

Chapter 4

Australian Democrats' Minority Report

Work Choices is badly flawed

4.1 The most obvious problem with this Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 is that it seeks to build onto a legislative house that has unsafe and shaky foundations. The main structure is faulty, and add-ons cannot alter that fact.

4.2 On the 2nd December 2005 Senator Murray gave a third reading speech in the Senate on the Work Choices legislation (the Workplace Relations Amendment (Work Choices) Bill 2005) that radically altered Australian workplace law.

4.3 In part he said the following:

As you know, Mr President, the Australian Democrats said that the government had a right to have the passage of that 1996 bill if they could agree to the amendments. We made 176 amendments to that bill, and the result was that the heat came out of that debate; the act was made economically effective and was found to be socially acceptable. We have claimed since that we played a part in the good times to which that act has contributed, along with other issues.

So, when the government look at our situation, where we are adamantly and vigorously opposed to this bill, they should be asking why. It is because there is no continuity with the past. This breaks with the past. The Australian Democrats value the past. We say that this bill breaks with the broad consensus that we have enjoyed. I will repeat what I have said before about the broad consensus, which existed despite the clash of the titans. That broad consensus was that our workplace law should reflect the social contract that growing national and individual wealth should be accompanied by rising living standards and a comprehensive safety net for the disadvantaged and powerless in our society, and low or inadequate wages should be supported by a sufficiently comprehensive welfare system to ensure family stability and sustainability.

That broad consensus was that wages and conditions of work should bear in mind the family more than the individual; that governments and parliaments should determine law and regulation but that enterprises, unions and tribunals should determine the detailed content and decision of workplace relations; that independent specialist tribunals were preferred for conciliation, arbitration and determination rather than the courts; that collective labour and collective capital had primacy over individual arrangements; that statute was the dominant determinant of collective arrangements at work and common law the dominant determinant of individual arrangements; that industrial relations should be a multiple federal system, not a single national system; that it was justifiable to

subordinate the economic to the social in the workplace by ensuring the living standards of the worst-off were consciously and deliberately raised; that health and safety and compensation for accidents or negligence should be a primary feature of workplace law.

This bill assaults the cultural, economic, social, institutional, legal, political and constitutional underpinnings of work arrangements in Australia. It aims to radically alter our work systems and values. Our problem with this is that we do not stand beholden to the unions or business. Our problem is that the case still, to this moment, has not been made that the economic and the social situation in this country desires or needs this radical change.

This change would not have happened if the Australian Democrats still held the balance of power in this chamber.

4.4 A year and a half later, notwithstanding the introduction of the bill, nothing has happened to change the view of the Australian Democrats. At the heart of the Coalition's agenda was a belief that it was good economics to increase the profit share and decrease the wage share, and to give employers greatly increased leverage in the employment contract. To achieve that, workers had to be made more vulnerable to exploitation. But the speed and extent with which some employers have taken advantage of the imbalance in the industrial relations system to strip back core workers entitlements has been alarming. There are numerous anecdotal reports highlighted in the media about workers being offered unfair agreements and told they could 'take it or leave it'.

4.5 Further, although many workers have felt the brunt of the unfairness of the Government's system, the disempowerment of workers will result in its most profound social consequences when, as it must eventually do, the economy slows down. To some extent the tight labour market has ameliorated the severity of Work Choices, but in different economic circumstances even the most well-intentioned employers may be forced to cut wages and core conditions to remain competitive as rivals do so. These adverse effects are likely to be more pronounced as Australian Workplace Agreements (AWAs) continue their migration from the managerial and mining sectors to the broader community, where many workers lack genuine bargaining capacity.

Motivations for the bill

4.6 The Australian Democrats wish it was not so, but cannot help but believe the motive for this bill is base. Every word uttered by the Coalition in the construction of Work Choices, in the disgracefully brief Senate inquiry into it, in the debate that surrounded it and since, showed the opposite. The Coalition dismissed and vilified the arguments of those who warned them of the perils of what they were doing. Among many matters, with respect to the safety net, the inquiry into Work Choices clearly brought to the Government's attention that workers would be disadvantaged if the award system was uncoupled from AWAs, and if the global no-disadvantage test that applied to pre-Work Choices AWA was abolished, but to no avail.

4.7 Finally the people spoke. The Coalition plunged in the polls, their hold on government seriously threatened. The response so far is 'A Stronger Safety Net', not motivated by a desire for a fairer go, but motivated by a primal desire to retain power and reverse Coalition electoral prospects.

4.8 Although the 'fairness test' under the bill comprises a modest measure to improve the working conditions of some workers, not all workers will benefit from it. Overall, the safety net proposed is only a small advance for workers and in no way addresses the radical and harsh measures introduced under Work Choices.

4.9 Up to 25 percent of employees are still on state systems in some states. Of those in the federal system, very large numbers are still on pre-Work Choices agreements, and will not move on to the Work Choices regime until 2008, well after the federal election. Of those left, not all workers are worse-off since this legislation became law in March 2006, because many employers behave well in the workplace, and a number of industries are benefiting from a high demand for labour, with accompanying good wages and conditions.

4.10 Nevertheless, there are many workers who have had their wages and conditions slashed. The Australian Democrats concur with the Institute of Public Affairs who state in their submission that this new bill addresses a 'glaring hole' in the Work Choices system that legally allows employers to reduce the overall income of workers, a practice that breaches ethical community standards.¹ Professor Andrew Stewart from the School of Law at Flinders University states what has now become obvious: that the deficiencies of the 2005 Work Choices legislation have materialised, even in the absence of more extensive data.² Not least among those deficiencies is a welter of complex regulation that reduces productivity and makes the system difficult to manoeuvre.

Government dogma now under attack

4.11 The Government stands guilty of grossly overstating the economic benefits of Work Choices, and understating the social costs to many workers and their families. To argue that Australia's low unemployment figures and strong economy are directly the result of the Work Choices industrial relations reforms is plain wrong. The fall in unemployment post-Work Choices, welcome as it is, essentially continues the positive downward trend pre-Work Choices. The resource boom and a strong Australian economy, coupled with strong global growth, are the principal contributors to jobs and economic growth and prosperity, not Work Choices.

4.12 A key problem with Work Choices is that it rests on notions of how the Government wants workplaces and business to be rather than how they are. In this sense, the Coalition Senators who sat on the 2005 inquiry into the Work Choices bill

1 Institute of Public Affairs, *Submission 4*, pp. 3-4.

2 Professor Andrew Stewart, *Submission 21*, p. 1.

did the Government a real disservice. By agreeing to a disgracefully short inquiry, by wilfully ignoring the evidence before them, for being belief-driven, for allowing the guillotining of the debate and the wholesale brutal out-of-hand rejection of amendments to Work Choices, they failed the Senate, and they failed the people of Australia.

4.13 If the Coalition government loses office because of Work Choices, part of the blame would lie with the failure of government senators to provide a steadying influence on an adamant and ideologically driven Prime Minister and his Executive. It is the duty of senators to review legislation and to check the executive, not to simply follow orders.

4.14 The Government still stands condemned for ramming Work Choices through the Senate. They forced a process and timeline on the Committee inquiry into a bill proposing the most radical changes to workplace laws ever, that treated parliamentary processes with contempt. As the Australian Democrats stated in their minority report:

The disregard for the Senate as a house of scrutiny may appear remarkable from a Government whose Prime Minister promised to use its numbers wisely and not provocatively. On that basis you would expect executive arrogance or the heady hubris of numbers would not get in the way of good law making. The reality is that the Prime Minister was saying what the Australian public wants to hear, and not what he believes.³

4.15 And once again the Government has subjected the committee to a disgracefully and regrettably short time frame to examine this ‘stronger safety net’ bill. Many submissions commented on the lack of sufficient time to properly consider the bill and its implications, and the time allotted for hearings was insufficient given the interest in, and importance of, the bill. Even in the short time allotted, it became evident during the inquiry that there are substantial problems with the bill, most of which have been inadequately addressed by the committee report. The Australian Democrats expect that this bill too will be rammed through without non-government amendment.

The ‘fairness test’

4.16 The Government’s claim that this bill will restore the rights lost by working Australians under Work Choices is misleading. Work Choices is fundamentally flawed and addressing one small element of unfairness and bad process will not remedy the Act as a whole. The Democrats are of the opinion that the ‘fairness test’ does not go far enough to establish an adequate safety net for workers. It has a number of fundamental deficiencies.

³ Australian Democrats’ Minority Report, Employment Workplace Relations and Education Legislation Committee, *Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005*, November 2005, p.92

Many workers left out

4.17 The Government's introduction of the bill represents an admission that its policies have severely disadvantaged many Australian workers, but it has still established a 'safety net' that excludes large proportions of the working population. The Australian Council of Trade Unions claims that around 2.5 million workers will receive no protection because they will not be covered by the 'fairness test', which only comes into operation prospectively from 7 May 2007. This figure includes those already claimed to be registered on AWAs and other agreements since March 2006, estimated at 961 000 workers.⁴ To lock out these workers from any monetary or other compensation for the remaining years of their employment contracts, is grossly unfair, especially considering the plight of many of these workers was the driving force for the bill. It is also grossly unfair to those employers who have done the right thing by their employees, who are economically disadvantaged and can be under-cut by their competitors until the lapsing of these unfair agreements.

4.18 The bill merely entrenches and promotes unfairness towards those workers with inferior rights under Work Choices up until May 2011. While in law it is difficult to unwind a contract (unless both parties agree) one partial solution could have been to give workers the right to terminate their agreements if the agreements do not comply with the new fairness test, but not to allow them any retrospective compensation for any period the agreement was in force.

4.19 Also excluded from the 'fairness test' will be those who earn more than \$1 400 per week or \$75 000 annually—about 1.14 million workers—if they sign an AWA. It was pointed out during the inquiry that this would exclude large proportions of key sectors and industries of the workforce, such as teachers and information technology workers, many of whom would otherwise enjoy award protections.⁵ It is also proposed that the base salary of \$75 000 be applied pro rata to part time workers. Hence, many part time workers earning well under \$75 000 will also miss out on protection. In this respect, the Media, Entertainment and Arts Alliance, highlighted that many of its members get paid for irregular work, but often will be excluded from the safety net protections, as the sums involved will grossly over-estimate their incomes.⁶ Additionally, as the \$75 000 cap incorporates casual loading, a casual position attracting an annual salary of \$62 501 would also be excluded from the 'test'. In sum, the cut-off is too low. Arguably there should be no cut off at all.

4.20 Perhaps the most concerning exclusion that was raised during the hearing was employees on NAPSAs would only be covered by the fairness test if they had been on

⁴ ACTU, Media Release, 'Tinkering with WorkChoices won't make it 'fair'', 29 May 2007; and see ACTU Submission 8, pp.3-4.

⁵ The Association of Professional Engineers, Scientists and Managers, *Submission 5*, p. 2; Independent Education Union of Australia, *Submission 28*, p. 1.

⁶ Media, Entertainment and Arts Alliance, *Submission 17*, p. 7.

these agreements immediately preceding the making of a workplace agreement when Work Choices was introduced. As the ACTU outlined during the hearing:

There are a group of workers who were at that time covered by preferred state agreements and NAPSAs who have since made an agreement and may make another agreement. That group of workers is not picked up by this amendment. Any worker who was in the state system and has made an agreement in the last 18 months will not be picked up by this amendment. They will never be able to have the fairness test apply to them unless and until the industry or occupation within which they work becomes covered by a federal award.⁷

4.21 This exclusion is completely contrary to the supposed intent of the provisions, which is to ensure that employees traditionally covered by industries usually regulated by an award have the appropriate protections.

4.22 Additionally, award free workers will not be covered by the test, which could exclude at least 1.16 million employees. In essence, a relevant award must be a Federal one made by the Australian Industrial Relations Commission, which would exclude many workers. The Bill also excludes those regulated or underpinned by a State award.

Limited conditions covered

4.23 The new 'test' also fails its claim of fairness by not covering all existing award conditions when determining compensation, even if they were to be viewed 'globally' as a whole, as with the pre-Work Choices no-disadvantage test for pre-Work Choices AWAs. This was overwhelmingly raised during the inquiry as of concern to many of those that contributed. A range of award and/or statutory entitlements could still be bargained away because they fall outside the category of 'protected award conditions.' For instance, long service and paid maternity leave could be taken out of employment agreements with no compensation. Also, not included in the 'test' are limitations on rostering, including minimum shift lengths and limitations on working more than one shift a day. Furthermore, the right to request flexible working hours to assist with family responsibilities is not protected. As many of the submissions highlighted, these conditions are often necessary to ensure adequate worker protections in various industries. While they are often specific to certain employment circumstances, this does not change the fact that they are fundamental to ensuring balanced and often safe working conditions.

4.24 Particularly worrying is that redundancy or retrenchment pay entitlements are not protected. Even if redundancy provisions in terminated agreements were allowed to remain in effect for up to five years, there is no guarantee that such pay could be included in a subsequent agreement and if removed, there would be no compensation payable. But again, this highlights the unfairness of the broader Work Choices

7 *Committee Hansard*, EWRE 38, 8 June 2007.

legislation, as there have been numerous examples in the community, of workers dismissed for 'operational reasons', some of which were recapitulated during the inquiry.

No independent umpire

4.25 The two statutory bodies to be established for administering the 'fairness test' will be answerable only to the Minister, which means they are not independent. The first is the Workplace Authority, which will replace the Employment Advocate, and will have responsibility for assessing the 'fairness test'. Its decisions will not be transparent; they will be made in private, not public. There will be no requirements for reasons to be given for any decision to the parties concerned, and any decision will not be reviewable.

4.26 However, advice can be given to an employer as to how an agreement could be varied to pass the fairness test. In short, there is little way of knowing how the 'test' is to be applied in practice. Concerns were raised during the public hearing by the SDA about the independence of the Workplace Authority and its conflict of interest, considering it is largely inheriting the role of the Office of the Employment Advocate. It highlighted:

We know that the person who is going to do the interpreting—the Employment Advocate—is not likely to be sympathetic to the views we represent. You have to remember that the Employment Advocate from the outset of the Work Choices legislation has been running seminars all around the country for employers to advise them how they can use the Work Choices legislation for their business. If the Office of the Employment Advocate is using all of the resources that are at its disposal to advise employers how to take advantage of the Work Choices legislation, you would expect that the disposition of the Employment Advocate would be to allow these sorts of things—these non-monetary compensations—to be used to take away penalty rates and other conditions.⁸

4.27 The lack of prescriptive details provided for the Workplace Authority is typical of the Government's approach to 'flexibility' in such arrangements, but has exacerbated concerns from employers and unions about the application of the fairness test. Without such details, the Workplace Authority is open to allegations of inconsistency and suspicions about its competency and motives. Various submissions also raised concerns that the process does not require consultation with both parties to an agreement, which is a breach of natural justice and would seem to be inconsistent with the purported objective of fairness. An amendment to require consultation with both parties seems to be a small change that would result in substantial reassurance. The scope of circumstances that can be considered in ascertaining the fairness of an agreement also opens up the Workplace Authority to criticism and workers to potentially unfair agreements. While it can be appropriate that an employee's

8 *Committee Hansard*, EWRE 32, 8 June 2007.

circumstances be considered, this should not be used to endorse discriminatory treatment or different remuneration levels for different workers engaged in the same employment. During the public hearing, the ACTU warned of the potential abuse of such a system:

Many men, but mostly women, can actually have their work devalued because they are primary caregivers...I could be working alongside another worker at night or on a weekend but, because I am not giving primary care at that time—because I have the support of my partner or indeed my family—I would be earning less than the person working alongside me.⁹

4.28 The Australian Democrats are concerned that inclusion of monetary compensation could potentially result in existing entitlements being considered additional and used to justify trading away protected award entitlements. Such a practice should be considered contrary to the fairness sought by the test. The use of non-monetary compensation also increases the complexity of the fairness test because of the continually evolving value that can be placed on such conditions, as was highlighted during the inquiry.

4.29 Many submissions during the inquiry raised concerns about the potential loopholes in the 'exceptional circumstances' provision of the bill. While the Australian Democrats understand the necessity of such a provision, we are not reassured by the committee's view that there are sufficient protections under the bill to prevent workers being unfairly disadvantaged. The bill should clearly identify that agreements formulated during exceptional circumstances can only operate during such conditions with constant reviews of those circumstances to allow fair conditions to be restored as soon as possible.

4.30 The second statutory body provided for under the bill is the Workplace Ombudsman, which will replace the Office of Workplace Services, and will provide additional protection for workers by ensuring employers comply with their obligations. However, the term 'Ombudsman' is actually being corrupted here, as this should be a body or person independent from government, rather than accountable to the Minister.

4.31 To ensure a genuine, fair and balanced approach in applying the 'test', it is essential that there be a role for an independent umpire to scrutinise workplace agreements. Workers should have access to open hearings as they did under pre Work Choices with the Australian Industrial Relations Commission. The independent, employment rights legal centre, JobWatch Inc, rightly state in their submission that:

...the Fairness Test is a poor substitute for the no disadvantage test which, prior to the WorkChoices changes, was applied by the Australian Industrial Relations Commission and the Office of the Employment Advocate (OEA)

9 *Committee Hansard*, EWRE 37, 8 June 2007.

before collective agreements could be certified and AWAs could be approved.¹⁰

A new direction is needed

4.32 Work Choices is unfair and has to go. Australia must have a workable industrial relations plan for the future. Australia needs a single system that is fair, balanced and practical. The Australian Democrats say a modern Australia needs industrial relations reforms that deliver productivity, efficiency, jobs growth and competitive gains, but it must also accord with the values and goals of a civilised first-world society. As yet the alternative offered by the Labor Opposition is far from clear. As for the Coalition, if they win the election they will have a mandate to tighten the IR screws further.

4.33 Australia needs a genuine single national unitary industrial relations system agreed to with state governments.

4.34 The democrats propose that a genuine single national unitary system would comprise four essential features.

An Industrial Relations Commission

4.35 Australia needs a single, strong, independent, pre-eminent industrial relations tribunal that is appointed on merit and that would:

- exercise judicial powers to determine awards, set minimum wages, approve agreements and resolve disputes;
- absorb the state industrial relations commissions; and
- absorb the federal Employment Advocate and Fair Pay Commission functions.

A Workplace Regulator

4.36 Australia needs a national and strong independent workplace regulator that would:

- absorb the regulatory functions of the state departmental inspectorates;
- absorb the regulatory functions of the Office of Workplace Services and the Australian Building and Construction Commission; and
- end federal ministerial discretionary and interventionist regulatory powers.

¹⁰ Job Watch Employment Rights Legal Centre, *Submission 22*, p. 2.

A Genuine Safety Net

4.37 Australia must have a genuine safety net underpinned by the minimum wage, minimum conditions and awards. It would have:

- fair and balanced minimum wage determinations made annually, taking into account living standards, skills, training, disabilities, anti-discrimination provisions, pay equity and relevant tax and government transfer payments;
- at least 8 minimum conditions for all workers, whether on statutory or common law agreements including carers and compassionate leave, public holidays, termination of employment and redundancy; and
- national and industry-based, simplified awards with at least 16 allowable matters.

A Genuine Flexible Bargaining System

4.38 Australia must have a genuine and flexible bargaining system that would:

- make a mix of industrial instruments available – union and non-union; collective and individual agreements; statutory and common law;
- enshrine the right to collectively bargain, genuinely and in good faith;
- enshrine freedom of association; and
- abolish Work Choices AWAs, replacing them with statutory individual agreements with a global no-disadvantage test, referenced back to the relevant award.

Conclusion

4.39 The Democrats do not agree with the Government's claim that the new 'fairness test' is similar to the global 'no disadvantage' test that applied to pre-Work Choices AWAs prior to the commencement of Work Choices. The bill does not require future fairness for all in the workplace, in fact it falls far short for the reasons outlined above. The provisions of the bill lack sufficient scope, coverage, objectivity and protections to provide the fairness it claims. Further, as was highlighted by many of the submissions and at the public hearing, there appear to be numerous loopholes that suggest the Government needs to seriously review the legislation to ensure it can provide the purported fairness. The degree of individualisation proposed in the application of the test will result in huge resource requirements and long back-logs of assessments or, alternatively, hurried and poorly considered assessments. Neither are desirable outcomes to preserve a system that most Australians have indicated they do not want.

4.40 The way in which the legislation has come about has highlighted that the Government does not really believe in its necessity and has simply acted to protect its electoral prospects. This does not bode well for Australian workers should the Government be returned later this year with a majority in both houses.

Senator Andrew Murray

