

Labour Relations Reform in Australia: The Employer Perspective

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Significant changes were made to Australian labour law by the Australian parliament in December 2005. They came into operation in March 2006. These changes, in a package of legislative measures known as ‘WorkChoices’, have sparked considerable debate within and outside Australia, including a favourable constitutional judgment by the High Court of Australia, a bevy of polarized media commentary, and a well-funded campaign of opposition by the Australian trade union movement and some sections of the Australian community.

What is less well-known about these changes is that they are the third phase in an ongoing process of 13 years of labour market reform in Australia.

It was in 1993 that a Labor government led by former Prime Minister Paul Keating first declared that the days of the old Australian system of centrally regulating industrial relations by compulsory conciliation and arbitration was “over”², to be replaced by a system of enterprise-level bargaining underpinned by minimum standards³.

Following the electoral defeat of the Keating government in 1996, the incoming government led by Prime Minister John Howard enacted a second wave of labour market reform⁴, which extended the bargaining system established

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² Speech to the Institute of Company Directors, April 1993. The system Keating described as “over” was the system of collectively setting wages and employment conditions on an economy-wide or industry-wide basis through orders of industrial tribunals made after a process of compulsory conciliation and arbitration. Those orders were known as ‘industrial awards’. That system had operated in Australia since 1904.

³ Industrial Relations Reform Act 1993. The Keating package also introduced a national employment protection (unfair dismissal) law and legislated a right to strike during the negotiation of collective bargaining agreements.

⁴ Workplace Relations Act 1996.

by the Keating government into the non-union sector⁵, and further limited the role of centralized conciliation and arbitration⁶.

It is in this context that ten years later, in 2006, the third wave of labour market reform (WorkChoices) came into operation. WorkChoices was developed by the Howard government following the 2004 general election when it gained a majority in both houses of the Australian parliament. It was enacted by the Australian parliament⁷ and came into operation on 27 March 2006⁸.

Constitutional Validity of WorkChoices Upheld

Following the enactment of WorkChoices, a major constitutional challenge was launched in the High Court of Australia by State and Territory governments. The States and Territories – all (Labor) governments of a different political persuasion to the (Liberal–National) Australian government – sought to have Australia’s highest constitutional court strike the laws down on the grounds that they exceeded the constitutional power of the Australian parliament. This challenge arose from the fact that WorkChoices uses a different constitutional power (the power to make laws with respect to corporations⁹) than the previously used constitutional power to make laws with respect to the conciliation and arbitration of interstate industrial disputes¹⁰.

In practice, this change in the constitutional basis of Australian workplace relations law was a product of the Australian government’s policy to create a single, more consistent, national set of labour relations laws. For the preceding century, labour relations law was a product of duplicate and overlapping

⁵Technically, the 1993 Keating government reforms allowed for collective bargaining in non-union workplaces. However this was not a well used option at the time, due to direct rights of union intervention. In contrast, the 1996 reforms limited collective bargaining with unions to workplaces where union members were employed. In addition, the 1996 changes also established a parallel stream to collective bargaining – direct employer/employee bargaining on an individual level (with scope for unions to be appointed as bargaining agents). The instruments used for individual bargaining were known as ‘Australian Workplace Agreements’. Both collective bargaining and individual bargaining were subject to compliance with legislative minimum standards and a global ‘no disadvantage’ test based on a prevailing industry-wide award.

⁶The content of arbitrated industrial awards was limited to specified subject matters.

⁷WorkChoices passed the parliament in December 2005, by a significant majority in the lower house (the House of Representatives) and by a slender majority in the upper house (the Senate).

⁸A number of minor provisions came into operation on its passage in December 2005.

⁹Australian Constitution, section 51(20); a number of other heads of power were also used.

¹⁰Australian Constitution, section 51(35); WorkChoices is the first general use of the corporations power for the purposes of making Australian labour law, but not its first use. It was first used by the Keating government in 1993 to underpin a system of national collective bargaining. Its use in 1993 was in addition to the conciliation and arbitration power, not (as in the case of WorkChoices) in substitution for it.

rights and obligations created by both the Australian parliament and the six State parliaments. That system had led to inconsistent rights and obligations within and across industry, with little or no policy basis for such differences. Whether businesses competing and employing in the same market were covered by laws of one parliament or another was a random decision of unions and tribunals based on the artifice of constructing interstate disputes to invoke Commonwealth jurisdiction. By the turn of the 21st century, it was widely acknowledged that this system was not sustainable, particularly as bargaining took hold, as disputes declined and as regulation adopted a greater safety net rather than market setting character¹¹.

Creating a national industrial relations system was opposed by most State and Territory governments¹² and some trade union interests¹³. The peak trade union body, the Australian Council of Trade Unions (ACTU), did not participate in the proceedings as either plaintiff or intervener. ACTU policy, whilst strongly opposing the content of WorkChoices, generally supports the creation of a national system of labour laws¹⁴.

On this issue, there was and remains a conjunction of views that cross both the political and industrial divide at the national level. The major political parties (Liberal–National and Labor), and the peak industrial councils (the ACTU and the ACCI) each support a national system of labour regulation. The case for such an approach, on both economic and equity grounds, is very strong, and outlined in an Issues Paper published by ACCI in October 2005¹⁵.

On 14 November 2006, the High Court of Australia, by a majority of 5:2, upheld the constitutional validity of WorkChoices, and dismissed the legal challenge¹⁶.

As a consequence, all workplaces in Australia where the employer is a corporation are governed by a single set of national labour laws: the WorkChoices

¹¹ In 2000 the Australian government re-opened the debate about the creation of a national labour law system based on the corporations power in a series of Issues Papers, 'Breaking the Gridlock: Towards a Simpler National Workplace Relations System' released by then Minister for Employment, Workplace Relations and Small Business Hon. Peter Reith MP.

¹² All States and Territories participated in the 2006 High Court challenge; however the Government of Victoria had referred most of that State's constitutional powers over labour law to the Commonwealth in 1996. Thus a single system of law applied in Australia's second largest jurisdiction during the decade preceding the High Court judgment in 2006.

¹³ Principally Unions New South Wales and the Australian Workers Union.

¹⁴ A policy confirmed by the ACTU national congress in October 2006.

¹⁵ Anderson P., 'Functioning Federalism and the Case for a National Workplace Relations System' (ACCI) October 2005 available at www.acci.asn.au

¹⁶ *New South Wales and Others versus Commonwealth* [2006] HCA 52 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; Kirby and Callinan JJ dissenting.

legislation. Only unincorporated employers remain governed by State labour laws, and even then if they were (prior to WorkChoices) under national laws, they remain in WorkChoices for a five-year transitional period.

It is estimated that some 85% of employees in the private sector in Australia are thus governed by WorkChoices. Bringing the remainder into the national industrial relations system is a further nation-building challenge for Australia. This can only be achieved, over time, by the use of available constitutional powers and/or intergovernmental agreements between the Australian and State governments¹⁷.

The Australian Context

Although the establishment of a near national system of labour law is a policy pillar of WorkChoices that has wide acceptance across the national political and industrial divide, most other policy changes introduced by WorkChoices are strongly contested matters between the tripartite stakeholders – government, employers and trade unions.

Matters of particular controversy concern exemptions from employment protection legislation; reliance on legislated minimum standards (rather than arbitrated industrial awards) as a basis for bargaining; restrictions on compulsory arbitration; conditions pertaining to the right to strike; allowing for individual employer/employee bargaining as an alternative or in addition to collective bargaining; limits on pattern bargaining; restricting collective agreements to matters that concern the employer/employee relationship; and conditions for trade union right of entry into workplaces.

It is not possible to assess the merits of these policy differences without placing them in the context of the system that regulated labour relations in Australia prior to WorkChoices.

The previous Australian legal and institutional framework of laws, regulations and legal decisions on employment matters had a long history of being highly interventionist, to the point of regulating how, when and where employers and employees in workplaces could deal with each other on issues that concerned their wages and employment conditions.

WorkChoices operates in a context where legislative minimum standards – derived from multiple Commonwealth and State laws – already existed across all sectors of the economy on many labour matters. It varies some of those standards and adds a range of new or different economy-wide standards.

¹⁷ An agreement to this effect has existed in the State of Victoria since 1997. ACCI supports the development of further intergovernmental agreements.

WorkChoices also simultaneously preserves the existence and enforceable legal status of the industry-wide industrial awards that had been established by the former system, but largely closes down the potential for new awards to be made. Those awards, of which there are over 4'000, constitute a very significant body of labour regulation on top of the WorkChoices legislative standards¹⁸. They mean that Australia has over 4'000 separate labour laws for a workforce of just ten million people.

In addition, Australia has a highly regulated system of minimum wages. Some 105'000 separate minimum wage classifications exist, and remain under WorkChoices¹⁹. Mandatory minimum wages start at a federal minimum wage (the highest amongst developed countries) and then extend through these classifications into lower levels of professional and management staff.

This unique dual body of regulation (the compulsory arbitration system and its mandatory awards, plus legislative minimum standards) is not found elsewhere in the labour market systems of industrialized countries²⁰.

In other words, unlike the situation in many countries, minimum standards in Australia are not set purely by bargaining. Bargaining is in addition to already established minimum standards in arbitrated awards and legislation. In contrast to the situation in Australia, bargaining in other countries tends to set wages and employment conditions much closer to both minimum and market rates of pay.

The essential principle underpinning WorkChoices is one of mutual consent to change. Pre-existing wages and employment conditions (and the consequent obligations of employers) overwhelmingly remain²¹ unless and until agreements are made through the bargaining system to regulate on different terms, subject only to compliance with legislative standards.

This is not to suggest that the changes introduced by WorkChoices are not significant – they are, as outlined below. They move labour regulation in Australia in the same general direction of the 1993 and 1996 changes (towards decentralization and flexibility underpinned by legislated minimum standards), but accelerate that policy direction in key areas. This has led ACCI and others to characterize them as evolutionary rather than revolutionary or discontinuous changes.

¹⁸ WorkChoices contemplates a rationalization of these awards over time.

¹⁹ Under WorkChoices, the minimum wage setting body (the Australian Fair Pay Commission) can rationalize these pay scales, but cannot reduce minimum pay levels. This is discussed below.

²⁰ The closest parallel was the New Zealand arbitration system which existed until the early 1990s. It was abolished by a National government and not reintroduced by a subsequent Labor government.

²¹ With some exceptions, such as wider exclusions from employment protection legislation.

Employer Bodies and the Case for Reform

It is no coincidence that in Australia the commencement of labour market reform in 1993 and the further reforms of 1996 heralded a 13-year period of uninterrupted economic growth²² and strong labour market performance that is widely acclaimed at home and internationally. This has included record levels of employment (in all categories – full-time, part-time and casual²³); the halving of unemployment²⁴; extremely high rates of labour market participation (including by women); growth in new forms of labour market participation (such as independent contracting and self employment); declines in industrial disputes to the lowest levels since records were kept²⁵ (both in aggregate numbers and in the numbers of days lost per thousand employees); real income growth; and the maintenance of high living standards. Labour market reform has also allowed Australia to recover from recessions of the early 1990s and avoid economic slow-downs in Asia in 2000 whilst successfully integrating new generations of persons into work.

Given these good outcomes, following the 2004 general election the government considered a further (third) round of labour market reform to be in the national interest. In the preceding years, micro economic reform to the labour market had been advocated by employers²⁶, a range of economic commentators, the OECD, the International Monetary Fund and the Reserve Bank of Australia.

ACCI, as the peak council of employer organizations in Australia, has been a lead advocate in this task. Industry relied on three propositions:

- that good economic and labour outcomes had only been possible as a result of past reform;
- that a decade had passed since the 1996 changes (and during that decade the global economy had moved on); and

²² Other factors contributing to this extended period of economic growth exist (such as economic management, trade liberalization, external demand for natural resources). The strong labour market performance has also been attributed to education and training reform (commenced by the former Hawke and Keating governments), the privatization of the employment services market (by the Howard government) and reforms in the welfare to work system.

²³ Over 276'000 new jobs were created during the first twelve months of WorkChoices, 265'400 of them full time. This is a rate of growth that significantly exceeded previous comparable periods. Whilst a range of factors can be attributable to that growth, micro economic reform to the labour market has been advocated by the OECD, the International Monetary Fund and the Reserve Bank of Australia as a basis for increasing productivity and lowering unemployment.

²⁴ To 4.6% (seasonally adjusted) in November 2006, from a high of 10.3% in the early 1990s.

²⁵ National statistical records of industrial disputes were first kept in 1914.

²⁶ Particularly by ACCI since November 2002 following the release of a ten year industry blueprint for reform, *Modern Workplace: Modern Future 2002–2010*.

- the 1993 and 1996 changes were limited steps which contemplated further change over time; they changed the former system from within, rather than replacing it with a new system (in contrast to what had occurred in other industrialized countries²⁷).

The framework for reform was set out by unanimous resolution of Australia's employer bodies in November 2002 when ACCI released a reform Blueprint, *Modern Workplace Modern Future – A Blueprint for the Australian Workplace Relations System 2002–2010*²⁸.

ACCI and employer organizations believed that there were two broad dimensions to labour market reform, workplace relations reform and education and training reform.

By workplace relations reform, employers contemplated changes to the legal and institutional framework of laws, regulations and decisions that govern the rights and responsibilities of employers and employees, trade unions and employer bodies in workplaces, and also the nature and quality of the workplace culture and the dealings at work between employers and employees.

The ACCI Blueprint argued that Australia was only one decade into its transition from the nine decade centralised system of highly regulated and interventionist employment laws, to more flexible bargaining approaches²⁹. WorkChoices is one of the next further important steps in this transition.

Reform Values Advocated by Employers

Whilst the 1993 and 1996 reforms were criticized in some quarters³⁰, there was widespread community acceptance of the principles on which they were founded (choice, flexibility, freedom and fairness) and the imperatives which justified them (productivity, competitiveness, economic and social change).

²⁷ For example, New Zealand reforms in the late 1980s and early 1990s (not overturned by the Clarke government in the late 1990s), and the United Kingdom reforms of the 1980s (not overturned by the Blair government in the mid 1990s) were far more substantial than the Australian reforms.

²⁸ Available at www.acci.asn.au

²⁹ “The concept of transition is important. Having left for a new destination, we have not yet reached it. We still sit uncomfortably in the middle of two systems... This is because the 1993 and 1996 changes did not displace the former system. They were introduced over the former system, not as a substitute. They were enabling, not compelling reforms that allowed for workplace change. The nature and pace of workplace reform and the transition to the new system was left to be a product of the needs, choices, attitudes and decisions made at the workplace, by third parties and by parliaments over the ensuing years. ACCI ‘Modern Workplace: Modern Future’ Blueprint (2002), page 5.

³⁰ The ACTU supported the 1993 changes but opposed the 1996 changes; some unions opposed both the 1993 and 1996 changes.

These principles found their way in the concepts of freedom of association; choice in agreement-making; primacy of employer and employee bargaining over tribunal arbitration; and a legislated safety net rather than a central regulation with 'one size fits all' rules.

More fundamentally, ACCI argued in support of the basic principle that workers and employers in each business should choose how their workplace relationship should be conducted and regulated, subject to minimum standards and compliance with principles of freedom of association, the promotion of collective bargaining and protection against coercion or duress when exercising free choice.

ACCI also called on the workplace relations system to take a broader view of those whose interests it serves. The regulation of employment affects not just those who are in jobs, but those who want to work. The regulation of employment also affects not just those operating businesses but those who want to start up a business.

In other words, ACCI argued that reforms must be designed to promote new jobs and new entrepreneurship and not just cater for those who are already on the inside of the labour market.

Employers highlighted that economic reform, including labour market reform, is not for abstract purposes. The object of reform is higher living standards – stronger businesses, employees and families. It was about and for people: business people and working people, and the community they live in.

International and domestic experience suggested that sensible and balanced workplace relations reform produces an economic benefit with the most fundamental of social dividends: more employment, higher living standards and greater workplace freedom, mobility and participation. Well-structured labour relations systems can contribute in a meaningful way to the goal, in the contemporary language of the International Labour Organization, of 'decent work'.

In the Australian context it was also relevant that the globalization challenge needed to be met, and its opportunities grasped. Being a country of a relatively small population (20 million) and geographically separated from natural markets, Australian businesses were acutely aware that the world owes no employer success in business or any employee the guaranteed security of his or her job. ACCI argued that business success and job security, like the level of employment, would be a product of the hard decisions made as a nation. Structural reform to our workplace system was a real pathway to achieving the gains that had been made and to sustain them into the future. The Australian labour market has also changed: the turn of the century saw the number of workers engaged as self-employed independent contractors exceed the number of trade union members.

The ACCI Blueprint advocated a vision of a workplace relations system that progressively empowered employers and employees across the nation to work co-operatively and make decisions in their shared interests.

Under the changes proposed in the Blueprint the regulatory system would progressively take on a different character. There would be less employment regulation. Remaining regulation would be simplified, and become more flexible, less prescriptive, be regularly reviewed and applied only to the extent necessary to provide a genuine safety net.

The shared interests of employers, employees and the unemployed would be the overriding factor regulating workplace relations cultures, structures and outcomes. There would be an increasing focus in workplace agreements sharing the benefits of improved business performance. There would be greater freedom for productive and entrepreneurial changes in the labour market, including direct employment and independent contracting.

The ACCI Blueprint envisaged compulsory arbitration being restricted to actual disputes seriously affecting the economy and public interest. There would be widespread recognition of freedom of association and voluntary unionism and collective bargaining within a framework of trade union and employer organizations. Unions and employer organizations that established a service oriented culture for members would prosper.

Following the Australian government's announcement in May 2005 that it proposed to proceed with a further significant round of labour market reform, ACCI and Australia's employer bodies released a series of further papers in support of the principles and vision underpinning the ACCI Blueprint. These were:

- The Economic Case for Workplace Reform³¹;
- Functioning Federalism and the Case for a National Workplace Relations System³²; and
- Workplace Reform: Working for Australian Women³³.

These supplementary materials, together with a detailed analysis of the proposed new laws, formed the basis for ACCI and employer organizations' dialogue with governments, unions and a parliamentary inquiry to the new laws in November 2005.

³¹ [http://www.acci.asn.au/text_files/Discussion Papers/Economic Case for WR Reform Electronic Copy.pdf](http://www.acci.asn.au/text_files/Discussion%20Papers/Economic%20Case%20for%20WR%20Reform%20Electronic%20Copy.pdf)

³² [http://www.acci.asn.au/text_files/Discussion Papers/Functioning Federalism Paper Electronic Version.pdf](http://www.acci.asn.au/text_files/Discussion%20Papers/Functioning%20Federalism%20Paper%20Electronic%20Version.pdf)

³³ [http://www.acci.asn.au/text_files/Discussion Papers/Aust Women & WR Reform Electronic Copy.pdf](http://www.acci.asn.au/text_files/Discussion%20Papers/Aust%20Women%20&%20WR%20Reform%20Electronic%20Copy.pdf)

OECD Support for Australian Reform

The OECD's 2006 Employment Outlook and 2004 Country Report for Australia provided support for continuing reform to Australia's labour market of the character pursued by WorkChoices (and the 1993 and 1996 reforms). The OECD argued³⁴:

- regulatory requirements for collective and individual agreements should be eased to promote enterprise bargaining;
- federal and state industrial relations systems should be harmonized;
- industrial dispute regulations should be streamlined to minimize the incidence of unlawful industrial action;
- safety-net award wage-increases should be guided by the productivity and thus employability of low-skilled workers;
- the minimum wage should be at moderate levels, with lower minima for youth and other vulnerable groups being essential³⁵;
- there is still much scope for further easing of the regulatory requirements for collective and for individual agreements³⁶;
- although the extent of the disemployment effects of employment protection laws (EPL) is unclear, EPL rules reduce dynamic efficiency, reduce employment prospects for the most disadvantaged job seekers (young workers, women and the long-term unemployed), prolong the adverse effects of economic shocks, hinder job creation and trap some workers in precarious jobs with little training or income security³⁷; and
- workers and employers should be able to negotiate working arrangements in a decentralized manner³⁸.

In many respects these policy directions have been pursued in WorkChoices.

³⁴ OECD 2004 Country Report, Australia, p 181.

³⁵ "The low-skilled face additional barriers to enter employment, or remain in it, because of relatively high minimum-wage scales and remnants of the formerly pervasive and excessively legalistic industrial wage award system still discouraging flexibility. Further reforms are needed in these areas." OECD 2004 Country Report, Australia.

³⁶ OECD 2004 Country Report, Australia, p 160.

³⁷ Employment Outlook, pp 96, 100, 186. In its Country Report for Australia, the OECD argues that EPL reforms should "lower the costs of managing the workforce and thus encourage hiring", p 159.

³⁸ OECD Employment Outlook, p 104.

The WorkChoices Reforms

The WorkChoices reforms adopt many (albeit, not all) of the foundations for reform advocated by Australian industry through the ACCI Blueprint. This was a very positive development and one that reflects on the leadership in public policy that can be provided through the collective work of employer organizations.

One of the principal objectives of WorkChoices is to establish a ‘fair and flexible labour market’ characterized by ‘high employment, improved living standards, low inflation and international competitiveness though higher productivity’³⁹. More specific objectives include protecting the competitive position of young people in the labour market⁴⁰; providing a safety net of minimum wages and conditions of employment⁴¹; promoting workplace or enterprise level bargaining⁴²; assisting employees to balance work and family responsibilities⁴³; and respecting and valuing diversity and non discriminatory employment practices⁴⁴.

At the same time, WorkChoices departed from the ACCI Blueprint in some key areas, resulting in a level of regulation of bargaining and the wider application of minimum standards (together with some unnecessary and prescriptive extra compliance requirements) than had been contemplated by industry.

Government also chose to largely internalize the drafting of legislation to its public administration and legal contractors, resulting in only a limited scope for employer organizations and trade unions to comment upon the details of specific measures. This is an aspect that has been the subject of criticism by both ACCI and the ACTU.

The WorkChoices amendments to the Workplace Relations Act 1996 were substantial. It is a matter of record that the amending legislation runs to hundreds of pages with many specific amendments. Reforms of principal importance for employers include:

- a national workplace relations system;
- national legislated minimum employment standards;
- collective and employer/employee bargaining;

³⁹ Section 3(a), Workplace Relations Act 1996.

⁴⁰ Section 3(k), Workplace Relations Act 1996.

⁴¹ Section 3(c), Workplace Relations Act 1996.

⁴² Section 3(d), Workplace Relations Act 1996.

⁴³ Section 3(l), Workplace Relations Act 1996.

⁴⁴ Section 3(m), Workplace Relations Act 1996.

- national minimum wages;
- targeted employment protection laws;
- freedom of association; and
- enforcement and compliance.

The key to ensuring the WorkChoices reforms translate into social, societal and economic gains is the human resource capacities and approaches of those who will implement the new policy options. In the immediate term, Australian industry faces the challenge not only of understanding and responding to WorkChoices, but also of delivering the improved management and human resource capacities necessary to fully and equitably implement WorkChoices and to create the necessary environment for workplace reform. Excellence in attraction, recruitment, selection and day-to-day management must support (for example) refinements to termination of employment claims and improved options for bargaining.

It is very important that employers and employees, particularly smaller businesses, be fully informed of what WorkChoices offers. WorkChoices delivers substantial new rights and capacities which must develop within the marketplace if employers in particular are going to be properly informed on – and avail themselves of – opportunities for new and improved ways of working.

There is a clear link between promoting reform and providing information necessary to support reform. The WorkChoices package implements arguably the most significant changes to the Australian workplace relations system since the original Conciliation and Arbitration Act of 1904. New rights, avenues and capacities are accompanied by new obligations, prohibitions and newly regulated ways of operating. WorkChoices should not only be promoted, but also supported by a substantial information campaign⁴⁵.

Following the commencement of WorkChoices, ACCI and employer organizations rapidly moved to understand and advise upon the new rights and obligations. Employer organizations encouraged and supported Australian employers to implement WorkChoices, and utilize the range of options under the new system as rapidly and comprehensively as possible. Key priorities have been promoting new capacities for agreement-making, and ensuring wage-setting and award-reform meet the interests of Australia's employers, their employees, and communities. Thus, ACCI and employer organizations are playing a significant part in providing information, representation, and strategic advice on developing productive, harmonious and mutually beneficial relations within workplaces.

⁴⁵ For example, the government-initiated WorkChoices Employer Advisers Programme (WEAP), which actively involves employer organizations; and web sites such as www.WorkChoices.gov.au

Employment Standards

It is a principal objective of WorkChoices that it provide ‘an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by the Act’⁴⁶.

Consequently, WorkChoices introduces national legislative standards for minimum wages and minimum conditions of employment. These are contained in a new legislative instrument, the Australian Fair Pay and Conditions Standard (AFPCS), and in related legislation.

The AFPCS provides for:

- minimum wages for multiple employment classifications and a federal minimum wage where classifications do not have a higher regulated minimum wage (including minimum loadings for casual work and rights to equal pay for men and women for work of equal value)⁴⁷;
- maximum full-time working hours of 38 per week⁴⁸, with protection against unreasonable requirements to work in excess of 38 hours⁴⁹;
- minimum four weeks paid annual leave each year (accruing per month, and paid out on termination)⁵⁰;
- minimum ten days⁵¹ paid personal leave each year (accruing each month, unlimited accrual able to be used for personal sickness and accrual of up

⁴⁶ Section 3(c), Workplace Relations Act 1996.

⁴⁷ WorkChoices fully preserves the level of minimum wage classifications or of the minimum wage as they existed at the time of its introduction; minimum wage reviews under WorkChoices can only increase or retain minimum wage levels. They cannot be decreased. The number of minimum wage classifications can, however be rationalized.

⁴⁸ Thirty-eight hours has been a widely applied standard in most industries in Australia since the 1980s, although when WorkChoices was introduced a 40-hour week applied in parts of some industries. Where 40-hour weeks applied, WorkChoices reduced standard working hours to 38 when transitional provisions expire.

⁴⁹ WorkChoices extended the concept of reasonable overtime into a new standard of reasonable working hours and applied that standard not simply to persons working overtime, but to all employment categories (including professionals and managers). In 2002 the ACTU had sought a reasonable hours standard from the Australian Industrial Relations Commission, but this had been rejected in a national arbitration. WorkChoices delivered a standard on reasonable hours in excess of what the ACTU had secured through the previous arbitration system.

⁵⁰ Four weeks annual leave has been a widely applied standard in most industries in Australia since the 1940s; under WorkChoices, some shift workers are entitled to a minimum of five weeks annual leave per year.

⁵¹ Ten days paid sick leave has been a standard in some industries in Australia since the 1970s, however at the time WorkChoices was introduced eight days per year applied in some industries. Where eight days applied, WorkChoices increased paid sick leave to ten days per year.

to ten days per year able to be taken for sickness of a family member⁵²); plus (if paid leave exhausted) two days unpaid leave on each occasion a family member is sick (number of occasions unlimited); plus two days paid compassionate leave on the death or life-threatening illness of a family member⁵³; and

- parental leave of a minimum of 12 months unpaid leave for mothers or fathers on the birth (or adoption) of a child, plus a week unpaid concurrent leave for spouses including rights to return to previous employment on the conclusion of parental leave and rights to transfer to a safe job prior to the birth of a child, or (in the absence of a safe job being available) payment of additional paid leave until birth.

Other legislative minimum conditions under WorkChoices include:

- right to redundancy payments, penalty rates, shift and overtime loadings, monetary allowances and annual leave loadings where they exist in arbitrated awards governing the employee (so long as they are not set aside by bargaining);
- minimum entitlement to meal breaks during work;
- right to days off work on public holidays;
- minimum rights to notice of termination, or payment in lieu of notice, on a scale of up to five weeks;
- right to not be unlawfully dismissed (such as dismissals based on union activities, exercising bargaining rights or other forms of discrimination);
- right to not be unfairly dismissed (dismissal based on performance grounds), except where employed by a small or medium business, or a short term casual employee;
- right to maintain conditions of employment for at least 12 months on the sale or transmission of an employing business;
- right to consultation (including trade union consultation) by employers when making more than 15 employees redundant;
- right to a dispute resolution process;

⁵² The use of five days of personal leave for family caring purposes has been a standard since the 1990s; immediately prior to the introduction of WorkChoices the ACTU and ACCI, supported by the Australian Industrial Relations Commission, had agreed to increase this to ten days per year from personal leave accruals. WorkChoices reflected that agreement and provided the legal basis for most employees to access this higher entitlement.

⁵³ WorkChoices extended the concept of bereavement leave from paid leave on death of a family member to the wider entitlement of paid leave to include cases of a life threatening illness of a family member.

- right to freely join trade unions, and establish new unions (provided rights of existing unions are not unreasonably interfered with⁵⁴);
- right to choose bargaining agents (including trade unions) when negotiating agreements; and
- right to not be coerced into bargaining or bargaining agreements.

In addition, WorkChoices retains legislative employment rights under certain laws of the Commonwealth, States and Territories. These include:

- right to at least an additional 9% of earnings paid on a quarterly basis by employers into a superannuation fund⁵⁵ of the employees choice (with no corresponding mandatory contribution obligations by employees⁵⁶);
- right to paid long service leave, generally in the order of 13 weeks after each ten years of service (and pro-rata payment on termination after seven years)⁵⁷;
- right to paid workers compensation for work-related injuries (physical or psychological) irrespective of employee fault (funded by mandatory levies on employers), including income replacement and payment of medical and rehabilitation expenses⁵⁸ ;
- right to safe workplaces and safe systems of work, including certain rights to trade union representation on health and safety matters;
- right to seek employment and undertake employment free from discrimination or harassment⁵⁹;
- right to work as an independent contractor, with equivalent rights for employees against sham contracting⁶⁰;

⁵⁴New trade unions can only be registered if the relevant employees cannot 'conveniently belong' to an existing trade union. This is an element of Australian law which existed prior to WorkChoices.

⁵⁵The expression 'superannuation' in the Australian context is the equivalent of a retirement pension in other countries; a government funded means-tested age pension also applies in Australia.

⁵⁶Employees who contribute to their superannuation entitlements are entitled to a co-contribution payment by the Commonwealth government into their superannuation fund.

⁵⁷This is the most common long service leave standard applying to Australian employees under legislation; some laws provide greater or lesser rights.

⁵⁸Some Australian workers' compensation laws provide income or partial income replacement for around two years, with access to lump sums thereafter; others provide employer-financed pensions until retirement. In addition, workers compensation schemes give employees a right to be provided with suitable alternative duties consistent with their medical condition, and rights against dismissal as a consequence of making compensation claims.

⁵⁹Discrimination grounds under Australian laws generally include race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

⁶⁰The Independent Contractors Act 2006 and related legislation was enacted in December 2006 and is the first contracting legislation of its kind amongst industrialized countries and in part follows a Recommendation adopted (by majority but without consensus) by the International Labour Conference in June 2006.

- rights to privacy in respect to employment matters⁶¹; and
- right to leave in respect of jury service.

The safety net for employees in Australia is also supplemented by a series of measures provided by the Commonwealth government, and funded from general revenue (a significant proportion of which is derived from business taxation). Australia's very substantial social safety net includes:

- payments (subject to certain caps) of unpaid wages, unpaid annual leave, unpaid long-service leave and unpaid redundancy payments on the insolvency of an employer⁶²;
- payment of AUD\$4'000 to a female employee on the birth of a child⁶³;
- monetary payments to employees with families through the taxation system;
- means-tested assistance to employees for the financing of child care; and
- fortnightly unemployment benefits and job seeking assistance.

The AFPCS set out in WorkChoices applies to all employment categories. This is a significant broadening of the legislative safety net in Australia. Prior to WorkChoices national employment standards did not apply to all occupational groupings. They applied only to employment relationships that were regulated by legislation, by arbitrated awards of industrial tribunals or bargaining agreements. This left gaps in minimum standard coverage in some unskilled areas and in many areas of professional or managerial employment. In contrast, the AFPCS in WorkChoices applies wherever an employment relationship exists⁶⁴.

In addition, each minimum wage and condition of employment in the AFPCS is a mandatory obligation of employers in respect of every Australian employee under WorkChoices. None of those minimum conditions can be varied or removed through bargaining. They are mandated, and compliance with them is strictly enforced. This is in direct contrast to the pre-WorkChoices position, where fewer legislative standards were mandated, and those that were included

⁶¹ Certain exemptions relating to small business and employee records apply under Australian law.

⁶² These payments are made under an administrative scheme established by the Australian government, the General Employee Entitlements and Redundancy Scheme. Until 1999, no such scheme operated in Australia.

⁶³ This payment is known in Australia as the 'baby bonus', and was the response of the Australian government to calls for the introduction of paid maternity leave.

⁶⁴ Subject only to the constitutional requirement that the employer is a corporation.

in arbitrated awards could be varied or removed through bargaining, provided employees were not, in an overall sense, disadvantaged.

The other legislative standards set out in WorkChoices, or retained by the WorkChoices scheme in other Commonwealth, State or Territory laws, generally apply to all employment categories unless a stated legislative exception exists.

WorkChoices also provides for freedom of association in membership of trade unions or employer organizations, and in collective and individual bargaining. It provides equal protections against persons being coerced into joining or remaining members of industrial organization, and being coerced into either collective or individual agreements. Conditions are placed on the circumstances in which trade union officials can exercise rights of entry into workplaces, and on the conduct of union and employer organization officials in agreement-making.

Based on the above, it can be seen that Australia has an extensive body of employment rights and that body has been broadened by WorkChoices.

Australia has only a very small informal economy. This means that the employment standards created by WorkChoices are widely applied by employers operating in Australia, whatever their region or industry.

In addition, WorkChoices establishes an active enforcement and compliance agency to give effect to another principal object, that is, 'to ensure compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of employee entitlements, and the rights and obligations of employers and employees and their organizations'⁶⁵.

To achieve this objective, the Australian government has considerably increased the size and financial resourcing of the compliance and enforcement agency (the Office of Workplace Services). The enforcement agency is actively embarking on compliance campaigns, education campaigns, investigations, prosecutions and recovery of monies owed.

Whilst it is always important that employee rights be protected (particularly while any system is undergoing change), enforcement, inspection and compliance can never be the source of new jobs, productivity and innovation. ACCI believes that governments should ensure inspection is undertaken constructively and sensibly, particularly where both employers and employees have to adjust to new systems and processes.

⁶⁵ Section 3(f), Workplace Relations Act 1996.

Bargaining

Aligned to the principal objective of providing a safety net of minimum wages and conditions, WorkChoices establishes a legal framework for bargaining in enterprises so that employers and employees can access wages and employment conditions above regulated minimum standards and generate improved business competitiveness and productivity. These objectives stated in law are:

- to ensure, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise levels⁶⁶;
- to enable employers and employees to choose the most appropriate form of agreement for their particular circumstances⁶⁷;
- to support harmonious and productive workplaces by providing flexible mechanisms for the voluntary settlement of disputes⁶⁸; and
- to assist employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers⁶⁹.

Bargaining under WorkChoices does not occur in a deregulated context. There are multiple levels of regulation which provide checks and balances that are designed to establish both fairness and flexibility in bargaining. These are:

- all bargaining agreements must include, without variation, each of the minimum conditions of employment and applicable minimum wages set out in the legislated minimum standards (the AFPCS);
- bargaining agreements cannot vary or set aside other legislative rights or protections under Commonwealth law, or that are retained in State or Territory law;
- bargaining agreements must include additional monetary provisions formerly provided for in some applicable arbitrated awards unless express agreement exists to vary or exclude them;
- bargaining agreements have a maximum duration and must have a dispute resolution procedure;
- employees have the right to be represented by a trade union or agent in bargaining negotiations;
- employees have the right to take collective industrial action in support of bargaining claims, after secret ballot approval of such action;

⁶⁶ Section 3(d), Workplace Relations Act 1996.

⁶⁷ Section 3(e), Workplace Relations Act 1996.

⁶⁸ Section 3(h), Workplace Relations Act 1996.

⁶⁹ Section 3(l), Workplace Relations Act 1996.

- it is unlawful for any employee to be coerced into making or terminating bargaining agreements;
- all bargaining agreements have legal effect only after they have been lodged with an independent regulator (the Office of Employment Advocate); and
- a party to a bargaining agreement can seek injunctions and damages for breaches, or secure assistance of a trade union or the enforcement agency.

Bargaining under WorkChoices can be collective bargaining (with a trade union, or alternatively by a group of employees who may collectively or individually be represented by a trade union), or individually between an employer and an employee (who may be represented by a trade union or other agent of their choice). Where agreements are made, they are either collective agreements or individual agreements (Australian Workplace Agreements, or AWAs).

As discussed above, the bargaining system under WorkChoices system operates within a context where both legislative minimum standards and certain conditions in previously arbitrated awards continue to apply. Hence bargaining in the Australian context is bargaining for wages and conditions in excess of regulated minimum standards.

This unique aspect of Australian labour law has given rise to the concept of both collective and individual bargaining. Collective bargaining is a notion well-known and accepted in Australia and the international community. Individual statutory bargaining is less well-known as a parallel bargaining concept, and has existed in Australia since 1996; however, when understood as the setting out of terms and conditions of employment between an employer and an employee akin to an employment contract, it is widely recognized and used internationally. In essence, AWAs are regulated forms of employment contracts.

Collective agreements and AWAs are subject to the same regulatory checks and balances on process and content. Both must include the minimum legislated wages and conditions of employment. However both can vary or set aside some of the pre-existing industry-specific conditions that had been arbitrated in awards.

This limited scope for bargaining flexibility is the *quid pro quo* for the APCS and its broader application of minimum standards, and the rights of employees to those minimum standards without them being varied or removed through bargaining.

The obligation to include legislative standards in all bargaining agreements but not necessarily any or all of the formerly operating award conditions (except where they form part of the legislative standards) is subject to policy debate in

Australia. Industry argues that this flexibility is necessary to provide a basis on which collective or individual agreements in workplaces can apply wage structures or conditions that reflect local circumstances of employers and employees and eliminate inefficient work practices. Unions argue that employees who agree to these agreements can be, in an overall sense, disadvantaged compared to what they would have previously been entitled to, ignoring or regarding as inadequate the protections mentioned above.

Whatever the merits of these positions, it is clear that the bargaining system (and its levels of regulation) established by WorkChoices is far from the deregulated employment contract models that unions seek to portray. Extensive protections regulating process and agreement outcomes have been imposed.

Another oft debated aspect of the WorkChoices bargaining system is that bargaining must be at the workplace or enterprise level, not at the sectoral level⁷⁰. Again this reflects the unique aspect of Australian law where pre-existing industrial awards already apply at the sectoral level, and these are in essence the equivalent of industry-wide collective agreements or arbitrated collective instruments. Applying the bargaining system on an enterprise rather than industry-wide basis has been the law in Australia since the 1990s and was a policy objective of the Keating government when enterprise bargaining was first introduced in 1993. WorkChoices maintained this approach.

WorkChoices also introduces some restrictions on the content of collective and individual agreements, primarily relating to matters that would not ordinarily fall within the employment relationship. This too has provoked debate, but largely reflects a series of court and tribunal decisions that were made under Australian laws before WorkChoices was introduced.

Unions in Australia also argue that WorkChoices is deficient because there is no obligation to collectively bargain with unions. In making this criticism unions generally fail to acknowledge that there is a right to make collective bargaining demands, a right to take industrial action in support of those demands and a right to have trade union representation in that process. It was also accepted well before WorkChoices that collective bargaining is not the exclusive form of employer/employee engagement, that agreements must be voluntarily entered into and that bargaining could not be the exclusive domain of trade unions. Two additional matters are also relevant:

- an extra obligation to collectively bargain takes on a different character to that applying in other countries where there is (as there is in Australia, but not elsewhere) already a framework of industry-wide wages and conditions of employment collectively imposed on industry sectors through negotiated or arbitrated industrial awards; and

⁷⁰ There is however limited scope for multi-employer agreements on certain projects.

- the level of trade union membership in the private sector in Australia is 15.2% (with an almost exclusive formal economy), meaning that large portions of the workforce would be unable to access collective bargaining if it was the exclusive domain of trade unions.

Minimum Wages

The WorkChoices system retains, and extends, a heavily regulated system of minimum wages in Australia. The Australian minimum wages system is the most extensive in the world, both in the level of the minimum wage and its pervasiveness across the economy.

Under WorkChoices each of the regulated minimum-wage classifications that existed before WorkChoices, continues. In Australia there is no single minimum wage, there are multiple regulated minimum wages; indeed there are over 105'000 of them for a workforce of just ten million people. They apply to both unskilled and skilled employment classifications, even into lower classifications of managerial employees and professionals. They exist in every industry. They extend beyond median earnings. They apply in all areas and regions, urban and rural. They are included in what is known as Pay and Classification Scales. They are set by an independent review body, the Australian Fair Pay Commission.⁷¹

The minimum wages are mandatory minima in any workplace bargaining or in any employment relationship. Bargaining can only increase them, not reduce them or vary them.

The review of minimum wages commenced within months of the new laws operating. Despite Australia having a very high minimum wage in global terms, the new review body conducted a review of minimum wages between May 2006 and October 2006. On 27 October 2006 it decided to increase minimum wages in each of these 105'000 wage classifications by AUSD\$27.36 for wages of less than AUSD\$700 per week, and by AUSD\$22.04 for wages of more than AUSD\$700. The federal minimum wage increased by 5.6% to AUSD\$13.47 per hour or AUSD\$511.86 per week. Immediately following the commencement of these increases on 1 December 2006, the Commission commenced a second review announcing that a further decision on the minimum wage would be made in mid 2007.

The minimum wage increases awarded in October 2006 under the WorkChoices system were the largest dollar increase to minimum wages in the history of Australian labour law.

⁷¹ Prior to WorkChoices they were set by a different body, the Australian Industrial Relations Commission. The former body set minimum wages by arbitration; the new body sets minimum wages by inquiry and review.

These regulated wage increases mean that the Australian minimum wage under WorkChoices has become the highest percentage of average median weekly earnings of any nation. In nominal terms it is also the highest – and that is simply the minimum wage applicable to unskilled employees. Minimum wages extend to classifications throughout the industry to certain work classifications remunerated in excess of AUS\$100'000 per annum.

This point is illustrated in the table below, which compares the Australian minimum wage to the mean wage ratio of a sample of other industrialized countries.

| Median Wage Ratio | 1997 | 2000 | 2004 |
|--------------------------|-------------|-------------|-------------|
| Australia | 0.59 | 0.57 | 0.58 |
| Turkey | 0.42 | 0.39 | 0.57 |
| Luxembourg | 0.55 | 0.52 | 0.54 |
| France | 0.55 | 0.55 | 0.54 |
| Netherlands | 0.48 | 0.50 | 0.51 |
| Greece | 0.52 | 0.50 | 0.49 |
| New Zealand | 0.45 | 0.44 | 0.47 |
| Belgium | 0.50 | 0.48 | 0.45 |
| Hungary | 0.25 | 0.27 | 0.45 |
| United Kingdom | - | 0.42 | 0.44 |
| Portugal | 0.43 | 0.46 | 0.44 |
| Canada | 0.44 | 0.44 | 0.41 |
| Poland | 0.45 | 0.41 | 0.40 |
| Ireland | - | 0.40 | 0.39 |
| Slovak Republic | - | 0.43 | 0.39 |
| Czech Republic | 0.22 | 0.30 | 0.37 |
| Japan | 0.31 | 0.31 | 0.32 |
| United States | 0.38 | 0.36 | 0.31 |
| Spain | 0.33 | 0.31 | 0.29 |
| Korea | 0.22 | 0.23 | 0.27 |
| Mexico | 0.23 | 0.21 | 0.19 |
| Average | | | 0.42 |

Arbitration

There are three tiers of workplace regulation under the WorkChoices system, these are:

- legislated minimum standards on wages and employment conditions;

- wages and employment conditions above minimum standards established by bargaining; and
- wages and employment conditions above legislated minimum standards established by collectively negotiated or arbitrated sectoral awards.

The existence of award regulation on a sectoral basis is retained by WorkChoices, but the scope for new awards or new regulation in existing awards is limited. This is because the policy underpinning WorkChoices is to move to a combination of legislative standards and workplace bargaining in preference to the former system of sectoral award-regulation established by compulsory conciliation and arbitration.

Award regulation on a sectoral basis was considered by government to be inadequate on both equity grounds (it excluded employment categories from protection if they were not award governed), and on economic grounds (it restricted bargaining flexibility at the workplace level). In addition it could be said that compulsory arbitration is also inconsistent with an effective system of collective bargaining; compulsory arbitration of bargaining disputes is an intrusion into the bargaining rights of employers and employees⁷².

Despite this, as discussed above, WorkChoices retained industrial-award regulation of employees where this existed at the time of its introduction, transferred some award conditions into legislative minimum standards, and requires certain award conditions to be incorporated in bargaining agreements unless they are expressly excluded by the parties.

Employment Protection

Australia has a well-developed set of employment protection laws. These include:

- laws against unlawful dismissal (including dismissal for trade union membership or representation);
- laws against dismissal that breach contractual rights;
- laws against discrimination-based dismissals;
- laws against dismissal whilst on workers compensation or personal sickness;
- laws against dismissal for family responsibilities;
- laws against dismissal for exercising industrial rights or claiming employment entitlements;

⁷² A number of decisions of the ILO Committee on the Freedom of Association have been critical of governments allowing compulsory arbitration of trade union bargaining demands (see for example, ILO Freedom of Association Digest of Decisions 5th revised edition, paragraphs 992–997).

- laws against unfair (performance-based) dismissal;
- laws providing minimum periods of notice of termination of employment;
- arbitrated awards providing mandatory minimum redundancy payments (additional to notice of termination or payment in lieu of notice) in the event of retrenchment;
- a government scheme of safety net payments in the event entitlements are unpaid where dismissal arises from employer insolvency; and
- a government scheme of unemployment benefits paid to workers who have been dismissed and are seeking alternative employment.

WorkChoices retained each of these employment protections but established a new exemption for small and medium businesses from unfair dismissal claims where the employer employs fewer than 100 employees.

WorkChoices established this exclusion because of the inappropriate use of these (well-intended) laws by employees who had been fairly dismissed but were simply seeking additional monies, the inappropriate touting of business by some consultants and lawyers, the limited capacity of small and medium businesses to effectively respond to unjustified litigation, and the disincentives to employment that had been created by the use and abuse of these laws flowing from their negative perception amongst small and medium employers.

Although Australian unfair dismissal law prior to WorkChoices had long provided for categories of exclusion, the new small and medium business exclusion was opposed by unions and labour lawyers. However, it must be recognized that:

- other employment protection laws remain, including for employees of small and medium businesses;
- all employees of larger businesses retain unfair dismissal rights;
- it was accepted by all sides of politics in Australia that the former unfair dismissal laws were routinely abused and rorted, with an adverse effect on small and medium businesses;
- the Australian government had made changes in previous years in an endeavour to overcome the problems of vexatious litigation but those changes failed to significantly stop the abuse and rorting;
- the Australian government sought to provide for a more modest exemption for small business (less than 15 employees) in previous years, but this was blocked by the upper house of the Australian parliament; and
- ILO Convention 158 contemplates exemptions for businesses of a particular size.

The small and medium business exemption has not led to any general misuse of dismissal laws by employers. In contrast, full-time jobs growth has surged in the period since this exemption has operated. The reasons for this are likely to be numerous, but the beneficial impact of small and medium businesses employing persons without risk of unfair dismissal litigation is considered by industry to be a significant contributing factor. Further, even with the easing of unfair dismissal laws, job security in Australia is high. The Morgan Job Security Index⁷³ released on 22 December 2006 reveals that 81% of Australian employees believe their current job is safe. This is one of the highest recorded expressions of job security since these surveys began in 1975.

Job security in Australia in this post-WorkChoices environment also exceeds the average of the 1970s (78.4%), the average of the 1980s (78.6%) and the average of the 1990s (72.4%). A further 64% of Australian workers believe that if they became unemployed a new job could be found quickly.

Australia's job security, together with New Zealand and Malaysia was the highest of the 14 surveyed countries in the Asia-Pacific region. Across the globe, Australia ranks seventh of 58 industrialized countries – higher than the UK, Germany, Sweden, Japan and the USA.

International Labour Standards

The International Labour Conference has not directly considered the WorkChoices reforms. However in 2006 a Report of the ILO Committee of Experts on the Workplace Relations Act 1996 and the secondary boycott provisions of the Trade Practices Act 1974 was debated by the Committee on the Application of Standards. A 2007 report on the new laws is expected.

The 2006 debate was a continuation of a discussion that started in 1998 following criticisms by the ACTU of the Howard government's 1996 workplace reforms. In 2006 the Committee of Experts repeated previously made criticisms of Australian law. They concerned:

- restrictions on protected industrial action, especially in relation to multi-employer agreements;
- suspension or cancellation of protected industrial action;
- prohibition on strike pay;
- prohibition on secondary boycotts (sympathy strikes) in sections 45D and 45E of the Trade Practices Act;
- Australian Workplace Agreements; and
- trade union collective bargaining rights.

⁷³ <http://www.roymorgan.com/news/polls/2006/4120>

The Committee of Experts consider these provisions a breach of ILO Conventions 87 (Freedom of Association) and 98 (Collective Bargaining).

Neither ACCI, nor global employers, agree with these views. Nor does the Australian government. The views of the ILO Committee of Experts are, in ACCI's view, based on incorrect interpretations of the conventions and a misunderstanding of the operation of Australian workplace law and practice.

In the debate ACCI argued:

- that ILO Conventions 87 and 98 did not expressly provide for a right to strike and, accordingly, the criticisms of the 'Committee of Experts' on the restrictions on the right to strike were not supported by the terms of the convention and were subjective conjecture;
- that no right to strike can or should be unrestricted;
- that secondary boycott laws in the Trade Practices Act are well-accepted by the community;
- that the ILO charter of reducing social disadvantage through decent and productive employment is being fulfilled in Australia with record levels of employment, high living standards, investment in skills, low unemployment and few industrial disputes;
- that AWAs are not inconsistent with Convention 98 on collective bargaining because all workplaces where AWAs are made are workplaces where collective bargaining is equally available to unions or employees. The convention does not make collective bargaining mandatory, nor does the convention say that it must be the exclusive form of bargaining.

ACCI also identified support for the Australian reforms from other international bodies such as the International Monetary Fund and in certain OECD reports.

The ACTU used the debate to criticize WorkChoices even though the Committee of Experts report was about Australian law as amended pre-WorkChoices – that is, amendments from 1996 until 2005. The ACTU was supported by officials from the global trade union movement.

Aside from criticizing the Australian government's workplace relations law and policy to a global audience (calling them an 'act of bastardry') and alleging that the government was 'in the grip of the greediest of business leaders', the ACTU used the ILO forum to launch an attack on the International Monetary Fund for its support of the Australian workplace reforms, describing the IMF as "morally bankrupt and economically shortsighted".

The presentation by the ACTU of Australia, Australian employers and Australian working conditions in such a negative light before a global audience is a matter of considerable regret. No doubt these are genuinely held views and it may suit

the ACTU's domestic political campaign against WorkChoices to do so, but in the process it is unfairly denigrating Australian employers and Australian workplaces in view of world governments. The Australian government also entered the debate, rejecting many of the conclusions of the Committee of Experts and undertook to provide details to the ILO about the WorkChoices amendments.

The debate in the Committee on the Application of Standards resulted in the ILO requiring further information from the Australian government about both the Workplace Relations Act and WorkChoices, and asked it to engage in consultations with the ACTU and ACCI on the Committee of Experts' report and the union concerns.

Conclusion

Recent changes to Australian labour law represent the third stage of reform to Australia's industrial relations system over the past 13 years. It is not a deregulation of labour law in Australia, but a further step towards bargaining and workplace flexibility within the framework of a national safety net.

The structural reform of moving towards a single national system of labour regulation in an economy with a workforce of only ten million is widely accepted as desirable and beneficial.

Many of the changes made are supported by industry, notwithstanding legislative detail that employers consider excessive. They have been welcomed by the OECD and the IMF.

They have attracted attention largely as a result of a campaign against them by the trade union movement. That campaign portrays the laws as unfair and extreme. In a charged political environment there is a failure to debate the laws in a balanced and objective manner⁷⁴. It can only be hoped that once the political temperature of the industrial relations debate in Australia recedes, that a more constructive dialogue on workplace reform can occur.

The implementation of WorkChoices is at an early stage. There is bound to be the need for amendment in such a large reform package. Much of the work of employer bodies and employers in the first year has been to bring employment practices into compliance with the new mandatory legislative standards and to be properly informed of rights and responsibilities under the new system, particularly in regard to bargaining.

The workplace application of these new laws by specific employers and employees will occur progressively, not at one time. There has been only limited variation to

⁷⁴ The independent workplace regulator in Australia, the Office of Workplace Services, concluded in July 2006 that certain aspects of the trade union campaign were misleading.

employment conditions, most visibly the sizeable economy-wide minimum wage increase of October 2006. The laws largely follow the principle of retaining the *status quo* in employment conditions unless and until employers and employees or their representatives use new bargaining options. A strong safety net of social protection for employees continues to exist in Australia.

The early signs are that the new laws are contributing to a wider incidence of collective and individual bargaining, especially in workplaces which have not been previously part of a formal bargaining system. Employer bodies are reporting strong interest in the small and medium sector about new bargaining options and opportunities.

The commencement of WorkChoices has also coincided with strong employment growth (276'000 new jobs since March 2006, 96% of which are full-time), low unemployment (4.6%), high job security and a further reduction in industrial disputes to historically low levels. Australia has well and truly thrown off the shackles of a generation ago when it was, from time to time, not regarded as a sufficiently reliable supplier of goods to the international community due to industrial disputes. Longer term impacts on productivity and competitiveness are far too early to judge. The first minimum wage review under the new laws surprised industry, unions and government for its size.

It is also important that employers continue work with governments to ensure that Australia moves to a fully national workplace relations system through the conclusion of intergovernmental agreements with respect to workplaces where the employer is not incorporated.

In a globalized economy, industrialized nations must progressively reform labour market institutions with a view to better and more efficient economic and social outcomes. This is particularly so for a nation the size of Australia, with its remote geography, and where Australia's living standards and wealth are deeply embedded in the notion of being a competitive trading nation with a skilled and productive (but relatively small) labour force.

The WorkChoices reforms have sparked political and industrial debate. Change can be confronting to the institutional interests of trade unions and even employer organizations, but if they are in the national interest they should be pursued with appropriate respect for the representative role of these bodies. In Australian workplaces employers and employees are largely getting on with the job of creating a stronger economy and a better way of life under the governance of these new laws and the system of workplace relations they herald.