unfair dismissal

One of the major changes made by the new laws is to limit the circumstances in which an employee can bring an 'unfair dismissal' proceeding against their (ex-) employers. Under the old system, if an employee had been dismissed in circumstances which were considered 'harsh, unfair or unjust' the employee could bring a proceeding in an industrial commission seeking to be reinstated to their old job or to be paid compensation for the dismissal. An employee could be paid up to 6 months worth of their previous wages as compensation if the Commission decided that their dismissal had been unfair.

There were many circumstances where a dismissal could be found to be unfair – especially where an employee was not given 'procedural fairness' in relation to the dismissal. For instance, if an employer thought the employee's performance was bad, it was generally a requirement that the employee be warned, counselled and given an opportunity to improve (as well as an opportunity to explain whether there were any 'extenuating' circumstances relating to their alleged poor performance).

Although the workers who could access this jurisdiction were limited even under the old system (for example, if you were earning over a certain amount or were a true casual employee you could not access unfair dismissal) the number of workers who can access unfair dismissal provisions under the new system is even more restricted.

As we saw above, many more employees and employers are now covered by the federal system – this means that many employees are now excluded from the more generous state systems. In addition, employees who work for employers who have less than 100 employees are also excluded from applying. Finally, employees whose dismissal was for (at least partially) 'operational reasons' cannot apply. The extent of 'operational reasons' is not yet clear – but certainly it gives employers a greater scope to dismiss employees than existed before.

Decline of the AIRC and rise of the AFPC

One of the more interesting changes the new IR laws have made is to restrict the role of the AIRC. In the past it was almost the sole forum for resolving workplace disputes; now employers and employees can choose private mediators to sort out a range of workplace disputes for them. In addition, the AIRC no longer sets the national minimum wage – a process it used to do once a year – usually resulting in increases in employees' weekly pay.

From now on, that role will be undertaken by the Australian Fair Pay Commission (AFPC). At its annual 'wage case hearings' the AIRC used to hear from employer groups, unions and others as to what the suitable minimum wage should be for Australian workers. It would then make an order for a pay increase and unions would apply for that increase to 'flow on' into individual awards. Now the AFPC will choose what method it wants in order to determine what the national minimum wage will be. It has just gone through a process of inviting submissions from unions, businesses, academics and individuals, as well as holding a number of public hearings, and is expected to announce the new national minimum wage soon. The AFPC is not limited to undertaking this role once a year, and can adjust the minimum wage whenever it thinks appropriate.

Critics have argued that this process is less open than that which was previously utilised by the AIRC, and have complained that the AFPC is 'stacked' with government sympathisers who will help push down workers' wages. They have also said that the way the process itself is structured will result in lower wages nationally, forcing more workers into poverty.

The Government and some commentators have countered that the new more 'flexible' system will actually result in *more* jobs and generally *better* pay for most workers, and will make the economy overall more competitive. They argue that taking away red tape and reducing the influence of unions increases efficiency and productivity – especially for small businesses. There is a good argument that union driven wage setting mechanisms work well to boost the wages of union members, but this is at the expense of the most vulnerable in society – the very low skilled, women and young workers.

Bashing unions?

There is no doubt that the current Federal Government is ideologically opposed to unions. Government leaders and spokespersons have repeatedly commented that they consider unions to be obstructive, destructive and a bar to productive and efficient workplaces. So there is no real surprise that the current round of IR laws undermine even further unions' power in workplaces.

However, the new laws should not be viewed only with this cynical perspective. It is certainly the case that unfair dismissal laws sometimes meant that there were unjust outcomes for employers – especially small businesses. In cases where an employee who had been involved in serious misconduct had not been technically provided with procedural fairness when the employer had sacked them, the employer may have been forced to re-employ them or to pay out tens of thousands of dollars in unfair dismissal claims – even though anyone knowing the details of the situation would agree that the employee deserved to be sacked.

Balance?

The big question in Australian IR has always been – and remains – finding the right balance. Most people agree that unions often have a valid role in some areas. However, most also agree that they sometimes have too much power and do not properly represent the interests of their members, or that they do not necessarily assist struggling businesses or the economy as a whole. Most people would probably say that employees need some protection from arbitrary dismissal from their employers and should have some job protections. At the same time, however, most would probably also say that employers should be able to sack bad employees or employees who engage in misconduct.

The law's role (and the role of those who have some influence in the making of the laws) is to strike a balance between all these competing interests. As you can imagine, with such a controversial topic this balance is not always easy to find. Although many say that the current laws may have gone too far in undermining the interests of employees, it is perhaps too early to tell. The laws, after all, have only come into operation, and although there have been stories on both sides of the argument (more people sacked unfairly versus more efficient businesses with a fairer deal for employers) it is probably too early to say whether the laws will deliver what the government promised – *more jobs, better pay*. Only time will tell.

Where do you stand?

What do you think of the Federal Government's recent workplace reforms? Are you in favour of AWAs, for instance? Why or why not? Do your answers reflect an 'individualist' or 'collectivist' approach to industrial relations?

Produced by The Berkeley Electronic Press, 2006