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WORKCHOICES:
MYTH-MAKING AT WORK

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On 26 May this year, an outline of the Howard Government's plans for a new industrial relations, sub-titled 'a plan for a modern workplace', was released. Between then and 9 October when the 'simpler, national workplace relations system', badged as '*WorkChoices*', was announced, there was much debate about the policy. Key questions remain. What will be the impact of this legislation? Will it achieve its stated aims of enhancing productivity and wealth as well as assisting in balancing work and family? Will it be equitable? Will it allow employees real choice in the setting of their wages and conditions?

Understanding these aspects of industrial relations policy has never been a simple matter. Nor, more importantly, is it a simple matter to theorise, explain and demonstrate the connections between industrial relations legislation and specific outcomes, be they changes in wages and profits, productivity, equity or the nature of work itself. Many of the arguments put for change – by the Government itself, employer associations and any number of editorialists and columnists – by-pass these difficulties. They often rely on anecdote and assertion; they frequently ignore the role played by non-legislative factors (such as changes in the economy itself and the structure of labour markets) in reshaping industrial relations outcomes; they fail to demonstrate *exactly* how changes in the regulation of work, that is, in forms of bargaining, affect productivity, wages growth and so on.

This paper provides an overview of recent research which examines what we do know about the impact of legislative change under the Howard Government thus far in order to speculate with some degree of confidence about where this new set of changes might take us.

The Government and the 'Modern Workplace'

The *WorkChoices* proposals build on, but will ultimately go far beyond, the changes made under the *Workplace Relations Act* of 1996. That Act was the first piece of national legislation to introduce individual contracts (Australian Workplace Agreements, or AWAs). It encouraged collective, non-union agreements (known as 170LKs after the relevant section of the Act), while putting prohibitions around union activity, limiting the scope of awards, the traditional regulatory instruments, and confining the powers of the key arbitral body, the Australian Industrial Relations Commission (AIRC).

The key proposals now are:

- The introduction of one, national industrial relations system, with the corporations power in the Constitution being used to overcome the limitations on the Commonwealth and, therefore, States' rights in industrial relations;
- The removal from awards and inclusion in legislation of four minimum standards to be known as 'Australian Fair Standards'; these will cover annual leave; sick leave; unpaid parental leave (including maternity leave); and maximum working hours.
- The 'No Disadvantage Test' for measuring agreements against awards to be replaced by the 'Australian Fair Standards'.
- The establishment of a 'Fair Pay Commission', to set a minimum wage but at intervals not known.
- The reduction, therefore, in the total number, now twenty, of allowable matters, thus limiting the arbitration coverage of the Australian Industrial Relations Commission. The number of matters remains unclear, with an 'award review process' commencing now.

- Limiting the rights of unions to organise and to bargain on behalf of their members; limiting access to worksites; and imposing further constraints on industrial action.
- Promoting and facilitating the use of Australian Workplace Agreements (AWAs) and the use of individual bargaining.
- Unfair dismissal not applicable to companies with fewer than 100 employees.

Before going on to assess the likely impact of these changes, we should pause to ask just how thoroughgoing these proposals are. Government spokespeople tend to have a bet each-way on this. They reassure sceptics that the new laws will merely continue the trend begun with Labor's push for enterprise bargaining. But they also tell their supporters that it is the most dramatic change in national labour law for a century. We incline to the latter view. The reason, which we can only discuss briefly here, lies partly in terminology: that popular word 'deregulation' conflates two quite distinct processes and disguises others. (For a recent attempt to assess policy in these terms, see Isaac & Lansbury eds, 2005).

Researchers have long argued that terms like deregulation fail to describe, let alone explain, change. Over a decade ago, Buchanan and Callus published what remains the definitive article on the misuse of the term deregulation. They argued that the word was unhelpful because workplaces and industrial relations are necessarily regulated in some way or another. The only question is '*how* to regulate the labour market' (1993: 521, original emphasis). That word disguises the processes and power at work in industrial relations.

Buchanan and Callus drew on the work of Flanders to show that there are two types of rules governing work: external and internal (1975: 90). External regulation is in some way underwritten by 'society' and its norms, and has been primarily driven by employees and their organisations seeking to develop common standards (1975: 90-91), but also, as Buchanan and Callus point out, by the state (1993: 520). Internal regulation arises from workplace-specific actions by employees and unions too, but in this case the main driver has been management seeking to control labour through changes in work organisation and management strategy (Flanders, 1975: 91-92). It is plain, as much research shows, that

since 1996 there has been a shift from formal, external regulation towards internal regulation, that is to say, towards enhanced managerial control.

Adding to this – and returning to the question about the ‘newness’ of the current proposals for change – we would say that the word deregulation also conflates two problems: first, the scale at which industrial relations actually works; second, the agents involved. Under Labor’s Accord there began a process of *decentralisation* from national or industry standards to the enterprise. The great change since 1996 has been to *de-collectivise* industrial relations, circumscribing the role of unions as agents of collective bargaining (Cooper, 2005). The 1996 legislation and the new proposals are a thoroughgoing break from the past because under the guise of deregulation they decentralise *and* de-collectivise the regulation of work. Furthermore, although the Government likes to talk of ‘updating’ and ‘unifying’ industrial relations laws, what it really seeks to do is all but replace the traditional *arbitral* laws with something entirely different, based on the *corporation* powers in the Constitution. The use of these latter powers can only lead to the subjugation of employee rights to those of the corporation (for a full discussion, see McCallum, 2005).

If we think in terms, then, of re-regulation and degrees of centralisation and collectivism, we are better able to appreciate changes over time and impacts of legislative change. On the other hand, the language in which Government policy is constructed is more than spin; it is positively Orwellian.

Processes: Bargaining and Choice

The Government claims that – in its terms – deregulation ‘frees up’ the labour market and leads to measurable economic benefits. We examine these claims in the next section but first we look at how changes in bargaining processes themselves have played out in recent years. We do so because of the argument that the *Workplace Relations Act* allows employee choice; employee rights at work, we are told, are guaranteed under that Act, as they will be under *WorkChoices*.

The evidence thus far points to quite the opposite. When the scope of awards was narrowed, as under the Act (from any number of clauses to a maximum of twenty 'allowable matters'), a regulatory vacuum necessarily arose (Bray & Waring, 2005). How is it filled? The answer depends of course on that question of agency, of who is involved in bargaining and representation, and thus what role unions and tribunals play. For employees solely under awards, any reduction in the scope of awards necessarily enhanced management authority; there is simply no evidence that those matters came up for negotiation. They became matters of managerial discretion. Even where collective bargaining has survived, many issues once covered by bargaining have not survived the transition to enterprise agreements (Barry & Waring, 1999; Ostenfeld & Lewer, 2003; Bray & Waring 2005).

Under AWAs or common law individual contracts, most employees have not been genuinely *bargaining* with their employers about the content of agreements. The word 'bargaining' is another misnomer because these contracts are typically 'take it or leave it'; they are 'pattern contracts' unilaterally developed by employers. The rise of AWAs therefore really 'amounts to an increase in managerial decision making within the workplace' (Bray & Waring 2005; see also Bickley *et al*, 1999).

Despite claims that employees can exercise choice and that the legislation and the proposals do not constrain collective bargaining, there is, under Commonwealth law, no guarantee that collective bargaining will occur simply because employees want it. Although many proponents of change argue that Australian workplaces are 'over-regulated', there are conspicuous holes in the legal framework. Unlike other nations with decentralised bargaining systems, Australia has no national laws designed to guarantee employees' rights to bargain collectively. Neither the *Workplace Relations Act* nor *WorkChoices* requires 'bargaining in good faith'. Collective bargaining *is* important: it allows workers to negotiate their terms and conditions of employment on a more equal footing with their employer and it makes a real difference to the working lives of employees.

For its part, the *Workplace Relations Act* is based on the principle that individual and collective agreements should be treated equally with no preference for either. The Government says it wishes to continue in this

vein. This set of options sounds even-handed but employers who wish to do so can readily frustrate the preference of their employees for collective representation. In the absence of legal processes to direct employers to respect the wishes of their employees to bargain collectively, there is little that employees without bargaining power can do.

There are two loopholes in employee protection. The first is 'take-it-or-leave-it AWAs'; that is, where an AWA is a pre-condition of employment (Barton, 2002; Briggs, 2005). The second is 'AWA Lockouts'. Employers are allowed to prevent their employees from working in order to force them into signing an individual agreement – unheard of in other OECD countries (Briggs, 2005; Briggs *et al*, 2005). How this constitutes a real choice is something open to question.

Although the 1996 Act affirms the right of individuals to belong to a union (or not to), the judicial authorities have developed constructions of the Act which empty these provisions of effective meaning. Typically, the Federal Court has separated membership of a union from the activities of a union. Central to these activities, of course, is collective bargaining. Freedom-of-association clauses have been rendered almost meaningless in the absence of obligations on employers to recognise collective bargaining (Coulthard, 2001; Noakes & Cardell-Rae, 2001; Ellem, 2004; Quinn, 2004).

In short, we have, since 1996 a story of the rise of managerial prerogative and the fall of collective bargaining. In effect, as opposed to rhetoric, bargaining choices and a voice at work have been constrained by the *Workplace Relations Act* and judicial interpretations of it. Further limits on union action and pattern bargaining (many contained in the *Better Bargaining Bill*, passed by the House of Representatives in September 2005) can only enhance managerial prerogative until forms of collective action find ways to subvert the intentions of policy-makers.

Outcomes: Equity and Productivity

If we are right about what has happened under the processes of decentralisation and decollectivisation, then what does this mean for

fairness and efficiency? Are there benefits in the outcomes which override our concerns about the processes? Once again, we can show that there are major flaws in the arguments of the supporters of the *Workplace Relations Act* and, by extension, of the boosters of the plans for further change. We will summarise the evidence in three of the most important areas of contemporary debate: the impacts on women and families; the link between individual contracting and productivity; the implications for income distribution.

(a) Women and Families

Across all aspects of women, work and family policies, the Government's approach appears to be riddled with contradiction. In part this stems from a desire to increase birth rates and female labour market participation at once. This problem becomes all but insoluble if a Government is unable or unwilling to address the cognate issues of paid maternity leave, extended parental leave arrangements and childcare provision (Baird, 2004; Bourke & Russell, 2005). There are many assertions that employers will recognise the worth of female employees and come up with imaginative and 'flexible' package for them. There are, likewise, claims that individual contracts can deliver flexibility for women to balance 'work and family'. Yet, study after study shows that neither AWAs nor enterprise agreements have delivered any significant, across-the-board improvements in paid maternity leave, a core component in any suite of work and family policies. For example, just 10 per cent of enterprise agreements and only 7 per cent of AWAs agreements refer to paid maternity leave (Baird, 2005). And it is the lower paid and those in female dominated industries who are least likely to have access to paid maternity leave and associated work and family entitlements (Baird *et al*, 2002; see also Watts & Mitchell, 2004; HREOC, 2005). It is, to say the least, unclear how the proposed changes would address these problems. In fact, we believe that, for the majority of female employees in a majority of workplaces, they will exacerbate those problems.

Not only do the proposals fail to address the issue of labour market shortages, they are more than likely to add to the *disincentives* for women to participate in paid work. They certainly do nothing to facilitate

women's access to full-time employment (Baird & Todd, 2005). Since 1996, there has been no progress at the national scale in dealing with the problems of lower pay, fewer entitlements and greater job insecurity which characterise female employment, although there are some exceptions in the State jurisdictions (see Todd & Eveline, 2004).

As to wages, this is one of the most closely researched aspects of recent industrial relations (Whitehouse, 2001; Whitehouse & Frino, 2003; Preston, 2003; Smith & Ewer, 2005). If we simply concentrate on the experience of women and men under the same regulatory instrument, registered individual agreements, we find that in 2004 women were earning an average of \$20.00 per hour compared with their male counterparts who were earning \$25.10. This gap in men's and women's average hourly earnings under individual agreements increased from 12.7 per cent in 2002 to 20.3 per cent in 2004. While men's average hourly rates had increased from \$23.70 to \$25.10, women's had actually decreased from \$20.70 to \$20.00 (Baird & Todd, 2005). Against this history, the prospects for decreasing the gender pay gap under the proposed changes appear very bleak. This is especially the case as the proposals are unclear about the maintenance of pay equity. It is certainly not the remit of the Fair Pay Commission.

(b) Individual Contracting and Productivity

Productivity is an equally contentious area. The Government's claim that individual contracts deliver higher productivity has been one of the central arguments used to support the case for further 'reform' of industrial relations laws. It is a highly questionable claim. Indeed, it is the clearest example of the muddy thinking that marks so much of what is said about industrial relations policy.

It must be recognised at the outset – as few people seem to – that productivity is difficult to measure and that labour is just one of the factors in determining it. It must also be said that linking changes in productivity with changes in labour regulation, be it at the organisational, industry or national scale, is no simple matter. Nonetheless, we are assured that it is all cut-and-dried. AWAs can boost productivity, says

the Business Council of Australia. They provide 'higher productivity, better pay and flexible working conditions', says the Australian Chamber of Commerce and Industry. The government body regulating AWAs, the Office of the Employment Advocate, also fearlessly champions them: 'Employers! Achieve more for your business with AWAs' (these examples are cited in Peetz, 2005).

How can this debate be approached? One way is to compare, as Peetz has done, once like countries, Australia and New Zealand, over time under changing regimes of labour regulation. Between 1991 and 1996, New Zealand's government drove a highly individualised set of arrangements after abolishing arbitration and awards, while in Australia the Accord favoured collectivism and union-based enterprise bargaining. There seems to have been *no* impact on productivity in New Zealand (Peetz, 2005; for detail, see Easton, 1997; Rasmussen & Deeks, 1997; Dalziel, 2002). In Australia, productivity *rose*; all this after the two countries had had similar productivity paths in the previous decade. Australian productivity growth increased through the mid-1990s but declined *after* the introduction of the *Workplace Relations Act* (Peetz, 2005).

The arguments about the links between individual contracting and productivity within particular organizations rely in part on assumptions about behaviour. Here too there is a massive literature and scores of studies designed in this case to examine whether individual arrangements enhance employee commitment. The problem for those running the pro-productivity arguments is that numerous studies show that company commitment is higher amongst people also committed to a trade union. One detailed examination of businesses over time showed that productivity levels in firms with individual contracts were 4 to 10 per cent higher than those with award-only coverage —so far, so good for the Government. However, in companies with registered collective agreements, productivity was also higher than in those with awards only; in this case the gap was 5 to 9 per cent. And where union membership was high, firms were 5 to 7 per cent more productive than in firms without a union presence (Tseng & Wooden, 2001; Peetz, 2005).

The most comprehensive Australian studies into this matter have been undertaken by Peetz. He concludes that 'in particular workplaces, the overall data do not support the claim that individual contracts

substantially and inherently enhance productivity' (2005: 17). What does happen, especially in the services sector, is that so-called productivity changes boost profits. As Peetz says:

There is no gain in the number of meals served per restaurant employee by abolishing their penalty rates. All that happens in that situation is that the wage cost per meal has gone down, and profits go up (and restaurant workers' incomes go down), even though productivity is unchanged (2005: 20-21).

(c) Income Distribution

This line of inquiry leads to some consideration of what might happen to income distribution. Evidence from Australian Bureau of Statistics income data since the mid-1980s, when the shift from awards to enterprise agreements began, reveals growing income inequality. Full-time workers as a whole, except those under 25 years of age, have experienced greater wage disparities.

Most researchers agree that, for full-time employees, earnings inequality has increased since the mid-1970s (Borland, 1999). Saunders' work, drawing on the Survey of Income and Housing Costs, shows that this inequality is primarily testament to changes at the high-income end (2000, 2004). On the other hand, female earnings inequality is characterised by strong growth at the bottom of the distribution (Pappas, 2001). The keenest debate arises about the causes for these changes. Are they due to changes in labour law? Other factors, notably changes in the structure of the labour market, are of course important; but there have been many studies showing that industrial relations policy has, both directly and indirectly, been an important causal factor (for discussions of this, see Wooden, 2000: 143-47; ACIRRT, 1999: 31-33, 36-63; Watson *et al*, 2003: 187-201).

It is clear that collective bargaining makes a real difference to employees: it delivers better wage increases than individual agreements for ordinary workers. The raw data recently cited by the Government seem to suggest that the employees under individual contracts have higher wages. However, if we remove managers and senior

administrators from these sets and compare the hourly rates of workers with workers in similar jobs, then things look very different. Non-managerial workers under registered individual contracts are paid 2 per cent *less* per hour than workers on registered collective agreements. For women the difference is still more striking: on average they are paid at 11 per cent *more* under collective agreements than under individual contracts (Briggs *et al*, 2005).

The public is entitled to be skeptical about whether the new national minimum wage proposal and the Fair Pay Commission will deliver effective minima, especially since the Government's package of reforms will reduce the effectiveness of awards (Brosnan, 2005; see also Brosnan, 2003). The Government's claim about the need for a new wage-fixing body – incidentally, more evidence of the inappropriateness of the term 'deregulation' – seems curious when the AIRC, despite what is frequently said, has long been compelled by legislation to take into account all economic factors when setting wages. Similarly, aping Britain's Low Pay Commission is odd: that was established because no such body previously existed in the UK. In effect, Australia does have one already – the AIRC.

Hiring, Firing, Casualising: the Changing Nature of Work

In Australia, there are very high levels of casual work compared to other OECD countries. Casuals (that is, counted as such in their main job) now comprise a quarter of all employees. Just under half the growth in employment from 1982 until 2004 was due to the growth in the number of casual workers (May *et al*, 2005). Does this matter? Much research shows that it does because casual work has negative effects on gender equality and on the skills development. Casual work provides workers with no security to plan for the future, let alone to plan for retirement, and contributes to a wider degrading of wages and conditions (Campbell, 2004; Hall, 2000; 2004).

What, then, has casualisation to do with industrial relations law? We argue in general terms that it is another example of so-called flexibility

being driven by employers and allowed for by growing managerial power. More particularly, as Campbell and Brosnan (1999; 2005) have argued, the existence of casual clauses in awards and agreements creates opportunities for employers to exploit (and indeed create) 'marginal employees'. This being the case, the proposed changes will not address these problems; in fact they will further expand the gaps in the system that have allowed the rapid expansion of casual work (May *et al.*, 2005).

Casualisation is by no means the only form of marginal employment. Other arrangements seek to avoid the employment relationship and therefore the obligations of labour law altogether. For example, the number of workers now hired as independent contractors has been increasing and many have found that their incomes are more uncertain, their hours of work less predictable, access to paid annual leave non-existent, and the threat of dismissal ever present. The Government, plainly, is seeking to ensure that such workers are deemed *not* to be employees at all, and there are likely to be still fewer protections against the imposition of such arrangements (Underhill, 2005).

While casualisation and contracting undermine rights at work, so too, for all employees in companies with 100 or fewer employees, will the 'unfair dismissal' proposals. Like the productivity debate, this is an area where there is no convincing evidence that the measure will achieve its stated goal, in this case generating new jobs. There are, at best, inconsistent results in the research (see Barrett, 2005 for an overview of the methodological issues). That 70,000 *new* jobs would be produced as a result of removing 'unfair dismissal' provisions for firms with fewer than 100 employees seems barely credible. Extensive analysis in several countries of the role of small business in generating jobs finds no definitive connection and suggests that, in general, the impact of such businesses in jobs growth is often overstated (Parker, 2000; 2001; Revesz & Lattimore, 1997; Barrett, 2005).

Barrett's extensive studies (2000; 2002; 2005) of small to medium sized enterprises (SMEs), the supposed 'engine-room of the economy', show that such a legislative change is likely to have an impact. But of what sort? She argues that it will affect the *quality* of jobs in SMEs, and it will do so negatively. Wages, working conditions, and career development are, typically, already worse in SMEs than in larger organisations.

Cutting back on job security can only exacerbate these differences. The outcome may not be what employers want: it may well become more difficult to hire and retain good workers. As for the existing laws, critics appear to overlook the fact that the AIRC is required to consider the size of a business when deciding unfair dismissal claims; and three-month probation periods already provide leeway for employers (Barrett 2005).

All of this evidence about how current legislation is shaping the nature of work suggests that there are already many bases for, and forms of, flexibility in the nature of the employment relationship. Typically, these favour employers. Researchers have long argued that the less is encoded in formal regulation, the greater is employer discretion or managerial prerogative (Hyman, 1975: 24). The proposed changes to 'free up' labour markets can, all other things being equal, do little except enhance a 'flexibility' that goes but one way.

Conclusions

There are indeed tensions in and around the nature of work and between paid work and all other private and social functions (see Pocock, 2003 for a critique of this latter 'collision'). There are indeed good arguments to reform a set of regulatory instruments constructed a century ago around a particular, gendered, protectionist 'national settlement' (Ellem, 2005). And there are, plainly, labour market challenges that need to be addressed, especially labour and skill shortages, work-family tensions, production issues in a globalised economy and the growth of precarious employment.

On all the evidence available from the wealth of existing research on industrial relations issues, there is simply no reason to believe that *WorkChoices*, the Government's proposed legislative changes, will do anything to address these complex economic and social problems. On the contrary, the evidence we summarise here suggests that these proposals will:

- undermine people's rights at work

- deliver a flexibility that in most cases is one way, favouring employers
- do – at best – nothing to address work-family issues
- have no direct impact on productivity or jobs
- disadvantage the individuals and groups already most marginalised in Australian society.

There is nothing very imaginative or innovative, let alone equitable, in this Government's policies from 1996 until now. The Government continues to assert that jobs and productivity will grow because of its industrial relations policies. Yet, there is no convincing evidence for these claims. And what sort of jobs are they encouraging? The evidence only points to low road, low skill, low pay jobs. Furthermore, the claims about choice and flexibility appear utterly at odds with employees' experience and the courts' readings of the law. These claims – like so much in the presentation of these policies – are marked by unhelpful if not disingenuous language and by myth-making about policy, work and regulation.

Australians do need a 'new deal at work' but one which is radically different from that which the government is offering them. A new kind of 'social contract' is required between citizens, employers, unions and government, based on principles which will provide equity and fairness for workers and their families as well as ensuring a productive economy (Lansbury, 2004). Indeed, the best guarantee of long-term economic success is an industrial relations system which guarantees the right of workers to bargain collectively with their employers. This system needs to be supported by, and integrated with, public policies which ensure adequate income support and social security for those whose bargaining position is weak. This was the foundation laid down by the Australian Constitution that ensured that the rights of workers were not subservient to corporations and provided a system of industrial justice through conciliation and arbitration. The *WorkChoices* proposals threaten to undermine the basis of Australian democracy and should be strongly opposed.

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The paper began life in much shorter forms: as a communiqué released on 21 June 2005 and as an op-ed piece published in the Sydney Morning Herald on 27 June 2005. It builds on a workshop based on the work of the authors of this paper and thirteen labour market and industrial relations researchers: Associate Professor Rowena Barrett, Monash University; Professor Mark Bray, University of Newcastle; Dr Chris Briggs, University of Sydney; Emeritus Professor Peter Brosnan, Griffith University; Associate Professor John Burgess, University of Newcastle; Dr Iain Campbell, RMIT University; Robyn May, RMIT University; Professor Ron McCallum, University of Sydney; Professor David Peetz, Griffith University; Professor Peter Saunders, University of New South Wales; Dr Patricia Todd, University of Western Australia; Elsa Underhill, Deakin University; Dr Peter Waring, University of Newcastle. The original papers, presented to the workshop on the Federal Government's Proposed Industrial Relations Policy at the University of Sydney on 20 June 2005, are available online. Go to <http://www.econ.usyd.edu.au/WOS>; follow the link to 'IR Changes Report Card'.

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