How Low Can You Go? Minimum Working Conditions Under Australia's New Labour Laws

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Abstract

The Work Choices package of legislative reforms has significantly altered both the institutions and the instruments of the federal regulatory architecture for setting minimum working conditions. This paper surveys the reduced role of awards and of the Australian Industrial Relations Commission, before considering the function and content of the Australian Fair Pay and Conditions Standard and Australian Pay and Classification Scales, as well as the role of the newly created Australian Fair Pay Commission. It argues that the Work Choices reforms have shifted power over the setting of minimum working conditions to the government, which will set many conditions directly, and to employers, who will be entitled to require employees to be party to workplace agreements that displace very many of the minimum working conditions that are otherwise purportedly guaranteed. These shifts have opened up the space for significant reductions in minimum working conditions, as well as for falls in real wages for those not able to benefit from wage bargaining.

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Introduction

The recent introduction of the Work Choices legislation[1] has brought about the greatest single change to Australian federal labour law since the introduction of compulsory conciliation and arbitration.[2] In particular, Work Choices marks the largest departure yet from Australia's reliance on compulsory conciliation and arbitration as a means of settling industrial disputes, and as a means of setting minimum working conditions. Not so long ago, Braham Dabscheck (2001) wrote of the 'slow and agonizing death' of Australia's 'experiment with conciliation and arbitration'.[3] Work Choices has certainly not reversed that process, but neither has it brought it to a conclusion. Neither conciliation and arbitration, nor the awards that have been their product, has been completely killed off. The impact of Work Choices on federal conciliation and arbitration is however central to this paper, the purpose of which is to consider how minimum working conditions will be set in Australian federal labour law after Work Choices comes into effect. In doing so, I compare the new provisions with the way that minimum working conditions have previously been set, and in particular the changes since the early 1990s to legislative policy in this respect.

In introducing Work Choices, the government promoted the package as one that would give Australia a 'simpler, fairer and national' system of industrial relations.[4] Notwithstanding the stated goal of simplification, the changes are very complex. Ironically, one of the reasons for that complexity is that the goal of creating a national system is being pursued by the commonwealth government without cooperation from any of the states. Because Work Choices represents a hostile federal takeover, it includes numerous and intricate provisions on the detail of how workplace relations arrangements devised under state systems will come into the new federal system. Given the complexity of the new system, it is valuable to give a brief précis of it before considering any of its elements in detail.

Work Choices' will largely end the role of awards as the instruments by which minimum working conditions are set and maintained; because of the federal takeover, this will be true for both federal and state awards. Although federal awards will continue to have a limited role, it will be possible to displace almost all award conditions entirely by making either an individual or a collective workplace agreement.[5]

Minimum working conditions will instead be found in an Australian Fair Pay and Conditions Standard (AFPCS), which will include provisions on wages, hours, and three types of leave: annual, parental, and personal/ carer's leave. For those working in award classifications above the

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minimum, wages will be regulated by an Australian Pay and Classification Scale (APCS). The newly-created Australian Fair Pay Commission (AFPC) will superintend the content of each APCS, and the wage level that is to be paid under the AFPCS. In dealing with any APCS, the AFPC will be required to consider the work of an Award Review Taskforce (ART). The Australian Industrial Relations Commission (AIRC) will have no power to set the minimum working conditions that will appear in the AFPCS, or in any APCS. Moreover it will have only a strictly limited power to create any new award. The AIRC will, however, have a limited role in relation to the continuing function of awards: it will principally be responsible for implementing processes of further award rationalisation and award simplification.[6] The AIRC will also have power to vary remaining awards as part of maintaining safety net conditions, other than on the subjects that will be set in the AFPCS, or in an APCS. Any state and territory award or law setting wages will effectively be deemed an APCS. The AFPC, however, will carry out a review of all APCSs, and in particular will be responsible for eliminating distinctions based on application to a state or a territory.

It should be noted that these minimum conditions - indeed the whole Work Choices system - will only apply to approximately 80 per cent of Australian employees. Notwithstanding the stated goal of creating a 'national' system, Work Choices rests principally on the Commonwealth government's legislative power over corporations,[7] although it will also apply to employees of the Commonwealth, to those who work in one of the territories, to flight crew officers, waterside workers, and to maritime employees; some provisions apply specifically to employees in Victoria.[8] Obviously enough, however, anyone outside these categories will be excluded. As is well known, it is not beyond doubt that the Commonwealth's legislative competence with respect to corporations will in fact support the Work Choices law. Given the possible doubts, and the hostile nature of the federal takeover, state governments and a number of trade unions have launched a High Court challenge.[9] For the most part, those are matters beyond my present scope and purpose. The first observation I make about them here is simply that it may not be thought that the system of setting minimum working conditions is 'fairer' if it is not in fact 'national' (or for that matter, 'simpler').

The second observation I make is that it is a puzzling irony that the Commonwealth has chosen to rely so heavily on its power over corporations, when it could have achieved a far more effective (or at the least more complete) federal takeover – hostile or otherwise – by using its

power over external affairs.[10] There is no legal (as opposed to political) reason why it could not have used this source of legislative power (Creighton and Stewart 2005: 109 - 111; Creighton 1998). It must therefore be acknowledged that the commonwealth government's strategy for taking over the field of Australian labour relations law is political, rather than legal. It hopes (indeed plans) that in time the various states will elect not to maintain separate labour relations systems, as they will cover too few workers to justify the cost that will be involved. Then, presumably, they will elect to refer their legislative powers in the field to the commonwealth, as did Victoria in 1996.[11]

Before turning to the detail of how these new arrangements will come into operation, it bears emphasizing that the AIRC will in future have virtually none of the powers that it and its predecessors exercised to arbitrate new minimum working conditions. Gone now (and perhaps forever) is the phenomenon of the federal tribunal making decisions on wage levels.[12] This aspect of its work, which was both fundamental to its influence and frequently contentious, now passes to the AFPC. The many principles developed and applied over the years from the *Harvester* decision until the most recent Safety Net Review will now largely pass into historical memory.[13]

Gone too to all intents and purposes is the capacity of the AIRC to set a new 'test case' standard that might flow on into awards throughout both the federal and state systems.[14] Over the years, the AIRC and its predecessor created and/or ratified (in the case of working conditions that had already spread widely through agreement-making) standards of general application that became enforceable minimum working conditions by flowing on into all awards. Important examples in recent years include the *Family Leave Case*,[15] the *Reasonable Hours Case*,[16] the *Redundancy Case*,[17] the *Metals Casuals Award Case*,[18] and the *Parental Leave for Casuals Case*.[19] Significant test cases from the thirty or so years before the shift in emphasis to enterprise bargaining include the *Superannuation Test Case*,[20] the *Termination, Change and Redundancy Case*,[21] and decisions on parental leave[22] and equal pay.[23] An example from an earlier era is the decision to establish a standard 40 hour working week.[24]

I leave until later the question of whether it is a good or a bad thing that the AIRC will no longer have these functions, either in relation to wages, or in relation to other minimum working conditions. It is however important at the outset to acknowledge that these functions have been removed from the AIRC even though it has recently been argued that we know relatively little about their operation and their effects (Murray 2005; Mitchell 2005).

In the balance of this paper I consider in turn (1) the evolution of the role of awards as a means of setting minimum working conditions; (2) the role of awards and of the AIRC after Work Choices; (3) the operation of the AFPC, the AFPCS, and the role to be played by an APCS; and (4) changes to other minimum working conditions.

In the conclusion I offer some brief observations about the likely implications of these major changes to how minimum working conditions will be set in Australian labour law. Generally speaking, as my title suggests, I argue (as have many others) that Work Choices marks a significant downward shift in the levels of minimum working conditions that are to be guaranteed to Australian workers. Some conditions are now to be regulated by legislation, but they are set at low levels, and it is at least as significant that this also marks a new turn toward direct government control over minimum working conditions. Many other conditions, however, are to be left effectively in the control of employers: the majority of the purported minimum working conditions can be overridden by express agreement, and Work Choices makes explicit what the federal court had already decided; an employer may require an employee to sign a workplace agreement as a condition of entry to employment.[25] Moreover, it will now be possible for an employer to offer an employee an AWA at any time, including during the course of a collective workplace agreement.[26] At the same time, Work Choices has further restricted the ability of trade unions to function as creators and enforcers of minimum working conditions, including by reducing the extent to which awards might provide them support for these purposes. Taken together, it is a potent mix, and a recipe to empower employers to drive down working conditions. Before considering the detail, I briefly recap the longer-term context of reforms to Australian labour law, especially since 1993, in order to help establish the extent of the shift that has occurred.

Arbitration, Bargaining and the Changing Role of Awards

The passage of the *Industrial Relations Reform Act 1993* (Cth) marked a major departure from the traditional emphasis in Australian federal labour law on the use of conciliation and arbitration as a method for resolving industrial disputes, and for setting minimum working conditions.[27] Since then (at least), the emphasis of both commonwealth and state government policy has been on the promotion of bargaining at the level of the enterprise as the preferred method of determining working conditions. Under this

approach, awards have shifted from being a de facto codification of employees' working conditions (Mitchell and Naughton 1993: 270), to a means of maintaining only minimum working conditions. In the federal system they have been the instrument by which a 'safety net' of minimum working conditions has been set and maintained. In some respects, the imperative of promoting bargaining has been an influence on the function of setting minimum working conditions through the residual use of awards. That is, the level of minimum working conditions has had at times to be set in a way that would encourage workplace bargaining (Peetz 1998: 539-542). As will appear presently, this is certainly true under Work Choices.

At the time of the legislative changes in 1993, federal or state awards set the working conditions of approximately 80 per cent of the Australian workforce across both the private and public sectors of the economy. This of course reflected the long history of conciliation and arbitration in Australia, a method that was established for the purpose of resolving industrial disputes but which 'evolved . . . into a national system for regulating employment contracts by award' (Mitchell and Naughton 1993: 270, 272).

The number of awards and the extent of award coverage have both been significantly affected by the process of award simplification. By the time that Work Choices was introduced, award simplification had been all but completed, with only 16 awards still undergoing simplification. The number of remaining awards was around 2,229, of which 782 had been made following the introduction of the concept of allowable award matters.[28] Of these awards, only 300 to 400 were 'full' awards that regulated the whole range of working conditions; the vast majority of awards did not have this character, dealing instead with single issues, or roping-in of particular employers. By May 2005 far fewer workers relied upon awards as a means of regulating their working conditions: the push toward enterprise bargaining has in this respect been a significant 'success.' Australian Bureau of Statistics (ABS) figures show that 20 per cent of all workers then had their pay regulated by awards; presumably these workers also relied on awards to set out their other working conditions (King and Stilwell 2006). Clearly this single statistic may be striking evidence of a significant reduction in the importance of awards. In only a dozen years the proportion of the Australian workforce relying on awards appears to have fallen by 75 per cent. The figure of 20 per cent award reliance is widely-known, and referred to, for example, in the AIRC's Safety Net Review decisions from time to time. It is important, however, to take care

in the use of this single statistical measure, so as not to overstate the extent to which it shows that awards have lost their significance.

Most importantly, the ABS method of collecting this data effectively asks whether the worker received the *last dollar* of their pay in accordance with an award.[29] In other words, any amount of over award payment would be enough to exclude a worker from this category of award-reliant employees. Thus, the figure of 20 per cent represents those for whom the award is – at least in terms of pay – both the minimum and the maximum; in effect, the group of workers for whom an award has been the *sole* source of regulation of their working conditions, at least for wages, and probably for other conditions as well. It follows of course that some unidentified proportion of the workforce is dependent on awards as the *principal* source of regulation of their working conditions. Without further empirical analysis of the extent of over-award payment or other upward variation in working conditions, it is however impossible to say how large that group of workers may be.

Awards have retained other significance as well. They have served as an important basis from which to shape campaigns for industrial bargaining and negotiation, and as inspiration for the form and often the very content of both collective and individual agreements under both state and federal laws. From the point of view of the *Workplace Relations Act 1996* (Cth) (WR Act), awards have served a critical function as the means by which the AIRC has discharged its responsibility to provide a 'safety net' of fair minimum terms and conditions of employment. I will return presently to this aspect of the importance of awards, and to the major changes that Work Choices has made to the functions of the AIRC in relation to making and varying awards. For now it is sufficient to emphasize that awards were not only retained in the changes that brought the WR Act into being, but that they were retained as the regulatory instrument through which a floor of fair minimum working conditions would be both set and maintained.

It should also be acknowledged, however, that using federal awards has not always been the most effective means of providing an adequate safety net. Necessarily, federal awards are limited to those who have been constitutionally respondent to them: since 1910 it has been established that a federal award made in reliance on the conciliation and arbitration power may not operate as a common rule.[30] Moreover, changing patterns of work organization have led to labour market changes, including greater use of contracted labour and other forms of business arrangement that can also have the effect of rendering federal awards ineffective as a means of

providing a safety net of minimum working conditions (Owens 2002: 220).

In addition, of course, the WR Act retained from the changes introduced in 1993 a direct link between awards and the enterprise-level agreements that it otherwise sought to promote. This was achieved by means of the 'no-disadvantage test': the requirement that the AIRC could only certify a collective agreement, and that the Employment Advocate could only register an AWA once they had determined that overall the conditions would not make workers any worse off than they would have been under the applicable award.[31] Over time, of course, the significance in practice of the no-disadvantage test diminished, as conditions achieved through bargaining came to exceed by significant margins the conditions that were otherwise available under applicable awards. In part, this was a product of the process of 'award simplification': from 1997, new limits were placed on the power of the AIRC to resolve an industrial dispute by arbitration.

Until then, the AIRC's power to resolve a dispute by arbitration had not been unfettered: it had been limited by how the federal statute defined the concept of an 'industrial dispute', and by how that phrase has been interpreted over time by the High Court. A key element of the definition of an industrial dispute was that it needed to be about matters 'pertaining to the relationship of employer and employee'.[32] Until 1988, the federal statute also included a definition of 'industrial matters' that indicated in a non-exhaustive way the topics upon which arbitration was permissible.[33] Under award simplification, however, a more prescriptive version of this approach was employed: all new awards could only be about the 20 matters listed as 'allowable award matters.'[34] Moreover, awards made before this limit was introduced had also to be reduced to comply with these requirements. Thus, it became increasingly unlikely that any given agreement would fail to pass the no-disadvantage test.

There were significant questions about the effectiveness of the no-disadvantage test in practice (Mitchell *et al* 2005; Waring and Lewer 2001; Merlo 2000). Moreover, Owens (2002) has argued that the no-disadvantage test was not a satisfactory means of ensuring that the system established and maintained minimum working conditions that might amount to something like those required by the concept of 'Decent Work' as it has been articulated by the International Labour Organisation (ILO). Notwithstanding these difficulties, simplified awards and the no-disadvantage test remained the legislative methods by which minimum conditions were set, and awards remained the benchmark against which enterprise agreements were measured for legitimacy and for legality.

Awards and the Australian Industrial Relations Commission after Work Choices

Under Work Choices, awards are no longer underpinned by the conciliation and arbitration power in the Commonwealth constitution. Moreover, the function of awards and the role of the AIRC in superintending their content have both been further curtailed. For the most part the AIRC will not be able to make new awards, and it will only be able to vary awards within specified parameters. Awards will retain a function as a means of providing a safety net of minimum working conditions. They will, however, be subject to further award rationalisation, and another process of award simplification. Work Choices has further reduced the list of matters that will be allowed in awards, and has also identified matters that will not be permitted in awards. Some of the conditions that will no longer be allowable as award matters will however continue to have effect as 'preserved award entitlements'. A second category of conditions will be considered 'protected award entitlements', although it will be possible to override these by express agreement.

Work Choices has introduced new legislative objects concerning both the function of awards, and the role of the AIRC in relation to them. The objects include ensuring that minimum safety net entitlements are 'protected through a system of enforceable awards' maintained by the AIRC, and that awards are rationalised and simplified so that they are 'less complex and more conducive to the efficient performance of work.'[35] The AIRC is commanded, in exercising its remaining powers to make and to vary awards, to ensure that awards encourage workplace agreement-making, and to pay particular attention to the position of young people in the labour market.[36] In addition, the AIRC will be required, when dealing with awards, to have regard to economic criteria including the desirability of low unemployment, decisions of the AFPC and the need to ensure that decisions of the two bodies are not inconsistent, and the need to set minimum working conditions in a way that is not a disincentive to workplace bargaining.[37] Under Work Choices, the AIRC will only be able to create a new award as part of the award rationalisation process.[38]

Award rationalisation

A key feature of the award rationalisation process under Work Choices is the role of the Minister, who is empowered to initiate a rationalisation process by sending a written request to the AIRC. Once the Minister does so, the AIRC will be obliged to carry out the request, and to do so within

a time frame specified by the Minister, which will not be greater than three years. More significantly, the Minister is empowered to specify in any request the awards that the AIRC is to rationalise, and the principles that the AIRC must apply in carrying out the rationalisation. Those principles might include the awards to be covered by the request, the nature and the coverage of the awards that might be made as a result of the award rationalisation process, and the matters that might be included in the award.[39] Moreover, the Minister might vary or revoke a request at any time.

Award rationalisation will be a key means by which the new system is made to operate nationally. Regardless of whether the Minister specifies all awards in the first award rationalisation request, the AIRC will be required to review all awards to see that they no longer have state or territory distinctions in them.[40] A second way in which the reach of federal awards will be spread is through the power of the AIRC in award rationalisation to make an award that is binding on groups or classes of employers.[41] Thus by using the corporations power, the commonwealth government evidently intends to expand the extent to which federal awards may operate as common rules.

The role of the Minister in the award rationalisation process is striking in both its scale and breadth. Both the Minister's power and the powers of the AIRC in acting on an award rationalisation request are expressed to be subject to the Act generally. As noted, Work Choices has introduced a new object for this part of the Act, which is that award rationalisation should be for the purpose of ensuring that awards are 'less complex and more conducive to the efficient performance of work.'

A striking omission from this aspect of Work Choices, however, is any reference to the ART. As will appear presently, the AFPC will be obliged to take account of the work of the ART in dealing with the AFPC and, more particularly, any APCS.[42] The ART is charged with responsibility for the rationalisation of award wage and classification structures, and the rationalisation of federal awards. It is to offer a preliminary report on the appropriate methodology to the Minister by March 2006, and then to complete its initial round of rationalisation by July 2006, in time to report to the AFPC, which is due to conduct its first wage review in Spring 2006. Work Choices, however, does not *require* either the Minister or the AIRC to follow the recommendations of the ART. Neither for that matter does Work Choices create the ART: it is self-described as a creature of the executive government.[43]

Thus, while the AFPC will be required to consider what the ART does

in relation to wages and classifications, on all other award topics, the Minister will have a significant degree of control, and one that is new in Australian federal labour law. A key feature of that power is that the Minister will be able to intervene in the award rationalisation process, and indeed to direct the AIRC in its work on rationalising awards.[6] While certain basic conditions are now to be protected by the AFPC and/or an APCS, the remaining allowable award conditions are intended to continue a role as a source of minimum working conditions. This amounts to a significant shift toward direct control by the executive government over minimum working conditions in Australia.

Award simplification

Work Choices has further reduced the number and scope of 'allowable award matters', thus further limiting the extent to which awards can act as a comprehensive set of minimum working conditions. The AIRC will (again) have to review all awards to ensure that they do not contain provisions that would no longer be permitted in awards by virtue of the new provisions.[45]

Almost all of the matters referred to in the list of allowable award matters that formerly appeared in s 89A(2) of the WR Act will continue to form part of the minimum working conditions of Australian workers after Work Choices. Not all, however, will continue to appear in awards: some will appear in the AFPCS, some in any given APCS, and some will be 'preserved award entitlements'. Classifications will now be dealt with by the AFPC and appear in any given APCS, as will rates of pay. Personal and parental leave will be dealt with by the AFPCS. Long service leave, notice of termination, jury service, and superannuation will be 'preserved award entitlements': that is, they will no longer be allowable, but they will continue to operate where they presently appear in awards.

There have of course been some modifications, and (at least) one notable omission. The provisions concerning allowances have been made much more specific and narrow, being limited now to expenses incurred in the course of employment, responsibilities for skills not taken into account in rates of pay, and disabilities associated with the performance of particular tasks, or work in particular locations. The provisions relating to public holidays have been made more specific, and while dispute-settling procedures continue to be an allowable award matter, this is only so to the extent that an award includes a dispute settling procedure in accordance with a model set out in the legislation.[46] The list of allowable award matters excludes redundancy pay for enterprises with fewer than 15 employees,

and the WR Act now includes more specific provisions for identifying when an enterprise meets this criterion.[47] A particularly significant omission is the matter of 'skill-based career paths', which is neither an allowable award matter, nor something that will be dealt with by the AFPC, the AFPCS, or an APCS. Nor is it a preserved award entitlement. Evidently this is a matter that the government considers ought to be dealt with by bargaining, or not at all. Further support for this assessment comes from the fact that the ART and the AFPC are to streamline wage classifications.

Work Choices has continued some of the general limitations on the scope of allowable award matters. The constitutional underpinning has shifted from the conciliation and arbitration power to the corporations power, but the federal government has used similar regulatory concepts to those that were employed to guide the exercise of arbitral power. Evidently it wishes therefore to maintain a tight level of control over the content and function of awards. First, a matter is only allowable to the extent that it pertains to the relationship of employers and the employees of any employer bound by the award.[48] By retaining a provision using this form of words, it must be assumed that the government intends to maintain the interpretation of these words given to them by the High Court of Australia in the *Electrolux* litigation, where the Court noted that the words had been included in the WR Act not long after litigation concerning their meaning as they had been used in the *Industrial Relations Act 1988* (Cth).[49] Insofar as *Electrolux* upheld the reasoning of earlier decisions of the High Court in *Portus*,[50] and *Alcan*[51] this general limitation should act – and was no doubt intended to act – as a further means of limiting the ability of trade unions to seek provisions in awards that will provide institutional support for their operations.

A second general limitation on allowable award matters is that they will only be allowed to the extent that they provide a safety net of minimum entitlements.[52] This provision is slightly different from those that until recently have guided the AIRC in its task of maintaining awards as a safety net of minimum working conditions. As I discuss further below, those provisions have required the AIRC to make its decisions with reference to broader considerations including fairness, and living conditions prevailing generally in the community. By contrast, under Work Choices, the AIRC will be able to alter award conditions as part of a minimum safety net, but the government has endeavoured to make sure that a minimum will be just that: a (bare) minimum.

In addition to altering the list of allowable award matters, the WR Act now specifically provides that certain matters are *not* allowable award

matters.[53] Many of these relate to conditions that support the operation of trade unions in a workplace, and in that sense these provisions continue the government's efforts, begun in 1996, to wind back the level of support that federal labour law gives to industrial organizations.[54] Examples of matters in this category that will not be allowable include trade union training leave, trade union picnic day, and a guaranteed role for a trade union in dispute resolution (unless it is chosen by the employee). A second key category of prohibitions makes non-allowable award provisions that would regulate an employer's use of independent contractors, or labour hire workers, or the conditions upon which those workers might be engaged.[55] A further important item on the list of matters that will not be allowable is provision for conversion from casual to any other type of employment, and restrictions on the maximum or minimum number of hours of part time employment.[56]

Preserved award entitlements, and protected award entitlements

Certain types of award conditions that are no longer allowable will become 'preserved award entitlements'. Preserved award terms continue to have effect even though they are no longer allowable. They will also apply where they are more generous than the conditions that would otherwise apply to a worker under the AFPCS, or where the relevant APCS does not contain any provisions about the matter.[57] The preserved award terms are: annual leave, personal/carer's leave; parental leave (including maternity and adoption leave), long service leave, notice of termination, jury service, and superannuation.[58] The last of these, however, will be preserved only until 30 June 2008. From this time, all occupational superannuation will be calculated according to ordinary time earnings as defined in superannuation guarantee legislation, instead of on the basis of award pay. This measure, according to the government, was introduced to ensure that all employees are treated equally for superannuation purposes.[59]

Work Choices also creates a category of working conditions in awards that are 'protected award terms', being those that deal with 'protected allowable award matters'.[60] Under Work Choices these conditions will be taken to be included in any workplace agreement, *unless* they are expressly modified or excluded.[61] These conditions are: rest breaks, incentive-based payments and bonuses, annual leave loadings, public holidays, certain monetary allowances, overtime and shift-work loadings, penalty rates, outworker conditions, and other matters that may be specified in the regulations. The way that these conditions are 'protected' is, however,

quite ineffective. Indeed the Work Choices booklet that was publicly released some time in advance of the legislation being introduced contained a particular example – apparently included at the behest of the Prime Minister himself[62] – that showed exactly how weak this protection might be. Under the circumstances, it is quite extraordinary for the government's public relations campaign to have placed such emphasis on the idea that these conditions would be 'protected by law'. In truth, they are only protected so long as the worker does not agree to have them excluded by express agreement, and yet a worker may be compelled to agree to such terms as a condition of accepting employment.

There is however at least one set of circumstances in which these conditions are arguably properly protected by law: when an agreement made under Work Choices comes to an end, it is possible for these conditions to apply to a worker, even where they had previously been excluded by the agreement. Broadly speaking, the Work Choices regime provides that a workplace agreement completely displaces all otherwise applicable award terms[63] and, as we have just seen, even those that are 'protected' can be excluded by express agreement. At the end of an agreement made under Work Choices, preserved award terms will continue to operate, but as noted, these conditions overlap with the minimum conditions under the AFPCS, or an APCS. Other award provisions, however, will fall into disuse over time, by virtue of the operation of section 399: it provides that when an agreement ends, neither the old award conditions nor those of the expired agreement come back to life. Until the parties reach another agreement, they are left with only the AFPCS and any applicable APCS. However, *protected* award conditions *will* apply.

Varying and revoking awards

The AIRC will retain a limited power to vary an award, including as part of award rationalisation or simplification, to clarify an ambiguity, to amend discriminatory provisions, or to reflect a change in name of an employer or an organization.[64] It will also be able to vary an award to remove any 'objectionable provision',[65] being any that would have the effect of requiring a person to belong or not to belong to an industrial association.

The AIRC will also have a power to vary an award if it is 'essential to the maintenance of minimum safety net entitlements'.[66] This source of authority is however strictly limited. If the AIRC receives an application for such an award variation it will have to notify affected parties, and the Minister will be able to intervene in the proceedings. It will only be possible to vary the award if it is essential to the maintenance of the safety net

entitlement, if the variation would be consistent with AFPC decisions, if the variation would be consistent with Work Choices' further goals of award simplification and award rationalisation, and if making the variation would not act as a disincentive to agreement-making. Further conditions may be imposed by regulation.[67]

The AIRC will retain a version of its former power to vary an award so as to 'rope in' a party, if after Work Choices it is necessary to vary an award to bind another employer.[68] It will be able to do so if the employer is award-free, a valid majority of employees agree that they should be bound by the award, and it is appropriate to make the order.[69] The AIRC may also make such an order on the application of either an employer or an organization of employees, in the absence of agreement about the application of the award, if it is appropriate to do so, and the parties 'have been unable to make a workplace agreement, despite having made reasonable efforts to do so'.[70] It will be interesting to see how this provision is applied in practice. For those parties who have not previously been in the federal system, and who are seeking to make agreements within it as an alternative to being covered by an award, this provision will offer some interesting strategic choices. An organization of employees may have to take care in determining whether to accept an employer's offered terms of agreement if the alternative is an order from the AIRC for a minimal set of award conditions that will have been rationalised and simplified following Work Choices.

Not only will the AIRC be able to bring employers into the fold of federal award regulation, it will also be able to vary awards to make them binding on an organization of employees. The AIRC will be able to bind any newly registered organization, as well as any 'transitionally registered' organization.[71] The latter category will capture those formerly state registered organizations that seek entry into the federal system.[72] The AIRC will only be able to make such an order where the organization has at least one member validly enrolled who is employed by the employer, where so varying the award would be necessary for the organization to represent that member's interests, and where the organization is representing someone in an area where it 'has traditionally been entitled to represent the industrial interests of its members'.[73]

The AIRC will not able to revoke an award other than as part of award rationalisation or award simplification, or because the award is obsolete or incapable of operating. On application for revocation of an award on

the ground of it being obsolete, the AIRC will be required to make the order unless it would be contrary to the public interest to do so.[74]

The Australian Fair Pay Commission, the Australian Fair Pay and Conditions Standard, and Australian Pay and Classification Scales

The Australian Fair Pay Commission and the concept of 'fairness' in wage-setting

The AFPC will be headed by a Chair who must have 'a high level of skills in business or economics'.[75] The other four Commissioners will need to have 'experience' in one or more of 'business, economics, community organizations or workplace relations'.[76] At the time of writing, no Commissioners had been appointed to accompany the appointed Chair, Professor Ian Harper of the Melbourne Business School.

The AFPC will have a 'wage-setting function', which is to conduct 'wage reviews'; it will exercise its 'wage-setting powers' as necessary, depending on the outcome of such reviews.[77] The WR Act sets out specific 'wage-setting parameters' that define the objective of the AFPC in performing its wage-setting function. It is to 'promote the economic prosperity of the people of Australia' and in doing so must have regard to:

(a) the capacity for the unemployed and low paid to obtain and remain in employment;

(b) employment and competitiveness across the economy;

(c) providing a safety net for the low paid; and

(d) providing minimum wages for junior employees, employee to who training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.[78]

This statement of objectives for the AFPC differs in important ways from those that guided the AIRC from 1993 to 1997, and from then until the introduction of Work Choices. Under the framework introduced by the *Industrial Relations Reform Act 1993* (Cth), the Act had among its objects ensuring that employees were protected by awards 'that set fair and enforceable minimum wages and conditions of employment . . . maintained at a relevant level'.[79] Within this framework, the AIRC was charged with the responsibility to 'ensure, so far as it can, that the system of awards provides for secure, relevant and consistent wages and conditions of employment'.[80] In each case, what is striking is the concept of

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'relevance': that award wages should be 'relevant'. By using this term, the legislation drew a link between levels of award wages and conditions, and those that might be agreed in enterprise bargaining.

That changed with the introduction of the WR Act. Since 1997, the system of awards has been intended to ensure that wages and conditions were set in 'enforceable awards', and that awards would act as 'a safety net of fair minimum wages and conditions of employment.'[81] In ensuring that the safety net met these criteria, the AIRC was required to have regard to:

(a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;

(b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;

(c) when adjusting the safety net, the needs of the low paid.[82]

In comparing the differences between these three statutory expressions of the function of awards and of the AIRC in superintending them, we see, in effect, the evolution of commonwealth government wages policy. From 1993, award wages were expected to fall below bargained wages, but through the application of the no-disadvantage test and a concept of 'relevance', the AIRC was (able, if not expressly required) to ensure that the gap between those on award wages and those on enterprise bargains was not too great. From 1997, under the (first) Howard government's changes, the concept of 'relevance' was removed. It was replaced, however, by an idea of 'fairness', which was expressed by reference, among other things, to 'living standards generally prevailing'. While this weakened the link to the levels of bargaining outcomes, it still required that wages be set by reference to some criteria other than the merely economic.

Under Work Choices, however, it is only the economic criteria that remain. As I argue presently, it is to these economic criteria that we must look to understand what is now meant by 'fairness' in setting wages and minimum working conditions in Australia. This is because (as many others have remarked), Work Choices creates an Australian Fair Pay Commission and an Australian Fair Pay and Conditions Standard, but it pointedly does not impose any criterion of 'fairness' to guide the activities of the one, or to determine the content of the other. Perhaps not surprisingly, the AFPC describes itself as a body 'with the primary objective of promoting the economic prosperity of the people of Australia.'[83]

The economic criteria that now shape the wage-setting function of the AFPC reflect the views expressed by the government in its submissions to

the AIRC during the annual Safety Net Review cases in recent years. In particular, it has argued that increasing minimum wages will run the risk of reducing employment, and that it will adversely affect the ability of those without work to gain employment, especially if they are low-skilled workers. While space does not permit a full examination of this argument here, suffice to say that the economic impact of raising minimum wages, particularly on future employment levels, is contested. The AIRC observed as much in the summary to its 2005 National Safety Net Review decision. It noted that economists disagree about the methods by which to measure the 'negative elasticity' of labour demand that might flow from any given wage rise. It further observed (rather dryly) that the government's own submissions in 2004 and 2005 used different methods to measure this 'negative elasticity', so that the AIRC would have been wrong in 2005 to have accepted the submission that the government put on the issue in 2004![84] Others have summarized the literature and the conflicts in this area (eg Peetz 1998: 543-548), or noted that the operations of the British Low Pay Commission have included steady rises in minimum wages without adverse effects on demand for labour (May 2006). The adverse effect is now, however, effectively a matter of legislative presumption.

Another important aspect of the government's approach to wage-setting criteria has been its argument that increasing safety net wage levels is an inappropriate means by which to deliver benefits to poor households. One key reason for this is that it is said to be necessary to distinguish between individuals with low incomes, and poor households. The government has argued that 'most low paid workers do not live in poor households, and most poor households do not contain low wage workers' (Howe *et al* 2005). A related issue of contention in recent safety net reviews has been the extent to which wage rises are effective in helping the low-paid, when consideration is given to the impact of a wage-rise on many social security benefits (usually a reduction), and effective marginal tax rates (usually an increase). So in many cases, low-paid workers may receive only a small proportion of an awarded dollar amount of wage increase.

Labour market economists, including for example Mark Wooden, have echoed at least the government's observation about the distinction between low incomes and poor households, in outlining the argument in favour of changes to the way that wages were set by the AIRC. Even Wooden, however, questions whether removing the wage-setting function from the AIRC and conferring it on the AFPC will make any significant difference. He observes, 'effective incomes policy requires decisions about minimum wages be made in conjunction with income support and tax practices, and

there is only one body in Australia that can do this – the federal government' (Wooden 2006: 85-86).

In this respect Wooden accurately identifies one of the biggest single questions that is unanswered about the government's decision to relieve the AIRC of power to set wages, and to create the AFPC instead. If the government's concern is about the interaction of wages and social security and income taxes, and how these come together to facilitate – or to frustrate – the efforts of the low paid to improve their situation, then it is hard to see what it has achieved by creating the AFPC, which has no more power over the tax and social security elements of incomes policy than did the AIRC before it. Indeed, as Wooden notes, the adverse effects of income taxes on increased earnings levels for those in receipt of social security payments is such that wages must also be set at a level that is not so low as to deter labour market participation. In order to do this, Wooden predicts that the AFPC may have to resort to a form of wage indexing! (Wooden 2006: 88).[85]

This brings us back to the question of 'fairness' in the setting of wages in particular, and in the setting of minimum working conditions in Australia more generally. In particular, it brings us to the specific question what is 'fair' about the AFPC, and also about the AFPCS? As noted, the answer to that does not lie in any legislative use or definition of the term 'fair' or of a concept of 'fairness'. But reading the legislation closely in light of the government's position on wages in the years leading up to Work Choices, we can discern what the government now means by 'fair' in this context. 'Fairness' in wage levels for the individual worker now means no more than the possibility of getting a job; of not being prevented from taking employment by having low skills; of not being priced out of the labour market. In this respect, the government is fond of quoting with approval British Prime Minister Tony Blair, to the effect that fairness begins with having a job. The minimum conditions at which that job might be offered may be objectionable from the point of view of other criteria. For example, it may be a requirement of employment that an employee sign a workplace agreement that expressly overrides all award conditions, including protected award conditions, leaving the worker the choice only of whether to accept a job at the minimum conditions under the AFPCS. With the recent Welfare to Work changes, the worker may also have to choose between the offered conditions, and losing their entitlement to certain social security payments. But these issues are not relevant to the government's concept of 'fairness' as enacted in Work Choices.

There is also a broader meaning to this concept of 'fairness', one that

travels beyond the idea of fairness to an individual worker in the level at which their wages are set. Apparently it is 'fair' to Australia, to the Australian economy and to the Australian people or community that the labour market should function in a way that continues to contribute to overall economic prosperity, to the growth of employment, and to the reduction of unemployment. This latter aspect of setting minimum standards has of course long been a consideration guiding the operations of the AIRC, including during the recently-ended period during which it was required to set a safety net of 'fair' minimum working conditions (and in doing so the AIRC gave detailed consideration to evidence and arguments about those matters). Moreover, the AIRC has long been required to have regard to the impact of its decisions on the 'public interest' and/or to take into account various economic objectives, and particularly in relation to setting wages, has gone to great lengths to do so (Hancock and Richardson 2004).

Now, however, the present versions of these economic criteria are the *only* ones that will determine how wage levels will be set for those who are unable to take advantage of bargaining. The economic criteria and imperatives are the *only* sign-posts to guide the work of the AFPC, an institution whose title, and whose principal instrument, include the word 'fair'. We must infer, then, that this is what the government means by 'fairness' to workers in wage-setting after Work Choices: it means no more than ensuring that workers have jobs at which to work, because the wages that will be paid at the minimum level will be so low that it will be hard for any worker not to find a job, no matter how few their skills.

The Australian Fair Pay and Conditions Standard, and Australian Pay and Classification Scales

The AFPCS will be a federal law that directly sets minimum working conditions for Australian employees. It will not be the first to do so. The commonwealth government has for example long set some working conditions directly for its own employees. Nor is the AFPCS the first instrument used by the commonwealth to set working conditions of general application.[86] From 1997 the commonwealth government directly regulated minimum working conditions in Victoria by the former Part XV and Schedule 1A of the WR Act. Not surprisingly, the selection of minimum working conditions for the AFPCS is quite similar to those in the former Schedule 1A. That schedule largely replicated the minimum conditions set by the Kennett government in the *Employee Relations Act 1992* (Vic), which in turn had been inspired by the models adopted in the few years

before that in both New Zealand and Western Australia. In other words, we have been able to see for some time what the present government considers a sufficient range of topics for minimum working conditions in the Australian labour market, and the levels at which those conditions might be set. Those who have had to consider the application of Schedule 1A would have realized that the portents were not good.

These precedents aside, the shift to the AFPCS as a means of identifying minimum working conditions will mark a major change in how these conditions are set, as they will apply as the minimum for the vast majority of the (employed) Australian workforce. The primary application for the AFPCS will be to any person who is an employee of a constitutional corporation. Consistently with the substantive content of the provisions that guide the AFPC in the conduct of its work, Work Choices eschews any reference to 'fairness' in its outline of the minimum working conditions that will be included in the AFPCS. On the contrary, they are described rather starkly as 'key minimum entitlements'.[87] As described in the legislation, these key entitlements are for 'basic rates of pay and casual loadings', 'maximum ordinary hours of work', 'annual leave', 'personal/carer's leave', and 'parental leave and related entitlements'.[88]

Broadly speaking, most of these key minimum entitlements will be enshrined in legislation, and unable to be adjusted other than by legislative action. The role of the AFPC is limited to wage-setting, of both the Federal Minimum Wage (FMW),[89] and wage levels at higher classifications in any given APCS. As will appear presently, the APFC also has powers in relation to the structure and content of an APCS, other than those for certain workers in Victoria.[90]

Wages

Employees will now have a pay 'guarantee': they will be entitled either to the APCS basic periodic rate of pay, as defined, for the classification in which they work, or where applicable to an APCS piece rate of pay.[91] If the work they do is not covered by an APCS, they will be guaranteed the FMW, which is to start at $12.75 an hour.[92] They may be entitled to a 'special FMW' if they are a junior, a person working under a training arrangement, or a person with a disability.[93] Wage rates in an APCS will not be lower than the FMW, although this guarantee only applies from the first decision of the AFPCS.[94] Casual employees are guaranteed a loading in accordance with the terms of their APCS. The initial loading will be a minimum of 20 per cent, although the AFPC has power to set a different (higher) default casual loading.[95]

Despite this guarantee for casual employees, there is no comparable guarantee of a premium rate of pay for overtime work beyond ordinary working hours for full-time employees. The AFPC is neither obliged nor empowered to set one; no APCS must contain one. As we have seen, overtime pay is a 'protected award entitlement', but, the protection can be bargained away by express agreement. On the other hand, as overtime pay is a protected award entitlement, there may be cases in which it will return to having a meaningful function after the termination of an agreement that has been made after Work Choices. The fact remains, however, that the newly legislated minimum working conditions in Australia contain no guarantee of a premium rate of pay for work performed after ordinary hours. By way of example, countries that do include such a guarantee in their legislation include Grenada, Indonesia, Mongolia, Peru and the United States of America.[96] The significance of this is only compounded by the fact that, as will appear presently, Work Choices does not include any solid guarantee of maximum ordinary hours of work, and yet enshrines the right of an employer to require that an employee carry out a 'reasonable' amount of paid overtime.

In this respect the new provisions closely follow the precedent of Schedule 1A of the former WR Act. Those provisions were the subject of some criticism, especially because Schedule 1A – in its initial form – did not guarantee a right of premium overtime pay; in fact it did not guarantee a right of any pay at all for work carried out above maximum ordinary hours (Victorian Industrial Relations Taskforce 2000; Fenwick 2003). Subsequently, the Commonwealth government amended Schedule 1A to provide an explicit right to be paid for hours worked over the maximum ordinary hours per week of 38. It did not, however, confer a right to be paid a premium rate of pay for overtime. Schedule 1A provided that a worker in Victoria had a right to be paid for the extra hours worked (cl 1(f)), but that the rate of pay that applied to this work was to be determined in accordance with clause (3). That provision in turn provided that the rate of pay for the excess hours was the basic rate of pay, 'unless an employer and an employee agree to a higher hourly rate of pay'. Here then the AFPCS has closely followed earlier precedent set by the current federal government.

Content and function of Australian Pay and Classification Scales

Broadly speaking, an APCS is an instrument that will contain pay rates and classification structures for workers at levels higher than the FMW.

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An APCS must contain provisions prescribing either basic periodic rates of pay or piece rates. If an APCS sets different rates for different classifications of work, it must also contain provisions describing those classifications, and it must contain 'coverage provisions'. An APCS may also contain provisions for casual loadings, frequency of payments, payment as working time for hours spent in training, and incidental provisions.[97] Basic periodic rates of pay are to be expressed as hourly rates.[98] An APCS will be of indefinite duration,[99] although it may be adjusted or revoked by the AFPC.[100]

The APCS will therefore replace a wide range of award provisions that have previously performed these functions. Moreover, existing federal and state awards, together with federal, state and territory laws that are yet to be identified, will be moved into an APCS under Work Choices. Generally speaking any pre-reform 'wage instrument'[101] will become a 'preserved APCS'. These will include any of their provisions for classifications, basic periodic rates of pay, and casual loadings (if any). A preserved APCS will honour a provision of a 'pre-reform' wage instrument for wage rises for particular classifications at points in time after the commencement of Work Choices, if they were included in the pre-reform wage instrument by a Commission or other body after a work value or pay equity determination.[102] Broadly speaking, from after the first decision of the AFPC, each APCS will be taken to have included the outcome of the 2005 Federal Safety Net Review.[103] Among other things, the AFPC will be responsible for ensuring over the first three years in which Work Choices operates that the classifications and scales in each APCS are no longer state or territory-based.[104]

The AFPC will have power to determine a new APCS,[105] as well as to vary an APCS in exercising its wage-setting function. The AFPC may determine an APCS for employees with disabilities,[106] and/or for employees on training arrangements.[107] In exercising its powers to create or to adjust an APCS, the AFPC is, broadly speaking, obliged to ensure that it does not act in a way that is discriminatory. Among other things it is directed to take account of Australia's responsibilities under the ILO's Workers with Family Responsibilities Convention, the principles contained in federal anti-discrimination legislation, and the principle that workers should receive equal remuneration for work of equal value.[108] Work Choices therefore continues the practice established in 1993 when the then section 93 was included in the legislation, to similar effect. The AFPC and an APCS are not subject to the content of and rights protected by anti-discrimination legislation, but the principles must be considered. It is a

nice question, perhaps, whether this distinction leads to any substantial difference.[109]

In dealing with an APCS, the AFPC will be obliged to take account of the activities of the ART.[110] As noted, however, the ART is not created by the WR Act. So here again the power of the Minister in determining minimum working conditions in Australia is significant. The Minister has no express power under Work Choices to direct the AFPC in what it does, but the Minister has exercised only executive power to establish the ART, including its terms of reference and procedures.[111] Those terms of reference require the ART to recommend a methodology for rationalisation of award wage and classification structures, but they expressly preserve the right of the government to make a decision on that methodology, and it will only be after that decision that the AIRC will embark upon any process of rationalisation. By this means, the Minister has thereby already exercised a significant degree of direct control over the content, structure and evolution of classifications and wage scales. The government retains the power to have a significant direct influence on the process. Notwithstanding the public process by which the ART is operating, including the receipt of submissions and the release of discussion papers, this is a rather different process from that of the AIRC, which formerly created these wage and classification structures in open hearings, by decisions that were subject to appeal and to judicial review.

Hours of work

Work Choices includes a 'guarantee of maximum ordinary hours of work' that is in truth no guarantee at all.[112] Under the AFPCS an employer will be able to require or request an employee to work a maximum of 38 hours a week, but the parties may agree in writing to reach the limit of 38 hours per week by calculating the average hours of work, and they may resolve to average over a period of up to 12 months.[113] There is no provision for ordinary working hours to be performed within a particular spread of hours, as has been common in awards (Creighton and Stewart 2005: 339).

work 'reasonable additional hours'. These are defined broadly in the terms that were adopted by the AIRC in its *Reasonable Hours Case*.[114] That is, they take into account a range of factors that are peculiar to both the employer/enterprise, and to the employee the subject of the request. The fact remains, however, that an employee may be *required* to perform 'reasonable additional hours'. Thus, for many workers, there will be no guarantee of either minimum or maximum hours of work in a week (Murray 2005a). The 'guarantee' of maximum ordinary hours of work is no better,

therefore, than the 'protection' that is given to ensure that protected award entitlements are 'protected by law': it is no guarantee at all.

Annual leave

Employees will be entitled to a minimum of four weeks' leave, other than shift workers who are rostered over a seven day period, who will be entitled to a minimum of five weeks' leave.[115] As with most other 'guarantees' under Work Choices, however, a good deal of it can be traded away. An employer and an employee may include in a workplace agreement a provision allowing the employee to elect in writing to forgo up to two weeks' leave in any given 12 month period, in return for cash.[116] In form, the provision will be one that empowers the employee to elect whether or not to cash out a certain amount of their annual leave entitlement, and an employer will be prohibited from forcing an employee to make such an election.[117] Nevertheless, for the reasons outlined above, there will be no obstacle to an employer making it a condition of employment that an employee should sign an agreement that includes such a provision. Notwithstanding the prohibition on an employer coercing an employee to make such an election, an employee who is unable initially to bargain for better conditions may not during the course of their employment be willing or able to resist pressure from an employer to exercise their 'election'.

Personal leave

An employee will be able to accrue ten days' personal/carer's leave in any 12 month period.[118] There are many rules about accumulation, crediting, and requirements that must be satisfied before being allowed to take the leave, however it will be cumulative.[119] Employees are also entitled to as much as two days' unpaid carer's leave for each 'permissible occasion' of the following possible events: to support a member of the employee's immediate family or household where they have a personal illness or injury, or 'an unexpected emergency' affects them.[120] In addition, an employee will be entitled to two days' paid compassionate leave when a member of the family or household is affected by a serious illness or injury that threatens their life, or where they die. The employer may require certain information as a prerequisite to taking this leave.[121]

Parental leave

Work Choices provides for an entitlement to a maximum of 52 weeks' parental leave, in terms that are broadly similar to those in the former

schedule 14 to the WR Act. The rights are largely the same for maternity, paternity or adoption leave, and are available to regular casual employees. In calculating the period of leave, it will be necessary to take into account other periods of leave that the worker has taken in conjunction with the parental leave (for example annual leave, or long service leave), *and also* any period of leave taken by their spouse. So for example a woman who takes eight weeks' accumulated annual leave, and whose spouse takes three weeks' annual leave at the time of the arrival of the child, is entitled to a maximum further period of parental leave of 41 weeks.[122] It has been widely noted in recent years that Australia is one of only two industrialized democracies that do not have a government-mandated paid maternity leave scheme; the other being the United States of America (see, eg, Raffin 2005; Smith 2003; Smith 2002).

Workplace bargaining and the AFPCS

There have been many changes to those parts of the WR Act that regulate bargaining, and also the ability to take protected industrial action. Many of these are at least tangentially relevant to the matter of minimum working conditions. Two of these changes, however, are of particular significance for the application and relevance of the new minimum working conditions. First, Work Choices has abolished the no-disadvantage test, replacing it with a simple lodgment process in the Office of the Employment Advocate. There is no longer even a requirement that an agreement be compared with anything: the legislation elsewhere simply provides that the conditions of the AFPCS and preserved award conditions cannot be avoided by contract, and that a workplace agreement may not be inconsistent with these conditions.

Secondly, it will now be possible for either party to a workplace agreement, once that agreement has expired, to give the other party 90 days' notice of their intention unilaterally to terminate the agreement. After the expiration of the 90 days, the former agreement conditions will no longer apply, leaving workers with only those conditions in the AFPCS, together with protected award conditions. Taken together, these new provisions significantly expand the relevance of the AFPCS.

Other Minimum Working Conditions

Meal breaks and public holidays

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Work Choices gives a specific right to a meal break of 30 minutes after five hours' continuous work, unless the employee's employment is regulated by an award, an agreement or certain other types of industrial instrument.[123] There is also a specific set of provisions relating to public holidays (as defined). These are the provisions included to deal with the issue of 'iconic public holidays' that arose during debate on the Work Choices legislation in the Senate.[124] These public holidays are protected in the sense that an employee has a right to a day off on these days, as well as on days declared by a State or territory to be a public holiday.[125] However, once again the 'protection' offered by Work Choices is weak. First, because under Work Choices the government has power by regulation to declare that a day will not be a public holiday for these purposes and, secondly, because an employer has a right to request the employee to work on such a day. As with the provisions relating to work in excess of the maximum ordinary hours, there is a test of 'reasonableness' that applies to the employee's decision whether or not to agree to work. There is a long list of indicia that will determine what is reasonable, including the nature of the work, the workplace and the employee's employment, the reasons for any refusal, whether or not the employee would receive additional pay for working on the public holiday and the like.[126] An employer must not harm an employee in their employment for a reasonable refusal to work on a public holiday.[127]

Unfair dismissal protection

A key element of the Work Choices changes, and one that has (rightly) attracted much attention is the new exclusion of 'small' businesses from the unfair dismissal provisions of the WR Act, being those that employ fewer than 100 employees.[128] In addition, it will not be possible to apply for a remedy in relation to unfair dismissal if the employee's employment was terminated for grounds that *include* 'genuine operational reasons', a term that has been given a wide definition as 'reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business.'[129] Another key change under Work Choices is the extension of qualifying periods for application for a remedy to six months' employment.[130]

The changes to the termination of employment laws are dealt with at length by Chapman (2006) and by Pittard (2006). In this context however it should be recalled that there is an important relationship between these sorts of procedures and maintaining minimum working conditions. This

is all the more so in an environment in which 'take it or leave it' employment offers will be able to override many working conditions that Work Choices (falsely) describes as 'protected' or 'guaranteed'.

Whether or not applicants may have over-used the AIRC's unfair dismissal jurisdiction in the past, it remains true that it was an important jurisdiction in which an applicant could quickly and cheaply press a grievance over termination of employment. The decided cases of the AIRC over time established some important points of principle about the substance of the employment relationship, and an employer's power over their employees. Work Choices does provide that disputes over the application of AFPCS provisions (other than those on wages) should be resolved using a new model dispute resolution procedure.[131] The parties must first to attempt to resolve the matter at the workplace, and then pursue alternative dispute resolution if that is unsuccessful. If the parties take their dispute to the AIRC, it is prohibited from arbitrating an outcome or making a determination about rights,[132] *even if the parties agree that it should do so*.[133] The requirement to use the model dispute settling procedure does not, however, preclude any person's right to take action in a common law court.[134]

So until a person takes court action, or is dismissed from employment and is eligible to pursue an unfair dismissal claim, it is unlikely that we will know very much about the meaning of these minimum working conditions in practice. This is particularly difficult in relation to those areas where the employer is given discretion, as for example, to require 'reasonable additional hours'. Simply put, the important regulatory function of the AIRC in this area has now been significantly eroded. Fewer applicants will be able to use the jurisdiction effectively to test the fairness of an employer's decision to terminate their employment. This means that there will be far fewer decisions of an independent body about termination of employment. It follows that the employer's hand has been strengthened, and that it will be easier for an employer to terminate an employee's employment, including in the course of a dispute over the application of their minimum working conditions. Taken together with the fact that (as we have seen) the legislation only weakly guarantees a number of the minimum working conditions, it further empowers employers and further reduces the level of secure minimum working conditions for Australian workers. It does so at the same time that Work Choices – assuming it passes constitutional muster – significantly expands the scope of federal labour law.

Protection of the exercise of the right of freedom of association

There have been relatively few changes to the freedom of association provisions in the WR Act. Some of them, however, have an important relationship to the protection of minimum working conditions. As is well known, these provisions are complex, and they remain so. Generally speaking, they prohibit certain conduct (such as termination of employment) if it is carried out for a 'prohibited reason' (such as membership or non-membership of a trade union). In most cases it will still be possible for an applicant to succeed if the reasons that actuated the prohibited conduct include the prohibited reason. An important change has been introduced however: where the prohibited reason alleged is entitlement to the benefit of an industrial instrument,[135] it will be necessary that the prohibited reason was the 'sole or dominant' reason.[136]

This will significantly strengthen the hand of those employers that seek to restructure their operations to take advantage of the fact that minimum working conditions under Work Choices will be much lower than they have been until now. An employer that wishes to avoid the costs of complying with a workplace agreement, or even the lower costs associated with award conditions, will be able to restructure so as to move workers onto an agreement at only the minimum working conditions in the AFPCS, and the agreement may be one that excludes the 'protected' award entitlements. Provided that the desire to move workers onto the minimum conditions is not the 'sole or dominant' reason, the employer will now be less inhibited by the WR Act in taking this course of action than before Work Choices. This in turn makes the role of the AFPCS and any APCS more significant, and relevant to a wider group of employees.

Restructuring of a business so as to avoid the costs associated with a particular type of industrial instrument, or to facilitate the use of labour hire or contract workers has been made easier by another change to the freedom of association provisions. They will now provide that an employer does not 'refuse to employ' a person where they did not intend to employ a person.[137] This change has evidently been made to overcome the effect of the decision in *AMIEU v Belandra*[138] in which North J held that a company that had resolved to rebuild its business (after a fire) by using labour hire workers thereby refused to employ the workers it had formerly employed under more favourable conditions.

There has also been an important change to the procedural aspects of the freedom of association provisions. The reverse onus of proof that has long characterized their operation will no longer apply at the stage of

seeking an 'interim injunction.'[139] It has traditionally been extremely difficult for a respondent to resist the grant of an injunction, when faced by the application of the reverse onus of proof (Jessup 2002). Hitherto, many proceedings have not continued beyond the grant of the injunction. This will surely no longer be the case.

Conclusion

Work Choices has significantly affected both the number and the level of minimum working conditions in Australia. There are fewer conditions that might be allowed in an award; a workplace agreement can displace almost all award conditions completely; and most award conditions will not be relevant again after the expiration of a workplace agreement. An exception to this is the small number of 'protected' award conditions, although that 'protection' can be bargained away by express language in a workplace agreement and therefore is of limited value while an agreement is in effect. This is true also of a number of the 'guaranteed' working conditions in the AFPCS: there is no true guarantee of maximum working hours, or of the right to take the full amount of annual leave that is prescribed. Work Choices has removed the no-disadvantage test that formerly acted as the gate-keeper for approval of a workplace agreement, whether individual or collective. It has thereby significantly lowered the basic safety net of minimum working conditions in Australia. Regardless of whether agreement outcomes have been ahead of those required by awards, the fact remains that now the only legal minimum working conditions are those in the AFPCS – *not* those in an award – and that those conditions offer limited protection at best. The abolition of the no-disadvantage test, combined with the introduction of the AFPC, has opened up space for employers to bargain working conditions down by significant margins.

There has also been a major shift in the regulatory architecture; in the ways that minimum working conditions are set. It has been marked by a move to direct government control, and to empowerment of employers, together with a further reduction in the role of and support for trade unions. Working hours and the three types of leave provided for in the AFPCS are now set directly by government. Wages are not, but the government has of course set objectives for the AFPC that differ in important ways from those that guided the AIRC in its former function of maintaining safety net wages. Broadly speaking, they reflect the views that the Howard government has put to the AIRC in recent years on the function and impact

of wage rises for the low paid. The government has also played a significant role in its crafting of the role of the ART, whose activities the AFPC is legislatively bound to consider. Furthermore, the Minister alone has statutory power to direct the AIRC in its conduct of award rationalisation.

The direct involvement of the federal government in setting minimum working conditions for a significant proportion of the Australian workforce is a major departure from Australia's history of independent determination of basic working conditions through conciliation and arbitration. Inevitably, it opens up the process to greater influence from political imperatives; presumably the answer to that from the government would be that to the extent that this may be true, it is answered by the accountability of the ballot box. Be that as it may, the government has introduced a regulatory model that significantly empowers employers and itself, at the expense of employees and society more broadly. In taking this approach, it has passed up the opportunity to devise a regulatory model that might have sought to achieve basic goals such as democratic participation, or used methods such as co-regulation instead of state regulation (Centre for Employment and Labour Relations Law 2005).

Where wage-setting is concerned, the government has avoided the political risks that may attend direction regulation by creating the AFPC. However there is a stark contrast between the methods formerly employed by the AIRC, and those that will be used by the APFC. While the AIRC Safety Net Review process (and other test case standard processes) were in form adversarial, in practice they were in many ways consultative and inquisitorial, they permitted involvement by interested interveners, and (among other things) they were open to the public (Murray 2005). The AFPC will not operate in any of these ways: there will be no hearings, and while the Chair of the APFC has declared that he will consult widely, there is no obligation on the AFPC to do so.

The change in regulatory approach reflects (in part) the government's long-standing position that 'unwanted third parties' should be removed as much as possible from the process of setting working conditions, in favour of direct negotiation. The government has been critical in particular of the 'adversarial' nature of AIRC proceedings. But the government has also exercised its right to 'cherry-pick' those outcomes of AIRC proceedings that it prefers. The AFPCS does not include the concepts developed by the AIRC in the recent *Family Leave Test Case*[140] – a worker returning from parental leave has no 'right to request' a return to part-time work. And there remains no mandated paid maternity leave in Australia. Awards will no longer be allowed to include provisions for casual employees to convert

their employment status,[141] and small businesses will not be required to make severance payments in the event of redundancy, even though the AIRC's test case on the issue found that not all small businesses required a blanket exclusion from this requirement.[142] In this particular respect Work Choices makes good the government's several attempts to exclude small businesses from the obligation to make severance payments in the event of redundancy.[143] On the other hand, by enshrining in legislation an employer's right to require an employee to perform reasonable additional hours of work, the government has effectively endorsed the outcome of the AIRC's decision in the *Reasonable Hours Case*.

It is a striking contrast that Work Choices maintains the outcome of an AIRC test case that affords an employer a right to require overtime, but overlooks the outcome of a more recent AIRC test case that awarded an employee a right to request to return to work part-time. In this, then, we see the government's attitude both to the AIRC and to minimum working conditions exposed for what it really is. It appears that the government is perfectly happy to accept the outcomes of the AIRC process so long as they accord with its own view of what those outcomes should have been. And this of course is consistent with the approach it has taken overall: it has avoided the possibility of having to use legislation to overturn other AIRC decisions by removing most of its powers; it has closely constrained the powers of the AFPC in line with its view of incomes and wages policy while not giving it any power over tax or social security; and it has reserved to itself power in the regulations to control many aspects of how working conditions are set.

It appears likely that real wage rates as set in the AFPCS and any APCS will fall over time. Although the AFPC does not have power to reduce wages, neither is it obliged to raise them. If it follows the economic criteria that are contained in its objectives, and if these have been set – as I have suggested – to reflect the government's views about wage-setting and the needs of the low paid and the unemployed, then a reduction in real terms would seem inevitable. Andrew Stewart (2005) has predicted that there may be further compression of wage rates across classifications, with the FMW being raised while wage rates at higher classifications are held steady. If this occurs then, in combination with the ART process of reducing the number of classifications, we may see the end of the last vestiges of comparative wage justice as a principle of wage-setting in Australia. This, however, would only be consistent with the new concept of 'fairness' that appears in the legislation.

Conditions generally may fall over time as employers exercise their

new powers to reduce bargaining conditions. If this occurs, the worst effects will be felt by the low paid. Evidence from the operation of a similar system in Western Australia points to the following likely adverse effects: greater wage dispersion, an increasing gender pay gap, falling conditions in particularly competitive industries, and the use of individual agreements to spread working hours so as to reduce or eliminate penalty rates. The worst effects are likely to be felt in those industries that are highly competitive (such as cleaning) or in feminized industries (Plowman and Preston 2006). For women workers, the adverse effects will include lower pay on individual agreements, and the risk of having to do without working conditions, especially leave provisions, that are designed to be family-friendly (Pocock and Masterman-Smith 2006).

The significance of all these changes and their effects in practice will, of course, only become known over time. The potential outcomes, however, clearly include major reductions in working conditions. The impact of this is all only the greater given that Work Choices also seeks to bring a far larger number of Australian workers into the federal regulatory scheme than ever before. If (when) there is an economic downturn, or a particular industry becomes further exposed to more productive and/or cheaper competition internationally, then employers will be well-equipped to bargain down conditions, while arguing that at least workers will be able to keep their jobs. This too will be consistent with the government's general view that having a job is the best sort of support system that a worker can have, and that the labour market is the best means of generating jobs.[144] Only in time, however, will we see in which direction the invisible hand will have taken us.

Notes

[1] The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) .(WRA(WC) Act).

[2] Among other things, it has been suggested that the recent changes amount to an importation of an 'Anglo-American' model of labour relations (McCallum 2005) and (more broadly) of 'foreign labour law concepts' (McCallum 2006).

[3] For less pessimistic analysis see Forbes-Mewitt, Griffin and McKenzie 2003, and on the continued use of conciliation and arbitration see Forbes-Mewitt, Griffin and McKenzie 2005.

[4] See, eg, the promotional material available at www.workchoices.gov.au.

[5] See generally *Workplace Relations Act 1996* (Cth) (WR Act) Part 8, and in particular s 354, which specifies the way that a workplace agreement may displace award conditions.

[6] WR Act ss 552 and following.

[7] Commonwealth Constitution, s 51(xx).

[8] The principal definition of 'employee' in s 5 is a person employed by an 'employer' as that term is defined in s 6(1). There are also numerous elements of the Work Choices package that will apply to Australian workers in other contexts, including for example those engaged in work in Australia's exclusive economic zone, or working above Australia's continental shelf. For a list of those parts that are to have extraterritorial application, see WR Act s 13.

[9] New South Wales was the first to file its proceedings in the High Court, on 21 December 2005. See 'NSW lodges High Court challenge to *Work Choices Act*, available at <www.worplaceexpress.com.au>. On the constitutional issues see, eg, Ford 2005; Gray 2005; Williams 2005; and Stewart 2001.

[10] Commonwealth Constitution, s 51(xxix).

[11] The referral power is in s 51(xxxvii). For comment on the Victorian referral, see, eg, Kollmorgen 1997.

[12] An exception to this is the power of the AIRC to establish wage-setting principles for awards under the transitional provisions in Sch 6 of the WRAct. This power, however, can only be exercised consistently with decisions of the AFPC.

[13] On the development and influence of wage-fixing in the federal tribunal over most of its life see, eg, Hancock and Richardson 2004.

[14] As I consider below, the AIRC will have power to vary awards to create new provisions as part of maintaining the safety net: WR Act s 553. However that power will be more constrained than was its former ability to set new standards.

[15] (2005) 143 IR 245.

[16] (2002) 114 IR 390.

[17] (2004) 129 IR 155.

[18] (2000) 110 IR 247.

[19] *Re Vehicle Industry – Repair, Services and Retail – Award 1983* (2001) 107 IR 71; but see also on the scope of the principle there established *Re Graphic Arts – General – Award 2000* (2002) 124 IR 421.

[20] (1994) 55 IR 447.

[21] (1984) 8 IR 34.

[22] *Parental Leave Case* (1990) 36 IR 1 and *Parental Leave Case (No. 2)* (1990) 39 IR 344.

[23] *Equal Pay Case* (1969) 127 CAR 1142; *Equal Pay Case* (1972) 147 CAR 172.

[24] *Standard Hours Inquiry* (1947) 59 CAR 581.

[25] WR Act s 400(6). It is also clear that an employer may lock out an employee in order to induce them to sign an AWA: WR Act s 400(2).

[26] WR Act, s 348(2).

[27] The passage of this Act was preceded over a period of several years by a number of important political and industrial events, especially the two National Wage Cases of 1991: *National Wage Case – April 1991* (1991) 36 IR 120, and *National Wage Case – October 1991* (1991) 38 IR 127. This history is well-known; for basic accounts see, eg, Creighton and Stewart 2005: 55-61, Dabscheck 2001, and Mitchell and Naughton 1993.

[28] Statistics as at 30 November 2005, available at: www.airc.gov.au/publications/award_simplification/lists_stats.html.

[29] 'Employees classified to "award only" had their rate of pay specified by an award and were not paid more than that rate of pay': (ABS 2005). I am grateful to Andrew Watson, then of the ACTU, for pointing out the significance of this

aspect of the ABS methodology.

[30] *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 11 CLR 311. This limit does not apply to an award made in reliance on other commonwealth legislative powers, including those over territories, external affairs, or that have been referred by a state.

[31] Under the no disadvantage test that operated between 1993 and 1997, the AIRC would only certify an agreement if *none* of the terms and conditions of the proposed agreement were less advantageous than *any* of the conditions of the relevant awards (and other laws): *Industrial Relations Act 1988* (Cth) ss 170MC and 170NC.

[32] *Conciliation and Arbitration Act 1904* (Cth) s 4.

[33] *Conciliation and Arbitration Act 1904* (Cth) s 4.

[34] The former WR Act s 89A(2).

[35] WR Act s 510.

[36] WR Act s 510(c).

[37] WR Act s 511.

[38] WR Act ss 539, 540.

[39] WR Act s 534.

[40] WR Act s 535.

[41] WR Act s 543(4).

[42] WR Act s 177.

[43] See further www.awardreviewtaskforce.gov.au.

[44] I am grateful to Andrew Stewart for an exchange that brought home the full significance of this matter.

[45] WR Act s 547.

[46] WR Act s 514.

[47] WR Act s 513(5). In accordance with s 2 and sch 3A of the WR (WC) Act, this change took effect when the WRA(WC) Act received royal assent, which was on 14 December 2005.

[48] WR Act s 513(2).

[49] *Electrolux Home Products Pty Ltd v AWU* (2004) 78 ALJR 1231. For the application of the High Court's decision in subsequent cases seeking certification of agreements that had to meet the test in s 170LI of the former WR Act, where the words 'pertaining . . .' appeared, see in particular *Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004*, and *Re Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) – Enterprise Agreement 2004* (2005) 142 IR 289.

[50] *R v Portus; ex parte ANZ Banking Group* (1972) 127 CLR 353.

[51] *Re Alcan Australia Ltd; ex parte Federation of Industrial Manufacturing & Engineering Employees* (1993) 181 CLR 86.

[52] WR Act s 513(3).

[53] WR Act s 515.

[54] On the changes made to the role of and support for unions in the passage of the changes that led to the WR Act, see Naughton 1997.

[55] WR Act ss 515(g) and (h).

[56] WR Act s 515(b).

[57] WR Act s 529(2).

[58] WR Act s 527(2).

[59] It was brought into effect by the *Superannuation Laws Amendment (2004*

Measures No. 2) Act 2004 (Cth). See the Explanatory Memorandum to the WRA(WC) Act, [1652].

[60] WR Act s 354.

[61] WR Act s 354(2)(c). But see also s 354(3), which appears to override this provision as far as outworker protections are concerned: that is, outworker protections apparently cannot be excluded by express agreement.

[62] ABC Television (2005).

[63] WR Act s 349.

[64] WR Act ss 552 and 554.

[65] WR Act ss 552, 810 and 812.

[66] WR Act ss 552, 553.

[67] WR Act s 553(4).

[68] WR Act Part 10, Div 6.

[69] WR Act s 558(3).

[70] WR Act s 559(5).

[71] WR Act s 560.

[72] WR Act sch 10.

[73] WR Act s 560C(4).

[74] WR Act s 556.

[75] WR Act s 29.

[76] WR Act s 38.

[77] WR Act s 22.

[78] WR Act s 23.

[79] Industrial Relations Act 1988 (Cth) s 88A(a).

[80] Industrial Relations Act 1988 (Cth) s 90AA(2)(a).

[81] The former WR Act s 88A.

[82] The former WR Act s 88B(2).

[83] See www.fairpay.gov.au.

[84] AIRC, Safety Net Review – Wages, Melbourne 7 June 2005, *Decision Summary*, [21].

[85] On the relationship between income tax, welfare policy and the labour market, see for example Rider 2005.

[86] I also leave aside examples drawn from wartime, for example.

[87] See, eg., WR Act s 171.

[88] WR Act s 171(2).

[89] WR Act s 194.

[90] The AFPCS will not be able to change the classifications set out in the former Victorian wages orders: WR Act Part 21.

[91] WR Act s 182.

[92] WR Act s 195.

[93] WR Act s 194.

[94] WR Act s 193.

[95] WR Act ss 185 (guarantee of loading), 186 (initial default loading of 20 per cent, and 188 (AFPCS power to adjust the default loading).

[96] These examples were drawn from a search of the Working Time Database maintained by the ILO's Conditions of Work Branch. It showed results for 91 countries in relation to 'compensation for overtime'. The vast majority of these specify at least a right to a premium rate, and in most cases identify the premium rate that applies. In some, for example Slovenia, overtime pay is to

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be set by collective agreement. The database is available at: http://www.ilo.org/travaildatabase/servlet/workingtime

[97] WR Act s 202.

[98] WR Act s 203.

[99] WR Act s 215.

[100] WR Act ss 216. 217.

[101] These are defined as federal and state awards, and federal, state and territory laws that may be identified by regulation: WR Act s 178.

[102] WR Act s 208.

[103] WR Act s 218.

[104] WR Act s 206.

[105] WR Act s 214.

[106] WR Act s 220.

[107] WR Act s 221.

[108] WR Act s 222.

[109] On the implications of instruments that refer to 'principles' rather than to other existing 'rights', in the context of international labour standards, see Alston 2005.

[110] WR Act s 177.

[111] Broadly speaking, the terms of reference for the ART require it to consider how to simplify wage structures: http://www.awardreviewtaskforce.gov.au/NR/rdonlyres/A008C47D-E66B-46DC-AA51-AC228358FF39/0/TermsofReference.pdf.

[112] WR Act Part 7, Division 3, Subdivision B.

[113] WR Act s 226.

[114] (2002) 114 IR 390.

[115] WR Act s 232; see also WR Act s 228 for its definition of shift worker for these purposes.

[116] WR Act s 233.

[117] WR Act s 233(3).

[118] WR Act s 246(2).

[119] WR Act s 246(5).

[120] WR Act s 250.

[121] WR Act s 257.

[122] See generally WR Act Part 7, Division 6.

[123] WR Act ss 607, 608.

[124] The list is: 1 and 26 January (New Year and Australia Day); Good Friday and Easter Monday; 25 April (Anzac Day); 25 and 26 December (Christmas and Boxing Days): WR Act s 611.

[125] WR Act s 612.

[126] WR Act s 613. In examining the Family Provisions Test case and its creation of a 'right to request' to return to part time work, Jill Murray offered some analysis of how one might determine whether it would be 'reasonable' for an employer to refuse such a request (leaving aside the specified statutory criteria). That analysis may also be applicable in these circumstances (see Murray 2005: 336-339).

[127] WR Act s 615.

[128] WR Act ss 643(5E), 643(5EA) and 643(5F).

[129] WR Act ss 643(5C) and 643(5D).

[130] WR Act s 643(5B).
[131] WR Act s 175(obligation to use model dispute settling procedure set out in Part 13).
[132] WR Act s 697(4).
[133] WR Act s 697(5).
[134] WR Act s 693.
[135] WR Act s 793(1)(i).
[136] WR Act s 792(3A).
[137] WR Act s 792(3).
[138] (2003) 126 IR 165.
[139] WR Act s 809. There is some ambiguity about this language. It may be that Parliament intended to exclude any application for an interlocutory injunction; by using the term 'interim' injunction it may, however, only have excluded the reverse onus from urgent, ex parte hearings. I am grateful to Leon Levine of Minter Ellison, Melbourne, for pointing this out.
[140] (2005) 143 IR 245.
[141] *Metals Casual Award Case* (2000) 110 IR 247.
[142] *Redundancy Case* (2004) 129 IR 155, and *Redundancy Case – Supplementary Decision* (2004) 134 IR 57.
[143] Workplace Relations Amendment (Small Business Employment Protection) Bill 2005; Workplace Relations Amendment (Small Business Employment Protection) Bill 2004.
[144] Compare, on the importance of government action to create employment, Howe 2001, and Arup *et al* 2000.

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