



STATE GOVERNMENT RESPONSES TO WORKCHOICES ARE DAMAGING INDUSTRY

The High Court's *WorkChoices* decision in November 2006 provided a real opportunity for all governments to put their energy into making a national industrial relations system a reality. So far, most state and territory governments have spurned that opportunity, and instead introduced new employment and workplace laws to try to counteract the reach of *WorkChoices*. Viewed as a whole, these piecemeal changes comprise a significant body of new employment regulation in Australia, on top of *WorkChoices*. While these state government initiatives have tended to pass 'under the radar', they deserve greater public scrutiny.

It is well understood that the Australian Government's *WorkChoices* workplace reforms are opposed by the labour movement, which has promised to 'tear them up'.

However what is not quite so visible are the regulatory, administrative and legal steps that state and territory governments are taking to wind back workplace reform and undermine *WorkChoices*. In doing so, they have spent millions of taxpayer dollars for little gain, and have weakened their position in Australia's ongoing federalism debate. Employers are being caught in the middle of this political fight – with new and legally questionable state workplace regulation being imposed on industry.

These state and territory government strategies do not appear to be random, or developed at low levels of government. The signs are that they are well co-ordinated and planned at ministerial or head of government level. At the February 2007 meeting of the Council for the Australian Federation (a body that excludes the Commonwealth), State and Territory Premiers and Chief Ministers discussed a report on industrial relations strategy. Although this was widely reported in the media before the meeting, the wide ranging communiqué issued after the meeting made no reference to this agenda item.

RETALIATING WITH NEW WORKPLACE LAWS

For employers and small business, the most concerning aspect of the State and Territory response to *WorkChoices* has been complications created by a wave of new State workplace regulation, either through industrial relations laws or through occupational health and safety (OHS) laws.

These state laws, or proposed new laws, seek to extend obligations on incorporated employers who are also

subject to the *WorkChoices* system, thus re-creating dual regulation (some of which may be constitutionally doubtful albeit currently operative). They create State laws which specifically counter or alter the intended operation of *WorkChoices*. They also impose new penalties on employers. Various examples are set out below.

NEW OHS LAWS ON DISMISSAL

The NSW *Industrial Relations Further Amendment Act 2006* commenced on 1 December 2006. It amends the NSW *Industrial Relations Act 1996*, the *Occupational Health and Safety Act 2000* and the *Workers' Compensation Act 1987*. Even though *WorkChoices* seeks to exempt some employers from unfair dismissal laws, the new NSW law provides for reinstatement by the NSW Industrial Court where an employee (or injured employee) is terminated in breach of the NSW OHS Act. Terminating or victimising an employee for these reasons is also an offence under the OHS Act, with penalties of up to \$27,500 for a corporation and \$16,500 for an individual.

This new law applies to employers whether they are companies or not and whether covered by *WorkChoices* or not. The NSW OHS laws are already widely recognised as the most unbalanced and unfair in the country. These changes have made them worse.

NEW RIVAL DISPUTE LAWS

Even though *WorkChoices* specifically limits the compulsory arbitration of industrial disputes, a number of States are passing new laws which create a new jurisdiction for industrial dispute notification and resolution, even for employers covered by *WorkChoices*.

Western Australia passed the *Labour Relations Legislation*

Amendment Act 2006, which was assented to and substantially commenced on 4 July 2006. The WA amendments create new laws relating to (so-called) good faith bargaining, even where bargaining concerns a federal agreement under *WorkChoices*.

These new laws are designed to enable an employer or a union seeking to make a federal collective agreement to initiate good faith bargaining obligations under the (WA) Industrial Relations Act. The Western Australian Industrial Relations Commission is able to make orders to ensure parties bargain in good faith – i.e. in a specific way prescribed by the tribunal. WA unions have the capacity to seek good faith bargaining orders against employers otherwise completely bound by the federal system. It also appears that to not bargain in good faith when the WAIRC has been invited into negotiations will be a breach of the WA Industrial Relations Act. Substantial penalties against employers could result.

This means that the WA amendments have the effect of establishing a separate parallel bargaining process/ bargaining period under WA State law for those employers covered by the federal system. This is a direct attempt to impose additional obligations upon agreement making under *WorkChoices* not included in the federal legislation. Already the WA government passed bad laws when it made individual employer/employee agreements under WA state law unworkable. This led to a flight by employers and employees from WA laws into Australian Workplace Agreements (AWAs) under federal laws. In this way the WA government damaged its own jurisdiction and is now compounding that error.

Similarly, in NSW, the December 2006 amendments also allow the NSW Industrial Relations Commission to provide dispute resolution services to parties covered by *WorkChoices*. Additionally, the amendments allow for joint proceedings with other state industrial relations tribunals and for the NSW Industrial Relations Commission to exercise functions conferred upon it or its members under the industrial laws of another State.

This would allow State jurisdictions to band together to jointly hear wage and test case claims for their remaining jurisdictions, or even in areas where the operation of state laws is arguably preserved for corporations. Already state minimum wage cases are being conducted in advance of and without the benefit of minimum wage decisions by the national minimum wage regulator – the Australian Fair Pay Commission. The result is different minimum wage increases for the same groups of employees over the same periods of time.

Similar measures have been proposed by the Victorian

and South Australian governments.

NEW LONG SERVICE LEAVE LAWS

Victoria has enacted the *Long Service Leave (Preservation of Entitlements) Act 2006*. The amendments commenced on 1 October 2006. The amendments have the effect of altering the interaction of Victorian laws and *WorkChoices* and add bureaucratic requirements beyond *WorkChoices* if workplace agreements are made on long service leave (LSL) matters.

Any federal agreement addressing LSL will now need to meet additional notice and information requirements imposed by Victorian law. These employers have more red tape to deal with when paying long service leave to staff.

In some cases, higher LSL payments will need to be made. If an employee had a federal award entitlement to LSL in excess of the Victorian legislative standard then this becomes their entitlement under the Victorian LSL legislation. The new law also retains award or agreement level LSL in excess of the otherwise prevailing Victorian statutory standard, when an employee comes off an agreement (e.g. when it legally ends). Thus, where ordinarily an employee would fall back to state statutory standards on LSL, the Victorian Government has ensured that the statutory standard in fact becomes the higher pre-agreement, LSL entitlement derived from an award. This had not previously been the case.

There are other new State law requirements if a (*WorkChoices*) agreement is made. Where a proposed agreement would alter LSL under the Victorian Act (including the new preservations) the employer must notify the employee in writing at least 7 days prior to entering into the agreement. Where the agreement has any one of a number of listed effects (including modifying levels of entitlement, qualifying service, early LSL etc...) this must be explained in writing to the employee. If an employer fails to do this, he or she may incur a court awarded penalty of up to \$10,000. This can be pursued by an employee, union or the Victorian Minister. This includes capacity for the fine to be paid to the individual or a union.

Unfair dismissal laws are also reactivated for LSL purposes. An employer must not terminate employment, threaten to terminate employment, or prejudice an employee for exercising rights under the Victorian law. The Act introduces a capacity to pursue unfair dismissal on this basis including fines of up to \$10,000 – payable to the individual, union or consolidated revenue, a reverse onus of proof resting with the employer, orders for reinstatement and reimbursement of lost wages. Where

reinstatement is impractical, capacity exists for a court to order compensation of up to 12 months' pay.

NEW LAWS WHEN EMPLOYING YOUNG PEOPLE

Even though *WorkChoices* applies to all persons employed by a company, some States have decided to make extra laws regulating the employment of employees under 18 years – even when employed under *WorkChoices*.

These measures load up employment regulation for young people just at the time they are trying to get a foothold in the labour market, combine schooling with a bit of work, or avoid the unemployment queue. Putting more regulation and red tape in the way of employers when employing young people does a disservice to our youth and to their employers.

The NSW *Industrial Relations (Child Employment) Act 2006* commenced between March and December 2006.

The NSW Act is quite specifically designed to target employers in that state who are otherwise bound by *WorkChoices* (i.e. constitutional corporations). Importantly, the new obligations do not just apply to NSW employers recently moving from the state system into the expanded federal system based on their status as trading corporations. Other NSW corporations, long respondent to federal awards and paying no heed to state workplace laws for some years, will pick up new obligations under the legislation.

The NSW legislation introduces a specific 'no net detriment' test for making agreements with employees under 18. If an employer seeks to make an individual or collective agreement with one or more employees under 18, they must provide, on aggregate, remuneration and entitlements at least equivalent to comparable NSW awards applying to the type of work the young person is doing, plus NSW state legislation (even though at law these state awards and legislation do not govern that employment).

This is in direct conflict with the intended operation of the federal system under *WorkChoices*.

WorkChoices abolished the previous award-based no disadvantage test in favour of controls on agreement content (the Australian Fair Pay and Conditions Standard), on how some former award provisions are addressed in bargaining (protected award conditions) and on the conduct of bargaining (no coercion etc). The *WorkChoices* reforms extended to employees under 18, who were

allowed to make agreements under the same arrangements for all other employees, with the added requirement that a parent or guardian must consent to the making of the agreement.

The effect of these amendments is that a NSW employer can bargain perfectly legally under *WorkChoices* with an employee under 18, but be found to not comply with the new NSW Act, and be exposed to NSW penalties.

These new requirements are to be implemented by way of the NSW Industrial Relations Commission making principles ("no net detriment principles") which an industrial court will apply in determining whether or not an employer has provided the employee with conditions of employment that, on balance, result in a net detriment.

Legal processes in the NSW industrial tribunals to set these principles have already commenced.

There are also new record keeping obligations under these NSW laws for employers who employ young workers, even though new regulations under *WorkChoices* already specify substantial record keeping requirements, higher penalties and a very active national enforcement agency.

NEW UNFAIR DISMISSAL LAWS

The new NSW law also exposes all employers of employees under 16 to a new unfair dismissal system – even if the employer may be a small or medium company specifically exempt by *WorkChoices*.

Unfair dismissal laws can be job-destroying, especially in small business, as the former NSW Labor Premier Bob Carr said in 1995. This is becoming more widely acknowledged, even at a federal level. The OECD recently said that unfair dismissal laws can inhibit the hiring of people in riskier or vulnerable employment categories. This includes untried and untested 16 and 17 year olds.

Further, the new unfair dismissal law in the NSW legislation does not include a number of key balances and exclusions introduced into the federal system over the years.

There is also retrospectivity in these new NSW laws. The new regulation on bargaining applies to individual or collective agreements entered into on or after 27 March 2006. The new unfair dismissal laws apply to employers who are constitutional corporations who have dismissed a young worker under 18 years of age since 24 October 2006.

NEGATIVE IMPACTS - EMPLOYERS

The above measures are not the full extent of the new state and territory laws, but they provide a clear snapshot of their character.

The negative impact will be felt by employers and small business. The deliberate differences between the *WorkChoices* provisions and the type of state counter legislation outlined above manifest themselves in offences which employers can commit under state law by seeking to take perfectly legal actions under federal law. This is unacceptable to industry and very poor public policy.

It is employers who face the sanctions and penalties under the new state laws and who must obtain legal representation to participate in state proceedings which they quite legitimately thought were precluded by *WorkChoices* (e.g. a state unfair dismissal claim against a small business, or state court actions in regard to an entirely properly made AWA or collective agreement).

NEGATIVE EFFECTS – EMPLOYEES

One recent example of the practical impacts of this type of State law has arisen in the construction industry.

Employers in that industry must comply with Commonwealth industrial relations laws if the business is working on Commonwealth-funded construction work. The new law in NSW about workplace agreements is in conflict with Commonwealth law. As a result, NSW employers have been advised that if they give a job to a young 16 or 17 year old person starting a trade as an employee, then the new NSW law will conflict with the Commonwealth requirements. If it went ahead and employed the young person, the business could no longer tender for Commonwealth construction work.

In other words, the new State law means that the business won't be able to employ a 16 or 17 year old if it wants to keep tendering for construction work on projects that are funded by the Commonwealth government. It will be the 16 and 17 year olds that lose out, and some may potentially drop out of school and into a cycle of welfare dependency, even though there are businesses that want to give them a job.

Australian employers and small businesses expect their national, state and territory governments to avoid these problems, not create them.

CREATING CONFUSION IN INDUSTRY

These initiatives not only compromise the integrity

of *WorkChoices* but also challenge the necessary move towards a single national system of industrial relations regulation.

Even more significantly, they purport to impose new and additional rights and obligations on employers, even those who are quite specifically and lawfully covered by *WorkChoices*. Doing this adds complexity and confusion to employment regulation, undermining the important steps *WorkChoices* takes towards a single national industrial relations system, at least for companies.

WorkChoices sought to make a break from complex past rules about which businesses are covered by Commonwealth industrial relations laws. It provides, in general terms, that if a business is a company (a 'trading or financial corporation') then it is under Commonwealth laws. If it is not a company (partnership or sole trader) then it is under State laws.

In Victoria and the two Territories, all employers are covered by Commonwealth laws because other legislative powers can be used. Some transitional rules were made – for example, unincorporated employers already under Commonwealth law when *WorkChoices* commenced, would stay in *WorkChoices* for 5 years. In the longer term, *WorkChoices* could apply to all employers, if Commonwealth and State governments agree on a referral of powers (as Victoria has).

CREATING NEW BUREAUCRACIES

These new State laws are also accompanied by duplicate bureaucracies for their monitoring and enforcement. This is despite the fact that under *WorkChoices* the Commonwealth has significantly beefed up the workplace relations regulator – the Office of Workplace Services.

In addition, some States have also established (or plan to establish) new stand-alone statutory bodies to monitor, investigate, comment upon and analyse the operations of *WorkChoices*, such as Workplace Rights Advocates. These are contentious roles which inevitably draw public servants or publicly-funded officials into the national policy debate.

In the past, public servants would provide advice to governments and ministers. These new bureaucracies see public officials themselves seeking and attracting attention as public commentators on contentious issues.

DISTRIBUTING UNION PROPAGANDA

Some State governments have allowed their agencies to be used as a distribution point for trade union pamphlets,

booklets and other propaganda on workplace reform and *WorkChoices*. No alternative or dissenting industry or employer publications are distributed. The mere fact that trade unions are conducting a \$30 million campaign against *WorkChoices* does not mean that a State government should allow taxpayer-funded premises or facilities to be used for the distribution of union propaganda.

MAKING A POLITICAL DEBATE A LEGAL ONE

During 2006 the States and Territories took legal action in the High Court of Australia claiming that *WorkChoices* was unconstitutional.

In November 2006 the High Court resoundingly (5:2) rejected the State and Territory government arguments. The Court said that the debate about *WorkChoices* was a matter of 'legislative choice' – in other words the policy decision of a democratically elected parliament. It was a law with respect to 'corporations' and was not unconstitutional.

In making this challenge, the States took a policy and political issue into the courts, tried to make it a legal one, and failed. Of even more concern is the fact that the States pursued this case in circumstances where most informed constitutional lawyers and academics believed their case would fail, or at least fail on all its central points. The States and Territories proceeded notwithstanding these publicly expressed views. This was a serious error of judgment. What has not been revealed by the States and Territories is whether their own legal advice rated their chances highly. If the States proceeded against the weight of their own legal advice, this would be a matter of grave public concern.

WEAKENING STATE BARGAINING POWER

By challenging *WorkChoices* in the High Court, the States forced the Court to rule on the constitutional power to make laws with respect to corporations.

In doing so, and given the breadth of the Court's decision, the States have weakened their bargaining power in future dialogue with the Commonwealth – not just about industrial relations, but about many other issues concerning federalism.

WASTING TAXPAYERS' MONEY

The failed High Court challenge has cost State governments and the taxpayer millions of dollars. Over thirty barristers and lawyers were in court for over a week, and for many months dozens were working behind

the scenes. Moreover, the High Court ordered the State and Territories to pay the Commonwealth's costs. It is estimated that legal costs incurred by the States have run into the millions.

Aside from the failed legal challenge, at the heart of the State government opposition to *WorkChoices* is an attempt to retain State industrial relations systems, with their network of duplicate laws, bureaucracies and industrial relations bodies and tribunals.

This is not in the national interest.

Australia is a national economy competing in a globalised world. We can no longer afford six separate State industrial relations systems in addition to the national system. That system may have worked in the horse and buggy era when it was designed, but it does not work in the 21st century. Since 1996 the Victorian State Government has bucked this trend and retained the referral of power which establishes a single industrial relations system in that State.

Clinging to State industrial relations systems is not only a massive duplication of regulation, but also a poor use of taxpayers' money.

Recent information given by the Commonwealth to the parliament indicates that about 80% of all employees are now covered by Commonwealth laws. The percentage of the workforce under State industrial relations systems continues to decline. Yet States have not cut back the infrastructure of their industrial relations systems – indeed in this post *WorkChoices* period new costs have been incurred and new bureaucracies have been established. It is conservatively estimated that State governments currently spend over \$120 million each year on these declining and duplicate industrial relations systems. At a time when the community is demanding value for money, and there is pressure on State services such as roads, public transport, schools, hospitals and police, this is unsustainable.

Asking well resourced state industrial tribunals, with their decline in jurisdiction and workload, to supplement their work by conducting 'inquiries' into aspects of *WorkChoices*, or supporting tribunals to 'review' matters over which they have no determinative power, has also been a tactic in some states.

Employers and the public are entitled to ask is this an appropriate use of public money.

Another area where some of the States are compromising on 'value for money' is in relation to the purchase of

services.

Some States have altered State procurement codes or policies to render ineligible as tenderers businesses which employ persons on AWA – even where that employment is legal and the agreements have been lodged with the regulator - the Office of the Employment Advocate.

Allowing the labour movement's ideological opposition to individual employer/employee bargaining and AWAs to compromise State government purchasing decisions means that taxpayers pay extra for the provision of comparable services. For example, the Victorian Government's decision to not allow Commonwealth industrial relations inspectors and regulators to operate at the Melbourne Cricket Ground during its reconstruction prior to the 2006 Commonwealth Games meant that State taxpayers footed the bill and were denied access to tens of millions of dollars in Commonwealth funds.

STATE JUSTIFICATIONS

These criticisms of the State and Territory governments need to be tempered by an appreciation of why the States have taken the approach they have.

No doubt there is a genuine view against *WorkChoices* from Labor State governments. However, State governments have not just sought to influence public opinion, but are using their executive and legislative powers to impose additional burdens on industry. In doing so, they have blurred the line between political debate and good public policy.

It could also be argued by the States that they are seeking to protect their industrial relations systems. Aside from the fact that a national industrial relations system is needed for a national economy, this does not however explain why some of these new State laws seek to regulate employers who were for years before *WorkChoices* already in the Commonwealth system, nor laws which increase regulation on employers staying in state systems. Further, all States and Territories were involved in the High Court challenge, including Victoria, the ACT and the Territories where the Commonwealth industrial relations system has applied for many years and where no State or territory system operated.

COMMONWEALTH APPROACHES

WorkChoices has been complicated by these State laws, and its policy intention compromised in a number of areas. The Commonwealth should be concerned about these developments. Industry certainly is.

However, the Commonwealth must accept some responsibility for what has happened.

Most of these new State laws arise because the legislative drafting of *WorkChoices* left a number of loopholes through which the States are now jumping – even though this was not the Commonwealth's legislative intent. Section 16 of the *Workplace Relations Act 1996* sets out which State laws are and are not excluded (overridden) by *WorkChoices*. The States have taken advantage of the broad and poorly drafted language used by the Commonwealth. The Commonwealth should take legislative action to remedy these deficiencies.

Aside from the referral of powers by Victoria in 1996, the Commonwealth has also been unable to secure further referrals of industrial relations power.

Industry recognises that political and policy differences make this a very difficult task. However, in the period following the High Court decision of November 2006, and while transitional provisions in *WorkChoices* are working their way through (until 2009 and 2011), it is essential that the Commonwealth and the States establish a meaningful dialogue on the terms under which further intergovernmental agreements on industrial relations can be made. It is intergovernmental agreements underpinned by Commonwealth legislative authority that remain the best way of achieving a national industrial relations system, as they do not leave gaps in coverage that exclude unincorporated employers.

CONCLUSION

The opposition by State and Territory governments to *WorkChoices* has extended from the political debate into the realm of increased regulation on business and a poor use of taxpayers' money.

While *WorkChoices* itself is not simple, bedding down these new laws and informing employers and employees about them has been complicated and compromised by conflicting or new State laws – some of which apply, some of which don't and some of which have doubtful legal validity. Current State governments have a different political philosophy on workplace relations from the Australian Government. They are a stakeholder entitled to express that view in a public manner. In doing so though, they (like the Commonwealth) have a responsibility to govern with broad interests in mind, including employers and small business. The re-regulation being undertaken in some State jurisdictions suggests that legitimate employer and small business interests are being compromised.

Employers and small businesses should be allowed to get on with the job of creating more employment and securing our prosperity, and not be the meat in the sandwich in a political battle and turf war between the State and Australian governments over industrial relations policy and jurisdiction.

It is hoped that in the period following the forthcoming federal election that the political temperature of the industrial relations debate will cool between Commonwealth and state governments, allowing a sensible dialogue to occur. That dialogue should respect policy differences but see the common sense in a national industrial relations system and provide fair and effective mechanisms to achieve that goal, without industry being burdened by poor or unnecessary regulation.