Australian Workplace Agreements Under *Work Choices*

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Abstract

This paper details how AWAs are made under the Workplace Relations Amendment (Work Choices) Act 2005. The Work Choices amendments introduce significant changes to agreement-making. The most significant of these changes are the abolition of the no-disadvantage test, the effect of termination of agreements, and the new 'safety net' provided by the Fair Pay and Conditions Standard. Employers have welcomed these changes as a step closer to a system of common law regulation of the employment relationship. However, for employees, the simplification of the approval process and the removal of the vetting of Australian Workplace Agreements (AWAs), may expose them to AWAs which contain low wages and very limited conditions of employment. How far down this path some employers will attempt to go is yet unknown but it is clear that for some AWA employees, there will be considerable detriment to their working conditions and entitlements.

Introduction

On 26 May 2005, the Howard government outlined the changes which would be introduced when it gained control of the Senate in July 2005. On 14 December 2005, the *Workplace Relations Amendment (Work Choices) Act* 2005 gained royal assent (Peetz 2005a: 90). Despite some provisions which came into effect on assent, most of the changes took effect upon proclamation, being 27th March 2006. Importantly, a large part of the detail behind the changes to the Act is contained in regulations – these were made available on 19 March 2006. At the time of writing, it was not possible to digest the more than 700 pages of regulations, however,

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where their effect is important in terms of agreement-making, this is noted.

This paper focuses on the changes to individual agreement making (Australian Workplace Agreements) which result from the Work Choices amendments. The paper explores how Australian Workplace Agreements (AWAs) are approved, lodged, varied, and terminated. Discussion follows on provisions regulating the content of AWAs, the ability of the parties to negotiate an AWA, the abolition of industrial action and changes to the concept of duress. Finally, remedies for breaches of AWA provisions will be outlined followed by concluding comments.

Prior to the introduction of Australian Workplace Agreements in 1996, there had been no statutory form of individual agreement-making at the Federal level. Since the first AWA was approved in March 1997, this type of agreement has been subject to the highest level of scrutiny, notwithstanding that they are 'secret' agreements. Most research on AWAs to date has found that AWAs provide wages and conditions less than those achieved through collective agreements (Roan et al 2000; Bramble 2001, Cole et al 2001; Whitehouse 2001; Mitchell and Fetter 2003; van Barneveld 2004). However, until Work Choices, the differences between agreement types had been somewhat limited by the application of the same 'no-disadvantage test' as part of the approval process. This test compares the content of a proposed AWA against the relevant award. To be approved, the overall content of the AWA (or collective agreement) must be no less than the award. Available research suggests, that while most collective agreements sit easily above this safety net, AWAs often just scrape through, and are sometimes approved despite falling short of minimum entitlements. One of the most important changes introduced by Work Choices is the replacement of the no-disadvantage test with just five minimum conditions, thereby removing this important, albeit faulty, safety net.

Some States, such as Western Australia, have already dabbled with the removal of the 'no-disadvantage test'. Subsequent research has found that once this floor is removed, workers on statutory individual contracts fare much worse than those on collective agreements, and many even fall below the minimum provided by the award system (Fells and Mulvey 1994; ACIRRT 1996, 1999; Bailey and Horstman 2000; Plowman and Preston 2005; Baird and Todd 2005).

The question becomes, for statutory agreement-making, why are we heading towards a model which research suggests will widen wage and condition gaps between those on individual agreements and those on collective agreements. The impetus has come from business lobbyists including the Business Council of Australia, the Australian Chamber of

Commerce and Industry, and the right-wing think tank, the HR Nicholls Society. These groups have long argued that the most appropriate mechanism to govern the employment relationship is common law (Evans 2005; Moore 2005). To their disappointment, the Work Choices amendments do not abolish statutory agreement-making. This has lead some to voice criticism that the changes do not go far enough. For example, the President of the HR Nicholls Society, just nine days before the Bill gained royal assent, lamented that 'the tragedy is that the Howard Workchoice Act, with minor exceptions, supports regulation and disparages freedom' (Evans 2005: 3). However, while criticising the changes overall, commentators such as Evans and Moore have quietly applauded the government's changes to agreement-making, in particular 'the diminution of regulation in AWAs and the improvement in procedures for making them legally effective' (Evans 2005: 5). This support for the changes to agreement-making must be contrasted with the vocal opposition from the trade union movement, and arguably from the broader community, to the Work Choices amendments.

In response to these debates, the Prime Minister acknowledged in November 2005 that the 'legislation does bring about significant change', suggesting that 'the change, whilst big, is fair' (Howard 2005: 3). Prime Minister Howard confidently predicted:

> *that in a years' time, people will look back on many of the misrepresentations of recent weeks and recent months, realising that the sky has not fallen in and the world has not come to an end and not every employer is Australia is a cruel, avaricious person... (Howard 2005: 3).*

Over the next few years, it will be interesting to see if the predictions made by the Prime Minister regarding the effect of Australian Workplace Agreements post Work Choices do occur. Certainly in the first week of the operation of the Work Choices amendments, some workers would disagree with the Prime Minister's prediction, with reports of sackings of abattoir workers, manufacturing workers, and hospitality workers, and of some companies offering re-employment solely under the terms of a lower-paying AWA (Insiders 2006). This brings us to explore the detail of the changes.

Procedural Steps in the Making of AWAs

Work Choices 'provides for a cascading hierarchy of instruments at the

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apex of which are AWAs, followed by collective agreements then awards. An instrument higher up the hierarchy operates to the complete exclusion of any instrument further down the list' (Gibian 2005: 4). The AMMA in its submission to the Senate inquiry into the Work Choices Bill noted that the position of AWAs at the top of the hierarchy 'will be most relevant where a collective agreement has provisions that do not suit an individual employee. This provision will allow the contract of employment to be customised to meet the needs of an *employee and the employer'* (AMMA 2005: 14). In contrast, the ACTU argued that the superiority given to AWAs 'will promote the unilateral determination of wages and conditions by the *employer* at the workplace. It does this by enshrining 'take it or leave it' AWAs in law; allowing AWAs to override collective agreements during their term; and allowing employers to reduce wages and conditions during the negotiation process' (ACTU 2005a: 4). One thing is clear, the superiority given the AWAs over collective bargaining and awards breaches several ILO conventions to which Australia is party (ICTUR 2005).

The primacy given to AWAs by the Work Choices amendments is also retrospective. Once Work Choices was proclaimed, a prohibition was imposed on all existing certified agreements, abolishing what have been deemed 'anti-AWA terms'. These are defined as 'a term of a pre-reform certified agreement that prevents the employer bound by the agreement from making ... an AWA with an employee bound by the agreement' (Schedule 7, Part 2, Division 1, s8). These preventative clauses have been commonly included in certified agreements to ensure that employers could not use AWAs to undermine the collective agreement during its term. This protection will no longer be possible since Work Choices, and the underpinning regulations, determines the scope of agreement negotiations and what is allowable agreement content (another breach of ILO Conventions).

Specifically, under the Work Choices amendments, AWAs are defined as follows (s326):

(1) An employer may make an agreement (an Australian Workplace Agreement or AWA) in writing with a person whose employment will be subject to the agreement.

(2) An AWA may be made before commencement of the employment.

According to s 351, an operating AWA binds the employer and the employee who is subject to the agreement. However, others may be bound as a result of transmission of business and, while not a party, bargaining agents can assist in the negotiation of the agreement. AWAs remain secret documents with a penalty of imprisonment for 6 months if AWA parties

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are disclosed in contravention of the legislation (s 165).

Section 337 of the Work Choices amendments outlines the requirements of employers when implementing an AWA. The Work Choices amendments require reasonable provision of the written AWA *seven* days before the agreement is to be approved (s 337(1)). Where an AWA incorporates terms from another industrial instrument (such as another workplace agreement or an award, s 355(2)), employees must also have ready access that that instrument in writing. Previously, the employer was required to take reasonable steps to provide the proposed AWA to a new employee *five* days in advance of signing and *fourteen* days for existing employees (170VPA).

What constitutes 'reasonable steps' and 'ready access' is unclear, although, for some employees, 'reasonable steps' and 'ready access' may be unimportant given that s 338 provides that employees may sign and date a written wavier eliminating the need for the employer to provide the AWA for seven days before it is to be approved. Should an employee not waive this requirement and the employer lodges the AWA for approval, civil penalties apply (s 337(8)). It is likely that this waiver provision will be used extensively for the hire of new employees since the current five day delay, which could not be waived under the previous legislation, was reported by some employers, particularly those in labour intensive, service orientated work, as problematic in the hiring of new employees (van Barneveld 2004).

The employer must 'take reasonable steps to ensure that' the AWA employee is given an information statement 'at least seven days before the agreement is approved' (s 337(2)). The statement must contain information about the time at which, and the manner in which, the approval will be sought under s 340 (s 337(4)(a); and, information about the right of the parties to use bargaining agents (s 337(4)(b). Should an employee reasonably not have ready access to the information statement at least seven days in advance of lodgement, civil penalties apply (s 337(9)). The required content of the information statement may be changed through publication in the *Gazette* by the Employment Advocate (s 337(4)(d)).

It is interesting to note that, possibly due to a fault in drafting, the employee does not have the ability to waive their right to being provided the information statement seven days in advance. Hence the civil penalties specified in s 337(9) will apply in *every* AWA case where 'reasonable steps' are not taken to provide an information statement. It must be observed, however, that 'reasonable steps' sets quite a low threshold for the employer to meet.

Once the employee has had access to the AWA for seven days (or waived this requirement) and had the information statement for at least seven days, the AWA is approved when it is signed and dated by both the employer and employee (s 340(1)(a)) and witnessed (s 340(1)(b)). For AWAs covering those under eighteen years, the agreement must be signed and dated by 'an appropriate person' (not the employer) who is over the age of eighteen years, indicating the consent of the underage person to making the AWA. The signature must be witnessed (s 340(1)(c)(i)). Again, where these steps for approval have not been met and the employer lodges the agreement, the employer is liable to a civil penalty (s 341).

An AWA which has been signed, dated and witnessed must be lodged with the Employment Advocate by the employer within 14 days of approval (s 342(1)). A declaration must be lodged with the agreement (s 344(1)). The contents of that declaration are not specified in the Work Choices amendments. Rather, under s 344(3) the 'Employment Advocate may, by notice published in the *Gazette* set out the requirements for the form of the declaration'.

Depending on what is gazetted as the requirements of the declaration, this may be one of the most important 'checks' in the new AWA system since the Work Choices amendments, by reference to the Criminal Code, create offences for providing false or misleading information or documents (s 344(2)). To be sufficient, the declaration must be a statutory declaration from the employer about the reasonable provision of a copy of the AWA and the information statement, as well as some indication that the employee had consented to the lodgement of their agreement. The Employment Advocate has indicated that this is his understanding of the meaning of 'declaration' (Senate 2005: 88). Therefore, by subsequently falsifying a statement to suggest that the employer has complied with ss 334-342, the employer could be exposed to a criminal penalty. However, given that AWAs remain secret documents, and the filling process is devoid of any vetting procedures, it is unclear how false statements will be identified.

Once the AWA has been lodged, the Employment Advocate must issue a receipt for the lodgement (s 345(1)). A copy of this receipt must be sent to both the employer and the AWA employee (s 345(2)). This is similar to the previous s 170VPF, however, under that provision, the OEA was only required to notify the employer, not the employee.

Finally, an AWA is operational on the day it is lodged – even if the requirements above have not been met. According to s 347(2), the agreement is operational *even if* the provisions in sections 334 (recognition of duly appointed bargaining agents), 337 (ready access to AWA and

information statements) and 342 (the requirement for the employer to lodge the AWA with an accompanying declaration) have not been met (s 347(2)).

Of course, there are civil remedies for such things as not giving access to the AWA, lodging an unsigned document etc., but in many cases, it would be impractical for an individual employee to pursue such actions. The only effective protection may be the threat of criminal penalties against an employer who lodges false or misleading information or documents but even this provides little protection to AWA employees.

Variation of an AWA

An operational AWA can be varied by the employer and the employee (s 367) as well as by the Employment Advocate to remove prohibited content (s 363)), by the Commission to remove discrimination (s 831) and as a result of a court order under s 410.

For variations by the employer and the employee, similar steps apply as for approval of the original AWA. The employer must take reasonable steps to ensure the AWA employee has the variation, or ready access to it, seven days before the variation is approved (s 370(1)) and ensure that an information statement is provided to the AWA employee at least seven days before the variation is approved (s 370(2)). The information statement must contain certain information (s 370(4)) and civil penalties apply for contravention of the requirements. Note that a waiver may be made under s 371. It has the same effect as a waiver made under s 338.

A variation to an AWA is approved according to s 373 if the same steps as those for drafting and AWA are followed. Failure to meet these steps could expose the employer to a civil penalty (s 374). Finally, a variation must be lodged with the Employment Advocate within 14 days of approval (s 375). The variation must be accompanied by a declaration at the time of lodgement (s 377). Again, the Employment Advocate is expressly 'not required' to consider whether any of the requirements in making a variation have been met (s 377(5)) but falsifying the declaration will expose the employer to criminal penalties under the Criminal Code.

The variation becomes operational when it is lodged with the Employment Advocate (s 380), even if the proper steps are not followed (s 380(2)). The Employment Advocate must issue a receipt for the lodgement and a copy goes to the AWA employee and the employer (s 378). Data is not publicly available to elicit how often AWAs were varied under the previous legislative provisions (s170VL). Similarly, it is not possible to predict how extensively the variation provisions of Work

Choices amendments will be utilised. However, given the increased maximum duration of AWAs, it is possible that variations may become more common.

Termination of AWAs

According to Work Choices, an AWA will cease to operate in a number of circumstances and once an AWA has ceased to operate, 'it can never operate again' (s 347(7)). These circumstances include: the replacement of the AWA by a new agreement (s 347(4)(b)); if the Court declares the AWA void (s 347(4)(c)); if the employer ceases to be an employer; or once the AWA has passed its nominal expiry date, by termination either unilaterally or by 'approval' (s 381(1)).

For an AWA to be terminated by 'approval' similar steps to those required for the making of an AWA must be followed. For example, the employer must take reasonable steps to ensure that the AWA employee has been provided with an information statement seven days before the AWA is to be terminated (s 384(1)). The agreement to terminate must be written, signed by both parties, dated and witnessed (s 386(1)). Again, special provisions apply to those employees who are under eighteen years of age. The termination agreement and a declaration must then be lodged by the employer with the Employment Advocate within 14 days of approval (s 388, s 389), and a filing receipt will be issued to both the employer and AWA employee (s 390). Civil penalties apply for breaches of these requirements.

An AWA, which is operating past its nominal expiry date may be terminated *unilaterally* by either the employer or the employee in one of two ways:

- if the AWA specifies a manner of terminating the agreement after its nominal expiry date, the terminating person (which may include a bargaining agent) must *follow the steps for termination outlined in the AWA* and take reasonable steps that the other party has written notice of the termination 14 days before the termination is to be lodged (s 392(4)).
- either party (or a bargaining agent) may give 90 days written notice of their intention to lodge a termination notice with the Employment Advocate (s 393), regardless of whether an AWA specifies a manner in which it is to be terminated.

If the employer is seeking termination, a written copy of any undertakings provided must also be given (s 393(4)(b)). The undertakings come into operation the day the AWA is terminated and cease when a new

agreement in agreed. However, there is no requirement for the employer to give undertakings and should none be given, the employee may fall to the five conditions in the FPCS and any applicable 'protected' award conditions (which are listed below).

Given that the likely outcome is that an employee's terms and conditions may be reduced to the FPCS, it is not foreseeable that employees will lodge an AWA termination notice with the Employment Advocate. This observation is further confirmed by the fact that once the termination has taken effect (s 398), no other awards or agreements can apply to the employee (s 399). Even if there is an existing certified agreement which could cover the AWA employee's conditions on termination, s 399(2) may prevent this by providing that other agreements are not applicable to the employee from the time the agreement is terminated until 'another workplace agreement *comes into operation* in relation to the employee'. The term 'comes into operation' is defined in s 347 as the day the agreement is lodged, so arguably a terminated AWA employee can only be covered by a *new* certified agreement.

Fair Pay and Conditions Standard (FPCS)

The FPCS which apply to employees once an AWA is terminated contain just five conditions (s 171). These conditions are basic rates of pay and casual loadings; maximum ordinary hours of work; annual leave; personal leave; and, parental leave and related entitlements. This can be compared to the twenty allowable matters which are currently permissible in awards – the previous 'fallback' position if an AWA was terminated.

Further, it has been argued that even the five conditions are not a guaranteed minimum since up to two weeks of annual leave may be 'cashed out' each year. In their submission to the Senate inquiry into the Bill, 151 academics noted that the FPCS of annual leave is most likely to be traded by AWA employees 'as the majority of AWAs do not provide for a wage increase during the period of the agreement. In such circumstances, the only access an employee may have to a wage increase is by cashing out annual leave' (151 Academics 2005: 10). The same could be suggested for workers who fall onto the standard if their agreement is terminated.

Workers who fall to these conditions, by a combination of termination of their AWA and an employer who will not undertake to maintain their terminated AWA wages and conditions, will suffer severe disadvantage compared to those on collective agreements, and in many cases, those on operating AWAs and awards. Whether employers use the FPCS simply as

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a threat will not be seen for some time unless after the Work Choices amendments become operative, there is an immediate rush to lodge new AWAs which have a short duration. This is because only AWAs which have been made under Work Choices can be terminated under the new provisions. Pre-reform AWAs are terminated under the pre-reform *WR Act* provisions – where no threat to drop the employee to just five conditions can be made.

Content of AWAs

AWAs have been criticised on a number of occasions for being minimal documents, focused on limited provisions, primarily designed to increase the number of hours an employee can work whilst minimising the cost of labour (Roan et al 2000; Cole et al 2001; Mitchell and Fetter 2003; Briggs 2005; HREOC 2005). This is often to the detriment of 'softer' provisions which are family friendly, and provide for training and consultation (Bramble 2001; Whitehouse 2001; van Barneveld 2004; Baird and Todd 2005). Further highlighting the labour-cost focus of AWAs, numerous studies have found that the wages of AWA workers, particularly non-managerial workers, are less than those on collective agreements (Carlson et al 2001; van Barneveld and Arsovska 2001; van Barneveld 2004; Peetz 2005b).

While one of the key arguments in support of individual contracts has been to tailor wages and conditions to suit individual employees and their employer, AWAs have generally been found to be pattern agreements. The most pertinent example of the pattern nature of AWAs, and one noted by many, is the existence of template AWAs and AWA clauses on the website of the Office of the Employment Advocate. In part, the pattern nature of AWAs reflects the previous s170VPA(1)(e) of the *WR Act* which required an employer to state that if AWAs with the same terms were not offered to employees doing the same kind of work, the employer did not act unfairly or unreasonably in failing to do so. This provision gives effect to the important principle of 'equal pay for equal work'. Work Choices abolished this obligation and arguably, employers are now more easily be able 'to discriminate between employees performing the same or comparable work'. This change 'further emphasises the broad intent of the AWA provisions, namely, that the individual bargaining capacity of a worker rather than the value of their actual contribution, be a substantial determinant, of the wages paid and the conditions afforded' (ICTUR 2005: 37).

Section 352 of the Work Choices Amendments details the required content of AWAs. Simply summarised, AWAs only need to contain a nominal expiry date and a dispute resolution clause (Gibian 2005: 3). In fact, there are more things which are expressly excluded from AWAs than expressly included.

The nominal expiry date of an AWA can be no later than the fifth anniversary of the date on which the agreement was lodged (s 352(b)(i)). If no date is specified, the expiry date is taken to be the fifth anniversary of the date of lodgement (s 352(b)(ii)). This amendment increases the nominal length of an AWA from a maximum of three years to five years.

Concerns have been raised in the AWA literature about pre-reform AWAs which operate for the full three year term. Of concern has been the lower wage increases provided on average in AWAs compared to collective agreements, the discretionary nature of AWA wage increases and the ability of AWA employees with low or non-existent wage increases to fall behind the relevant award rate during the life of their agreement, or worse, find their real wage decreasing. The longer the nominal term, the more likely AWA wage rates will fail to keep pace with rates of pay in collective agreements and possibly even the inflation rate (van Barneveld 2004; ACIRRT 2003; Mitchell and Fetter 2003; van Barneveld and Arsovska 2001; Hawke et al 1998).

Although it is clear, with the extension of the life of an AWA to five years, that concerns about AWA employees falling behind compared to the relevant award will remain valid, whether the concerns about the outcomes of AWAs under Work Choices can be voiced in the same way is doubtful. Under the current provisions, the actual shortfall over the life of an AWA compared to the relevant award rate can be retrospectively calculated (van Barneveld 2004). Under Work Choices, the comparator is not the relevant award (which may not exist due to award rationalisation), but the fair pay and conditions standard. However, this standard cannot provide a useful gauge of AWA outcomes.

Similar to agreements made under the pre-reform provisions, Work Choices AWAs must include a dispute settling procedure (DSP) (s 353). If the agreement does not include a DSP, the model DSP will apply.

In addition to the expiry date and a DSP, unless an AWA expressly includes or modifies all or part of the 'protected award conditions' (s 354(2)(c)), these protected award conditions are 'taken to be included in the agreement' (s 354(2)(a)). Similar to the content of some pre-reform AWAs and certified agreements, a common phrase in AWAs may well become 'this AWA operates to the exclusion of all protected award

conditions' thus denying the AWA employee these, otherwise mandatory, inclusions. Should these protected, allowable award conditions not be expressly excluded, they will provide an important addition to the content of AWAs beyond the five conditions in the FPCS.

The protected allowable award conditions are those in the award (as varied from time to time) which would apply to the AWA employee's employment had they not signed the AWA. These protected matters cover:

(a) 'rest breaks;

(b) incentive-based payments and bonuses;

(c) annual leave loadings;

(d) public holidays

(e) monetary allowances for:

(i) expenses incurred in the course of employment; or

(ii) responsibilities or skills that are not taken into account in rates of pay for employees; or

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(f) loadings for working overtime or for shift work;

(g) penalty rates;

(h) outworker conditions; and

(i) any other matter specified in the regulations'.

Incidental provisions and machinery-type provisions which highlight the allowable matters listed above can also be included in an AWA (s 354), and under s 355 an AWA can incorporate by reference terms from another workplace agreement or an award.

The content of agreements has been the focus of both the Australian Industrial Relations Commission (AIRC) and parties to agreements since the High Court's decision in *Electrolux* in September 2004[1]. However Gibian notes, 'the (Act) says very little in relation to the content of agreements' which 'suggests that agreements can cover anything' (Gibian 2005: 3). This is misleading though as the content of agreements is limited through 'the *regulations* (which) may specify matters that are prohibited content' (s 356, Gibian 2005: 3).

According to Division 7.1 of Part 8 of the *Workplace Relations Regulations 2006*, a term of a workplace agreement is prohibited content to the extent that it deals with the following:

(a) 'deductions from the pay or wages of an employee bound by the agreement of trade union membership subscriptions or dues;

(b) the provision of payroll deduction facilities for the subscriptions or dues referred to above;

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(c) employees bound by the agreement receiving leave to attend training (however described) provided by a trade union;

(d) employees bound by the agreement receiving paid leave to attend meetings (however described) conducted by or made up of trade union members;

(e) the renegotiation of a workplace agreement;

(f) the rights of an organisation of employers or employees to participate in, or represent an employer or employee bound by the agreement in, the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;

(g) the rights of an official of an organisation of employers or employees to enter the premises of the employer bound by the agreement;

(h) restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;

(i) restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency;

(j) the forgoing of annual leave credited to an employee bound by the agreement otherwise than in accordance with the Act;

(k) the provision of information about employees bound by the agreement to a trade union, or a member acting in a representative capacity, officer, or employee of a trade union, unless provision of that information is required or authorised by law'.

Further prohibited under Division 7.1 of Part 8 are clauses which: encourage or discourage union membership; allow for industrial action to be taken during the life of the agreement; prohibit or restrict the disclosure of details of the workplace agreement by a person bound by the agreement; provide a remedy for unfair dismissal; and, any matter which does not pertain to the employment relationship.

According to s 357 an employer 'must not lodge an agreement containing prohibited content'. Civil remedies apply where an employer is 'reckless' as to whether the agreement contains prohibited content. Where prohibited content is contained in an agreement, the prohibited term will be void (s 358) and the Employment Advocate must vary the agreement to remove the prohibited term (s 363). The Advocate can exercise his/her power to remove content either at his/her own initiative or 'on application by any person' (s 359). When considering a variation to an agreement under s 363, the Advocate must give notice to the employer and the AWA employee (s 360). The notice must contain a number of matters including

the reasons for the variation, the terms of the variation and an invitation for the employer and AWA employee to make written submissions within 28 days to the Advocate about whether the variation should be made (s 360). Once a decision has been made, the Advocate must provide written notice of the decision to the employer and AWA employee (s 363).

The Abolition of the No-Disadvantage Test (NDT)

Before he became Employment Advocate, Jonathan Hamberger wrote that 'the challenge for policy makers is to provide sufficient flexibility in the area of individual contracts while preventing employers from using them to reduce wages and conditions' (1995: 288). The application of the no-disadvantage test to AWAs went some way to meeting this challenge by preventing employers from using AWAs to reduce wages and conditions *vis-à-vis* the relevant award (van Barneveld 2004). Of course, the value of the NDT derives its relevance from a comprehensive and pertinent system of awards. With the reduction of awards to contain just 20 allowable matters by the *WR Act*, and the further rationalisation of awards proposed by Work Choices, the effectiveness of the NDT in providing a 'barrier' below which employment conditions could not fall, has been significantly reduced. Regardless, under s 344(5), when accepting an AWA as lodged, the Employment Advocate is expressly '*not* required to consider or determine whether any of the requirements ... have been met in relation to the making or content of anything' lodged with the Advocate (Gibian 2005: 7). Under Work Choices, the 'test' has become the five conditions in the FPCS since the FPCS prevails over an AWA to the extent that the FPCS is more favourable than the agreement content (s 172).

For award-dependent employees who move to AWAs, the abolition of the NDT 'will lead to the loss of important sources of earnings such as overtime/penalty rates and casual loadings – especially in non-union service sector jobs' (Briggs 2005: 4). This prediction has some currency since there is overwhelming evidence that, in some traditionally award-dependent industries such as hospitality, inadequacies in the NDT have already caused some employees to lose these entitlements and fall behind the rates in the relevant award (van Barneveld 2004). The new provisions will exacerbate this loss, since the inclusion of any payments over and above the base rate will no longer be a requirement in order to have an AWA approved.

Under the pre-Work Choices system, the important role of the NDT in maintaining a minimum level of wages and conditions was highlighted by the proportion of AWAs which did not 'pass the test' without additional

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'undertakings' being given to the OEA. During 2004-05, 11.7 per cent of agreements lodged with the OEA were only approved once undertakings were given, 0.5 per cent of AWAs were refused approval and 0.6 per cent were referred to the AIRC for consideration (OEA 2005: 38). In other words, almost 13 per cent of proposed AWAs initially fell shourt of award minimums and this undercutting was only stopped because of the vetting process undertaken by the OEA.

There are many examples which suggest that the removal of the NDT will lead to worse outcomes for workers. For example, in 1993, the Western Australian government introduced Western Australian Workplace Agreements (WAWAs). Instead of being underpinned by the minimum conditions in awards, WAWAs were underpinned by the *Minimum Conditions of Employment Act 1993* (WA). These conditions were that the agreement had to be a written agreement; it could not be in place for more than five years; it had to contain a dispute resolution procedure; and it had to be signed by both parties. Studies of the content and effect of WAWAs have concluded that a significant proportion of workers were worse off than they would have been had they been entitled to the wages and conditions in the relevant award or a collective agreement (Fells and Mulvey 1994; ACIRRT 1996, 1999; Bailey and Horstman 2000; Berger 2000; Plowman and Preston 2005). It was generally concluded that WAWAs 'were not used to facilitate mutually rewarding workplaces. They were used instead to strip awards and drive down wages and employment conditions' (Senate 2005: 73). The experience in New Zealand under the *Employment Contracts Act* was a similar one (Anderson 1998; Bray and Ostenfeld 1999).

The abolition of the NDT without a suitable replacement (HREOC for example supported detailed statutory minima in its 2005 submission to the Senate inquiry into the Work Choices Bill) suggests that policy makers have not risen to the challenge suggested by the former Employment Advocate. It also raises questions about the adequacy of the description in the Explanatory Memorandum to the Work Choices Bill of the removal of the NDT simply as a change that 'will remove a significant layer of complexity with regards to agreement making, and (one which) will provide additional incentives to negotiate at the enterprise or workplace level' (House of Representatives 2005: 14).

With the effective removal of the floor underpinning individualism, the race to the bottom may well begin. In highly labour intensive industries, 'good' employers who have collectively negotiated wages and conditions may need to be drawn into the race or face going out of business. To

remain competitive, labour costs will need to be cut by hiring new employees on sub-standard individual agreements (with wages and conditions which undermine the collective agreement). Briggs has called this the "inter-generational' effect' (2005: 4). Evidence of this undercutting of collective agreements may well be easy to find – 151 academics expect that during the operation of Work Choices, 'the share of wages in national income (will) fall, and ... profits (will) rise, as (these indicators) have done in trend terms since 1997' (2005: 32). One way to avoid the 'race to the bottom' is to adopt the industry-based approach which has been long used in the construction industry where labour has been taken out of the tendering equation through industry labour standards.

Negotiation of AWAs: Bargaining Agents, Industrial Action and Duress

Work Choices retains the ability of both the employer and employee to request a bargaining agent to be involved in the making, variation or termination of an AWA. There are no limits to who can be a bargaining agent, however, for an agent to be recognised, they must be validly appointed, which includes in writing (s 334(1)). If the agent has not been duly appointed, there is the ability under s 334(3) for the employer or employee to refuse to recognise the bargaining agent, but otherwise, a duly appointed bargaining agent must be recognised by the other party (s 334(2)). Section 400(3) provides a civil remedy for coercion in relation to appointments under s 334(1).

Both the pre-reform provisions and the Work Choices amendments require the employer to provide an information statement to an AWA employee which contains information on their right to use a bargaining agent. Despite this requirement, case study evidence suggests that often employees are unaware of their right to have someone assist in the negotiation of their AWA. Regardless, if they had been aware of such a right, many employees have commented that they would not have used an agent (van Barneveld 2004). As early as 1998, ACIRRT data confirmed this, finding that nearly all AWA 'negotiations' did not involve a bargaining agent (91.8 per cent). The lack of the use of bargaining agents suggested by the ACIRRT data was also reflected in seventeen of the nineteen brief 'case studies' conducted by the OEA in 1998. Only two of the cases mentioned the use of bargaining agents – in one case the employer used an agent, and in another, some employees nominated the union as their bargaining agent. The other seventeen case studies did not specifically

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mention the use of bargaining agents (OEA 1998), leading to the conclusion that neither the employees nor the employer used one.

However, rather than concluding from the available data that employees simply do not want to utilise the services of a bargaining agent, it is possible that 'AWAs are rarely negotiated at all – they are simply offered to employees by employers and accepted without any substantive change' (van Barneveld and Waring 2002: 106-7). Again, using the OEA's 1998 case studies as examples, in virtually all of the nineteen cases, the AWA was drafted by management and presented to employees. In nine of the nineteen cases, negotiation was either not mentioned or explicitly did not occur. While it is impossible to gauge the depth and quality of negotiations[2] in the remaining cases, the draft AWAs were reportedly discussed with employees. Whether employees were then able to make changes to the content of the proposed AWA is unclear (OEA 1998). From the information presented in the case studies, only in three of the nineteen cases could it be said that genuine negotiations occurred. This lack of negotiation was also found in Waring's case studies of firms using AWAs in the mining industry (2000), van Barneveld's case studies in the hospitality industry (2004) and is supported by research on Federal Court cases involving allegations of duress in the use of AWAs (van Barneveld 2000). van Barneveld and Waring note that data on the use and type of bargaining agent used in AWA negotiations is not readily available, but would be useful to highlight the extent of negotiations which occur with AWAs (2002).

Given that these findings suggest a lack of the use of bargaining agents has occurred under a framework which is effectively unchanged by the Work Choices amendments, it is not likely that there will be a significant increase in the proportion of employees and employers who use a bargaining agent. This is unfortunate since the bargaining agent provisions were included in the legislation to assist employees in negotiations. Even if unions were to increase their participation as bargaining agents, their ability to effect real change in AWA negotiations will be limited by the removal by Work Choices of the AWA industrial action provisions.

In 1996, as a result of negotiations with the Democrats over the content of the Workplace Relations Bill, protected industrial action rights were inserted into the *WR Act* (Part VID, Division 8). These provisions enabled those negotiating an AWA to take protected industrial action. The effectiveness of these provisions has been questioned, not least by McCarry who commented that when negotiating an AWA 'one may wonder just how much leverage a striking individual employee could exercise,

particularly in light of the employer's option of locking out without pay' (McCarry 1998:67). Indeed, the Office of the Employment Advocate (OEA) has advised that there has not been any employee-initiated industrial action taken in relation to an AWA (van Barneveld 2004). In contrast, a number of employers have used the provision to induce employees to sign an AWA (Arsovska and van Barneveld 2001) and, somewhat paradoxically, according to a representative of the OEA, 'the only cases it has ever been used is by a complete and utter bastard of an employer screwing employees' (van Barneveld 2004).

A review of the Work Choices amendments (ss 419-507) suggests that the ability of AWA employees and employers to take protected industrial action over AWAs has been abolished since all references in the amendments relate only to protected action taken in support of a collective agreement. Given the above discussion, this deletion from the *WR Act* will probably have little effect.

Once an AWA employee has signed an agreement, the complex AWA termination provisions (including the threat of the five FPCS) limit the employee's ability to participate in industrial action surrounding negotiations for a collective agreement (provisions under which they may wish to become covered). An AWA employee cannot participate in any industrial action until the nominal expiry date of their AWA has passed (s 450; s 495). Further, where a collective agreement is being negotiated, the AWA employee cannot be included in the roll of voters for a 'protected action' secret ballot if, 'on the day the ballot order was made, the person was bound by an AWA whose nominal expiry date had not passed' (s 467). This provision may have interesting implications at workplaces where a predominately AWA workforce attempts to move onto a collective agreement. If the AWA expiry dates are not the same, it may be difficult for workers to gain a sufficient critical mass of 'expired' AWA employees at the appropriate time for any industrial action to have an impact. It is not likely that workers will survive for long if they fall to the FPCS while waiting for the AWAs of their colleagues to expire. Somewhat pointedly, the ICTUR notes that 'once AWAs dominate the workplaces, it is unlikely that the employees will ever again have a capacity to combine and take protected action to improve their terms and conditions of employment' (ICTUR 2005: 33).

The previous s 170WG of the *Workplace Relations Act* 1996 provided that a person could not apply duress to an employer or an employee in connection with an AWA or ancillary document. During the first few years of the operation of AWAs, significant arguments were heard about whether

or misleading statement with the intention of persuading another person to make or not make an AWA. In contrast, it appears that a person contravenes the proposed s 401 only if it is possible to establish that the making of a false or misleading statement *actually caused the other person to* make, approve, lodge vary or terminate an agreement or not to do so' (Gibian 2005: 11, emphasis added). Gibian notes that 'it is surprising that the intention of the (amendments) is to impose a penalty *only if* a person makes false or misleading statements *and is successful* in altering the conduct of employees in relation to an agreement' (2005: 11-12, emphasis added). As mentioned by ACIRRT, 'the legal concept of 'duress' is very specialised and difficult to prove' (2005: 5). Under Work Choices, it will become even more difficult.

Remedies for breach of AWA provisions

The discussion thus far has highlighted that contravention of certain provisions will render the contravening party liable to civil penalties. Employers are most likely to be exposed to these penalties since they have most of the responsibilities in relation to making and lodging AWAs. However, in reality, it is unlikely that there will be many prosecutions by AWA employees or their bargaining agents. This is for a number of reasons:

- according to s 747, an industrial organisation has no right to investigate a breach of an AWA unless requested by the AWA employee in writing to investigate the breach. This restricts the right of entry of unions to AWA workplaces and may potentially expose individuals who require assistance from a union.
- in order to pursue an alleged breach, the aggrieved party must commence an action in the Federal Court (or Federal Magistrates Court) (s 403). The cost at April 2006 for an individual to file an initial application is $606.00 and for corporations is $1453.00. The cost associated with such applications will limit the number made for alleged breaches.
- the usual Federal Court rules of evidence and court procedures will apply to any hearing (s 729). For individual workers, not represented by a trade union or legal professional, the complex nature of proceedings may act as a deterrent to commencing proceedings.

These changes are significantly different to the previous procedures, where most matters are addressed in the less formal environment of the AIRC and where costs are minimal. For many, it is likely that the Work Choices changes will act as a deterrent to pursuing any civil breach by an AWA employer.

Another concern for an AWA party to consider is the provision in Work Choices (s 404) that if a proceeding is commenced, a workplace inspector can take it over. Once taken over, the inspector can decline to take the matter further (s 404(2)(b)). According to the section, inspectors have the power to discontinue any proceeding commenced under Division 11 'irrespective of their merit' (Gibian 2005: 15).

If a prosecution is successful, the Federal Court or the Federal Magistrates Court may order a pecuniary penalty to be paid by the contravening person or body. The penalty is either 30 or 60 penalty units depending on the contravention by an individual and five times that for a body corporate[3] (at April 2006 this equates to $3300/$6600 for individuals and $16500/$33000 for a body corporate). Section 407(2) outlines the provisions to which a pecuniary penalty attaches. This amount, especially for a body corporate is not significant, particularly considering that in some industries, the initial savings which may be achieved through the introduction of AWAs may be much greater.

In addition to pecuniary penalties, the Court may provide other remedies for breaches of certain provisions (as listed in s 408). For breach of these provisions, the Court may 'declare a workplace agreement or part of a workplace agreement void' (s 409); 'vary terms of a workplace agreement' (s 410), or 'order that the agreement continues to operate despite termination (s 411). Further, the Court may order 'appropriate' compensation for any loss or damage resulting from the contravention suffered by the AWA employee (s 413). The Court may also order an injunction (s 414) or an interim injunction (s 838) requiring the person to cease contravening or to not contravene the provisions listed in s 408 (s 414). Damages are also available for breach of an AWA provision (s 721). Damages actions must be bought within six years of the damage being suffered.

It is important to keep in mind that while these remedies are available, access to them by AWA employees to access them may be limited, not least for the reasons listed at the beginning of this section.

Conclusion

It has been argued that the use of AWAs 'will enhance the ability of employers and employees to enter into flexible and productive workplace arrangements', tailored to suit individual needs (AMMA 2005: 14). However, since AWAs first became available in March 1997, there has been a proliferation of pattern AWAs and very little evidence of individual

tailoring of wages and conditions of employment that arguably enhance productivity (van Barneveld and Nassif 2003). The question remains as to whether individually tailored wages and conditions can lead to higher productivity (IRV 2003). If high performance workplaces are the aim of the reforms, it could be expected that a review of AWAs operating under Work Choices will reveal high wages and good working conditions – unfortunately, the evidence from the AWA experience over the last nine years, and from other jurisdictions, suggests that this outcome is highly unlikely.

What is clear from the above discussion, is that Work Choices introduces significant changes to the making of Australian Workplace Agreements. Most important of these changes are the abolition of the no-disadvantage test, the way in which AWAs can be terminated and the consequences for wages and working conditions upon termination. Employers have welcomed the changes to the making of Australian Workplace Agreements as a step closer to a system of common law regulation of the employment relationship. On the other hand, the experience elsewhere suggests that the simplification of the approval process and the removal of the vetting of AWAs has exposed employees to AWAs which contain low wages and very limited conditions of employment. How far down this path some employers attempt to go is yet unknown but it is clear that, for some employees, there will be significant detriment.

Notes

[1] *Electrolux Home Products Pty Limited v The Australian Workers' Union & Ors* [2004] HCA 40 (2 September 2004).

[2] These case studies have been accused of containing misleading information by the LHMU in their 1999 submission to a Senate Committee considering amendments to the *Workplace Relations Act* 1996 (LHMU 1999).

[3] Crimes (Sentencing Procedure) Act 1999 – s17 defines penalty units 'Unless the contrary intention appears, a reference in any Act or statutory rule to a number of penalty units (whether fractional or whole) is taken to be a reference to an amount of money equal to the amount obtained by multiplying $110 by that number of penalty units'.

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