The Economic and Labour Relations Review Vol. 18 No. 1, pp. 115–142

AWAs and Individual Bargaining in the Era of WorkChoices: A Critical Evaluation using Negotiation Theory

Peter Sheldon *
Nancy Kohn *

Abstract

The Howard government's WorkChoices legislation appeared set to irremediably remake industrial relations in Australia by prioritising individual agreement making (through AWAs) at the expense of Australia's traditional award systems based on collective bargaining. That government explicitly intended these changes to reduce labour market rewards to, and protections for, low paid and more vulnerable employees. Yet, it also deployed a rhetoric of individual choice in advocating these changes, promoting, in particular, a notion that individual bargaining and agreement making under WorkChoices empowered individual employees by opening opportunities for integrative (mutual gains) bargaining. This article asks what these changes really meant for bargaining between individual employee and employer. We analyse crucial elements of WorkChoices to highlight how its main structural mechanisms intensified employee bargaining weakness in individual bargaining. As well, we use negotiation theory, especially in relation to integrative bargaining, to evaluate the government's own published advice to individual employees on how to bargain for an AWA. We find that the government explicitly sought to disempower employees through WorkChoices' additional legal and institutional impediments and also through the concerted attempt at coaching employees to choose a losing path in their AWA negotiations.

Introduction

For more than 90 years, Australia's federal industrial relations system developed out of the 'industrial arbitration power' within the Commonwealth Constitution. This power explicitly recognised a number of fundamental matters endemic within capitalist democracies: opposing (as well as shared) interests between labour and capital; the inevitability of industrial conflict and the possibility of institutionally managing it; and the fact that individual employees gain power resources by combining in a union and that they have the right to

* School of Organisation and Management, The University of New South Wales

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

do so. The obvious public policy and state intervention aspects of Australia's systems of conciliation and compulsory arbitration have long gained extensive attention here and abroad (Perlman 1954; Dabscheck 1993; Gardner and Palmer 1997). Yet those fundamental matters inevitably generated an industrial relations system based on bargaining — and, in particular, collective bargaining (Clegg 1976; Strauss 1988). Moreover, they took as given that the dynamics of this bargaining would flow from the human interests, needs and wants of employees as they engaged with the requirements of capital. Crucial to this process were the pre-existing strengths of Australia's unions and their ability to channel employee needs and wants through collective bargaining, at times with support of the arbitral system.

Upon its election in 1996, John Howard's Liberal-National coalition government placed its own perceptions of the requirements of capital alone at centre stage. It did this by basing its national industrial relations system increasingly on the Constitution's corporations power via the *Workplace Relations Act 1996* and, more especially, the *Workplace Relations Amendment (Work Choices) Act 2005* (WorkChoices), (Kirby and Creighton 2004; Dabscheck 2006; Stewart and Williams 2007). Among the most telling indicators were draconian restraints on many accepted operations of employee unions in a democratic society (Forsyth and Sutherland 2006; ILO 2007).

WorkChoices provided for a uniform national industrial relations framework by subsuming most of those who, until 2006, had come under state arbitral systems (Australian Government 2005). Much of the critical debate on WorkChoices focused on measures targeted at individual employees, such as the removal of protections against unfair dismissal for employees of organisations with fewer than 100 employees, and the growing use of individual contracts — the new Australian Workplace Agreements (AWAs) — to cut employee incomes by removing overtime rates or to extend working hours (van Barneveld 2006; *Workforce* 2006; AHRI 2007).

Largely remained unremarked outside specialist academic circles (Cooney 2006; Fenwick 2006; Riley and Sarina 2006), however, was the attempted obliteration of the award system, the core system of regulatory instruments at the heart of Australia's industrial relations for a century. While legislative downgrading of the award system in favour of collective — but enterprise-based bargaining — had begun in 1993 under Labor Prime Minister Keating, the Howard government accelerated its demise and also weakened collective bargaining involving unions (Fenwick 2006; Stewart and Williams 2007). This escaped attention because of the maximum three-year transition process for the demise of state awards, delaying WorkChoices' most obviously damaging impacts.

The Howard government, through WorkChoices, intended individual agreement making between employer and employee to be the preferred model. Thus, a 'choice' to enter into an AWA meant an employee no longer had any access to an award or collective agreement (Cooney 2006; Riley and Sarina 2006; van Barneveld 2006). The Howard government spent enormous energy and public money on propagating the idea that WorkChoices freed individuals to negotiate directly with their employers, as if that had never been possible before.

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

They pointed to the (belated and reactive) engineering, through the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007*, of elements of 'fairness' supplementing the five minimal conditions that WorkChoices had introduced to underpin all individual bargaining (Hockey 2007).

How many employees were involved? Recent Workplace Authority data (*Workforce* 2007) showed that between 27 March 2006, when WorkChoices came into effect, and 31 October 2007, the Authority had accepted lodgement of 522,576 AWAs. While employees covered by union collective deals made up the largest category — due to the transfer from state awards — 'live' AWAs covered about 9.3 per cent of employees, a huge rise on the percentages covered under the 1996 Act. Had the Howard government not lost power on 24 November 2007, this trend was set to increase, given the absence of choice for employees to avoid AWAs.

What did individual bargaining mean for employees in those circumstances? The purpose of this article is to use negotiation theory to speculate on the meaning of WorkChoices for employees engaged in individual bargaining, or negotiation — words that we use interchangeably here. We examine the way WorkChoices (as amended in 2007) influenced employees' capacity to bargain individually, focusing on employees with least power in the labour market — those most dependent on the award system (Fenwick 2006; AAP 2007). In particular, we attempt to make sense of AWAs under WorkChoices by concentrating on the literature pertaining to *integrative* (or mutual-gains) bargaining, as this was the type of bargaining that the Howard government explicitly promoted through law and policy. We pay particular attention to that government's own targeted advice to employees on how to engage in AWA negotiations. This article therefore represents a novel genre in Australian industrial relations: an attempt to look, from an individual employee's perspective, at the options for individual bargaining and agreement making within an institutional framework.

First, however, it is necessary to discuss briefly the apparently doomed award system, the collective bargaining that fed it and their significance for individual bargaining. This will clarify the changes that WorkChoices brought to individual negotiations for contracts of employment. We understand that the new Labor government under Kevin Rudd will do away with AWAs: while we have, as yet, no clear idea of what will replace WorkChoices, we therefore write about them in the past tense.

Award Systems and Collective and Individual Bargaining

For much of the twentieth century, the vast majority of Australian employees worked under terms and conditions established in a legally-binding industrial award — similar to a collective agreement or labour contract in other countries — that covered their particular job. A sometimes bewildering multiplicity of awards crisscrossed the labour market, depending on whether their definitional jurisdictions related to industries, professions, trades, occupations, regions, particular employers or some combination of these. According to Norris (1993: 139), in 1985, awards covered some 85 per cent of employees

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

and while this proportion declined over the 1990s, it remained much higher than union density levels (Considine and Buchanan 2007). This meant that most non-unionised employees were also covered by union-negotiated (and -defended) awards.

Awards almost always had two characteristics. First, they had at least two separate parties — one from the employer and the other from the employee side. This most visibly recognised the negotiation relationship and the parties' shared as well as genuinely divergent interests. In almost all cases, employees' access to award-making was via their union, as unions were the parties to the award, not individual employees or groups of employees. In some cases, the relevant parties were single employers; but in many cases, they were lists of employers or even employer associations. Second, in most cases, in a negotiation impasse, there was the potential and, often the statutory necessity, for a state tribunal to engage in third party intervention. Typically, this first took the form of conciliation but, where impasse remained, the tribunal could engage in compulsory (binding) arbitration of its own authority.

Award-making is, as Alan Flanders (1975) pointed out for collective bargaining more generally, a rule-making process that governs certain jobs and work. Every person taking such jobs and doing such work had the right to the substantive (and procedural) terms and conditions contained in that award (or collective agreement) *as a minimum*.[1] As Flanders (1975: 216) made clear, a 'collective agreement … does not commit anyone to buy or sell labour.' Instead it regulates all the (individual) commitments to sell or buy labour that, respectively, individual employees and their employers may enter into. Awards and collective agreements thus provide a floor under all relevant individual contracts of employment.

An award provided a set of minimum employment and working conditions, governing jobs included under its jurisdiction — for example, 'electrician' or 'nurse' — and work — for example, 'working in tight spaces', 'rest breaks' or 'shift work'. Much regulation of work related to working hours and payment rates for work done outside normal hours. Penalty and overtime pay rates were a source of income and protection to employees as well as a spur to greater managerial efficiency, providing a disincentive to inducing employees to work dangerously long hours or in ways that encroached heavily on their non-work lives. Awards also provided unions with substantive and procedural rights that strengthened their position during and between negotiations.

Thus, in practical terms, when an employer hired a new employee under the award system, this process did *not* involve the two parties signing the award — which already existed. A parallel, better-understood example is that no one expects an individual employee or employer to sign a relevant law — such as a law against racial discrimination — before the employee starts a job. Instead, under the award system, individual employer and individual employee entered into an individual contract of employment — a common law contract — whether written or oral. Whereas the award regulated the job and the work, this individual contract pertained to the person in the job, the employee.

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

The degree of real negotiation in the process of entering an individual contract under the award system varied greatly according to circumstances. However, as the contract of employment could not legally undercut an employee's award-based terms and conditions, many employers were content to offer terms and conditions that replicated those in the award. In particular, hiring processes focused on clarifying, in contractual terms, the main substantive elements of the award: pay rates; hours of work; penalty pay rates for overtime and weekend work; paid holidays and the like. Clearly, at times of very full employment or in sectors or occupations where labour was hard to find or keep, employers might offer an employee well above the award in both the quantity and range of conditions. Where unions could generalize these improvements, for example through local bargaining, they could establish 'over-award' rates or conditions that then regulated all the jobs and work covered under such formal or informal agreements (Hancock 1985: 193–199).

Once employed, a person's individual terms and conditions of employment, being based on the award, improved as the award improved. Historically, for example, when an award improved paid annual leave, say from two to three weeks, then the contract of employment for each individual employee also automatically changed to provide that improvement. This involved no individual negotiation between employee and employer. It was the result of negotiations elsewhere, between union/s and employer/s (or employer associations) or of arbitral intervention. Once again, it was always possible for individual employees to better their terms and conditions through individual negotiation with their employer, further improving on the award that had just created improved terms and conditions for the relevant job or type of work.

Under the award system then, when an employee entered into an individual contract of employment upon taking a new job, (s)he was, at minimum, signing up for the terms and conditions that the collective strength and purpose of 'her/his' union had been able to generate. This occurred irrespective of her/his union membership and whether (s)he was able or willing to engage in any real individual negotiation prior to being hired. Even awards in areas where unionism was weak gradually followed paths cut by stronger unions. This reflected unions' commitment to maintaining some degree of equity or comparability across industries and occupations and, at times, tribunal policy (Norris 1993: 6, 191; Hancock and Richardson 2004).

Thus, awards — like systems of industry- or regional-level collective agreements in other countries — embodied decades of industrial and political struggles by unions (and employers), industrial relations jurisprudence and, at times, creative engagement between unions and employers. Through collective bargaining and, in Australia, its meshing into award-making, unions successfully captured, for almost all employees, a greater portion of last century's economic growth and rising prosperity and a more egalitarian income structure than would have been available to employees as disparate individuals (King 1990; Norris 1992 and 1993).

The collective bargaining that fed Australia's award systems also represented unions' determination to improve employees' working lives, including their

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

human dignity at work. This added 'voice' at work, spreading democratic norms and broadening the range of issues that employees came to have a legitimated input into. Thus, awards included a range of matters that improved employees' quality of life at and outside work.

Awards and more centralized collective agreements had other advantages. Employers knew what they had to pay or provide (as a minimum) and knew that their competitors were unable, legally, to undercut them. This reduced downward competitive pressure on the unit pay element of labour costs and was one reason that many employers supported the arbitral system and award-making. Awards provided economies of scale, greatly reducing employer transaction costs in hiring and remunerating employees. Again, there was no restriction on an employer negotiating individually with any employee.

In sum, when the Howard government ushered in an era of individualized industrial relations through the 1996 Act, most individual employees, knowingly or not, carried a historically-generated, award-based inheritance in their employment entitlements. The 1996 Act gradually caused them to lose some of these entitlements and WorkChoices intensified this process. It removed direct access to most of them through further stripping from awards matters no longer 'allowable'. Further, once an employee signed an AWA, that AWA displaced any relevant award protection and, at the end of the AWA period, the employee could not return to an award (Cooney 2006). As Riley and Sarina (2006: 343) suggest, WorkChoices:

> has destroyed the test-case system of determining basic wages and conditions of work by consultation with all stakeholders, gutted the system of arbitrated industry-based awards, withdrawn unfair dismissal protection from armies of Australian workers, and severely curtailed what little opportunity trade unions have to instigate industrial action in support of employees' claims.

This removed almost all of the protective mechanisms — legislative or institutional — that employees previously enjoyed. Instead it established a system where most of that inheritance no longer had legal support or defence and that provided no mechanism for most employees to achieve similar gains. In fact, the legislation deliberately blocked such activity. An increasingly large number of individual employees faced employers alone in a situation where the government overwhelmingly championed the use of AWAs. Individual bargaining in this context concerned not just the person but also the job and the work. This suggests a number of important questions.

How plausible was Howard government rhetoric that WorkChoices would encourage integrative bargaining on AWAs in the absence of the sorts of protections previously available from awards or collective agreements? What sorts of negotiation, if any, were those less powerfully placed individual employees likely to engage in? Given the lack of any collective or institutional support for employees entering AWAs, how did that government choose to assist those individual employees? What did this approach suggest when coupled with the more concrete measures contained in WorkChoices?

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

To help address these questions, the next section discusses important areas of change that WorkChoices introduced, relating to individual employees and the making of AWAs. The subsequent section explains relevant aspects of negotiation theory — referring, in particular, to integrative bargaining. In the process, we link these concepts to the employment relationship and negotiation of contracts of employment, drawing out the concepts of bargaining power and negotiating 'scripts'. We then use these concepts to analyse government advice to individual employees — on its Workplace Authority website — about how best to negotiate AWAs. We develop a plausible, if still speculative, explication of the Howard government's intentions for individual AWA bargaining under WorkChoices by combining an analysis of some of the main concrete measures contained in WorkChoices together with one on the predictable effects of following government advice through the Workplace Authority website. These two sources seem better indicators of government intention and likely outcomes than, for example, the more public relations-oriented second reading speeches of the relevant legislation. We conclude by bringing together our analyses of these two areas through which the Howard government used WorkChoices to shape the making of AWAs.

WorkChoices as an Environment for Individual Bargaining

Legislative shifts to non-union bargaining frameworks since 1993 have focused on assuring employee 'consent' and an absence of 'duress', rather than supporting or monitoring bargaining. In fact, there is evidence that, under the 1996 Act, AWAs in many organisations very closely followed a pattern dictated by the employer. Employees had no choices and there was no bargaining allowed. In reality then, the notion of employee consent to an AWA was meaningless in areas of the labour market where the only option was to refuse a new job or leave an existing one. This trend appeared set to intensify under WorkChoices (Briggs and Cooper 2006; Cooney 2006; van Barneveld 2006).

According to Prime Minister Howard (cited in Westcott et al. 2006: 9) underlying his government's design of WorkChoices was the notion that it '[trusted] the employers and employees of Australia to make the right decisions in their interests and in the interests of the nation.' While a simple re-statement of neo-liberal economic faith, consistent with Dabscheck's (2006) more general argument about WorkChoices, it was also one more powerful example of the government's Orwellian 'doublespeak' on industrial relations.

Contrary to the assumptions of Westcott et al. (2006), WorkChoices did *not* seek to provide unfettered individual bargaining but concretely fettered individual bargaining processes in ways that accentuated employer power. Whereas employees used to individually bargain with these entitlements already 'in the bag', they now had to bargain (and thus sacrifice on other issues) to regain some entitlements through AWAs, and they faced legal restrictions to accessing others. For those millions of employees in workplaces of 100 or fewer employees who lost all protections from unfair dismissal, a crucial previous option — the choice to just remain in their jobs — disappeared. For those in larger workplaces, the spectre of dismissal for 'reasons that include genuine operational

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

reasons' also loomed large (Dabscheck 2006: 15; AIRC 2007; Rollins 2007). Employers could thus use the 'right' to replace employees covered by a collective agreement with employees on sub-standard AWAs (Dabscheck 2006).

The main substantive limitations employers faced were five very minimum terms and conditions under the Australian Fair (*sic*) Pay and Conditions Standards and the very limited fairness checks introduced under the 2007 Act. The five core conditions included a national minimum wage — but one with no concept of fairness built into its criteria or process of determination (Fenwick 2006). The maximum ordinary hours of work were 38 hours but the Act gave employers much greater discretion to average this maximum over a twelve-month period, providing latitude to shape an employee's life circumstances at will. As well, employers were still allowed to demand a 'reasonable' number of overtime hours, with no clear indication of what might be 'reasonable'. Thus, as Fenwick (2006: 106) points out, WorkChoices did not 'include any solid guarantee of maximum ordinary hours of work, and yet enshrine[d] the right of an employer to require that an employee carry out a "reasonable" amount of paid overtime.' It again put employees in the situation of having to sacrifice in other areas just to regain entitlements that WorkChoices unilaterally denied them (AHRI 2007).

The third minimum standard was four weeks' paid annual leave. However, the Act allowed an employer to 'request' that an employee agree to trade away up to two of those weeks for cash. As Fenwick (2006: 109) notes, the employer could make this part of an AWA that was a pre-condition for taking a job. As Riley and Sarina (2006: 344) suggest, this made four weeks' leave — a standard in Australia for over 30 years — an illusion. The final two minimum conditions were personal (sickness and carer's) leave and access to unpaid parental leave. For many, the five minimum conditions amounted to almost nothing when compared to previous award (or collective agreement) protections.

WorkChoices also deprived employees of a crucial option previously available to all award employees and widely available in other countries. That option is, at the end of an agreement, automatically to remain on the same employment terms and conditions pending a new award or agreement. Under WorkChoices, once an agreement expired, either party, on 90 days' notice, could unilaterally terminate a collective agreement or AWA. At that point the agreement's terms and conditions no longer applied, and unless the employer provided specific 'undertakings', the employee's terms and conditions fell to the five minimum standards — including the national minimum wage — and the few remaining allowable award matters (Dabscheck 2006: 15). As Cooney points out (2006: 152), this unilateral termination would be 'a very powerful weapon for an employer seeking to improve its bargaining position since it forces employees to bargain simply to retain the status quo.' This has enormously increased bargaining leverage for the employer, and deprived individual employees of a place of refuge when facing a hostile bargaining scenario.

Hence while individual employees began the Howard era having employment entitlements that derived from generations of collective negotiations, in the absence of an award or collective agreement, they could no longer avail

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

themselves of those minimum standards and protections (AHRI 2007; Considine and Buchanan 2007). By late 2007, the main defence for individuals facing AWAs was the Workplace Authority and its Fairness Test. While this involved scrutiny and regulatory oversight, it did not look at whether an employee had the opportunity to bargain, whether the fairness off-set in the AWA was one the employee wanted, or if employee consent was genuine (Cooney 2006).

As the drive for AWAs came from the Howard government and employers and their associations, understanding what attracted employers to choose AWAs helps explain likely and actual outcomes. Research suggests that AWAs attracted employers for several interlinked reasons (Briggs and Cooper 2006; Todd et al. 2006). First, unlike awards and collective agreements which are publicly accessible documents, AWAs were 'private' documents, legally protected from public scrutiny. AWAs thus also avoided union gaze and hence contributed to union exclusion and avoidance. They therefore became the instrument of choice for many larger employers ideologically committed to de-unionising their workforces. Second, procedurally, AWAs were very simple to draft and put into effect. As Briggs and Cooper point out (2006: 9), there was 'no infrastructure for consultation and voting.' Compared to WorkChoices 2005, the 2007 Act made decision making more complex for employers, once the Workplace Authority assumed the task of comparing a restricted set of monetary losses against previous awards and agreements.

For many employers, the appeal of AWAs lay primarily in their ready potential for reducing labour costs, mainly through forced changes in working hours and removal of penalty rates and shift allowances. An employer consultant interviewed by Briggs and Cooper (2006: 11) conceded that as an 'aggressive wage-saving mechanism', AWAs were 'your best option'. Another stated:

> There is not one organisation I've met that accepts AWAs as being anything other than an instrument to drive down wages and benefits and terms and conditions of awards. In one sense, unfortunately I think a lot of the evidence is that that's the case. AWAs are being used to drive down terms and conditions found in industrial awards (Briggs and Cooper 2006: 12).

While the 2007 Act may have tempered some of the worst previous excesses, its Fairness Test was very narrow in scope, particularly given that WorkChoices had declared many pre-existing conditions 'prohibited' for employees. The focus of the Fairness Test was monetary exchange and it said nothing about the agreement-making process, the quality of working life or an employee's work/life balance. It was also backward-looking, focusing on compensating employees for losses suffered in signing an AWA. By contrast, WorkChoices opened up, to any employer, the opportunity to exert much greater control of an employee's future working hours. Thus, the Workplace Authority had no way of estimating the eventual levels of (under-compensated) overtime or weekend work required. This, plus the lack of employee choice in the matter, meant that some employers continued to cut standards in ways consistent with losses suffered by employees who had had to accept AWAs under the 1996 Act and its

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

No Disadvantage Test (Mitchell et al. 2005; AHRI 2007). As award protections shrank, the previous No Disadvantage Test and its belated replacement, the Fairness Test, became increasingly meaningless (Fenwick 2006).

Therefore, under WorkChoices, employees entered 'negotiations' with only the five minimum conditions for protection — none of which related to work — and the changes under the 2007 Act which only related to a very narrow range of work matters. Even so, on the question of work, its regulation and its remuneration, individual employees negotiating AWAs faced an abyss — if indeed any real bargaining occurred. As the 2007 Act provided for no real support for genuine bargaining or proper consent, any bargaining under these circumstances was likely to intensify and spread disadvantage among employees. We will explain this further by reference to negotiation theory and collaborative (or integrative) bargaining.

Negotiation Theory and Integrative Bargaining

Under WorkChoices, in practice, an employer could demand that any individual employee enter an AWA as a condition of attaining or keeping employment. Through the media and its WorkChoices website, the Howard government portrayed this as an occasion for choice. It advised employees that a *bona fide* AWA 'negotiation' was going to take place and that, with the right attitudes from an employee, a favourable outcome was available to both parties. The government claimed that it had created this particular situation to foster greater 'flexibility' and that employees could thereby tailor their employment and work to suit their individual needs (Australian Government 2005). Before considering these claims further, it is important to understand some of the basic principles of negotiation: what negotiation entails; why people choose to engage in it; and how it unfolds. In particular, we will refer to mutual-gains negotiations as this is the focus of both Howard government rhetoric and this article.

There are several important characteristics that describe a negotiation (Lewicki et al. 2006). The first characteristic is that two parties choose to negotiate together, rather than electing to pursue other options. Furthermore, they are choosing this particular negotiation rather than a different negotiation — with a different other party, at a different time, in a different context or over different issues. If a party chooses instead not to negotiate, other options may include simply accepting the other party's offer or refusing to negotiate that offer. This may include the choice to walk away. It may involve seeking redress through other means such litigation or some exercise of power or duress (Lawler 1992). In industrial relations, such an exercise of power may include an employer's use of lockout or dismissal and employees going on strike.

Generally, people choose to negotiate when they cannot independently achieve what they want but believe that negotiating provides the best route for attaining their objective. Thus, the second characteristic of a negotiation is that each party needs the other; that is, there is interdependence between the two parties. Importantly, however, one may have a greater need of the other; (s)he is more dependent. This 'asymmetric interdependence' between parties generates unequal power in negotiations as one party needs to negotiate more than the

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

other who enjoys a greater array of other options (Bachrach and Lawler 1981; Fiske 1992; Lawler 1992). Typically, individual employees are wholly dependent on their wage or salary and hence on their employment for income while it is extremely rare for any employer to be particularly dependent on any one employee. An employee may leave one job for another or even set up in self-employment. These are more limited and riskier options than those facing an employer who can, in the short term, replace one employee with a new one, get existing employees to take over the residual work, use agency labour or labour hire or even eventually outsource the work.

A third characteristic in most negotiations is there is some conflict of needs and desires between the parties. What one party desires may not be what the other party desires and the purpose of the negotiation here is for both parties to search for means to resolve the differences, hopefully in a way that is mutually acceptable. For example, in a workplace negotiation, an employee may seek higher pay, while the employer wishes to maintain the status quo or even pay less.

A fourth characteristic is that, during a negotiation, the parties expect a certain amount of 'give and take'. A core idea of negotiation is that, in order to reach agreement, both parties understand that they may need to modify their opening offers in recognition of the claims of the other party. Thus, both parties enter a negotiation expecting to make changes in their initial offer. A common assumption is that this give and take results in a compromise in order to reach a settlement. However, a skilled and experienced negotiator, if (s)he seeks to, may be able to find outcomes that satisfy the main needs of both parties by going beyond compromise. This is the essence of integrative bargaining.

The negotiation literature usually identifies two types of negotiation strategy (Fisher et al. 1999; Thompson 2005; Lewicki et al. 2006). Authors have coined a range of names for the first type: 'zero-sum'; 'win-lose'; 'competitive'; and 'distributive'. They typically refer to the second type of bargaining as: 'nonzero-sum'; 'win-win' or 'mutual gains'; 'collaborative' or 'integrative'. Differences between the two types can reflect different notions of interdependence. A distributive strategy is one where one party chooses to compete, at the expense of the other, for portions of a fixed resource, commonly called the 'negotiation pie'. In essence, in distributive negotiation, what one party gains from the pie, the other party loses. In contrast, when parties choose to engage in an integrative negotiation, they seek to work with the other party to find solutions that enable both parties to do well and achieve at least some of their main goals. Working together like this can allow the parties to 'expand the negotiation pie' before deciding how to divide it among themselves. Thus this approach is often called 'win-win' or 'collaborative' negotiation. This is the approach that the Howard government purported to support in pushing individual employees into AWAs.

Underlying the use of integrative negotiation are several elements that distinguish it from the choice to engage in distributive negotiation. Significantly, at least one party perceives that a relationship exists with the other party or desires that a relationship develop through the negotiation . Moreover, the con-

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

tinuing nature of that relationship is valued. This suggests that the two parties share an ongoing connection that has a past, present and/or future (Lewicki et al. 2006). It is important to reiterate that integrative negotiators continue to pursue their own individual, substantive interests — they do not abandon their own priorities. Integrative bargaining is not the same as compromising, even less conceding on core objectives. Rather, elements of the relationship offer the potential to jointly discover ways to meet the interests and needs of both parties in ways not accessible through distributive bargaining. In reality, most negotiations offer both integrative and distributive potential and choosing to be largely integrative means that, at some (late) point, the parties may still compete over an issue.

A particular type of ongoing relationship is an employment relationship underpinned by an individual contract of employment, either at common law or via an AWA. Yet, historical experience overwhelmingly suggests that the existence of this ongoing relationship does *not* generate integrative impulses in agreement making. On the contrary, the well recorded history of collective bargaining and the much less well known history of individual bargaining suggest a long tradition of distributive negotiation, particularly over questions such as pay levels and (paid) hours of work. Yet, one of the defining features of a choice to engage in thoroughly distributive negotiation is the assumption that the parties will probably not be meeting again, or that, for at least one of the parties, their relationship has little value, despite its being long-standing and ongoing.

The Howard government claimed that in championing AWAs through WorkChoices, it provided opportunity and encouragement to overturn traditions of distributive attitudes and behaviours in workplace relations. The problem is that, for large sections of the workforce, the government exacerbated structures of asymmetric interdependence in employment and at work, encouraging more distributive approaches from employers. There was nothing in WorkChoices or government policy that encouraged employers to increase the value they placed on their employment relationships.

In particularly tight labour markets — by region or occupation — supply constraints do increase levels of employer dependence and so encourage this type of shift in employer perspective, but the unevenness of these market dynamics just further widens the gap between differently advantaged sections of the workforce. Elsewhere, where labour costs are an important element of an employer's total costs or where employers are less dependent, this encourages employers to be very distributive in negotiations over pay levels and payment for working time. This more asymmetric interdependence manifests itself as employers' ability to impose 'agreements' on employees without any bargaining or to prevail in distributive negotiations.

Interestingly, the Howard government explicitly sought to redress this type of asymmetric interdependence, in case where it disadvantaged small businesses in their 'relationships' and 'bargaining' with large corporations. It amended the *Trade Practices Act 1974* to allow collective bargaining by small business and heavily promoted this option as a way of redressing power imbalances amongst organisations (ACCC 2007). On the other hand, it introduced WorkChoices to

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

remove protections against the power imbalances that employees faced in their relationships and bargaining with employers, and to exacerbate the deleterious effects of asymmetric interdependence in employment relationships.

Negotiation and the Question of Power

Clearly, the use of power is one of the most fundamental aspects of negotiations (Lawler 1992; Anderson & Thompson 2004). Negotiation scholars often define power as the capacity to influence others or affect their decision-making in ways favourable to you (Thompson 2005; Lewicki et al. 2006). Power is being able to get what you want from the other party. Yet, people have unequal access to negotiation power (Lawler 1992). Fisher (1983) points out that powerful negotiators generally have more assets or wealth, are more educated, have better or more secure jobs, and better social or business connections than do less powerful negotiators. One example of this power imbalance occurs when an individual employee is negotiating with his or her boss. In almost all cases, when the employee negotiates alone, the employer has more power. When the employee is part of a group (or other collective body), and particularly if represented by a union, then the power can shift and become more equal. Differences in power between negotiators can make it more difficult to attain integrative agreements (Lawler 1992; Mannix 1993; Donohue and Taylor 2007). When there are clear differences in power, negotiators tend to focus more on the distributive aspects of the negotiation, making integrative outcomes less likely.

In choosing to work towards integrative outcomes, the more powerful negotiator has to therefore *choose* to minimise the perceived power distance between the two parties (Anderson and Thompson 2004). This is a time-consuming and hence expensive process for employers engaged in individual bargaining. Hence most employers who chose AWAs were not interested in developing such valued individual relationships — rather, they used AWAs as a way of forcing unionism out of the workforce, increasing management control over employee behaviour and/or cutting costs (van Barneveld 2006). Presenting AWAs as a take-it-or-leave-it option to employees or potential employees, as WorkChoices allowed employers to do, was itself an aggressively distributive approach that only increased employee perceptions (and experience) of their own powerlessness.

Power in negotiation derives largely from two factors that are often linked. First, having a lower degree of dependence means having more options or better alternatives. This situation is encapsulated in the concept of having a stronger 'BATNA' (Best Alternative to the Negotiated Agreement) (Fisher et al. 1999). The second factor is the power that comes from effective use of a negotiation 'frame'.

According to Fisher et al. (1999), the BATNA is the best option you can turn to when you walk away from a negotiation, having failed to reach a settlement acceptable to you (Thompson 2005). Each side's BATNA, in a sense, sets its floor (or ceiling) for the negotiation (Fisher 1983). BATNAs reflect the nature of interdependence between negotiation parties. The more dependent a party, the weaker its BATNA. An employee's labour market position — via

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

skill, experience, networks, location and the like — can create very different BATNAs, depending on the prevailing situation. In a negotiation for increased pay in a favourable labour market for employees, an employee's BATNA could be to quit and find another job that pays more. In another situation, the best alternative may be to unionise so as to put a pay demand collectively. If this does not work, the BATNA for collective negotiations may, eventually, be to go on strike.

Prior to WorkChoices, individual employees had some expectation that their BATNA to an unwelcome AWA negotiation might be the existing relevant award or, sometimes, a collective agreement. WorkChoices removed that BATNA from most employees and spread this situation extensively to former state system employees. Individual employees facing AWAs therefore have weakened best alternatives, despite some 'fairness' mitigation via the 2007 Act.

The perceived strength or weakness of each party's BATNA will have a significant influence on how they negotiate and, indeed, how far a negotiation will progress. An employer who has the power benefit of having a number of highly dependent employees may not wish to spend much time and energy on an employment negotiation with each of them. Yet, if one party believes they have a weak BATNA, then that party will need to try very hard to keep the other party at the negotiating table to conclude an agreement, as failure to do so may appear worse than what is being negotiated.

BATNAs are also subject to change. An employee may have to negotiate without another employment option to turn to, yet a few months later, may have lined up a potential job. Such an employee has 'strengthened his/her BATNA. Employers too have this ability to strengthen their BATNAs, for example, by exploring options to outsource work, use labour hire or employ casual employees. How negotiators see the strength of their BATNA and hence their interdependence helps shape how they approach a negotiation in terms of what they ask for and the worst offer they will accept — their 'resistance point'. The resistance point is the last offer they will accept before walking away from a negotiation. It reflects the strength of an individual's BATNA, but terminating a negotiation and turning to a BATNA may also carry transaction costs. For example, in the case of an AWA, refusing or quitting a job may mean having to move to a different location or there may be emotional costs in leaving workmates and starting anew.

The second source of negotiation power is the construction of an effective negotiation 'frame'. It is a much more subtle exercise of power than the BATNA. Framing is a perceptual process, a subjective mechanism that people use to evaluate and make sense out of situations (including negotiations). Our choice of frame directs us to pursue or avoid subsequent actions. Framing can be a conscious activity or it occurs unconsciously. We can be aware (and self-aware) about framing or unaware of its occurrence. In either situation, during the process of framing, people select and isolate central issues to include in a particular picture, or frame, and exclude others (Neale et al. 1987; Levin et al. 1998; Keren 2005; Lewicki et al. 2006).

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

Effective planning for a negotiation normally includes conscious framing, or 'frame control', as negotiators deliberate over their own interests and priorities as well as strategies relative to the other party. Choosing what to exclude can be just as important as deciding what to put inside the frame. People will create different frames for the same negotiation, constructed from the elements that are important to them. There can be multiple frames used within a negotiation, depending on the issues and the parties involved. Having frame control facilitates a negotiator's influence or control of the negotiation agenda and the negotiation process and is therefore an important source of negotiation power. A mismatch of frames creates conflict within the negotiation itself, This is particularly evident in distributive negotiations when two parties feel as if they are talking at each other about two different issues. Such mismatches are, in themselves, entirely legitimate where the parties have genuinely opposed interests that generate different perspectives. Where the parties have both shared and opposing interests under negotiation, both may shift to other frames at different points during the negotiation process, depending on the content and process of the negotiation.

One of the main goals of a negotiation is to persuade the other party to accept, or 'walk into', your frame. Persuasion of this sort is called 'reframing'. Reframing the other party means that you have convinced them to see and accept the situation from your point of view. This makes it much more likely that they will accept what you are offering or demanding. If one party is not actively self-aware about their framing for a negotiation, they are more likely to suffer reframing by the party with frame control. Thus, actively self-aware framing is a crucial element in the effective planning and conduct of negotiation. Those who do not plan sufficiently may conclude a negotiation with suboptimal outcomes, or fail entirely (Ury 1993; Thompson 2005; Lewicki et al. 2006). Planning includes identifying the main goal of the negotiation, the best strategy or strategies, and the BATNA and resistance point. The negotiator uses these to create a target point and opening offer. Effective negotiation (integrative negotiation in particular) requires forecasting of the likely objectives of the other party, their priorities, negotiation approach and tactics. By thus 'putting yourself in the other party's shoes (Fisher et al. 1999; Lewicki et al. 2006), negotiators can more successfully engage in integrative bargaining.

An integrative negotiator displays a willingness to listen to the other side and cultivates lateral thinking that can allow for the uncovering of unexpected options to satisfy both parties. This can occur through 'unbundling' of claims to 'expand the pie' and then 'logrolling' on issues uncovered. These terms — in a context of trust, openness and honesty — signify much of what differentiates integrative from distributive bargaining. As Fisher et al. (1999) point out, integrative negotiators work hard at gaining their own substantive objectives while also working hard to maintain or build a mutually-fruitful relationship with the other party. When negotiators attempt to 'expand the pie' by 'unbundling', they break up a claim or issue into as many separate parts as possible. This increases the number of issues that the parties can negotiate over — thereby expanding the pie. It offers the opportunity for the parties to identify additional

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

interests and needs that they can use to craft the final outcome. For example, if an employee wishes to negotiate for higher pay, unbundling (and expanding the pie) may include — beyond the question of the total amount or percentage claimed — the starting date for the pay rise, whether it is to be backdated in whole or part, whether the pay increase will arrive in one amount or be staggered over time, whether it is linked to working hours, performance, training, seniority or qualifications, or changes to working patterns or responsibilities. Clearly, for such a negotiation to be more fully integrative, an employee would need to have a better sense of their employer's financial resources and the organisation's total remuneration structure than is usually the case. When integrative negotiators 'logroll', they trade off issues of less value to themselves in order to secure issues of greater value. As well, they work to accomplish the same logrolling tactic for the other party.

WorkChoices undermined unbundling and logrolling as the Minister had the power, unilaterally, to make *ad hoc* regulations specifying 'prohibited' bargaining matters. Once these regulations became current, the government's Workplace Authority had to 'remove any prohibited content from an agreement, even if the agreement has already been approved' (Riley and Sarina 2006: 349. See also Cooney 2006). This allowed the Minister 'to make up the rules' and 'to shift the goal posts', calling into question 'whether any registered workplace agreement will in fact represent the parties' own "work choices" ':

> In effect, this could mean that parties who have negotiated a five year agreement may later be informed that a number of elements that were essential to reaching such an agreement have now been removed, so that they are obliged to operate under an agreement that does not reflect the trade-offs that the parties initially agreed upon (Riley and Sarina 2006: 349).

Few employees have the opportunity to learn negotiation skills in a structured setting. Although we all negotiate different things in our lives every day, most employees have limited experience in employment or business negotiations. The negotiation literature uses the terms, 'naïve' or 'novice' negotiators, to describe such people (Thompson 1990). Very few people know that a negotiation has a framework with well-defined components and that there are different strategies available. Few understand that they need to plan carefully for a negotiation, starting with a very clear understanding of their BATNA, resistance point and how these can help them frame and structure their negotiation. In comparison, employers are 'expert' or 'experienced' negotiators (Thompson 1990) as they will have had much more relevant negotiation experience — whether with clients, suppliers or employees. They also have ready access to expert advice and even training through membership of an employer association. Employer association membership and use of consultants and employment lawyers are tax deductible business expenses. Even small employers have a great deal more resources and experience than individual employees. Larger employers with their own HRM units and in-house lawyers are much more advantaged.

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

Before the 1996 Act, union membership and widespread employee coverage under awards and collective agreements reduced many of these imbalances from employees, including most non-union employees. Yet, with the planned large-scale shift under WorkChoices to AWAs, inexperienced employees, these naïve negotiators, faced negotiating their AWAs with their employers who were much more expert negotiators. As well, unions could not financially or organizationally support millions of individual employees — most of whom were not union members — in their engagement on AWAs. As employers are far fewer than employees and have greater financial resources for paying their associations, lawyers or consultants for advice, this allowed employers to access advice, training and support undreamed of by individual employees.

Another way of thinking about this has to do with the important question of negotiation planning, assuming that an employer will allow any genuine bargaining. For example, an employer proposing AWAs to each of their 20 employees had, theoretically, 20 times more experience in designing and implementing an AWA than any one employee. The larger the firm, the more the expertise gap increases. One vital source of negotiation power is access to useful knowledge and time to process and use it. This is particularly vital for naïve negotiators. Secrecy provisions for AWAs under WorkChoices bound each individual employee to silence about the contents of their AWA. In the case of a firm with 20 employees on AWAs, theoretically each employee may only have known about their own AWA, contradicting the notion fundamental to integrative negotiation theory that free flow of information is highly desirable. On the other hand, the employer knew about all those 20 AWAs and could use that knowledge accordingly. While, in practice, employees may indeed have shared information on their AWAs, the design of the system itself undermined openness, trust and honesty as well as the ability of employees to properly plan. It also stymied the capacity for an employee to get relevant pay information from their own AWA negotiation process.

Further, under the 1996 Act, employers were obligated to provide employees (or potential ones) with the proposed AWA 14 days ahead of their intended day for signing it. They also had to take 'reasonable steps' to explain the meaning of the proposed agreement to the employee. WorkChoices reduced the notification period to seven days and allowed an employ to 'consent' to waive this period in the interests of speed. As well, the employer no longer needed to provide an explanation of the proposed AWA (Briggs and Cooper 2006; van Barneveld 2006). This weakened what little bargaining power employees retained, undermined openness, trust and honesty and encouraged a highly competitive take-it-or-leave-it attitude from employers. Faced with these changes, employees had little time or resources to plan properly even if there were to be a genuine rather than *faux* negotiation. Realistically, for most employees at the lower levels of the labour market, there was the choice of consent without bargaining or, as naïve negotiators, bargaining oblivion. How were they to approach this and how could they have understood what happened to them? Here, the concept of negotiation 'scripts' becomes very important.

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

Negotiation Scripts

A script describes events or behaviours, or sequences of them, appropriate for a particular context. The most important, defining characteristic of a script is that it is socially shared; people agree on the same essential action elements (Abelson 1981; Gioia and Poole 1984; O'Connor and Adams 1999). For example, there is a script for going to the movies. People can describe such a script, and are able to distinguish it from other similar scripts, such as going to a football match, or going out to dinner. These scripts will generally match in basic characteristics from person to person. According to research by O'Connor and Adams (1999), negotiations are also scripted activities and the term 'negotiation' will prompt particular scripts from memory.

We can acquire scripts directly and indirectly. Direct script acquisition occurs through real life experience or through role playing. Indirect script acquisition occurs via modelling, that is, watching others enact the script either live or through media (television or videos, for example). Indirect acquisition can also occur via communication with others, such as discussing how to act or behave with someone who is experienced in the activity, or by reading about appropriate behaviour, such as in a book of instructions. Generally, direct script acquisition has the greatest impact on script formation and retention.

O'Connor and Adams (1999) found that when naïve (or novice) negotiators anticipate a negotiation, they expect a sequence of behaviours they believe are appropriate for that negotiation. Most employees are naïve negotiators, especially for contract of employment negotiations. Novice negotiators — such as most employees entering an AWA — overwhelmingly agree about the actions that they consider to constitute a negotiation, as well as the temporal sequencing of those actions. Naïve negotiators, when characterising a script for a negotiation, created a script based on a distributive format with the following elements. The two parties have incompatible goals, they resolve negotiation issues sequentially, and behave competitively. These components that naïve negotiators deem important are those that comprise a distributive negotiation and are detrimental to formulating integrative agreements.

When an employee is told they will be 'negotiating' an AWA, there are several possible responses and the response repertoire can include both direct and indirect script acquisitions. Direct acquisition means the employee has engaged in similar negotiations in the past and can use these scripts for guidance. Employees without this experience can use indirect acquisition to create a script. Most commonly, a person may discuss the situation with a family member, friend or work colleague. In addition, the Howard government assiduously publicised AWAs in the media and assured the public that help was available for employees. An employee with access to the Internet could view, for example the webpage 'Tips for negotiating your workplace agreement' (Australian Government Workplace Authority 2007).

At first glance, the 'tips' appeared to foster integrative negotiation. In line with a standard script for an integrative negotiation and, under the heading 'What's in it for me?', the website told employees that an AWA was 'an opportunity' for employers and employees to reach an agreement that suited them

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

both. The word 'opportunity' generally indicates a favourable situation. However for many employees, the start of an AWA was a forced arrangement. Few, if any employees actively looked for the 'opportunity' to move to an AWA from a collective agreement or state award because the AWA regime offered fewer and lower employment standards and was considered the harbinger of harsher conditions. The website nevertheless continued for a short time with elements of a plausible integrative script, asking the reader to 'consider the other person's point of view' and 'prepare options' and, even, to bear in mind, 'What are the needs of the business?' The whole script provided by the website created a powerful negotiation frame in favour of the employer while framing the employee to concede his or her interests.

Next, the webpage counselled the reader to 'be realistic' about what they want from their AWA and to approach discussions with 'an open mind'. Taken together, these tips are *not* supportive of integrative negotiation where we would expect encouragement to an employee to 'be creative' while pursuing their own interests. Rather, the implication was that employees would make unrealistic demands on their employers, in the context of a fixed pie, and therefore needed to exercise greater self-monitoring and self-control. One of the fundamental questions when negotiating an employment contract is pay. Telling individual employees to 'be realistic' when negotiating an AWA represented an effort to persuade them, or frame them, to shift their resistance point away from their own interests, such as a certain percentage or absolute wage increase, to points closer to the interests of their employer. In the context of no award safety net — and hence a much weaker BATNA — it may well also have included acceptance of reduced pay.

This interpretation receives confirmation from the way the webpage also reminded the reader to consider: 'What do you want in your AWA?' and proceeded with the statement: 'Although more pay *may* be a legitimate request, you may have concerns other than money' [italics added]. This statement answers our previous query regarding what the employee needs to be realistic about. It sought to frame the reader to refrain from asking for a wage increase. Despite what the government suggested here, asking for more pay is always a legitimate request, particularly in a country where the economy has been robust, with corporate profits at record levels and consumer prices rising (Polygenis 2007; Polygenis et al. 2007).

The webpage then advised the reader to consider: 'What are the needs of the business?' and, in particular, 'Who can help with my work when I am absent?'. This was an odd question to ask of any individual employee when discussing making an employment contract, particularly if the employee was new to the business or only knew about part of the organisation they worked in. How could an AWA, as a contract of employment, bind this third imaginary party (who was to do the covering) into the terms and conditions of employment? It was more like a question that might come up in informal discussions with a manager in the course of an employment relationship. In the context of establishing an AWA, it sought to shift the responsibility for any concession gained

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

to that individual employee, transferring to the employee tasks that are standard managerial responsibilities.

However, consider this statement 'What are the needs of the business?' as a framing statement. It invited the employee to step into the frame of the employer, to consider, when making a legitimate request, that the employee take on the role of employer. It framed the employee to expect very little, to restrict their expectations to whatever seemed immediately available and convenient to the employer. It coached both employee and employer to view management activities as a fixed pie, uncreative and not open to problem-solving. The problem with this framing attempt was that it came from the federal government, and one that claimed to be assisting individual employees as naïve negotiators.

After having coached the employee to ask for little if anything and to expect to graciously concede to employer demands, the government's website then asked the employee to contemplate: 'What can you offer?'. Most importantly, the reader received advice to 'think about changes or improvement you can offer to cover the cost of the things you want.' This implied a lean work environment without anyone to cover for absent employees. Once again, this was a framing statement suggesting only a fixed pie was available and that anything the employee asked for, such as flexible hours or working at home had to be 'paid for' by that employee. What if the requests came at no cost or little cost to the employer? What if these options were trade-offs for other work issues? What if employees had the temerity to expect improvements in their working lives as their share of greater corporate and national productivity and prosperity? Why was the employee always expected to cover the costs of any improvements?

The website then instructed the reader to: 'Do your homework', in this case, to be aware of their current workplace pay and conditions — which, given that WorkChoices makes AWAs confidential, may be legally impossible. Employees then received admonishment to 'Be reasonable'. Together, these statements were condescending in their tone, mimicking the power-laden hierarchy of employer to employee. Yet, in the first sentence of this section the reader was told that: 'Negotiating your AWA should take place in an atmosphere of trust where everyone has the chance to express their views.' There are two points to consider. First, this statement described two of the most important elements in an integrative negotiation. Resolving the 'dilemmas' of trust and honesty (Lewicki et al. 2006) are essential to the integrative script. The foundations of an integrative strategy are establishing trust and acting honestly within the negotiation. Achieving this comes, in part, through both parties revealing information about their underlying interests. This webpage encouraged, or framed, its readers to act in an open, honest and trusting manner (Keren 2005). However, for integrative negotiation to be successful, both parties need to be open, honest and trusting. Otherwise, the less open or honest party can exploit the trust and openness of the other and, the great power imbalances in these negotiations encourage employers to behave in competitive ways.

The second point is that while an ideal negotiation will take place in an open, trusting atmosphere, this does not describe all — or even perhaps most — employment relationships. Many employees work in situations where being open and

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

honest could work against their main interests. The webpage gave no advice for employees in less-than-ideal work negotiation environments and did not countenance the possibility that this may occur. It provided a Pollyanna-like script that, given WorkChoices had removed almost all their regulatory or institutional BATNA options, left many employees even more defenceless. Under the command to 'Be reasonable', employees received the advice that 'An outcome where everyone feels they benefit is the best in the long term even if compromise is necessary in the short term.' This was a troubling sentence. First, the reader learnt that they should evaluate the negotiated outcome purely on subjective feelings rather than on substantive attainments and that they should be looking out for the feelings of their employer as well. This goes against basic negotiation principles where the advice is to 'separate the person from the problem' (Fisher et al. 1999), and again encouraged the employee to step into the employer frame. Given that WorkChoices robbed employees of unfair dismissal protections, it was also not clear what the 'long term' here meant for them. What appears clear though is that the short-term compromise meant that, in exchange for getting or keeping their job, the employee had to accept losses of entitlements from that legacy of rights that carried over from the award system.

Further, in negotiation theory (and practice), a compromise strategy is not the same as integrative bargaining. It assumes a fixed pie. As well, where there is asymmetric power, such as when negotiating AWAs, a script that leads an employee to compromise is a recipe for prioritising employer needs and power; a recipe for employees to concede. Once again, this webpage was framing its readers to adopt a strategy of conceding. Encouraging employees to adopt this strategy limited their ability to negotiate advantageous outcomes for themselves and further advantaged employers.

Additionally, the website provided the reader with 'Some negotiation tips'. These included useful actions that do fall under integrative negotiating planning and tactics and that work well when both parties engage in them as well. However, the website also admonished the reader not to argue. Under 'Don't argue', there was the warning: 'Remember, at the end of the day you are talking to your employer. Be clear about what you want but also consider your ongoing work relationship in the way you approach talks.' The phrase, 'at the end of the day', signals what is believed to be the most important fact of a situation (Cambridge Dictionaries Online 2007). In this situation it was: you are talking to your employer. The frame was for the employee to understand that they were not approaching the negotiation as an equal, but as subservient to their employer. The instructions were to keep the employee in his/her place. As the employer received identically worded webpage advice, both parties received the same frame: one that legitimated the great disparities in dependence and power between them and that then coached them to approach an AWA 'negotiation' accordingly.

Finally, the reader received advice to: 'take your time', when, as we know, WorkChoices greatly restricted employee rights to information and preparation time. For the employer, there may have been many similar employee 'negotiations', but for the employee, a naïve negotiator, there was only one. It deeply

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

concerned their working life and yet they had a minimum seven days to prepare and obtain advice, if indeed they had not 'consented' to waive even this.

How can we explain the apparent purpose of this webpage? First, there was the overall impression, or framing, of the information for the naïve negotiator facing an AWA. It attempted to frame employees to accept potentially unfavourable employment and work conditions. Different framing strategies were evident on the webpage, but one of the most significant frames was one that meshed financial and organisational to focus the employee into considering the needs of an imaginary, archetypal employer. Underlying the advice provided was a frame that, in general, businesses were struggling and that the employer could (legitimately) barely cope with the organisational demands of the business. In this frame, each employee was negotiating their AWA with an employer whose business was teetering on the brink of insolvency, one that could not afford any real concessions to employees and one where the employee (or anyone else) could not expect the employer to manage their way through inconveniences that such concessions might have created. It was a frame of employer powerlessness and vulnerability in the face of external change.

This frame was so pervasive that it coached employees to restrict their demands but also to be realistic about suffering losses of existing entitlements. The webpage invited the reader to step into this financial frame at the start, when advising 'realistic' expectations and that requests for more pay were, in fact, not inherently legitimate. It continued by directing the employee to couch any requests in terms of off-sets — organisational as well as financial — that they could provide to the employer in advance. Not only did this managerial frame persuade the employee to accept the situation from the employer's point of view, at the same time it discouraged the employee from focusing on his or her own employment and other needs.

The second frame was a managerial/hierarchical frame that, on the contrary, stressed the uncontested power and legitimate dominance of the employer in the employment relationship (Fiske 1992 and 1993; Keltner et al. 2003). It coached the employee to be very aware of their powerlessness before the employer, reinforcing a subservient role under the 'don't argue' heading. Thus, one frame portrayed the employer as powerless to deal with challenges facing the organisation and the other had that same employer as omnipotent within the employment relationship. What could an employee, as naïve negotiator, make of this framing while considering an AWA? The answer returns us to the discussion of scripts and strategies used when negotiating. As mentioned previously, novice negotiators instinctively tend to use a distributive strategy when approaching a negotiation. This strategy, while often very limiting, at least explicitly addresses the substantive needs of the individual negotiator. An integrative strategy can be far more sophisticated and rewarding if it successfully addresses the underlying interests and needs of both parties. On the Howard government's Workplace Authority webpage, the style of information given appears, at least superficially, to support an integrative strategy. However, closer inspection of the webpage as a whole reveals that the Howard government chose to coach millions of individual employees to willingly embrace a strategy of concession to their employers.

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

Conclusion: What did Individual Bargaining Mean under WorkChoices?

The 1996 and 2005 Acts stripped awards of their attractions to employees and gave employers almost all the initiative and leverage in determining the timing and type of agreements they may have wanted (Considine and Buchanan 2007). In these conditions, it was likely that rapidly increasing numbers of AWAs under WorkChoices would soon turn into a flood, mitigated only by the administrative inconvenience, to employers, that the 2007 Act presented. What conclusions flow from our analyses?

It is clear that the design of WorkChoices further increased the power of employers — and government — in the AWA-making process and in the employment relationship that the AWA created. Individual employees had almost no protections or support when facing an AWA and little hope of gaining an alternative form of agreement unless they took collective action or moved to a new employer. The whole fabric of WorkChoices, by reducing the pre-existing safety nets to a charade, intensified asymmetric relations in the labour market, particularly as they pertained to employees in less advantaged circumstances.

Simply put, WorkChoices took from an employee — as an individual entering an AWA — almost any chance of a BATNA related to bargaining over that job. It provided nothing to support employees who may have wished to bargain. On the contrary, its effects made genuine bargaining much less widely available by strengthening the hand of the more aggressively distributive employer seeking cost-savings and greater control in the workplace at the expense of their employees. They were able to achieve this by making acceptance of a pattern AWA a condition for future or further employment. Where bargaining occurred, employees with less labour market power — the main focus of our article — were most likely to face employer bargaining that was highly distributive. This reflected the connection between strongly asymmetrical interdependence and bargaining strategy evident in the negotiation literature. Without a viable BATNA — apart from finding another employer — and a plausible resistance point, an employee was likely to face having to make repeated concessions irrespective of the financial health of the organization and higher rewards flowing to its senior management. In fact, the employee may have preferred not to bargain at all but had no choice given the impending losses from the AWA. To return to the Workplace Authority website's admonition, at the end of the day, an individual employee was indeed talking to their employer but increasingly in circumstances that created what Dabscheck (2006: 15) has called a 'chilling effect' on bargaining.

Nevertheless, in its WorkChoices experiment with AWA-making, the Howard government did not limit itself to providing employers with substantially greater legal, institutional, resource and personal power at their employees' expense. Beyond depriving employees of their most useful BATNA options, it also sought to further disempower them through actively reframing their approach to an AWA negotiation. In doing this, it took advantage of many of those employees being naïve negotiators who — short of experience, resources and knowledge regarding negotiating an AWA — may have taken government advice at face value and with some goodwill. Our analysis shows that the gov-

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

ernment was engaged in misrepresenting the notion of an AWA negotiation on its WorkChoices website, allegedly dedicated to informing and coaching employees facing an AWA. Superficially, the government purported to advocate an integrative style of negotiation — one that the website held out as offering to employees a range of concessions otherwise unobtainable. On closer examination, the clear intent of the website was to frame the employee reader to willingly adopt a strategy through which they consistently conceded on their interests and desires to accommodate those of the employer. Adoption of this strategy and its script would almost inevitably have resulted in an erosion of an employee's already compromised employment and working conditions.

However, if all had gone to the website's plan, the employee would have lost but would still have felt as if they had won. This was because the frame completely robbed them of any real, material expectations for making gains from the negotiation. On the contrary, it also conditioned them to accept reduced standards now — for some nebulous future gains — and to help the employer with the business. This was a particularly manipulative approach to people already deprived of support, knowledge and labour market power. So what might this combination of dispossession — of BATNA and a viable bargaining frame — have meant for, in particular, the more disadvantaged sections of the labour market engaged in AWAs?

One way to think about the implications of what our analysis suggests is to briefly digress to an analogous experience. The WorkChoices AWA model largely followed Western Australia (state) legislation of 1993 and its individual Workplace Agreements (WPAs) 'that operated outside the jurisdiction of the WA Industrial Relations Commission … and were to replace the relevant state award' (Todd et al. 2006: 509). Underpinning WPAs were ten minimum entitlements — double the five under WorkChoices. According to Todd et al. (2006: 509–10), labour-intensive service industries, in particular, used pattern-style WPAs to reduce costs by widening standard working hours and removing penalty rates, loadings and sundries related to the work. Employee needs or wants for flexibility were of little or no concern to these employers. Overall, those employees shifted onto WPAs were worse off than under their previous award. In sectors like contract cleaning, access to WPAs allowed some employers to drive down their tender prices and thus force competitors to match their downward pressure on wage costs. Furthermore, as new small business owners started up under this greatly reduced employee-protection regime, many appeared to have decided they had no regulatory obligations to meet at all. Such was the level of exploitation WPAs encouraged that even some employer associations advised the state government to strengthen protection of employees under the No Disadvantage Test by basing it on the award rather than the ten statutory minima (Todd et al. 2006: 510–11). That such a level of exploitation occurred was a telling warning of the likely effects, on employees, of AWAs and individual bargaining under WorkChoices.

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

Notes

1. Whereas, there were also awards that set minimum that were also maximum 'paid' rates, these were much less common.

References

AAP (2007) 'Low-paid workers unhappy on AWAs: Study', *Sydney Morning Herald*, 22 November, available http://www.smh.com.au/news/National/Lowpaid-workers-unhappy-on-AWAs-study/2007/11/22/1195321924656.html [accessed 27 November 2007].

Abelson, R. (1981) 'Psychological status of the script concept', *American Psychologist*, 36, pp. 715–729.

ACCC (Australian Competition and Consumer Commission) (2007) Guide to collective bargaining notifications, Commonwealth of Australia, Canberra, available http://www.accc.gov.au/content/index.phtml/itemId/776299/fromItemId/776294 [accessed 11 November 2007].

AHRI (Australian Human Resources Institute) (2007) *WorkChoices: Its impact Within Australian Workplaces. Survey Findings*, 23 August, AHRI, Melbourne.

AIRC (Australian Industrial Relations Commission) (2007) Village Cinemas Australia and Carter, [2007] *AIRCFB35*, 15 January.

Anderson, C. and Thompson, L. (2004) 'Affect from the top down: How powerful individuals' positive affect shapes negotiations', *Organizational Behavior and Human Decision Processes*, 95(2), pp. 125–139.

Australian Government (2005) *WorkChoices: A Simpler, Fairer, National Workplace Relations System for Australia: Overview*, available: https://www.workchoices.gov.au/NR/rdonlyres/6F58B4CC-C8E5-4D53-B489-E0B78F844277/0/WorkChoices_Overview_Statement.pdf [Accessed 11 November 2007].

Australian Government Workplace Authority (2007) Tips for negotiating your workplace agreement, available: http://www.oea.gov.au/graphics.asp?showdoc=/employers/tips_for_negotiating_agreements.asp [accessed 11 November 2007].

Bacharach, S. and Lawler, E. (1981) 'Power and tactics in bargaining', *Industrial and Labor Relations Review*, 32(2), pp. 219–233.

Briggs, C. and Cooper, R. (2006) 'Between individualism and collectivism? Why employers choose non-union collective agreements', *Labour & Industry*, 17(2), pp. 1–23.

Cambridge Dictionaries Online (2007) *Cambridge International Dictionary of Idioms,* available http://dictionary.cambridge.org/define.asp?key=end*2+0&dict=I [accessed 20 November 2007].

Clegg, H. (1976) *Trade Unions Under Collective Bargaining: A Theory Based on Comparisons of Six Countries*, Basil Blackwell, Oxford.

Considine, G. and Buchanan, J. (2007) *Workplace Industrial Relations on the Eve of WorkChoices: A report on a Survey of Employers in Queensland, NSW and Victoria*, Workplace Research Centre, University of Sydney, September.

Cooney, S. (2006) 'Command and control in the workplace: Agreement-making under work choices', *Economic and Labour Relations Review*, 16(2), pp. 147–164.

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

Dabscheck, B. (1993) 'Industrial relations and theories of interest group regulation', in R.J. Adams and N.M. Melz (eds), *Industrial Relations Theory: Its Nature, Scope and Pedagogy*, IMLR Press/Rutgers University, Metuchen NJ, pp. 227–254.

Dabscheck, B. (2006) 'The contract regulation club', *Economic and Labour Relations Review*, 16(2), pp. 3–24.

Donohue, W. and Taylor, P. (2007) 'Role effects in negotiation: The one-down phenomenon', *Negotiation Journal*, 23(3), pp. 307–331.

Fenwick, C. (2006) 'How low can you go? Minimum working conditions under Australia's new labour laws', *Economic and Labour Relations Review*, 16(2), pp. 85–126.

Fisher, R. (1983) 'Negotiating power', *American Behavioral Scientist*, 27(2), pp. 149–166.

Fisher, R. Ury, W. and Patton, B. (1999) *Getting to Yes*. 2nd ed., Random House, Great Britain.

Fiske, A. (1992) 'The four elementary forms of sociality: Framework for a unified theory of social relations', *Psychological Review,* 99(4), pp. 689–723.

Fiske, S. (1993) 'Controlling other people', *American Psychologist*, 48(6), pp. 621–628.

Flanders, A. (1975) *Management and Unions: The Theory and Reform of Industrial Relations*, Faber and Faber, London.

Forsyth, A. and Sutherland, C. (2006) 'From "unchartered seas" to "stormy waters": How will trade unions fare under the Work Choices legislation?', *Economic and Labour Relations Review*, 16(2), pp. 215–236.

Gardner, M. and Palmer, G. (1997) *Employment Relations: Industrial Relations and Human Resource Management in Australia 2nd ed.*, Macmillan, Melbourne.

Gioia, D. and Poole, P. (1984) 'Scripts in organizational behavior', *Academy of Management Review*, 9(3), pp. 449–459.

Hancock , K. J. (1985) *Report of the Hancock Committee of Review: Australian Industrial Relations Law and Systems, Volume Two*, Australian Government Printing Service, Canberra.

Hancock, K. J. and Richardson S. (2004) 'Economic and social effects', in J. Isaac and S. Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, pp. 139–206.

Hockey, J. (2007) 'Workplace relations amendment (a stronger safety net) bill 2007. Second reading speech', *Official Hansard. House of Representatives Parliamentary Debates*, Commonwealth of Australia, Canberra, 29 May.

Keltner, D., Gruenfeld, D. and Anderson, C. (2003) 'Power, approach and inhibition', *Psychological Review*, 110(2), pp. 265–284.

Keren, G. (2005) 'Framing, intentions, and trust-choice incompatibility', *Organizational Behavior and Human Decision Processes*, 103, pp. 238–255.

King, J. E. (1990) *Labour Economics: An Australian Perspective*, Macmillan, Melbourne.

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

Kirby, M. and Creighton, B. (2004) 'The law of conciliation and arbitration', in J. Isaac and S. Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, pp. 98–138.

ILO (International Labour Organisation) (2007) 'Freedom of association cases', *Documents Available in ILOLEX for Australia*, ILO, Geneva, available: http://www.ilo.org/ilolex/cgi-lex/countrylist.pl?country=Australia [accessed 18 November 2007].

Lawler, E. (1992) 'Power Processes in Bargaining', *Sociological Quarterly*, 33(1), pp. 17–34.

Lee, S. (2006) 'Labour market institutions under threat? The case of working time', *Labour & Industry*, 17(2), pp. 41–56.

Levin, I., Schneider, S., Gaeth, G. (1998) 'All frames are not created equal: A typology and critical analysis of framing effects', *Organizational Behavior and Human Decision Processes*, 76(2), pp. 149–188.

Lewicki, R., Saunders, D. and Barry, B. (2006) *Negotiation*, 5th ed., McGraw Hill/Irwin, Boston.

Mannix, E. (1993) 'Organizations as resource dilemmas: The effects of power balance on coalition formation in small groups', *Organizational Behavior and Human Decision Processes*, 95, pp. 1–22.

Mitchell, R., Campbell, R., Barnes, A., Bicknell, E., Creighton, K., Fetter, J. and Korman, S. (2005) 'What's going on with the "No Disadvantage Test"? An analysis of outcomes and processes under the *Workplace Relations Act 1996* (Cth.)', *Journal of Industrial Relations*, 47(4), pp. 393–423.

Neale, M., Huber, V. and Northcraft, G. (1987) 'The framing of negotiations: Contextual versus task frames', *Organizational Behavior and Human Decision Processes*, 39, pp. 228–241.

Niland, J. (1978) *Collective Bargaining and Compulsory Arbitration in Australia*, University of New South Wales Press, Kensington.

Norris, K (1992) 'The wages structure: Does arbitration make any difference?' in J. E. King (ed), *Readings in Australian Labour Economics*, Macmillan, Melbourne, pp. 105–135.

Norris, K. (1993) *The Economics of Australian Labour Markets,* 3rd ed., Longman Cheshire, Melbourne.

O'Connor K. and Adams, A. (1999) 'What novices think about negotiation: A content analysis of scripts', *Negotiation Journal*, 15(2), pp. 135–147.

Perlman, M. (1954) *Judges in Industry*, Melbourne University Press, Melbourne.

Polygenis, R. (2007) Economics update: Australian Q3 2007 CPI: Accelerating core inflation to force RBA's hand, ANZ Bank, available http://www.anz.com.au/aus/Corporate/EcoComm/AustEconUpdates.asp [accessed 28 November 2007].

Polygenis, R., Rabinov, A., Yuen, W., Beaini, F., and Rodrigues, M. (2007) *Economic update: Australian GDP Q2 2007: Full steam ahead*, ANZ Bank, available: http://www.anz.com.au/aus/Corporate/EcoComm/AustEconUpdates.asp [accessed 28 November 2007].

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press

Riley, J. and Sarina, T. (2006) 'Industrial legislation in 2005', *Journal of Industrial Relations*, 48(3), pp. 341–356.

Rollins, A. (2007) 'Employers win wider power to sack', *Australian Financial Review*, 16 January, Factiva Document AFNR000020070331e31g003e8 [accessed 27 November 2007].

Stewart, A. and Williams, G. (2007) *Work Choices: What the High Court Said*, Federation Press, Sydney.

Strauss, G. (1988) 'Australian labor relations through American eyes', *Industrial Relations*, 27(2), pp. 131–148.

Thompson, L. (2005) *The Mind and Heart of the Negotiator*, 3rd ed., Prentice Hall, New Jersey.

Todd, P., Caspersz, D. and Sutherland, M. (2006) 'Employers' choices in workplace regulation', *Journal of Industrial Relations*, 48(4), pp. 507–522.

Ury, W. (1993) *Getting Past No*, (Revised Edition) Bantam Books, New York.

van Barneveld, K. (2006) 'Australian workplace agreements under WorkChoices', *Economic and Labour Relations Review*, 16(2), pp. 165–192.

Westcott, M., Baird, M. and Cooper, R. (2006) 'Re-working work: Dependency and choice in the employment relationship', *Labour & Industry*, 17(1), pp. 5–17.

Workforce (2006) 1541, 2 June.

Workforce (2007) 1612, 16 November.

https://doi.org/10.1177/103530460701800107 Published online by Cambridge University Press