



WORKCHOICES: REMOVING THE CHOICE TO STRIKE

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'We won't remove the right to strike' claimed a government *WorkChoices* advertisement. But with *WorkChoices* the legal right to strike has almost gone. Organising strike action legally was risky under the former *Workplace Relations Act* (1996), the *Trade Practices Act* (1974) and the common law of torts. In practical terms it now becomes much more difficult. This article explores the implications of the unique *WorkChoices* scheme for legally curtailing workplace conflict by restricting further any lawful right to strike, arguably to the point of suppression.

In an era of the lowest working days lost for 45 years, strikes are not a public or industrial relations problem. Only 241,900 working days were lost in 2004-5, in stark contrast with the strike waves of 1973-4 of 5,426,200 days lost (Australian Bureau of Statistics 2005). The government strategy to legally suppress strikes is nevertheless one feature of the *WorkChoices* industrial relations regime.

From the Right to Strike to the Suppression of Strikes

In 1993, the Keating government introduced a legal right to strike, called protected industrial action. Employees in enterprise bargaining industrial action maintained protection from dismissal. Unions had the lawful ability to organise and, as a last resort, to take strike action during enterprise bargaining without the risk of injunctions, fines and common law tort damages (Creighton 1997a). Protected action applied based on

minimum International Labour Organisation (ILO) Conventions on the freedom of association, and the right to organise and bargain collectively (Creighton 1995, 1997, 1998).

The Howard government's *Workplace Relations Act* (1996) began the process of circumscribing the right to take protected action. The last ten years have seen the right to strike judicially narrowed and the scope of protection limited (Creighton & Stewart 2005). Legal sanctions available to employers were increasingly used to secure orders and injunctions to halt strikes and to fine and make unions civilly liable for damages under common law. The International Centre for Trade Union Rights (ICTUR 1999-2004) exposed that Australia's *Workplace Relations Act* (1996) failed to comply with ILO standards for the protection of the right to strike. The ILO stated:

The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers (ILO 1983: para 200).

In 2005, with Senate control, the government signalled its intention to move even more strongly against the interests of organised labour by targeting the building and construction unions (Dabscheck 2003). The right to strike for building and construction workers was outlawed in the *Building and Construction Industry Improvement Act* (2005). This was rushed through in August 2005 and applied retrospectively to penalise unions' campaigns (White 2005c). The new *Australian Building and Construction Commission* with wide-ranging powers is 'investigating' building unionists involved in so-called 'unlawful industrial action'. Building workers' basic civil rights to silence and not to incriminate themselves have been removed with the threat of six months jail for non-cooperation (Roberts 2005). A CFMEU newspaper advertisement asked "In what country can you be interrogated about a routine union meeting, and jailed if you don't comply?" (November 28, 2005). The International Labour Organisation (2005) upheld an ACTU complaint that the

Building and Construction Industry Improvement Act (2005) breaches ILO Conventions on union rights to freely associate and collectively bargain.

Scheme Controlling Strikes Changed

In relation to the right to strike, the key features of the new *WorkChoices* industrial relations arrangements are:

- pattern bargaining strikes are made unlawful;
- new compulsory secret ballots are preconditions for protected action;
- the AIRC has stronger powers to terminate protected action;
- the Minister has new unprecedented powers to halt strikes;
- strikes are outlawed during the life of an agreement;
- corporations have unlimited power for greenfield projects; and
- green bans and legitimate political protests are outlawed.

WorkChoices is a prescriptive 'command and control' penal model, designed to legally curtail so-called 'unlawful' industrial action (Howe 2005). State power institutes a shift against collective union organising, creating a stronger corporate bargaining position. The Australian Industrial Relations Commission's (AIRC) dispute settling role is transformed into 'policing' functions and the Federal Court's legal sanctions are strengthened against industrial action. Without the practical and legal ability to strike, union collective bargaining is severely undermined.

Industrial Action Becomes Unlawful

The *Workplace Relations Act (1996)* created a dichotomy of industrial action that was protected and industrial action that was not protected. Protected action was available after the union notified an employer of a bargaining period for an enterprise agreement. Within this period, after three days' notice the union could take strike action to press the claims

without being penalised. Such protection did not extend to industrial action outside of enterprise bargaining, such as in response to grievances against management but, depending on the circumstances, not all unprotected industrial action was judged by the AIRC as illegitimate and consequently judged unlawful by the Federal Court. Some scope for industrial action existed and, rather than penalise unionists, the employer often settled the dispute, with the AIRC's assistance.

The *WorkChoices* scheme severely narrows the scope of protected action. The union's capacity to undertake protected action is constrained. Any strike outside of protected action is automatically unlawful, able to be stopped and subject to penalties. This has the potential to delegitimise and even criminalize previously legitimate industrial action. The following six provisions are the levers that *WorkChoices* uses to exclude unions from taking strike action.

(1) New Penal Powers to Halt Strikes

First, the AIRC is now compelled to stop all strikes that are not protected action. Section 111 of *WorkChoices* removes the AIRC's discretion to allow unprotected industrial action to occur by changing the provision that states that the AIRC 'may' stop industrial action that is not protected to 'must' stop industrial action that is not protected. Such compulsion overturns a decade of AIRC and judicial decisions, whereby a strike that was not protected was not necessarily halted by the AIRC and made unlawful by the Federal Court (Creighton and Stewart 2005). Now, irrespective of the specific circumstances of industrial action including considerations of fairness and conciliation of grievances, the AIRC 'must' stop all pending or probable unprotected industrial action.

(2) Protected Action for Pattern or Industry Bargaining Outlawed

Under *WorkChoices* collective industry-wide industrial action is prohibited and only action against a single business is permitted. This means that pattern or industry bargaining strikes, which serve to support claims made on more than one employer or on an industry, are made

unlawful. New prescriptive instructions compel the AIRC to halt pattern bargaining. The shift in the balance of power to employers is profound, as pattern or industry bargaining has existed since the beginnings of unionism and has been widely accepted as pragmatic by the community and industrial institutions for lifting industry-wide working conditions. For national unions to be effective, workers have combined collectively with other workers for common industry interests.

Indeed, it is hard to conceive of an effective industrial relations system that does not have elements of pattern or industry bargaining. For example, research by the Australian Centre for Industrial Relations Research and Training ACIRRT (2002) shows:

there is no sector in the Australian labour market or bargaining system in the OECD which fits the fictitious model of 'genuine' enterprise bargaining – all bargaining systems contain elements of pattern-setting and workplace bargaining.

Under *WorkChoices* Australia is the only western country to outlaw pattern bargaining (White 2005b), in contravention of ILO standards on labour law. The ILO has previously criticised Australia for attempting to move down this path, stating that:

Provisions which prohibit strikes if they are concerned with the issue of whether a collective employment contract will bind more than one employer are contrary to the principles of freedom of association on the right to strike (ILO 1998: 312).

Indeed, the ILO found in relation to multi-employer agreements that:

...by linking the concept of protected industrial action to the bargaining period in the negotiation of single-business certified agreements, the Act effectively denies the right to strike in the case of the negotiation of multi-employer, industry-wide or national-level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests (ILO 1999:205).

By outlawing union pattern bargaining, employers have a new weapon aimed at unions in coming campaign rounds. In contrast, employers in

national and industry associations are free to act together to pursue their interests. Employers can press individual contracts Australian Workplace Agreements (AWAs) with identical conditions of employment in concert across their industries: this is not unlawful under *WorkChoices*.

(3) Compulsory Secret Ballots

WorkChoices introduces compulsory secret ballots before protected action can begin. Since 1996, three days notice of protected action gave some scope for unions to organise for action within enterprise bargaining. A postal ballot was voluntary and in practice not often used. For protected strikes, it is now compulsory for unions and workers to comply with 45 sections of complex process requirements. The AIRC polices the process and the Australian Electoral Commission or a private agency conducts the ballot. Unions have to ensure a quorum of at least 50 per cent of eligible voters who must cast a vote, of which more than 50 per cent must approve the action. Only a simple majority of valid votes cast is warranted and indeed the quorum rule may hide the true level of support for the strike. For example, looking at votes in two workplaces of 100 employees, where in the first 49 employees in the ballot vote, all in favour of strike action and in the second, 50 employees vote, 26 of them in favour of strike action. In the first example, strike action would not be authorised, while in the second it would, even though it would appear that there was greater active support for the strike in the first workplace. The traditional short 'rolling stoppages' tactically organised on the job will be impossible. If unions do manage to get through the 45 sections, longer stoppages are likely with an escalation of tension, an all-out approach to dispute resolution" (Briggs, 2005; Forsyth, 2005). The ILO accepts balloting before strikes, but not in a form that denies effective strike organisation (Novitz, 2003).

In 2004, Employment and Workplace Relations Minister Andrews argued that compulsory secret ballots:

were a basic issue of workplace democracy. We think it's something that is justifiable because people ought to be able to have a say in matters about industrial action. They ought to be able to have a clear say in matters that affect them as employees.

But let me go a step further – we won't be stripping away the right to strike (*The Australian* 29/11/2004).

Minister Andrews did not cite any abuses. It is a conservative myth that union leaders force workers to strike (Hyman 1986). The contrast in *WorkChoices* with employer lockouts is also significant. No ballot requirement is made for employers legally locking out their workforce in bargaining for collective or individual agreements - no balloting of management, directors or shareholders. For an employer lockout to be lawful only three days notice must be given to employees and the union (Briggs, 2004).

Stewart (2004) has argued that the AIRC system has been excessively legalistic. Wide scope exists for legal challenges by employers to test whether unions have complied with appropriate processes. Judicial determinations in the past have found minor technical breaches of process in the conduct of both employees and employers that made their actions invalid. It can be predicted that further legal challenges to ballot requirements will be made. Under *WorkChoices* powerful legal firms hired by employer groups will more easily halt and penalise strikes. Stewart (2005) sees *WorkChoices* as much more legally complex. Strict legalism, divorced from industrial relations fairness, will be a dominant priority for enforcing employer rights over the workers' rights to collectively organise and strike.

(4) AIRC Powers to Suspend or Terminate Protected Action

Even if a valid vote authorises industrial action and union action is under way, the AIRC has stronger powers to suspend or terminate it. Termination can occur if the union is:

- 'failing to genuinely try to reach agreement';
- 'endangering life, personal safety or health' or 'significant damage to an important part of the economy';
- taking industrial action with 'employees who are not members' and
- in a 'demarcation dispute';

- and for 'cooling off' orders to assist the employer's negotiating tactics.

WorkChoices gives a significant new right to halt protected action to any third party affected by industrial action (i.e. not the employer and employees in dispute). When there is significant harm to any third person or action adversely affecting an employer, the AIRC *must* suspend the bargaining period. Industrial action is at risk where third parties are 'particularly vulnerable', or the conduct 'threatens to damage the viability of a business', 'disrupt the supply of goods or services to a business', 'reduce the person's capacity to fulfil a contractual obligation' and 'cause other economic loss'.

By definition, a strike affects other businesses and persons (White 2005b). As O'Neil (2004:11) has said about an earlier version of this Bill defeated in the Senate: 'It is difficult to imagine that protected industrial action will not result in some economic damage to third parties and there is at the least the potential for the scope of the immunity offered under protected action to be narrowed.' Any business affected can apply to halt protected action, such as car companies affected by strikes in component suppliers. Patients, students and any persons affected by public sector bargaining can apply. The ACTU (2004) said this was 'a spiteful proposal of the government's repression of industrial action for the caring professions, nurses, teachers and others that portrays them as wanting to hurt students and patients.'

(5) Ministerial Power to Intervene

Two extraordinary Ministerial powers are introduced to stop strikes.

(a) Industrial Action Prohibited Over Claims Banned from Agreements

The Minister is given unprecedented power to ban union claims. Protected action is not allowed if a union log of claims contains 'prohibited content.' What is 'prohibited content' has not yet been made clear but some banned claims were listed in *Workplace Express* 10/10/2005.

Unions and employees (and employers) will not be able to take protected industrial action in support of claims for an agreement that includes prohibited content. Banned clauses include those that:

- prohibit AWAs, even though AWAs will exclude both collective agreements and awards;
- restrict the use of independent contractors or on-hire arrangements;
- allow for industrial action during the term of an agreement;
- provide for trade union training leave, bargaining fees to trade unions or paid union meetings;
- provide that any future agreement must be a union collective agreement;
- mandate union involvement in dispute resolution;
- provide a remedy for unfair dismissal; and
- "other matters" proscribed by regulation.

Extraordinary penalties of up to \$33,000 will apply for seeking to include prohibited content in an agreement or lodging an agreement containing prohibited content.

Such prohibitions take away the freedom of employers who choose to recognise and encourage cooperation with unions. This is most objectionable as not only does the government not trust employers to make their own choices, both parties can be fined for seeking such claims.

(b) Ministerial Declaration Terminates Bargaining Periods

WorkChoices further mandates executive power to the Minister to declare a bargaining period terminated and stop industrial action. The AIRC formerly heard argument, and on its merits, decided whether or not to terminate the bargaining period.

The Minister can now simply form an opinion on what is likely 'to cause significant damage to an important part of the Australian economy'. This may not be limited to the 'essential services' of the army, police and

senior public servants. The Minister, for example, could assist the Mines and Metals Association by stopping strikes that affect large corporations' exports to China. Political intervention by the Minister into disputes is likely in these circumstances.

(6) Prohibiting Strikes During the Term of an Agreement.

WorkChoices prohibits industrial action for *all* reasons during the term of an agreement. Minister Andrews has responded to employer lobbying by reversing the Federal Court decisions that stated that a union was not always prohibited from taking protected action during the agreement's life. O'Neil (2004) argued that 'the notion that industrial issues are closed for the life of a particular agreement is at odds with the fact that businesses are at liberty to significantly restructure the business during the course of the agreement, which will be responded to by claims from employees and their organisations.' Total prohibition of strikes during the agreement is questionable in international labour law. The ILO allows a civic right to strike in political protest during the agreement (White 2005a). The right to strike, as a human right, cannot be totally prohibited (Ewing 2004).

More Circumstances Removing the Right to Strike

All these provisions show how *WorkChoices* imposes severe restrictions on the right to strike. There are further provisions that seek to minimise the circumstances under which unions can strike.

For example, a particularly remarkable provision allows 'employer greenfields agreements' for new projects or new undertakings. These are not 'agreements' in any normal sense as there are no employees or unions with whom the employer must reach agreement. Employers can unilaterally fix wages and conditions by 'agreements' with themselves! An employer could treat a new contract or client as a new business and determine the conditions to apply: and there can be no strikes.

WorkChoices also proscribes union strike action on important issues that are not directly industrial. 'Green bans' supporting environmental action are outlawed, even where there is support from community and environmental groups. Political protests with industrial action, although a legitimate civil liberty in a democracy, are made unlawful (White 2005a). Occupational health and safety action is legally made more difficult with a subtle legal change putting the onus on the employee to prove the health and safety risk.

Furthermore a strike is not protected if a non-unionist is involved. Protected action may be deemed illegitimate where a few non-union employees are involved or are otherwise caught up in the 'wrong' industrial action.

Finally, unions under the *Workplace Relations Act* (1996) had immunity for 72 hours from common law tort while the AIRC conciliated the dispute, but this immunity is now repealed. No justification is given. Nineteenth century 'master and servant' common law doctrines, where strikes by definition are tortious, are now immediately available. For over 70 years the industrial relations practice was to settle the claims, without recourse to the common law of tort. Now automatic common law injunctions apply. So more injunctions are likely, such as were used in the (in)famous *Dollar Sweets* case (Costello 1988), and damages that can cripple a union, as in the *Pilots* case with \$6.48 million (McEvoy & Owens 1993).

Conclusion

The right to strike, in practical terms, is extinguished by *WorkChoices*. Workers legitimately taking industrial action may be liable to be ordered back to work, dismissed, fined, sued and even criminalised. This is a clear break with the century-old recognition within the Australian industrial relations system of workers' collective rights to exert economic pressure through industrial action in order to balance the unequal bargaining powers between an employer and an employee (Cameron, 1970). Employees on collective union agreements may go into their next negotiating rounds without a credible threat for lawful industrial action

and effective bargaining (Peetz, 2005). Employers will know unions have no means to implement pressure through industrial action (ACTU 2005).

With higher penalties to curtail prospective strike action, the new scheme moves away from repressive tolerance towards the legal suppression of strikes. These changes herald an unprecedented institutionalised shift to greater corporate power and State intervention against unions.

Past suppression of strikes, however, has not worked (Hutson, 1983; Creighton, 1991). Unions still have an important role to play. Crosby (2005) describes the rebuilding of the Australian union movement already underway. The rebuilding now takes place in a period of intensifying class conflict, as Sutton (2005) predicts. Powerful global corporations striving for profits will continue restructuring and intensify their anti-union campaigns by using the new provisions against organised labour. In this context the government's 'law and order at work' strategy is designed to combat the resistance of so-perceived union 'militants'. Combet (2005) anticipates that unions will not pay the fines and some union leaders could go to gaol. It is pertinent to recall that in the 1969 unions defeated the then penal powers with national protest actions after the jailing of union leader Clarrie O'Shea. After there was recognition that penal sanctions were not justified (Hancock 1985). Arguments for a legal right to strike were developed (Green 1990). A similar challenge is for unions now to resist these new penal powers, as they do not have legitimacy. One part of the campaign for labour law reforms will have to be to protect the human right to strike.

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Workplace Express: 'WorkChoices makes agenda clear: Cripple awards and outlaw strikes in essential services' 10/10/2005, http://www.workplaceexpress.com.au/news_selected.php?act=2&selkey=30440

One submission into the Senate inquiry into the *WorkChoices Bill* was made by Professor Andrew Stewart from the Flinders University School of Law. He argued that *WorkChoices*:

- Will not create a 'unitary' system even for the employers it covers, and will generate disputation and uncertainty in relation to the exclusion of otherwise applicable state laws.
- Is profoundly unfair, not least in failing to ensure that workers who choose not to make agreements have access to a 'safety net' of award entitlements; and
- Overall, will do nothing to simplify labour regulation – indeed quite the reverse.

See

www.aph.gov.au/Senate/committee/eet_ctte/wr_workchoices05/submissions/sub174.pdf