

**Australian Labour Law After the Work Choices Avalanche:  
Developing An Employment Law for Our Children**

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**1. Introduction**

Good evening fellow members of the labour law and industrial relations community. It is indeed an enormous privilege to have been asked to deliver this address in the honour of our late friend Julian Small. I arrived in Sydney in the closing days of 1992 to take up the inaugural Blake Dawson Waldron professorship in industrial law at the University of Sydney. This arrival time meant that there were not many occasions on which I had the opportunity to come to know and to speak with Julian. What impressed me from the very outset was his warmth, his deep learning in so many areas, and his abiding concern for fairness and for justice, especially for employers and employees whose harmonious relationship is the bedrock of the necessary cooperation which builds and nourishes our nation.

In this address, I humbly seek to take up Julian's torch of fairness and justice and to argue for the reshaping of our employment laws so that we are able to bequeath a balanced and pragmatic employment relationship for our children and grandchildren.

The subject of my address this evening is the new Work Choices laws which I have styled the Work Choices Avalanche. The Australian Parliament speedily enacted the *Workplace Relations (Work Choices) Amendment Act 2005 (Cth)* in late 2005. This statute which has rewritten most of the provisions of the *Workplace Relations Act 1996 (Cth)*, became fully operational on Monday 27 March 2006. Now that six months has elapsed since this avalanche shook our federal and State labour law systems to their very foundations, it is timely to take stock of these changes.

This evening's lecture is divided into two sections. In the first part, I shall set forth the reasons which lead me to believe that the Work Choices laws will not continue in their present form for very long. In fact, it is my view that they will most assuredly be substantially revised within the next six to eight years. At this point in time, we Australians will have an opportunity to work towards a consensus on the scope and content of post-Work Choices labour laws. Accordingly, in the final part of this talk, I shall draw a road-map of some key aspects of a balanced labour law regime which I believe will be acceptable to most Australian workers and their employers. This section will conclude with some brief comments on a way forward to establish a truly national labour code for Australia.

## **2. The Work Choices Avalanche**

The manner in which the Work Choices laws have changed Australian labour law is well-known to this audience. However, it is necessary before I take issue with the sustainability of these new laws for me to give an albeit brief overview of them. The very complexity of these laws, however makes it a rather daunting task to summarise them accurately in a few words. As you all know, the current *Workplace Relations Act 1996* (Cth) and its attendant regulations cover more than seventeen hundred pages of the statute book. These laws are so detailed and prescriptive because in my view, the Parliament is seeking to use the very weight and mass of these laws to alter the behaviour of employees, of trade unions and of employers.

### **2.1. Work Choices: A Brief Overview**

Owing in large part to the sheer volume of the Work Choices laws, already books and articles have appeared which analyze the Work Choices scheme in great detail, [2] and I have gratefully drawn upon them in what follows. The Work Choices laws have been enacted pursuant to the corporations power which is contained in section 51(xx) of the Australian Constitution. [3] When it is combined with other ancillary constitutional powers, it appears that the Work Choices scheme will apply to at least 75% of the Australian workforce. As most Australian employees (especially in the private sector) are employed by trading corporations, it is this constitutional power over corporations which does most of the Parliament's "heavy lifting" to give the Work Choices laws their broad coverage. Unlike the immediate past, employers and employees are no longer given a choice as to whether they desire their relationships to be governed by federal or State labour law. Instead, the Work Choices scheme mandates that if the employer comes within the broad constitutional net, which will occur in most instances by the employer being a trading corporation, then Work Choices applies to the employer and its employees. Even where employers and their employees are satisfied with agreements or awards under State industrial law, they have no option other than to submit to federal regulation. On 27 March 2006, trading corporations whose employment relations were governed by State awards or agreements automatically came under the Work Choices laws. By the magic of the legislative fiat, their State awards and agreements were turned into federal instruments which were slimmed down to conform to the strictures of the Work Choices scheme.

For all practical purposes, the Work Choices laws abolish compulsory conciliation and arbitration which has been the bedrock of federal labour law for one hundred years (and for details see Isaac and Macintyre 2004, Kirby 2004). In fact, the labour power which is contained in section 51(xxxv) of the Australian Constitution, [4] is not relied upon by the Parliament to uphold the Work Choices scheme, other than with respect to some transitional arrangements. The Australian Industrial Relations Commission no longer may make new awards to settle industrial disputes, and nor may it set the minimum wage. It no longer possesses the power to hold test cases to declare or modify industry standard conditions of employment like maternity leave, redundancy pay or superannuation.

The essence of the Work Choices scheme is that the employment relationship should be governed by workplace agreements which may not undercut a statutory floor of minimum terms and conditions of employment. This statutory floor which is known as the fair pay and conditions standard comprises the following matters. The minimum wage which will be set by a newly created agency titled the Australian Fair Pay Commission; thirty-eight hours per week averaged over twelve months with the requirement to work reasonable overtime having regard to the employee's circumstances; four weeks annual leave, two weeks of which may be cashed out with the permission of the employee; ten days paid sick/carers leave, with two days paid compassionate leave and two unpaid days of sick/carers leave; and twelve months unpaid parental leave on the birth or adoption of a child. Employees will no longer be able to seek redress from an independent tribunal where they have been unfairly dismissed, unless their employer employs more than one hundred employees. This means that a majority of Work Choices employees have now lost their right to be protected from harsh, unjust or unreasonable employer behaviour which leads to their termination. On the other hand, all employees still retain protection from being dismissed unlawfully or in a discriminatory manner. This means that Work Choices employees may seek a remedy in the Federal Magistrates Court where conciliation fails, for

terminations which are discriminatory on the grounds of race, sex, disability etc, or in some other specified unlawful manner. Overtime rates and penalty rates which are often set out in awards are not part of this statutory fair pay and conditions standard because they may be abolished by clear words in a workplace agreement.

The centrepiece of the Work Choices laws is workplace agreements which may be individual or collective workplace agreements. Provided workplace agreements do not undercut the fair pay and conditions standard, they are lawful and will commence operation when lodged with the Office of the Employment Advocate. The legislation places individual workplace agreements above collective agreements and clearly encourages employees and employers to conclude individual workplace agreements instead of collective agreements. The legislation makes this clear by providing that even where a collective workplace agreement is in operation, it is open to the employer and any employee to sign a valid individual workplace agreement which departs from the standards in the collective agreement.

Trade unions may engage in collective bargaining with single employers, however, these laws not only tightly limit the bargaining capacity of trade unions but their sheer detail is mind boggling (and for details see McCrystal 2006, Riley 2006 459-627). As a matter of Work Choices law, trade unions may engage in collective bargaining, only where the employer agrees to bargain for, and to enter into a collective agreement with the trade union. Put another way, a majority of employees in an undertaking are unable to require the employer as a matter of law to bargain in good faith with them directly or with their trade union. The levers of choice are exclusively in the hands of the employers. The capacity of employees and their trade unions to take industrial action to support their demands at the bargaining table has been greatly curtailed. Lawful strike action must be preceded by a favourable pre-strike ballot. Even when lawful industrial action occurs, the Australian Industrial Relations Commission, and interestingly the Minister for Workplace Relations, possess broad discretionary powers to terminate the bargaining period and thereupon any further strike activity is unlawful. Where trade unions engage in strikes outside the narrow confines of lawful industrial action, they face a broad array of tribunal and curial sanctions.

The content of workplace agreements is narrow by comparable world standards because many terms are outlawed, being styled as "prohibited content". For example, it is unlawful to place the following terms in workplace agreements: terms limiting the hiring of contractors or labour hire employees; Terms allowing trade union members time off to undergo any training involving a trade union, or paid leave to attend union meetings; terms giving rights to trade unions to participate in dispute resolution processes; and most curiously of all, terms protecting employees from unfair terminations where such employees do not have a remedy under the Work Choices scheme.

Space does not permit me to detail the extensive transitional provisions, nor to summarise the new private dispute resolution sections or the new rules which will operate upon the transfer of businesses. Similarly, I do not have time to discuss the re-cast freedom of association provisions or the new right of entry restrictions which limit the capacity of trade union officials to enter and to inspect employing undertakings.

To sum up, the Work Choices laws have diminished the rights of employees especially by narrowing the safety net of minimum terms and conditions of employment and through the taking away of unfair termination rights from many workers. In my opinion, the Work Choices laws elevate managerial prerogatives to new heights over and above fair outcomes.

## **2.2. The "Big Bang" Approach to Labour Law Changes**

The Work Choices scheme has a relatively long history by law reform standards. Many of its features like the virtual abolition of compulsory conciliation and arbitration, a preference for individual contract-making and its confining of tribunal and trade union powers can be traced back to October 1992. In that month, the Liberal and National Party Coalition opposition industrial relations policy titled Jobsback (Jobsback 1992) was released when Mr John Howard was Shadow Minister for Industrial Relations. For the first nine years of the Howard Government, its failure to obtain a majority in the

Senate which is the upper house of the Parliament of Australia, meant that it had to be content with very much watered down versions of its true industrial relations policy. Once the Government gained a Senate majority commencing on 1 July 2005, it was necessary to proceed in a speedy manner so as to bed down these new laws as long before the late 2007 election as was reasonably possible. The legislation was speedily passed through the Australian Parliament in late 2005, without the agreement of any State or Territory Government, and without sufficient consultation with the community and especially with rank-and-file employers.

What brought about this strange set of affairs? I can only engage in speculation, however, a clue to the Prime Minister's thinking can be gleaned from a speech which he delivered to the Sydney Institute in July 2005 (Howard 2005). The Prime Minister made it clear that he regarded industrial law changes to be imperative to create Australian enterprise workers who would be in a better position to compete in our globalised world, more especially in periods of economic downturns. In the Prime Minister's view, if Australian businesses are to survive in the long-term, employees must play their part by giving up benefits which business no longer should have to sustain on an industry basis. Only where individual businesses have realised sufficient workforce productivity gains which would enable them to share these fruits with their employees, should businesses bestow above minimum benefits upon their workers.

It is unusual to say the least, to be able to sustain massive legal changes on this scale especially when the minimum rights of employees have been diminished. In comparison, it took over a decade for the Thatcher and Major governments to comprehensively alter British labour law through the enactment of a series of statutes gradually diminishing the power of trade unions and making it more attractive for employers to sign individual agreements with their employees (Auerbach 1990, Wedderburn 1989, Davies and Freedland 1993 526-639). The Government of New Zealand, did adopt a "big bang" approach when it enacted the *Employment Contracts Act* 1991 (NZ (and for details see Wilson 1991)). This statute was brief, especially when compared with the Work Choices laws, but once a change of Government occurred in 1999 it was swept aside.

### **2.3. The Work Choices Laws, Are They Sustainable?**

In my considered judgement, in their current form the Work Choices laws are not sustainable. Unless they are significantly amended to soften and to simplify their operation, they are likely to be swept aside in six to eight years time. This may appear at first blush to be a surprising claim on my part. After all, the Work Choices scheme is a huge wall of law. Yet, as I shall show, it is this very legal edifice which carries within itself some of the seeds of its destruction.

I believe that Work Choices is not sustainable for the five following reasons. First, all of the State and Territory governments strongly oppose the Work Choices laws. This state of affairs is hardly surprising. After all, none of the governments were fully consulted, and apart from Victoria,<sup>[5]</sup> all of the remaining States lost more than half of the employers and employees who previously were governed by State industrial law. As the general public is presently both sceptical and frightened by the diminution of their conditions of employment under Work Choices, the State and Territory Australian Labor Party governments believe that they are on a "winner" in strongly opposing these new laws. On 9 September 2006, the Queensland Government easily won the State election, and it does appear that the New South Wales Government will be returned after the March 2007 polls. Both Queensland and New South Wales still retain workable industrial relations systems based on conciliation and arbitration, and in my view there is little chance that these large States will moderate their approach in the immediate future.

A number of State governments have already taken steps to protect their employees from the Work Choices avalanche so far as they are able. The following examples will suffice for my present purposes (and for further details see Dungan 2006). In 2005, the Queensland Parliament amended its Industrial Relations Act to increase its minimum conditions of employment and to place these conditions squarely within the statute.<sup>[6]</sup> In March 2006, the New South Wales Government moved back into its public service, and thus out of the reach of the Work Choices laws, some one hundred

and ninety-five thousand workers in State owned corporations.[7] The Parliament of New South Wales has amended its industrial relations statute to enable the Industrial Relations Commission to exercise powers pursuant to a written agreement between an employer and a trade union to enable it to settle disputes over common law agreements.[8] In Victoria, the Parliament has protected the award entitlements of its public sector workers,[9] and it has also established the statutory office of the Victorian Workplace Rights Advocate[10] who will be a watch dog protecting fair outcomes for Victorian workers. These State and territory measures have already started chipping away at the base of the Work Choices edifice, and are showing Australian employees that there are softer and more palatable ways of overseeing the employment relationship.

The second reason why I am of the view that the Work Choices laws are unsustainable in the medium-term, is owing to their prescriptive nature. When laws are overly prescriptive, people usually by-pass them in one form or another. For example, many in this audience will recall the prescriptive nature of the ill-fated *Industrial Relations Act* 1991 (NSW) (and for details see McCallum 1998). Amongst other things, this large industrial relations cone made it very difficult to vary awards because it wished to impose upon the industrial parties a "rights v interests" contractual model of labour relations. However, the employers, the trade unions and the tribunal created single issue awards known as "splinter awards" to deal with new situations which came before them. It was in large part the rigidity and prescriptive nature of this statute which lost its proponents vital employer support (McCallum 1998).

The best example of the manner in which prescriptive measures are used in the Work Choices laws, are the regulations which set out what matters will amount to prohibited content in workplace agreements.[11] Earlier, I detailed some of the prohibited content such as terms relating to trade union training and to protecting employees from being terminated unfairly. It has been suggested to me that the primary reason for their being such a large list of prohibited terms is to ensure that trade unions are not able to take protected industrial action to press for these matters to be included in a workplace agreement. In other words, Work Choices does not prevent employers and trade unions from informally agreeing upon matters which are prohibited content. I disagree because if it was the Parliament's intention to restrict protected industrial action to matters other than prohibited content, it would have been easy to do so. This has been the law for very many years in the United States. Both the National Labor Relations Board and the United States Supreme Court have developed the doctrine of mandatory and permissive bargaining matters under the *Wagner Act*[12] to make it clear that while everything can be put into a collective agreement, lawful strike action may only be taken about central items known as mandatory bargaining matters. In the United States, trade unions may strike over mandatory bargaining matters like wages and hours, but may not strike over permissive bargaining matters like some forms of contracting-out, however, all such bargaining matters may become terms in collective agreements (and for details see Gorman and Finkin 2004 661-717, Cox et al 2001 427-487). American employers would rightfully regard a list of prohibited bargaining matters specified by Congress as a gross interference upon their liberty to contract with trade unions.

The true motive of the Parliament, I believe, is to diminish the role of trade unions in collective bargaining. However, what will happen in many instances is that far-sighted employers who are seeking innovative workplace arrangements will enter into agreements with trade unions on prohibited matters. Some agreements may be entered into as Common Law agreements, or made by deed poll, or enforced by the good will of the parties. The prescriptive nature of prohibited content, like so many other prescriptive areas of Work Choices, will not alter the behaviour of employers, of employees and of trade unions. Rather, it will force the parties outside and beyond the federal statute to make their own arrangements.

My third reason for asserting that the current Work Choices laws have a short life, is the failure of very many employers to engage with these new laws. Most employers wish to treat their employees in a fair and appropriate manner. They recognise that the Work Choices laws are unbalanced in the sense that they place managerial prerogatives above fair outcomes and tie trade unions in knots. Many employers see no need for this harsh regime and do not wish to get caught up in this legal net.

Fourth, while I believe that the High Court will uphold the essence of the Work Choices scheme, a number of the provisions of this very large statute which in some portions were hurriedly drafted, are likely to be declared invalid. For example, I believe that portions of Schedule 1 of the statute which enables trade unions to register as employee organisations owing to their members being employed by trading corporations, is likely to be held to be beyond power. If I am correct, then the Work Choices laws will need to be amended to take account of this decision which will further weaken this edifice.

My final reason for viewing the Work Choices laws as impermanent, is that their collective bargaining provisions have been written without taking into account international labour law. In my considered judgement, the failure of Work Choices to give employees any choice whatsoever as to whether they wish to enter into collective agreements with employers, breaches the International Labour Organisation conventions 87 and 98 on freedom of association[13] and collective bargaining.[14] Of even more importance, however, this failure to recognise that employees have any sort of voice in choosing whether or not to engage in collective bargaining, breaches the 1998 declaration by the International Labour Organisation of the *Fundamental Principles and Rights at Work*. [15] Few Australian industrial lawyers appear to be aware that in 1998, the International Labour Organisation re-stated four fundamental rights at work which made up its declaration on the *Fundamental Principles and Rights at Work*. Three of these rights concern the abolition of forced labour, child labour and discrimination in employment. However, the first right upholds "freedom of association and the effective recognition of the right to collective bargaining". Both the International Monetary Fund and the Washington Group have adopted this 1998 declaration on these four fundamental rights at work. While Australia was able to sign a so-called free trade agreement with the United States without adhering to these core labour principles, we are likely to have difficulties in the future. If our nation is to continue down the track of signing bilateral trade agreements, we will need to take greater account of international labour law and to bring our collective bargaining laws into line with the International Labour Organisation standards on collective bargaining.

### **3. A Balanced Regime of Post-Work Choices Laws**

Since the announcement by the Howard Government of its intention to enact the Work Choices laws in May 2005, a broad ranging discussion has begun on what principles, rights and obligations should be bestowed upon employees, employers and labour only independent contractors by our labour laws. In his recent Foenander Lecture which was delivered in August 2006, Professor Emeritus Joe Isaac, a former Deputy-President of what is now the Australian Industrial Relations Commission, has sketched out his suggestion of eight appropriate principles for Australian labour relations (Isaac 2006). Dr Iain Ross, formerly Vice-President of the Australian Industrial Relations Commission and I have in separate but related pieces explored what should be the entitlements of Australian industrial citizens who are undertaking paid work (McCallum 2005, 2006, Ross 2005). The Institute of Employment Rights, under its Executive Director Rob Durbridge, is commencing discussions on a Charter of Employment Rights for Australia (Durbridge 2006). Finally, Mr Paul Munro, a former Deputy-President of the Australian Industrial Relations Commission, is writing a piece (munro 2006) to be published in the *New Matilda*, along somewhat similar lines to the Institute of Employment Rights. In the remainder of this lecture, I shall also take up the gauntlet and set forth some propositions as foundations for a balanced post-Work Choices set of labour laws. The starting point is collective bargaining. Then I shall examine some aspects of a balanced set of rights and obligations of employers and employees. To complete this lecture, it will be necessary to say a few words about the establishment of a truly national labour law for our nation.

#### **3.1. Collective Bargaining**

Earlier, I explained how employees have no legal right to require their employing undertaking to bargain collectively with them, even if the overwhelming majority of employees wish to be dealt with collectively. How did this come about in Australia? When the Keating Australian Labor Party Government enacted its enterprise bargaining reforms in 1993[16], it failed to enact many of the safeguards which are part and parcel of United States collective bargaining law (McCallum 2002). For example, it failed to enact a trade union recognition mechanism to enable unions with majority support

to legally require employing undertakings to collectively bargain in good faith. Under the federal registration provisions, union recognition was on an industry basis, but only for the purposes of compulsory conciliation and arbitration (Frazer 1995, McCallum 2002). This type of industry recognition was neither appropriate nor viable for collective bargaining at the level of the individual enterprise. The Keating Government and the trade unions believed that if a trade union was unable to fairly bargain with an employee, the appropriate safeguard was the Australian Industrial Relations Commission which could exercise its full arbitral powers and impose a settlement on the parties. This matter came to a head in the 1995 CRA Weipa dispute<sup>[17]</sup> where the Commission did intervene to give some protection to the employees who wished to remain on award regulation (Moir 1996, Hendy and Walton 1997). When the Howard Government limited the Commission's award-making powers in late 1996<sup>[18]</sup> employees had no backstop if their employer did not wish to bargain. In late 1996, the workplace relations laws only enabled the Commission to make minimum rates and not market rates awards, and the terms and conditions in awards were slimmed known to some 20 allowable award matters. It can be seen that since the 1993 changes, as a matter of law, employees have not been able to require their employer to engage in collective bargaining with their representative trade union. The Work Choices scheme has simply continued down this track, but has further weakened collective bargaining by enabling employers to sign individual workplace agreements, even when collective workplace agreements are in operation.

To comply with international labour law, Australia must establish a mechanism to enable employees to choose whether they wish a trade union to engage in collective bargaining on their behalf with their employer. Earlier this month in a speech to the National Press Club, the Secretary of the Australian Council of Trade Unions, Mr Greg Combet, argued that if a majority of employees at an undertaking wished to be represented by a trade union for the purposes of collective bargaining, they should have this right (Combet 2006, and see also Australian Council of Trade Unions 2006). Most people agree with this simple proposition which if adopted would bring Australia back into line with international labour law. However, the real issue on which a final agreement may be difficult to broker, is how such a majority should be determined, and here we can learn from the experience of other comparable nations.

Under United States collective bargaining law, a representation vote is held of all of the employees in the proposed bargaining unit to determine whether a majority wish to be represented in bargaining by a trade union. These representation votes are somewhat akin to political election campaigns where the employer on the one side, and the trade union and its employee supporters on the other side compete for the votes of the employees (and for details see Cox et al 2001 263-280, Gorman and Finkin 2004 53-67). Over the last thirty years, American trade unions have not fared well in winning representation votes (and for cogent criticisms see Weiler 1983 esp 1775-1780). Once a trade union has been certified as the sole bargaining agent for the bargaining unit, the National Labor Relations Board may order the employer to bargain in good faith with the trade union.

In Canada, on the other hand, where similar collective bargaining laws operate under provincial law, the lengthy representation election is done away with by two other strategies. First, in some provinces, quick representation votes are held within a few days of the trade union's application to prevent undue employer pressure. Second, in other provinces, a trade union may be certified as the bargaining agent without a vote of the employees, where the union is able to show by membership cards that it has majority support. A subsequent representation vote may be held where evidence shows a change of heart by employees (and for details see Labour Law Casebook Group 2004 350-358). Once a union has been certified then the employer must bargain in good faith with the trade union.

When the Tony Blair Government of Great Britain came into office in 1997, plans were set in train to modernise British Labour law. In its 1998 white paper titled Fairness at work (Fairness at work 1998 Ch 4), a trade union recognition model was proposed which was derived in part from the North American experience (Oliver 1999). As subsequently enacted into law,<sup>[19]</sup>voluntary recognition of one or more trade unions by employers for the purposes of collective bargaining is encouraged (and

for details see Collins et al 2005 768-832). It is up to a trade union to apply for recognition as the bargaining agent for a bargaining unit of employees. There will often be disagreement between the union and the employer over the make up of the bargaining unit. The Central Arbitration Service may assist the parties in discussions over voluntary recognition. Where discussions fail, the Central Arbitration Service may order an employer to recognise a trade union in the following circumstances. Recognition will be ordered where the trade union is either able to show that a majority of the employees are members, or if it gains a majority of the votes in a representation election where at least 40% of the eligible employees vote (Collins 2005 771-775).

In my view, the United States and Canadian models are less suitable for Australia than is the British recognition process. Given our history of a mix of conciliation and arbitration and collective bargaining, together with our independent tribunals, it would be sensible of us to closely examine the British union recognition model and to adapt it to Australian circumstances.

So far, discussion on an appropriate trade union recognition model for the purposes of Australian collective bargaining, has been largely engaged in by the trade union movement and the industrial law and relations academic community. In my considered opinion, it would be an error of judgement on the part of employer bodies to stand on the sidelines and to remain silent. I surmise that there is some concern at high levels of business and government, especially in the field of international trade, upon the disconformity between our collective bargaining laws and the laws of comparable nations whose bargaining laws adhere to widely accepted standards of international labour law. This issue will be reconsidered sooner than later, and I call upon employer bodies to participate in this dialogue.

This commentary upon collective bargaining would not be complete without some discussion of individual workplace agreements. It is clear that individual workplace agreements should not be able to be used to undermine collective bargaining. Under Work Choices, an employer may sign an individual workplace agreement with an employee whose terms are above or fall below those of a collective agreement which is currently in force. If this type of individual agreement-making took place in either the United States or Canada, the employer would be guilty of an unfair labour practice. So, it is essential to amend the Work Choices laws to prevent individual agreements from under-cutting valid collective agreements.

I do not currently advocate scrapping individual workplace agreements in their entirety. However, I believe that much of the angst would be taken out of this area if individual workplace agreements whose remuneration was lower than say \$100,000 had to pass a fairness test by an independent body as a pre-condition to their validity. It is the capacity of individual agreements to diminish the terms and conditions of employees, and especially of young and casual employees without significant bargaining power, which makes them inappropriate without adequate safeguards like a fairness test.

### **3.2. A Balanced Set of Terms and Conditions of Employment**

An entire book could be written on the elements of a balanced scheme of employer and employee rights, duties and obligations. I shall content myself by commenting on several of them, namely, a minimum wage, occupational health and safety, workers compensation and discriminatory and unfair terminations.

The centrepiece of any safety net of terms and conditions of employment is a living or minimum wage. Almost all Australian policy makers are in favour of a process to set a minimum wage, however, there is sharp disagreement on how this should be done and on what criteria a minimum wage should be based. All that I can do this evening is to set forth a few thoughts on this topic.

In my view, over the last century, the Australian Industrial Relations Commission and its predecessor bodies performed well in setting a basic, then later a minimum and a living wage for Australia. In fairness, its members should be given full credit for this fine achievement which is unparalleled in any other comparable nation (Isaac and MacIntyre 2004). While the desire of the unemployed to obtain remunerative work is an important factor when setting a minimum wage, the central issue is whether the minimum wage is fair to employees who are being paid it. What we should be working towards is

ensuring that as many people as possible are given an opportunity to undertake decent work and not just work of any kind. Of course, levels of taxation and social security payments are relevant in this mix. I am open to observing the work of the newly created Australian Fair Pay Commission, which I expect to operate in a truly transparent manner. If after several years it is not up to the job, then consideration should be given to once more enabling the Australian Industrial Relations Commission to set the minimum wage. If this did eventuate, then thought should be given to providing the Commission assistance through an independent research arm.

Everyone would agree that employees require protection from unsafe working conditions and they and their dependents should receive compensation for work related injuries, diseases and or death. However, when one gets down to details there is much room for disagreement, especially with respect to the breadth and operation of our occupational health and safety laws. For my part, the *Occupational Health and Safety Act 2000* (NSW) and its attendant regulations is a good starting point for any such discussion. I would view with dismay, any attempt by the Parliament of Australia to once more use its powers to make laws with respect to trading corporations to water down our grid of State and Territory occupational health and safety laws.

There is also general agreement that employees should be granted a remedy where they are dismissed or ill-treated because of their sex, sexual orientation, pregnancy, marital status, race, national or social origin, religion, age, physical or intellectual disability or owing to their political beliefs. Currently employees under Work Choices are protected from terminations based on most of these grounds because such terminations are unlawful. However, if conciliation fails, an aggrieved employee is required to take the claim to the Federal Magistrates Court. I have read the decision of the High Court of Australia in the *Brandy Case*,<sup>[20]</sup> which holds that the judicial power of the Commonwealth necessitates that discriminatory termination matters must be heard by a court vested with federal jurisdiction. However, this approach is far too rigid. If a tribunal can validly determine that an employee has been unfairly dismissed and craft an enforceable remedy, I see no reason why the same tribunal cannot also craft a remedy if it finds a termination was discriminatory. It is time that the High Court reconsidered this type of artificial distinction.

There is sharp disagreement over granting employees remedies for dismissals which are harsh, unjust and /or unreasonable. In my view, Australian industrial citizens should be entitled to go to a forum to have the reasonableness or fairness of their termination be tested. Like Professor Emeritus Joe Isaac, I can see some merit in excluding employers who employ ten or less persons from this process (Isaac 2006). However, an independent review of terminations is, in my considered judgement, a necessary element in a balanced set of laws. A good starting point would be the manner in which the Industrial Relations Commission of New South Wales promptly deals with most unfair dismissal applications. I am best acquainted with the work of this Commission, but no doubt other commissions dispute resolution forums and other bodies are worthy of study.

#### **4. A Truly National Labour Law System for Australia**

The Parliament of Australia does not possess the constitutional powers to establish of its own volition a truly national labour law mechanism. Work Choices is an interesting effort in going a good way towards the establishment of a national system by primarily relying upon the corporations power. As I have argued elsewhere (McCallum 2006), an over reliance upon this head of power will inevitably lead to the corporatisation of Australian labour law. By this I mean that the contours of federal labour law will be so shaped by the corporations power that it will in time become a sub-set of corporations law. However, for the current federal scheme to be truly national, it will need a majority of State parliaments to refer their labour relations powers to the Australian Parliament pursuant to section 51(xxxvii) of the Australian Constitution.<sup>[21]</sup> Given the political stance of the States, further referrals of such powers are highly unlikely.

Is there another way forward? As Professor Bill Ford has reminded us recently (Ford 2005 176-178), it would be possible for the federal and State parliaments to use all of their constitutional powers and for each Parliament to pass an identical statute creating a labour law code for the entire nation. In

1946, the Parliaments of Australia and New South Wales passed joint legislation to establish a coal industry tribunal, and this form of cooperative legislation was upheld by the High Court of Australia.[22] Therefore, if the federal Parliament and at least several of the State parliaments were able to cooperate in this manner, a cooperative scheme could be born. A tribunal could be established to oversee collective bargaining etc.

The difficulty with this approach is that enforcement could only take place in State courts who can be vested with both federal and State jurisdiction. However, since the 1999 decision of the High Court in *Re Wakim*,[23] it is clear that State jurisdiction cannot be vested in federal courts. With great respect, this decision is far too rigid. It impedes cooperative federalism and I venture to believe that before too long the High Court will have to reconsider this narrow precedent.

Finally, if we are able to create a truly national labour law regime through cooperative federalism, It would be my hope that a national legal code would be relatively short in length, clear in its expression and easily readable. What we need are employment laws which spell out the rights, duties and obligations of employers and employees at work in clear and readable language. Labour law, more than most other areas of legal endeavour, is guided best by the experience derived from actual cases involving flesh and blood employees and employers. Laws which repose broad discretionary powers in tribunals and in courts are best able to satisfy the changing needs of employers, of employees and of their representative trade unions and employer associations.

## 5. Conclusion

After detailing the Work Choices scheme, I have argued that these new laws are not sustainable for very long. In fact, I have suggested that at the very least they will be changed and softened within six to eight years. This is because of strong opposition by State and Territory governments, the overly prescriptive nature of these laws, the failure of many employers to engage with Work Choices, the High Court challenge to the new scheme, and the fact that the collective bargaining features of the scheme contravene international labour law. In section 3, I set forth some features of a balanced set of post-Work Choices labour laws including collective bargaining, a minimum wage, safety, compensation, and discriminatory and unfair terminations. Finally, brief comments were made on a way forward to create a truly national employment law code through utilising cooperative federal and state federalism through the enactment of joint legislation to put in place truly national labour laws.

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Friday 28 September 2006

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### End Notes

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- [2] See generally Australian Journal of Labour Law 2006, CCH 2006, Riley and Peterson 2006, Stewart and Priest 2006, University of New South Wales Law Journal 2006.
- [3] Section 51(xx) of the Australian Constitution enables the Parliament of Australia to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".
- [4] Section 51(xxxv) of the Australian Constitution which is known as the labour power, enables the Parliament of Australia to make laws with respect to "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".
- [5] In late 1996, the Parliament of Victoria referred the vast bulk of its legislative powers over labour and employment law to the Parliament of Australia. This reference was made pursuant to section 51(xxxvii) of the Australian Constitution which enables the Parliament of Australia to make laws with respect to "Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred or which afterwards adopt the law", and for comment see Kollmorgen 1997.
- [6] *Industrial Relations (Amendment) Act 2005* (Qld).

- [7] *Public Sector Employment Legislation (Amendment) Act 2006* (NSW).
- [8] *Industrial Relations (Amendment) Act 2005* (NSW).
- [9] *Public Sector (Award Entitlements) Act 2006* (Vic).
- [10] *Victorian Workplace Rights Advocate Act 2005* (Vic).
- [11] *Workplace Relations Act 1996* (Cth) section 356; and *Workplace Relations Regulations 1996* (Cth) chapter 2 regulation 8.5.
- [12] *National Labor Relations Act 1935* (US) as amended.
- [13] *Freedom of Association and Protection of the Right to Organise Convention*, International Labour Organisation, Convention No. 87, 1948.
- [14] *Right to Organise and Collective Bargaining Convention*, International Labour Organisation, Convention No. 98, 1949.
- [15] *Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 86th session, June 1998, Geneva, reproduced in 137 *International Labour Review*, 253-257, and also available at <http://www.ilo.org/public/english/standards/decl/declamtion/text/index.htm>.
- [16] *Industrial Relations Reform Act 1993* (Cth), which amended the *Industrial Relations Act 1988* (Cth).
- [17] *Comalco Aluminium (Bell Bay) Ltd v O'Connor and ors* (1995) 59 IR 133.
- [18] *Workplace Relations and Other Legislation (Amendment) Act 1996* (Cth) which amended the *Industrial Relations Act 1988* (Cth) and re-named it as the *Workplace Relations Act 1996* (Cth).
- [19] *Employment Relations Act 1999* (UK) as amended by the *Employment Relations Act 2004* UK.
- [20] *Brandy v Human Rights and Equal opportunity Commission* (1995) 183 CLR 245.
- [21] See footnote 5 above.
- [22] *Re Duncan; Ex Parte Australian Iron and Steel* (1983) 158 CLR 535.
- [23] *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511, and for comment see Lam 2000.