

Submission to Senate Inquiry into
the Workplace Relations Amendment Bill 2007

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Introduction

The Bill has to be considered within the context of the workplace relations reforms that came into effect in March 2006 under the WorkChoices legislation.

Summary

Specifically the Bill reflects and responds to the difficulties of introducing flexibility into employment relations while the legal fact of employment continues to be one in which employers have rights under contract over and above that of employees. That is, employers have contractual rights to direct, control, and require things of employees whereas employees cannot require similar things of employers. (Further explanation is below at 'The Policy Hole'.)

WorkChoices:

- Transferred the administrative processes of securing employee protections from the Australian Industrial Relations Commission and unions to new government bureaucracies (Office of Employee Advocate and Office of Workplace Services).
- Allowed employers and employees to alter their work arrangements on an individual basis subject to statutory protections administered by the OEA and the OWS.
- Retained the legal right of employers to 'require' employees to do things as directed but which had the effect of making legal, potential reductions in employee take home pay when compared to pre-WorkChoices laws. This occurred as a result of a flaw in the statutory design of WorkChoices.

The flaw in the legislation occurred because the right of the employer to direct the employee effectively extended to a right to reduce employee income in certain circumstances. The Bill targets the elimination of this statutory flaw by ensuring that where an employee is 'required' to perform duties the employee cannot be paid less than they would have under the pre-WorkChoices laws.

The need to introduce the Bill demonstrates that the legal nature of employment is not an easy fit with the objective of flexibility in labour. The community reaction against WorkChoices is largely the result of this mismatch between employment and flexibility. The political campaign against WorkChoices was built upon the mismatch.

Overview

WorkChoices has been a politically contentious reform to workplace relations in Australia primarily because the Australian union movement has run a successful marketing campaign against the reforms. It is understandable that unions have run this campaign because the reforms substantially removed well entrenched union legal authority to influence, control and often dictate the terms of employment contracts between employers and employees.

Until March 2006 'employee protection' was delivered primarily through the instrument of the Industrial Relations Commission in which unions were effectively an institutional arm of government. As of March 2006 the position of the AIRC was significantly diminished as the legal authority for administering employee protection. With the diminishing of IRC power unions substantially lost their institutional position as a quasi arm of government.

New system performance

What has generally not been well stated in the public debate is that the process of securing employee protections was not abandoned. Unions have portrayed the March 06 reforms as creating a 'free for all for employers.' This is only a part truth. The part that is not true relates to the administration of employee protection.

From March 2006 the systems for ensuring employee protections were substantially transferred from the IRC and unions to the Federal bureaucracy under the Office of Workplace Services (OWS) and the Office of the Employee Advocate (OEA). The OEA and OWS combined, acted as both policemen and prosecutor seeking to discover employee exploitation and to rectify it.

Initially the OEA and OWS suffered from start up problems related to the building of infrastructure, training of staff and establishment of systems. However as their operations settled in, they have demonstrated a robustness in undertaking the employee protection task. Both the OEA and OWS appeared to have been significantly more efficient and faster at protecting employee rights than under the old system.

The old system was excessively legalistic, process driven and was slow and inefficient in securing employee rights. The OWS by comparison has been quick to prosecute employers underpaying employees and to recover money for employees. Certainly it appears to have been much more effective in this regard that the old system which had a priority of securing union involvement in processes rather than achieving the practical outcome of recovering money

for underpaid employees.

The OEA has proven to be significantly more efficient and faster at processing, correcting and approving industrial instruments that was the old system. The old system took many months and frequently years to approve relatively small numbers of collective agreements in comparison to the tens of thousands of individual agreements the OEA has been required to process. The transaction cost benefits to businesses, workers and the community have been significant although difficult to quantify. A comparative study of this would be of value.

Our observation is that the OWS and OEA have performed a competent job given the time and organizational constraints under which they have been working in the early stages of implementing and creating the administrative processes for the new system.

The policy hole

However the new system had a glaring hole because it delivered to employers the legal right to reduce overall employee income. This is better understood when the legal, contractual nature of employment is comprehended.

Employment is a legal contract of subservience. It delivers to the employer the right to 'require' the employee to do certain things. The language of industrial legislation and instruments is couched in this terminology. A most obvious example of this employer 'right' is in the requirement for overtime. An employer may 'require' an employee to work overtime, presumably whether the employee wants to work the overtime or not.

The subservient contractual nature of employment contrasts glaringly with normal contractual relationships and transactions in the community. By their nature commercial contracts do not for example deliver to a seller the 'right' to 'require' a potential buyer to buy. Normal, everyday commercial transactions operate exclusively on the basis of offer and acceptance of contract a situation which underpins much of the freedom we enjoy in a free society. However we tend to accept this freedom of commercial transaction without thinking about it.

By comparison the employment contract only has offer and acceptance of contract operating at the point of entering the contract. However once entered, offer and acceptance of contract ceases to exist as a legal aspect of the employment contract. As a consequence the employment contract enjoys less moral authority than the commercial contract. This lower moral authority emboldens union and other campaigns against work reform processes that attempt to introduce flexibility into employment.

It may be that the behaviour of employers and employ-

ees in the workplace may or may not reflect the legal nature of employment. Employers may have a legal right to 'require' employees to do certain things but may in practice give employees a choice to reject requests to do certain things. However this is not relevant to legislative design. Legislation is concerned with one thing only; legality.

This is where WorkChoices lost much of its moral positioning at the point of its introduction. It retained the employers' right to direct, and to require employees to work additional hours and public holidays and so on but delivered to employers the legal right not to compensate employees for the requirement. That is, the legal right to remuneration levels available under the old system, were stripped from employees under WorkChoices without employees having the legal right to reject remuneration stripping.

It is probably true however that employers have not generally acted on this new power under WorkChoices due to their own ethical considerations and the need to do the right thing by valued employees in a tight and tightening labour market.

However it would also appear true that small numbers of employers have sought to utilize this new power and have done so legally. But in exercising this legal right they have breached ethical standards expected in the community of employers.

Even though the numbers of such employers are probably few, the issue from the community perspective has been that this hole in the WorkChoices laws facilitated unethical employer behaviour. This has been a primary reason why the Federal government has suffered political damage as a result of the WorkChoices laws.

This Bill before the Senate seeks to address this situation by making illegal, employers lowering of employee remuneration in comparison to what an employee may have received before WorkChoices.

The specifics of the Bill

The Bill is some 80 pages in length with about 30 pages relating to the issue of employee remuneration. (The balance relates to the renaming of the OWS and OEA)

A key clause is on page 15 the 'Fairness Test' (Clause 346M) and has about 7 sub clauses. It requires that total remuneration cannot drop below protected award conditions assessed on:

- Monetary and non monetary compensation
- Taking into account
- personal and family circumstances of employees
- subject to
- public interest considerations

- and having regard to
- the industry, location, economic and employment circumstances of individual cases; and
- whether a business may be in a short term ‘crisis’.

The Bill is predicated on employment contract terminology; ‘Where an employer requires an employee...’ and so on. An expanded and re-badged Federal bureaucracy will be charged with checking all industrial instruments to ensure underpayment does not occur.

Comments on the Bill

The Bill will add considerable complexity and uncertainty to the task of checking industrial instruments by the bureaucracy and by employers seeking to comply with the Bill. But this is the trade-off resulting from an employment regulation regime that seeks to facilitate flexibility in work arrangements but which is still captured by the legal inequality contained within the employment contract.

Inevitably the *Workplace Relations Act* is a model of employment regulation that seeks to anticipate and control every aspect of the employment contractual relationship. Hence it is written as an instruction manual to the policing bureaucracy. Further, it remains heavily reliant on as yet unidentified regulations. This means that the Act is not a ‘stand alone’ document readily assessable to the layperson.

But within this framework the Bill is necessary. If a person has a contract (whether commercial or employment) and there are terms in the contract that deliver benefits and rights to that person, the government should not sanction the right of any entity to take away previously secure rights without some form of compensation being paid to the other person. If there was no right to compensation the government would effectively be condoning the theft of a property right. Any government that does this deserves to experience community and political backlash. On this issue the union campaign against WorkChoices had a strong moral basis.

But does this mean that the workplace legislative reforms of March 2006 should not have occurred? The answer is no!

The prior employment regulation processes operating through the AIRC and using unions as an instrument of government, had become principally focused on the maintenance of itself, was cumbersome, ponderous and expensive in its legalism and encouraged relationships in the workplace that resembled tribal warfare rather than relationships of maturity between adults. The system fa-

voured the cult of collectivism over the morality of individualism.

Systems that encourage individual relationships between adults in the workplace is the direction in which labour regulation must head. The reforms of March 2006 were an important step in this direction but were flawed in enabling the theft of contractual employee rights. This Bill before the Senate seeks to correct that flaw.

However, even with the correction in the flaw, the *Workplace Relations Act* suffers under the burden of the legal inequality inherent in the employment contract. Unfortunately all employment regulation, however designed suffers from this burden. It is one of the great dilemmas of employment regulation.

The *Workplace Relations Act* seeks to deliver protection to employees through the mechanism of a large policing government bureaucracy. So far the bureaucracy appears to have been more efficient at performing this task than was the old pre March 2006 system.

But achieving flexibility in work relationships means achieving the ability to tailor work contracts to the specific and individual needs of each worker balanced by the needs of enterprises with which they work. Achieving this through the employment contract, given its legal constraints, presents a continuing challenge.

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