

THE FAIR WORK ACT

two years on



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A review of Labor's changes to
workplace laws

July 2011

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THE ACTU

The Australian Council of Trade Unions is the nation's peak body for organised labour, representing Australian workers and their families.

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THE WORKING AUSTRALIA PAPERS

The Working Australia Papers are an initiative of the ACTU to give working people a stronger voice about social and economic policy. Although low and middle income Australians ultimately bear the costs of poor policy decisions made in relation to tax, infrastructure, retirement incomes, welfare, and services, their voice is too often absent from national debates about these issues.

Working Australia Paper 5/2011

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GLOSSARY

ABCC	Australian Building and Construction Commission
AFPC	Australian Fair Pay Commission
AFPCS	Australian Fair Pay and Classification Standard
AIRC	Australian Industrial Relations Commission
AWA	Australian Workplace Agreement
<i>BCII Act</i>	<i>Building and Construction Industry Improvement Act 2005 (Cth)</i>
<i>Fair Work Act</i>	<i>Fair Work Act 2009 (Cth)</i>
FWA	Fair Work Australia
IFA	Individual Flexibility Arrangement
ILO	International Labour Organisation
NES	National Employment Standards
WorkChoices	<i>Workplace Relations Act 1996 (Cth)</i> , as amended after March 2007
<i>WR Act</i>	<i>Workplace Relations Act 1996 (Cth)</i>

INTRODUCTION

The *Fair Work Act* commenced on 1 July 2009, ushering in a new era of industrial relations in Australia in the aftermath of WorkChoices. This report evaluates whether the *Fair Work Act* has delivered for working people and their families.

The end of WorkChoices was the culmination of an unprecedented campaign for all working Australians - that unions and our community fought hard for and are proud of - to restore rights at work.

Restoring rights at work meant: an end to Australian Workplace Agreement individual contracts; unfair dismissal protections for all workers; a stronger safety net; good faith bargaining; and, the return to an independent umpire to resolve disputes.

The second anniversary since the *Fair Work Act* began operation provides an opportunity to examine the impact of these laws on working Australians and the economy.

This extensively researched report comprehensively debunks the myths and misinformation being circulated by employer groups and the Liberal Party to bolster their case for a return to WorkChoices.

While not covered in this report, Australian unions recognise that beyond the end of WorkChoices, working people and their families have benefited in other ways since the Howard Government's demise. Now all Australian working mothers receive paid maternity leave at the birth of their child. Investment in skills and training has increased. Jobs were protected during the global economic downturn.

And working people stand to benefit from the Labor Government's commitment to improve financial security in retirement by increasing compulsory superannuation contributions to 15%, and protect workers' entitlements through the Fair Entitlements Guarantee scheme.

At a time when working Australians and their families are struggling to make ends meet, these advancements achieved through workers and unions collectively with the Labor Government will make a difference. But there's more work to do.

To build on the *Fair Work Act* we need to improve the bargaining system's ability to meet the needs of the modern economy and provide positive rights for union delegates. And construction workers deserve to have the same rights as all other working Australians.

Looking to the future, the ACTU believes that fair and secure work for all workers is crucial if we are going to drive productivity and participation, and build the skilled workforce our growing economy needs.

With employer groups and the Liberal Party continuing to push back against the *Fair Work Act*, Australian unions know our job in standing up for working families will not cease. Our campaign for the rights of all working people and their families, no matter if they are casual or permanent workers, in white collar or blue collar jobs, is vital and ongoing.

Jeff Lawrence

Secretary, Australian Council of Trade Unions
July 2011

EXECUTIVE SUMMARY

On the second anniversary of the *Fair Work Act*, Australian unions are looking to the future to entrench an industrial relations system that supports cooperation, provides workers a real voice in their workplace, and allows industry and labour to work together to plan for the economic challenges and opportunities ahead without leaving working people and their families behind.

Unions support the structure of the industrial relations system established by the *Fair Work Act*. Despite the clamour of some business lobby groups, neither Australian workers nor do many employers want to undergo another disruptive overhaul of the industrial relations system. But the Act can be made more effective and practical for working Australians, especially those in insecure employment.

The *Fair Work Act* replaced WorkChoices, which was rejected by Australian voters along with the Howard Government in 2007. Importantly, the decision of Tony Abbott and the Liberal Party not to release any industrial relations policy meant there was a political consensus at the 2010 Federal Election that workplace rights must be protected and the *Fair Work Act* was here to stay.

Achievements

The changes ushered in by the *Fair Work Act* have restored rights at work for millions of Australian workers and their families. They include:

- No more Australian Workplace Agreement individual contracts.
- A strong safety net through the National Employment Standards.
- Collective bargaining rights, including a requirement to bargain in good faith.
- Rights to union membership and representation.
- Protection from unfair dismissal.
- A genuine independent umpire to resolve disputes.

Dangers

Publicly, the Liberal Party continues to bicker over its position on industrial relations, but the party's commitment to labour market deregulation is steadfast. Whether it is the Peter Reith full-frontal attack on rights at work, or Nick Minchin's 'incremental change' approach, their attitude is clear.

The Liberal Party will continue to be the party of WorkChoices until it supports the right to protection from unfair dismissal no matter what size workplace they work in, and guarantees not to reintroduce individual statutory agreements, like Australian Workplace Agreements. It will continue to be the party of WorkChoices until it commits to an enforceable right for collective bargaining, to maintain the integrity of the Award system and the National Employment Standards, and to ensure there is a genuinely independent umpire.

Liberal-National state governments have shown, while they be silent in the election campaign, once they are in power they will attack workers' rights. The most striking example of which is the O'Farrell Liberal Government's legislation to restrict public service wages to below the cost of living, and give Parliament the ability to cut important conditions, like penalty rates, redundancy pay, and long service leave.

Business groups have not stopped lobbying for the removal of rights at work, and a return to WorkChoices, and beyond. The business wishlist is extensive, a sample of which is laid out in the report.

Notably business groups want:

- To attack the safety net: getting rid of penalty rates, minimum shift length and leave loading.
- Exempt workers in small business from unfair dismissal (last time business got their way over 4 million workers lost out).
- Undermine the bargaining system through watering down the obligation to bargain in good faith.

Business groups continue to challenge rights at work by stealth through vexatious claims in Fair Work Australia. For example: the Victorian Employers' Chamber of Commerce and Industry's application to vary the minimum shift entitlement in 81 modern Awards, later withdrawing all but three applications.

What next

The *Fair Work Act* restored the rights of working people and their families, but there is always more work to be done. Australian unions and workers will continue to campaign for improved rights at work, and to lift living standards. In particular, we believe:

- Construction workers need the same rights as all other workers
- Bargaining should meet the needs of the modern economy and the workers in it
- Recognition needs to be given to the important role of delegates and workplace representatives through positive rights
- Occupational health and safety must be of the highest standard
- Equal pay must be made a reality
- Government can lead the way in ensuring fairness and rights at work through contracting only to service providers who are committed to decent workplace protections.

This report looks at the facts to establish what has been achieved and what needs to happen next. This is important, because much of the current debate is distorted by misrepresentations and myths on the part of the employer groups, and this poses a serious risk of poor policy outcomes.

SUMMARY OF THE REPORT

This report is structured to first explore in depth the changes under the Fair Work Act, and then to consider some aspects of the future.

Impact on the economy

Despite the claims of the business and employer lobby, since the *Fair Work Act* came into effect, the economy has grown strongly. Indeed, the robust performance of the Australian economy since the Global Financial Crisis shows that workplace rights and a strong economy are not incompatible.

- Half a million new jobs have been created since the introduction of the *Fair Work Act*.
- Wage growth has been solid but sustainable, with no inflationary wages outbreak.
- Productivity sits steady at 1.8 %, matching figures prior to the *Fair Work Act*'s introduction.

Conditions of employment

With the *Fair Work Act*, Labor has substantially restored the safety net of Award conditions that was dismantled under WorkChoices. Workers were covered by only five minimum standards under WorkChoices.

- The vast majority (89%) of Australian Workplace Agreements (AWAs) removed basic Award conditions: penalty rates (removed in 65%), shift loading (70%), annual leave loading (68%), substituted public holidays (61%), public holiday pay (50%).
- Workers are now covered by 10 National Employment Standards *and* modern Award conditions.
- Rights to conditions like overtime, public holiday pay, penalty rates, redundancy pay are protected.

Minimum wages

Among the workers to have benefited from the *Fair Work Act*, are the 1.4 million workers who are Award-dependent and rely on minimum wages.

- Under WorkChoices, minimum wages declined in real terms (by up to \$84 a week), and the so-called Fair Pay Commission imposed a wage freeze in 2009.
- The *Fair Work Act* has restored the real value of minimum wages for the least-skilled workers, following this year's 3.4% decision minimum wages for these workers will be back above 2006 levels for the first time.

Unfair dismissal protections

Removal of unfair dismissal protections under WorkChoices impacted more than 4 million workers. As reducing unfair dismissal protections is something of an employer and Liberal Party Holy Grail, Australian unions stand prepared to defend this important right.

- Under the *Fair Work Act*, 6 million workers now have unfair dismissal protection (only those who have been in their job for less than a six months - or a year for small business employees - and high income earners are excluded).
- The system is not being abused. 11,000 unfair dismissal applications have been lodged in the last year; this accounts for only 1% of all dismissals across the workforce.

Women, work, and family

Women suffered disproportionately as a result of WorkChoices. Steps have been taken to improve women's rights at work.

- Paid parental leave is now available to all working parents (including part-time and casual employees) providing 18 weeks government-funded payment at the federal minimum wage.
- Restoration of the Award safety net and fairer setting of the minimum wages will assist women workers, many of whom are Award-dependent.
- The *Fair Work Act* equal remuneration provisions have allowed Australian unions, led by the Australian Services Union, to run a national equal pay case for workers in social and community services.
- Women workers, particularly will benefit from the low paid bargaining provisions in the *Fair Work Act* – that allow low paid workers to negotiate collective agreements, many for the first time.

Collective bargaining

The *Fair Work Act* places collective bargaining at the core of the Australian industrial relations system, in stark contrast to WorkChoices that sought to undermine collective agreements, leaving workers to fend for themselves.

- Bargaining suffered under WorkChoices from a reduced safety net, limited agreement making, restricted industrial rights, and limitation on the matters that workers and employers could agree on; in addition to the reality that at any time, an individual contract could undermine collectively agreed wages and conditions.
- More workers are covered under collective agreements than before: 43.4% of all employees.
- There has been a reduction in the number of working days lost to industrial disputes since the *Fair Work Act* took effect.

Right to representation

WorkChoices also sought to stop workers from exercising their fundamental rights to be represented by unions, and to have delegates represent them in their workplace.

- Under WorkChoices there were strict limitations on workers' ability to meet with their union at the workplace.
- Workers have greater protections to representation and have a say at their workplace through the 'General Protections' under the *Fair Work Act*.
- Positive rights should be provided to delegates and workplace representatives to better represent their workmates and colleagues.

Building and construction workers

Despite this being one of the most dangerous industries, building and construction workers have fewer rights to take action about safety and other workplace issues than all other workers.

- Under the Howard Government's *Building and Construction Industry Improvement Act (BCII Act)*, workers risk prosecution for refusing to do unsafe work, and the burden of proof rests on them.
- The Australian Building and Construction Commission (ABCC) can require a person to attend an interview, with no right to silence; if the person fails to attend they could be jailed.
- Fewer than 5.5% of the ABCC's prosecutions have targeted employers, despite the construction industry having some of the highest rates of non-payment of wages and entitlements.
- The *BCII Act* and ABCC continue to exist under the Labor Government, and should be repealed and abolished.

Insecure work

Insecure work has not been explicitly addressed by Australia's IR system, but there remains a large section of the workforce who require attention to improve rights at work.

- One in four workers are casual, and do not receive benefits such as sick leave, annual leave, notice of termination and redundancy pay that others take for granted
- Another 10% of the workforce are classified as contractors, many of them dependent contractors who are treated as employees without any of the same rights.
- A rise in sham contracting under the Howard Government, means that some employers are avoiding their obligations such as minimum wages and superannuation in industries like construction, call centres, security and cleaning.
- More should be done to ensure that all workers, no matter what employment classification they are, have their rights at work protected, including the right to secure and predictable employment.

THE HOWARD ERA

Before considering the impact of the *Fair Work Act*, it is important to remember what came before: the first Howard Government's 1996 *Workplace Relations Act*, and the *WorkChoices* legislation a decade later.

As most academic commentators noted, these two Acts stripped workers of important rights and entitlements, and firmly shifted power back into the hands of employers. It did this in a number of ways which will be explored in greater detail in this report, but which are convenient to summarise here.

- John Howard's laws encouraged the use of AWAs. Despite the rhetoric that they would allow 'individual' flexibility for workers, in reality AWAs were used by employers to avoid their obligations and allowed them to cut pay and conditions of thousands of workers.
- Howard's laws gutted the Award system. Previously, the AIRC had made Awards which set a range of important conditions of employment, such as penalty rates. *WorkChoices* exempted new businesses from having to comply with Awards. Existing businesses only had to comply with a stripped down version of Awards, or else they could use AWAs and other instruments to avoid the Award. Had nothing changed, over time, the Award system would have withered into irrelevance as was Howard Government's intention.
- *WorkChoices* gerrymandered the minimum wage system. Previously, the AIRC was required to set 'fair' minimum wages for Award-dependent workers. After *WorkChoices*, the 'fairness' requirement was removed and the hand-picked economists on the Fair Pay Commission who did not even believe Australia should have a minimum wage, and could be trusted to keep minimum wages growth low¹. This they did – even freezing minimum wages in 2009.
- Howard's laws undermined workers' rights to be represented. Workers on AWAs were prevented from consulting with union officials in their workplace. Employers – including large businesses like Telstra and the Commonwealth Bank – routinely refused to recognise union delegates and officials, let alone bargain with them.
- *WorkChoices* made it difficult for workers to bargain collectively. There was no obligation on employers to bargain with workers, let alone unions. Indeed, if employers wanted to avoid collective bargaining, they could simply impose AWAs or 'Employer Greenfields' agreements on their staff. If workers tried to take industrial action in support of their claims, employers could frustrate or stop the action by flimsy technical objections.
- Howard's laws took away the AIRC's power to help resolve workplace disputes. Previously, the AIRC could conciliate and, as a last resort, arbitrate most workplace disputes. After *WorkChoices*, the AIRC could only intervene if the parties were covered by a collective agreement that specifically authorised it to. Most agreements did not. As a result, workers in dispute with their employer had nowhere to turn.

¹ One of these commissioners, Judith Sloan, has since become a regular newspaper commentator, espousing a radical approach to workplace relations including little more than lip service to the concept of minimum wages.

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- Howard punished building workers and their unions. He set up the Cole Royal Commission, hoping to find evidence of criminal activity by workers and unions. Despite costing taxpayers \$60 million, nobody was ever tried for committing a crime. He promulgated the Building and Construction Code, which withheld government work from any builders that had a good relationship with unions. As a final step, he passed the *Building and Construction Industry Improvement Act*, which banned building workers from striking, and which set up the Australian Building and Construction Commission to conduct a witch-hunt against alleged strikes. Anybody who refused to cooperate with the ABCC could be sent to jail. All of this clearly breaches international law.

The Australian people overwhelmingly rejected WorkChoices and the Howard Government's agenda for workplace relations. There was widespread support for Labor to introduce laws that were fair, that restored the balance between workers and employers, and which provided a system that was appropriate for the 21st century workforce and economy.

The *Fair Work Act* needs to be considered in this context.

IMPACT ON THE ECONOMY

- Half a million new jobs have been created since the introduction of the *Fair Work Act*.
- Wage growth has been solid but sustainable, with no inflationary wages outbreak.
- Productivity sits steady at 1.8 %, matching figures prior to the *Fair Work Act*'s introduction.

Since the *Fair Work Act* came into effect, the economy has grown strongly. Jobs, wages, profits and productivity are up, without any sign of a 'wages breakout', despite employer rhetoric.

Indeed, with such a strong economy, the challenge for Labor – and for the industrial relations system – is to ensure that the benefits of prosperity are shared widely and fairly.

Jobs

Since the *Fair Work Act* came into effect on 1 July 2009, over half a million net new jobs have been created. Around 400,000 of these new jobs were full-time jobs.

Australia's jobs growth has been particularly striking given that many of our trading partners continue to struggle with high unemployment. While Australia's unemployment rate has fallen below 5 per cent², the USA faces 9.1% unemployment³, and the UK has 7.7% of its workforce unemployed⁴. New Zealand fared slightly better, but its unemployment rate of 6.6% is still nearly two percentage points above Australia's⁵.

While the Act has been in operation, the number of unemployed people has fallen by over 80,000, and the labour force participation rate reached an all-time high of 66%.⁶

Wages

Wages growth has been solid but sustainable over the period since the Act came into effect. The Wage Price Index has grown at an average of 0.8% per quarter, around its long term average of 0.9% per quarter.⁷

Other measures of wages growth have shown more moderate growth. In the year to the February 2011 quarter, average earnings for full time workers (AWOTE) increased by 3.8%, the slowest growth in over four years. In the past decade, AWOTE has grown at an average of 4.8% in year-ended terms. This measure of wages growth is therefore well below its long-term average.⁸

² ABS, *Labour Force*, 6202.0, May 2011.

³ US Bureau of Labor Statistics, *Employment Situation Summary*, May 2011.

⁴ UK Office for National Statistics, *Statistical Bulletin*, April 2011.

⁵ Statistics New Zealand, *Household Labour Force Survey*, March 2011 quarter.

⁶ ABS 6202.0, seasonally adjusted.

⁷ ABS 6345.0, seasonally adjusted.

⁸ ABS 6302.0, seasonally adjusted.

There has been no inflationary wages breakout. The RBA has said that unit labour costs are ‘the most relevant concept’ when assessing inflationary pressures from the labour market.⁹ Real unit labour costs have fallen since the *Fair Work Act* came into operation, falling 1.6% in 2010 alone.¹⁰

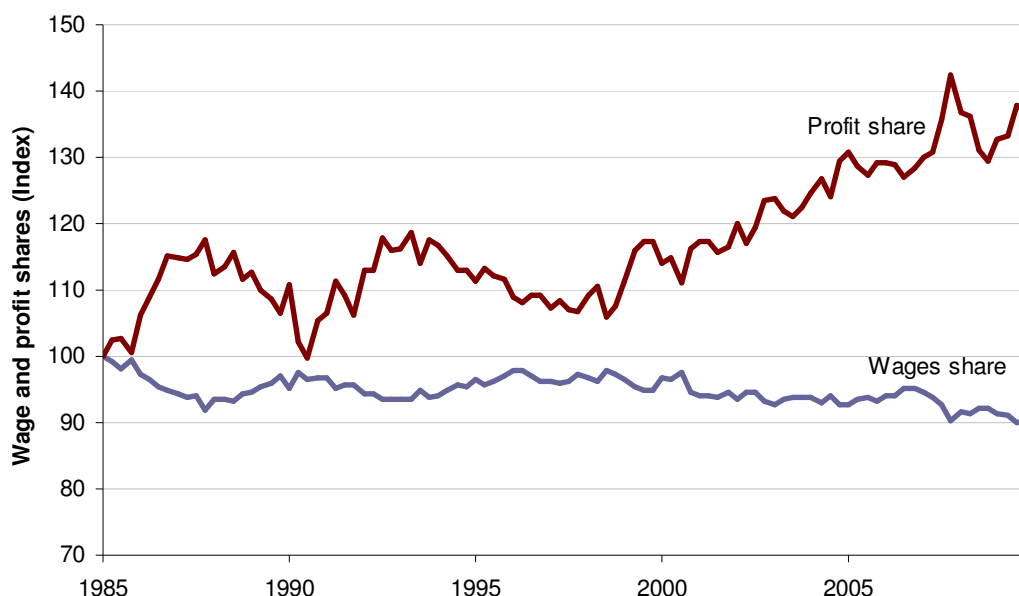
The wages share of national income fell from 53.8% to 52.5% in December 2010, its lowest level since 1964. The wages share increased in the March 2011 quarter, back to around 2009 levels.¹¹

The Act’s goal of encouraging collective bargaining at the enterprise level has been successful. More Australian workers are covered by collective agreements than ever before. The proportion of employees covered by a collective agreement has risen from 39.8% in 2008 to 43.4% in 2010.¹²

Profits

Businesses continue to do well under the *Fair Work Act*. Total profits have grown twice as fast as total wages since the Act came into effect. Gross business operating profits have risen 21.1% since June 2009 (to March 2011), while total wages have grown by only 10.5%.¹³

Figure 1: Wages and profit shares of national income, 1985-2011



Source: ABS 5676.0, seasonally adjusted

⁹ RBA, *Statement on Monetary Policy*, May 2006, p64.

¹⁰ ABS 5206.0, seasonally adjusted.

¹¹ ABS 5206.0, seasonally adjusted.

¹² ABS 6306.0.

¹³ ABS 5676.0, seasonally adjusted.

As a result, the profits share of national income rose from 27% to 28.2%, near the all-time high it reached prior to the financial crisis. The profits share fell slightly in the March 2011 quarter, as a result of the temporary downturn caused by the natural disasters.

Productivity

Australia's rate of productivity growth has slowed over the past decade. Productivity growth peaked in the mid-1990s and has been slowing ever since. This cannot be ascribed to the *Fair Work Act*, an Act which has been in operation for only two years.

The March 2011 quarter National Accounts showed a fall in the level of productivity, but this is expected to be a short-term side effect of the natural disasters in early 2011. Output fell in the quarter, largely due to a slump in exports, predominantly coal. However, Australian businesses continued to hire staff, increasing the number of total hours worked in the economy.

Because output fell, but hours worked didn't, the National Accounts measure of productivity (GDP per hour worked) fell. As GDP recovers in the June quarter and beyond, productivity growth should resume. Setting aside the temporary fall in productivity in the March quarter, productivity growth since the *Fair Work Act* came into effect has been around the same rate as in the period before the Act.

- In the first 18 months of the *Fair Work Act*'s operation, productivity in the market sector increased by 1.8%.
- In the 18 months before the *Fair Work Act* took effect, productivity in the market sector also increased by 1.8%.
- In the last 18 months that the Howard Government was in office, a period in which WorkChoices was in operation, productivity in the market sector increased by 1.7%.¹⁴

Productivity has continued to grow at around the trend pace from the latter half of the 2000s. The fact that this trend pace is below the pace recorded in the 1990s is a longer term issue, not one that can be ascribed to the Act.

Indeed, the slowing of productivity growth in the 2000s has been a problem common to much of the developed world. The slowdown in productivity growth that Australia has experienced over the past decade has actually been less severe than in many other developed economies.

Saul Eslake and Marcus Walsh of the Grattan Institute note:

*Australia is not unique in experiencing a decline in labour productivity growth over the past decade. Indeed, across the OECD area as a whole, labour productivity growth averaged just 0.4% pa over the five years to 2010, less than half the Australian rate, and down from an average of 1.5% pa over the first half of the decade.*¹⁵

Any claims that the slowdown in the rate of productivity growth should be attributed to solely domestic causes, much less workplace relations, are not based on an honest assessment of the evidence.

¹⁴ ABS 5206.0, seasonally adjusted.

¹⁵ Eslake, S. and Walsh, M. 2011, *Australia's Productivity Challenge*, Grattan Institute, Melbourne.

CONDITIONS OF EMPLOYMENT

- The vast majority (89%) of Australian Workplace Agreements (AWAs) removed basic Award conditions: penalty rates (removed in 65%), shift loading (70%), annual leave loading (68%), substituted public holidays (61%), public holiday pay (50%).
- Workers are now covered by 10 National Employment Standards *and* modern Award conditions.
- Rights to conditions like overtime, public holiday pay, penalty rates, redundancy pay are protected.

Labor has substantially restored the safety net of Award conditions that was slashed by Howard's IR laws.

The challenge now is to progressively build on the safety net, and ensure that fair and decent conditions of employment are enjoyed by all workers, not just those in permanent jobs.

Under WorkChoices

Prior to WorkChoices, a wide range of minimum conditions of employment were determined by the Australian Industrial Relations Commission (AIRC) and provided for in Awards.

WorkChoices dramatically reduced the safety net for Australian workers. First of all, it exempted new businesses from Awards. These businesses only had to provide workers with five minimum conditions of employment under the 'Australian Fair Pay and Classification Standard' (AFPCS):

- Minimum wage – that in 2006 was \$12.75 per hour (less for workers under 21 years);
- 4 weeks' annual leave per year;
- 10 days' sick/carers' leave;
- A 38 hour working week (which could be averaged out to avoid payment of overtime);
- 52 weeks' unpaid parental leave.

Other Award entitlements – like penalty rates, overtime pay, and consultation rights – were no longer protected.

WorkChoices removed the 'No Disadvantage Test' that stopped workers getting ripped off in bargaining. Until the 'Fairness Test' was hastily reintroduced from 6 May 2007, an employer could make an AWA or non-union workplace agreement that stripped employees of basic Award conditions, so long as they provided their employees with the five minimum classification standards.

An analysis of AWAs lodged in 2006 proved that the vast majority of AWAs (89%) removed basic Award conditions:

- 70% removed shift work loadings;
- 68% removed annual leave loadings;
- 65% removed penalty rates;
- 63% removed incentive based payments and bonuses;
- 61% removed days to be substituted for public holidays;
- 56% removed monetary allowances;
- 50% removed public holidays payment;
- 49% removed overtime loadings;
- 31% removed rest breaks;
- 25% removed public holidays.¹⁶

Under the *Fair Work Act*

The *Fair Work Act* restores a safety net of minimum terms and conditions of employment which cannot be undermined by individual or collective bargaining.

The safety net includes the 10 legislated standards under the National Employment Standards:

- A 38-hour working week for full time employees and the right to refuse unreasonable overtime;
- One year's unpaid parental leave, with a right to request a second year;
- A right for parents to request flexible working arrangements;
- Four weeks' paid annual leave each year, plus an additional week for shift workers;
- 10 days' paid personal/carers' leave each year, two days' paid compassionate leave, and two days' unpaid emergency leave;
- Long service leave;
- A right to refuse work on public holidays;
- Unpaid community service leave;
- Notice of termination and redundancy pay (except small business);
- A right to receive a Fair Work Information Statement containing advice about workplace rights.

¹⁶ Julia Gillard, 'AWA Data the Liberals Claimed never Existed', Media Release, 20 February 2008.

In addition, the *Fair Work Act* provides for a system of modern Awards. Modern Awards set out terms and conditions of employment relevant to particular industries and occupations including:

- Working time (including rostering, minimum shift lengths, rest and meal breaks);
- Penalty rates (including for evening, weekend and public holiday work);
- Allowances and loadings;
- Superannuation;
- Rights to consultation, representation and dispute settlement procedures.

These entitlements are guaranteed minimum standards. Employees cannot be pressured to give them up. Businesses that fail to comply with these standards are in breach of the law.

An employers and an individual employee may agree to vary the application of modern Award conditions to meet the genuine needs of the employer/employee by making an Individual Flexibility Arrangement (IFA). IFAs are subject to a number of important limitations which ensure that the safety net is not undermined.

Despite these formal protections, unions continue to receive reports that many employers are making unlawful IFAs: either by making them a condition of employment, or by making deals in which entitlements are traded off for no material benefit. The General Manager of FWA is currently researching the use of IFAs; if the research shows evidence of widespread abuse, further reform will be needed.

Finally, Labor has improved on the Howard government's GEERS scheme for protecting employee entitlements when their employers go bust. Under Labor's Fair Entitlements Guarantee, 100% of the severance entitlements (for almost all workers) will be insured by the government, in case the employer cannot pay. This is a significant achievement.

The future

It is clear that the Coalition will keep trying to attack the safety net. Their agenda includes:

- Removing important protections for employees covered by IFAs such as the better off overall test;
- Significantly reducing modern Award conditions, including minimum shifts and penalty rates; and
- Undermining the NES.

This would incrementally return many of the worst elements of WorkChoices.

In contrast, unions will fight to maintain and improve the safety net; for example, by ensuring that the 'rights to request' are enforceable, and that all workers who need to provide care can access flexible work.

MINIMUM WAGES

- Under WorkChoices, minimum wages declined in real terms (by up to \$84 a week), and the so-called Fair Pay Commission imposed a wage freeze in 2009.
- The *Fair Work Act* has restored the real value of minimum wages for the least-skilled workers, following this year's 3.4% decision minimum wages for these workers will be back above 2006 levels for the first time.

The *Fair Work Act* has restored a fair and transparent system of setting minimum wages. The recent 3.4% Award wage increase was welcome, although workers on minimum wages continue to struggle to make ends meet and earn increasingly less than the average wage.

Under WorkChoices

The WorkChoices legislation altered wage setting arrangements that had served Australian workers well for over 100 years. Responsibility for setting minimum wages was shifted from the AIRC to the newly created Australian "Fair Pay Commission".

Unlike the AIRC, and despite the new body's name, the "Fair Pay Commission" was not required to take 'fairness' into account when setting wages. Its statutory mandate was to restrain minimum wage growth.

Between 2006 and 2008, the "Fair Pay Commission" awarded wage increases that were below the rate of inflation. Worse, in 2009, the Commission imposed a wages freeze on workers on Award minimum wages. As Table 1 demonstrates (page 20), real wages for more than a million low paid working Australians went backwards, by up to 8%.

Under the *Fair Work Act*

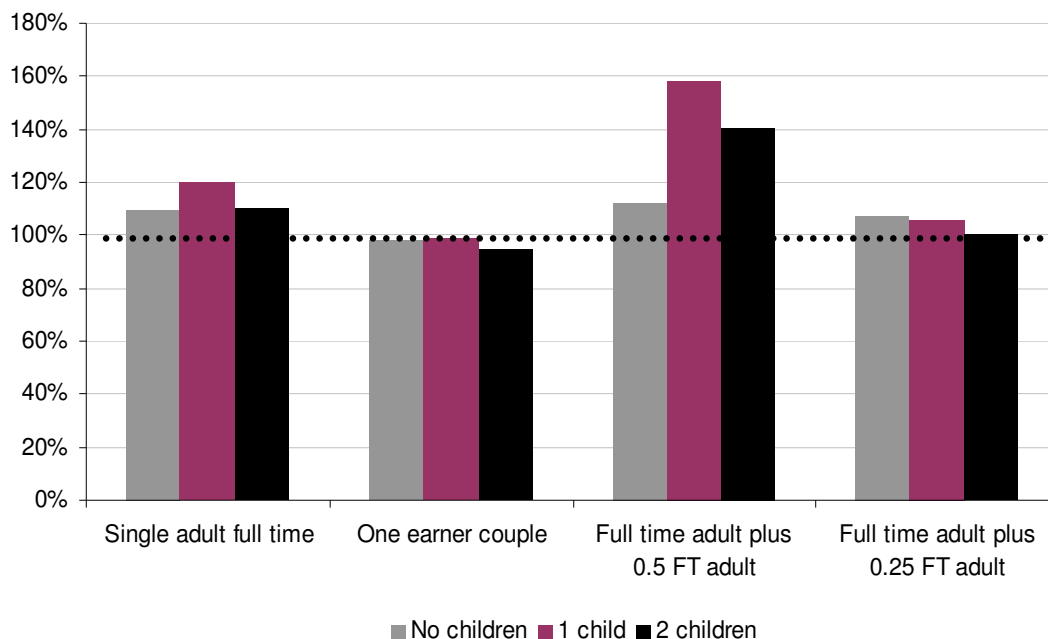
The *Fair Work Act* replaced the "Fair Pay Commission" with a Minimum Wages Panel within Fair Work Australia and made a number of important changes to the process for setting minimum wages. The legislation now requires that minimum wages must be 'fair' and 'relevant' to market wages generally.

In its first minimum wage decision under the new Act, the Panel awarded an increase of \$26 per week for all Award-dependent workers. The second decision awarded 3.4% to all Award-dependent workers. These increases made a significant difference to the lives of low paid workers. They have at least restored the real value of the C14 wage to its pre-WorkChoices levels.

However the gap between minimum wages and average earnings remains significant. The national minimum wage equates to less than half (44.7%) of average earnings for full-time workers. If an individual lives in a household with an income below 60% of the median national income, he or she is said to be experiencing poverty.

The following graph compares the disposable incomes of illustrative Award-dependent households with the income poverty line. The data demonstrates that minimum wage workers in certain households live in relative poverty even after government benefits are taken into account.

Figure 2: Comparison of 60% median income poverty line with disposable incomes of selected Award-dependent households, September 2010



Source: ACTU modelling

The Future

Fair Work Australia is required to review conditions contained in modern Awards on a regular basis to ensure that the safety net remains fair and relevant.

It is clear that employers and the Coalition would prefer for Award wages to stagnate. However, unions believe that in a strong economy, it is appropriate that the benefits of prosperity are shared, and that no worker is left behind.

Table 1: Performance of Award wages, real and nominal, 2005-2009

Decline in Real Wages: June 2005 - June 2009					
Award classification	Minimum Wage (June 2005)	Minimum Wage (July 2009)	Nominal increase (inflation over the period = 12.53%)	Change in real wage (%)	Change in real wages (\$)
C14 (least skilled)	\$484.40	\$543.80	12.26%	-0.27%	-\$1.47
C13	\$501.10	\$560.50	11.85%	-0.68%	-\$3.81
C12	\$523.60	\$582.90	11.33%	-1.20%	-\$6.99
C11	\$544.50	\$603.80	10.89%	-1.64%	-\$9.90
C10 (trade qualified or equivalent)	\$578.20	\$637.60	10.28%	-2.25%	-\$14.35
C9	\$599.10	\$658.50	9.92%	-2.61%	-\$17.19
C8	\$619.90	\$679.10	9.54%	-2.99%	-\$20.31
C7	\$638.80	\$698.10	9.28%	-3.25%	-\$22.69
C6	\$680.50	\$734.90	8.00%	-4.53%	-\$33.29
C5	\$701.40	\$750.50	7.00%	-5.53%	-\$41.50
C4	\$722.20	\$771.40	6.81%	-5.72%	-\$44.12
C3	\$763.90	\$812.80	6.40%	-6.13%	-\$49.82
C2(a)	\$784.80	\$833.70	6.23%	-6.30%	-\$52.52
C2(b)	\$822.50	\$871.30	5.94%	-6.59%	-\$57.42
C1(a)	\$906.00	\$954.90	5.40%	-7.13%	-\$68.08
C1(b)	\$1031.10	\$1,080.00	4.74%	-7.79%	-\$84.13

Source: ACTU calculations based on AIRC/FWA and ABS data

UNFAIR DISMISSAL

- Under the *Fair Work Act*, 6 million workers now have unfair dismissal protection (only those who have been in their job for less than a six months - or a year for small business employees - and high income earners are excluded).
- The system is not being abused. 11,000 unfair dismissal applications have been lodged in the last year; this accounts for only 1% of all dismissals across the workforce.

Unfair dismissal protection is a fundamental right, recognised by international law. Not only does it give workers security about their jobs, but it gives them the confidence to speak up at work about issues that concern them. Without unfair dismissal protection, if you challenged a boss's decision you could get the sack.

Under WorkChoices

One of the most significant and far-reaching implications of WorkChoices was the curtailment of unfair dismissal rights.

Employers with less than 100 employees were exempt from any claim of unfair dismissal by a worker whose employment was terminated by them. This denied 66% of all employees in the federal system unfair dismissal protections.

Combined with other exclusions, the result was that only 25% of employees covered by WorkChoices had unfair dismissal protection. If WorkChoices was still in existence, it would mean that over 5.7 million workers would not be protected from unfair dismissal.

Even those within the system faced being unfairly made redundant. Under WorkChoices, employers were able to make redundancies for 'genuine operational reasons'.¹⁷ The AIRC was not allowed to look into the fairness of the decision to implement redundancies, or the selection of particular individuals for redundancy. Howard also increased filing fees, in an attempt to deter people from making claims.

Under the *Fair Work Act*

The *Fair Work Act* has restored unfair dismissal rights for all workers. The only workers who are excluded are high-income earners (about 500,000 employees) and those serving their six months qualifying period (about 1 million employees). The system now covers more than 6 million workers.

In addition, FWA can now look into the fairness of a redundancy, and consider whether a worker should have been redeployed rather than dismissed.¹⁸ Filing fees have also been reduced, to \$60.

There were 11,116 unfair dismissal claims made in 2011. This increase is to be expected, given that the number of workers with unfair dismissal protection has tripled.

¹⁷ *Workplace Relations Act* s643(8)

¹⁸ *Fair Work Act*, section 385

It is also less than the number of claims that were made in the federal system before the Howard Government's 1996 laws.¹⁹

Given that each year about a million employees are dismissed,²⁰ 11,000 unfair dismissal applications represents a complaint rate of about 1%. Ninety-nine per cent of employees do not complain, either because their dismissal was fair, or else because it was unfair but they do not want to make an application (or do not have anybody to help them through the process).

Of the 11,000 applications, the vast majority are settled, mostly for no money or a small sum of money. For example, of the 9,369 unfair dismissal applications made under the *Fair Work Act* that were *finalised* by FWA in 2009-10:²¹

- 9,282 (99%) were settled. Of the settlements observed in conciliation, 25% settled for no money, perhaps only with an apology. Of those that were settled with a money payment, 28% settled for less than \$2,000 (two weeks' wages, on average) and a further 30% settled for between \$2,000-\$4,000 (2 to 4 weeks' wages). The Coalition asserts that all monetary payments represent 'go away money'. However, there is no evidence for this. They may well represent payment of employee entitlements, or compensation for acknowledged wrongdoing by the employer.
- 109 were dismissed at a preliminary hearing for not being within the scope of the *Fair Work Act*. Only 4 were dismissed on the grounds that they were 'vexatious'.
- 87 were arbitrated. Of these, the employer won in 35 cases. Where the employee won, reinstatement was ordered in 15 cases, and compensation ordered in 35 cases. Where payments were ordered by FWA, in the 6 months to January 2011, 29% of payments were less than \$4,000; a further 23% were between \$4,000 and \$8,000; and a further 13% were for \$8,000 to \$15,000. The maximum amount (6 months' wages) was only ordered in fewer than 2% of cases. Once again, these amounts can include payment of employee entitlements and compensation.²²

Despite all the evidence that the system is working well, employer groups continue to call for the jurisdiction to be wound back, with blanket exemptions for small business, casuals, redundancies, et cetera. Decent employers who dismiss people fairly have no reason to fear Australia's unfair dismissal laws; employer groups are simply seeking to shield bad employers who insist on the unfettered right to fire.

The future

After two years of operation, it has been shown that these laws not only provide workers with job security and a fair go at work, but they are also consistent with strong jobs growth and business success. Employers' assertions to the contrary have been thoroughly disproven.

Ensuring that workers know their rights to unfair dismissal protection and extending the lodgment time, would ensure that workers who are unfairly treated can exercise their rights.

¹⁹ In 1995-6 there were 13,643 unfair dismissal applications: AIRC, *Annual Report 1995-96*.

²⁰ 6209.0 ABS statistics: Labour Mobility, Australia as at February 2010

²¹ FWA, *Annual Report 2009-10*, p 12-14, 76.

²² Senate Standing Committee on Education Employment and Workplace Relations, *Additional Estimates* (February 2011), FWA Answer to Question on Notice EW0749_11.

WOMEN, WORK AND FAMILY

- Paid parental leave is now available to all working parents providing 18 weeks government-funded payment at the federal minimum wage .
- Restoration of the Award safety net and fairer setting of the minimum wages will assist women workers, many of whom are Award-dependent.
- The *Fair Work Act* equal remuneration provisions have allowed Australian unions, led by the Australian Services Union, to run a national equal pay case for workers in social and community services.

Despite some advances over recent decades, women workers face a number of continuing challenges in the labour market. Many women work in jobs that are low-paid and devalued because they are seen as ‘women’s work’. Other women work in well-paid jobs, but face subtle discrimination and exclusion from men. At the same time, whether high- or low- paid, women still primarily bear the social expectation that they will sacrifice their interests at work to look after children or the elderly.

Women workers (and other workers with family responsibilities) need and deserve recognition and extra protection from the law. Far from dealing with the challenges women face at work, WorkChoices left these difficult issues to ‘market forces’ to resolve – where clearly they would be resolved against the interest of workers.

The *Fair Work Act* has taken a number of important steps towards improving the position of women and workers with family responsibilities.

Under WorkChoices

Women were particularly disadvantaged by the deregulation of labour laws under WorkChoices.

WorkChoices exploited the lack of bargaining power of employees in casual or part-time jobs who were dependent on regular hours of work and/or rosters to fit around family and other commitments. Employees with family responsibilities were also more vulnerable to increased discrimination and coercion when the employment legislation designed to protect workers from exploitation and unfair dismissal was retracted under WorkChoices.

Women workers suffered in particular when the safety net was reduced as they are concentrated in low-paid jobs dependent on minimum wages and conditions.

Women fared poorly under WorkChoices as a result of:

- Their weak bargaining positions and WorkChoices’ emphasis on individual contract negotiations²³;

²³ Particularly in the retail and hospitality industries, AWAs had the potential to exploit young, low-skilled and low-paid women. For example, [Darrell Lea](#) casual employees were told that unless they signed AWAs they would lose weekend shifts. The AWAs traded off Saturday penalties, Sunday penalties, public holidays, laundry allowance, tea breaks, sick leave and accident make-up pay *without* any compensating wage increases.

- The stripping back of minimum Award pay and conditions, especially penalty rates²⁴;
- The failure of the AFPC to provide real wage increases for low paid workers²⁵;
- The reduction in employees' control over working hours;
- The power given to employers to refuse to bargain with employees;
- The removal of unfair dismissal protection for the majority of employees;
- The reduction in powers and functions of the AIRC independent umpire to ensure fairness; and
- The lack of public transparency of workplace agreements so that unions could identify injustices.

For the first time in over a decade the gender wage gap widened under the WorkChoices: worsening by 2%.²⁶

Under WorkChoices, women in full time jobs earned \$100 a week less than men – the same gender pay gap as 1978, almost 30 years ago.²⁷ ABS figures show that the pay gap was worst for women on individual contracts. Female workers on AWA individual contracts earned an average of \$110.20 a week less than women on registered union collective agreements.

The female dominated retail and hospitality sectors suffered the greatest decline in real earnings for workers under WorkChoices. In the first year since WorkChoices took effect, hourly earnings growth in the retail and hospitality industries were the lowest across all industries, a reflection of the loss of penalty rates, overtime and other conditions of employment through AWAs.²⁸

Under the *Fair Work Act*

The *Fair Work Act* restored a safety net of minimum terms and conditions which could not be undermined by individual bargaining and which included a number of provisions designed specifically to assist women and workers with family responsibilities, including:

- Revised equal remuneration provisions which no longer require a comparison between a woman and a man performing exactly the same work. Unequal pay can now be proved if a female dominated industry (such as social and community workers) undervalues its employees because of a gendered perception of the value of their skills, qualifications and work. The broader term 'remuneration' allows the gender pay gap to include a range of penalty rates, overtime and bonuses which men are more likely to access than women. The Act allows FWA to

²⁴ For example, Spotlight employees (the majority of whom are women with family responsibilities) were 'offered' AWAs which undercut existing conditions by excluding rights to penalties, allowances, loadings and rostering conditions which were compensated for by an additional two cents an hour, equivalent to a 16.7% pay cut (\$3,639 per year less).

²⁵ Between 2001 and 2006, the real wages of women working full-time in the private sector fell by 1.8%: ABS Cat no. 6410.0, 6302.0, March 2007

²⁶ Australian Bureau of Statistics, Average Weekly Earnings, cat 6302.0

²⁷ ABS Cat no. 6410.0, 6302.0, March 2007

²⁸ Whilst the Government did its best to keep this data from the public eye, a Senate Inquiry revealed that almost 90% of AWAs removed a basic award condition (see section on the Safety Net).

provide a broad range of remedies in an Equal Remuneration Order to rectify the inequality.

- Bargaining support for low paid workers who have not historically had access to the benefits of collective bargaining and face substantial difficulty in bargaining at the enterprise level, including where their wages are dependent on government funding (such as aged care workers). Bargaining support may include directing third (funding) parties to the negotiating table, issuing non-binding recommendations, or in limited circumstances, making a workplace determination (arbitration).
- A right to request changes to work arrangements for employees who care for children under school age or dependents with a disability under the age of 18.
- A right to request an extended period of unpaid parental leave for a total of up to two years.
- Protection against an employer taking adverse action against an employee on discriminatory grounds, including for the first time, the grounds of family or carer's responsibilities.²⁹
- Protection against an employer taking adverse action against an employee exercising a workplace right (such as a right to request flexible work arrangements) under a workplace agreement or law.³⁰

In addition to the provisions of the *Fair Work Act*, the government also introduced Australia's first Paid Parental Leave scheme, which will benefit 150,000 families each year. The scheme began on January 1 2011, providing 18 weeks government funded payment at the federal minimum wage to all eligible parents (including part-time or casual employees) earning less than \$150,000 per financial year. Two weeks secondary carer's leave which can be taken concurrently with paid parental leave to be paid at the minimum wage will be available to secondary care givers from 1 January 2013.

The Government is also in the process of reviewing the Equal Opportunity for Women in the Workplace Act (EOWWA). The terms of reference of this review include amending the legislation to ensure more effective reporting by employers, more changes to discriminatory workplace practices and a stronger compliance regime.

The future

Whilst the *Fair Work Act* and other related legislation has delivered real benefits for women and workers with family responsibilities, there remain some key areas that require further improvement.

²⁹ 'Adverse action' is broadly defined and includes where an employer:

- Dismisses an employee;
- Injures the employee in his or her employment;
- Alters the position of the employee to the employee's prejudice; or
- Discriminates between the employee and other employees of the employer; and
- Applies to contractors and prospective employees.

³⁰ Note (1) the employer bears the onus of proving that it did not take adverse action against an employee for unlawful reasons; and
(2) applicants are no longer required to prove the discrimination was the 'sole or dominant purpose' of the adverse action.

All workers who provide care should have the 'right to request' flexible work. This right (and the right to request a second year's parental leave) should be made fully enforceable. Unions will continue to bargain and campaign for improvements to the Paid Parental Leave scheme, such as employer 'top up' of payments; superannuation payments on parental leave pay; and longer periods of paid leave.

The current equal pay case by unions, for social and community services workers, is important to ensure that workers in women-dominated industries are adequately rewarded for their work. It should be supported by employers and all governments. To further support this advancement of equal pay, the government should implement the Recommendations of the 2008 Senate Committee Inquiry into Pay Equity.

COLLECTIVE BARGAINING

- Bargaining suffered under WorkChoices from a reduced safety net, limited agreement making, restricted industrial rights, and limitation on the matters that workers and employers could agree on; in addition to the reality that at any time, an individual contract could undermine collectively agreed wages and conditions.
- More workers are covered under collective agreements than before: 43.4% of all employees.
- There has been a reduction in the number of working days lost to industrial disputes since the *Fair Work Act* took effect.

While WorkChoices tried to undermine collective bargaining, the *Fair Work Act* recognises the benefits that it provides: the typical worker covered by a collective agreement earns 67%³¹ more than the Award, and most workers on collective agreements benefit from annual pay increases of approximately 4%³², compared to around 3% under the Award.

Consistent with the long term policy movement toward enterprise arrangements, collective bargaining is the centrepiece of the *Fair Work Act*. Since the *Fair Work Act* has been introduced more workers are covered under collective agreements than before: 43.4% of all employees.

However, there are several new bargaining provisions that could be regarded as surprising to those familiar with the development of Australian industrial relations law over the last 20 to 30 years.

That is not to say that *Fair Work Act* does not represent a departure from WorkChoices, as it clearly does. The point is that WorkChoices deviated so radically from accepted principles that any return to or evolution of those longstanding principles after WorkChoices necessarily involved substantial reform.

Under WorkChoices

The most extreme shift introduced by WorkChoices was that collective bargaining commenced from a lower base than ever before. Up until that time, and for as long as enterprise bargaining has been a feature of our industrial relations system, it had been underpinned by a safety net of Award conditions and a 'no disadvantage' test to ensure that enterprise agreements did not undercut that safety net other than in exceptional circumstances where the independent umpire, the Australian Industrial Relations Commission (AIRC), was satisfied that it was in the public interest.

i) Award safety net reduced

After midnight on 26 March 2006, WorkChoices determined that scores of Award conditions, such as pay classifications and career paths or minimum weekly hours for part time workers, which had been derived from countless decisions of the AIRC, were no

³¹ On average, full time, non managerial workers covered by a collective agreement earn approximately 83% more than the award: ABS Employee Earnings and Hours, May 2010, 6306.0.

³² See Department of Education, Employment and Workplace Relations, Trends in Federal Enterprise Bargaining (September Quarter 2010).

longer Award conditions. The safety net was reduced to the five conditions in the Australian Fair Pay Classification Standards.³³ Everything else was on the table because WorkChoices did not require any independent authority to assess whether a collective agreement would disadvantage workers before that agreement became effective.³⁴

When the Howard Government tried to counter the bad press that WorkChoices was getting and moved to introduce its so-called 'fairness test' on new agreements, it only required those agreements to be tested for disadvantage against a subset of the Award conditions that would have otherwise applied.³⁵ So, for example, the agreement could be regarded as 'fair' even if it cut back redundancy pay, sick leave and annual leave, abolished paid maternity leave and removed a requirement for roster changes to be agreed.

ii). Limited agreement making under WorkChoices

Reaching a 'fair' agreement under WorkChoices was an uphill battle. To begin with, it was difficult for workers to receive representation at their workplace. If there was not already a union involved at their workplace through an existing collective agreement or being party to an Award, then there was no mechanism to ensure workers' could receive union representation: they were left to fend for themselves.³⁶

This was compounded by the ability for employers in new business to unilaterally determine the conditions that would apply at their workplace, through 'employer Greenfield agreements'. These "agreements" made by the employer with themselves, were given the same status as those that were agreed between employers and unions.³⁷ All agreements could last up to five years. These factors presented barriers to starting the bargaining process particularly among workers who had no previous experience or involvement in it.

In cases where workers did manage to receive representation and wanted to have a collective agreement, if an employer refused to respond or negotiate, the independent umpire had no power to step in and encourage or facilitate discussions.³⁸

iii). Industrial action rights curtailed

Under WorkChoices, workers and their unions retained the capacity to organise protected industrial action to support the bargaining claims to apply pressure where an employer refused to negotiate. However, there were significant obstacles to exercising those rights.

Firstly, prior to giving notice of any industrial action, a union needed to make an application to the AIRC to get permission to ask its members whether or not they wanted to take industrial action.³⁹ The AIRC was required to approve the questions being put in relation to each particular type of industrial action that was to be proposed - it was not possible to seek a general endorsement to take industrial action.

Secondly, if that application was approved, the question had to be put to the workforce as a secret ballot, ordinarily administered by the Australian Electoral Commission. To administer the ballot, both the union and the employer needed to compile a list of the workers who were eligible to vote, ballot papers needed to be produced, the ballot taken, the results counted and the results communicated back to the union.⁴⁰ This had to be

³³ *Workplace Relations Act 1996*, Part 7.

³⁴ Section 347.

³⁵ Sections 346M(1)(b), 346B(1), 354(4).

³⁶ Section 760(a).

³⁷ Section 330.

³⁸ Section 704(1)(b).

³⁹ Part 9 Division 4.

⁴⁰ *Ibid.*

paid for by the workers through their union. It was an unnecessarily lengthy and complex process.

Finally, it was not enough that the majority of the vote was in favour of any industrial action – a majority of the eligible voters also needed to vote. It was only after the union had met each of these hurdles that it could give notice of, and take, protected industrial action. And if the industrial action that had been authorised by the ballot and the AIRC, in its exact form, had not been taken within 30 days of the ballot, another application to the AIRC would have to be made.

The result was employers were given the upper hand during bargaining. The process took so long, that employers effectively had over a week and up to a month, to prepare for any industrial action. For the proceeding decade, only 3 days notice needed to be given.⁴¹ The fact that action under WorkChoices was limited to the precise terms stipulated in the ballot, meant unions and workers were not able to quickly pursue a different course of industrial action (that may have been in a lesser form) as bargaining evolved.

iv). Restrictions on content of Agreements

If or when negotiations did commence, there were heavy restrictions on what could be the subject of those negotiations or contained in any final agreement. For example, it was not possible to negotiate or agree on any term that stopped AWAs being introduced into the workplace⁴² or committed the employer to attempt to renegotiate a future collective agreement⁴³, nor was it possible to protect job security in agreements through reducing the incentive to outsource or contract out jobs⁴⁴. In addition, it was not possible to negotiate protocols for effective union representation in the workplace⁴⁵ and there was no requirement for the agreements to contain any procedure for disputes to resolved by an independent person. By pursuing claims that were not permitted, unions lost their rights to take protected industrial action⁴⁶ and could be sued.⁴⁷ By agreeing to claims that were not permitted, employers were also exposed to prosecution.⁴⁸

Assuming workers and their representatives were able to break through all of these barriers and make a collective agreement, it was possible for employers to avoid the obligations of the collective agreement and effectively contract out of them if the employer ‘offered’ individual AWAs to workers who ‘agreed’ to their terms. Furthermore, it was legal under WorkChoices for an employer to require new starters to give up their right to be covered by the collective agreement and submit to an AWA with lesser conditions⁴⁹, leading to workers doing the same job on the same shift together on different pay and conditions.

To make matters worse, once a collective agreement had run its term, the conditions were up for grabs once again because WorkChoices turned over the longstanding principle that collective agreements stayed in place after their term until they were replaced or terminated by the AIRC. Instead, an employer could just back out of the agreement after its term by giving 90 days notice⁵⁰, in which case the workers would fall back to the 5 minimum conditions in the AFPCS.

⁴¹ Section 170MO.

⁴² *Workplace Relations Regulations* 2006, r. 8.5(8)

⁴³ Regulation 8.5(1)(e)

⁴⁴ Regulation 8.5(1)(h)-(i)

⁴⁵ Regulation 8.5(1)(f), (g) & (k).

⁴⁶ *Workplace Relations Act* 1996 s. 436.

⁴⁷ Section 365.

⁴⁸ Sections 357, 365.

⁴⁹ Section 400(6).

⁵⁰ Section 393.

Under the *Fair Work Act*

The *Fair Work Act* returns some of the balance to collective bargaining, allowing employers and workers and their unions to reach agreements more efficiently and fairly.

The *Fair Work Act* has reversed the radical stance to collective bargaining that WorkChoices had taken:

- There is an enforceable right to a collective agreement including through access to good faith bargaining orders.
- There is a new Award safety net and a new independent umpire (Fair Work Australia) that makes sure that all new agreements leave workers better off.⁵¹
- The integrity of collective agreements is no longer threatened by the capacity to seek, or require, employees to submit to individual agreements that disadvantage them.
- It is easier for workers to access unions to represent them in collective bargaining⁵² and unions are allowed to meet workers at work to discuss the negotiations, irrespective of whether those workers have bargained or been represented in bargaining before.⁵³
- For the first time in Australia, special provisions exist to assist low paid workers collectively bargain.⁵⁴
- Employers cannot unilaterally withdraw from collective agreements.⁵⁵
- The scope of matters that can be the subject of negotiation and agreement has been expanded.⁵⁶
- All collective agreements must include provisions that permit an independent person to assist in resolving workplace disputes.⁵⁷

In addition, Fair Work Australia has a more meaningful role in supervising the bargaining process, including a capacity to require parties to engage in collective negotiations in good faith where the majority of workers want an agreement.⁵⁸ This role reflects longstanding test case principles established by the AIRC regarding the processes it could put in train where parties were refusing to bargain or the steps it could take to ensure relevant information was disclosed during the bargaining process.⁵⁹

Contrary to the scare campaign that has been conducted in some media outlets, this return to more orthodox industrial relations principles has not led to a wages breakout or widespread industrial unrest. In fact, there has been a reduction in the number of working days lost to industrial disputes since the *Fair Work Act* took effect (3.4 days per 1000 employees; compared to 4.5 days in the same period prior to the Act began)⁶⁰ and the Australian Bureau of Statistics' *Wage Price Index* demonstrates that current wages

⁵¹ *Fair Work Act* 2009 s. 186(2)(d), 193.

⁵² Part 2-4, Division 3.

⁵³ Section 484.

⁵⁴ Part 2-4 Division 9.

⁵⁵ Part 2-4, Division 7, Subdivision C-D.

⁵⁶ Section 172(1).

⁵⁷ Section 186(6).

⁵⁸ Part 2-4, Division 8.

⁵⁹ *Enterprise Flexibility Agreements Test Case*, Print M0464, 11/5/95

⁶⁰ ABS Industrial Disputes, Australia, Mar 2011, 6321.0.55.001

growth is on par with the 10 year average (3.8% in the year ending March quarter, compared with 3.7 for the decade long average).⁶¹

The future

With the Liberal opposition encouraging employers to be vocal on reforming industrial relations laws⁶², and employer groups making false claims of rampant 'industrial carnage', it more important that the longstanding principles that underpin our national industrial relations system are protected and progressed.

Without ensuring that workers have a say in their workplace agreements, employers will over the long term, drive down wages and conditions, which would make it harder for working people to make ends meet and have time to spend with their families.

Good collective bargaining laws, allow workers and employers to work together to drive productivity gains, build commitments to skill development and strengthen occupational health and safety standards.

Unions believe that our bargaining laws can be improved by:

- removing unnecessary restrictions on the level of bargaining and permitted content of agreements;
- ensuring that FWA can always hear and settle disputes that arise during the course of the life of the agreement; and,
- ensuring that restrictions on the right to strike are brought into conformity with ILO rules.

⁶¹ ABS Labour Price Index Australia, Mar 2011 6345.0, seasonally adjusted.

⁶² 'Be loud on IR problems, opposition tells employers', *Workplace Express* 27/5/11

RIGHT TO REPRESENTATION

- Under WorkChoices there were strict limitations on workers' ability to meet with their union at the workplace.
- Workers have greater protections to representation and have a say at their workplace through the 'General Protections' under the *Fair Work Act*.
- Positive rights should be provided to delegates and workplace representatives to better represent their workmates and colleagues.

Workers have a fundamental right to be represented at work. In practice, this means:

- (a) Providing workers with the right to consult with union officials, in the workplace; and
- (b) Providing workers the right to have union delegates represent their workplace group.

WorkChoices tried to stop workers exercising these fundamental rights. This gave more power to employers at the expense of workers. These laws deliberately isolated workers to make them too afraid to stand up to their rights. Many workers had their rights taken away, and were unable to say anything.

The *Fair Work Act* restored the balance, and protected workers' right to be represented by their union.⁶³

(a) RIGHT TO CONSULT WITH UNIONS

It is vital that workers have a right to consult with their union in their workplace. In order to give effect to this worker right, the law must grant unions a 'right of entry' to the workplace, to meet with workers.

Under WorkChoices

Before 1996, awards permitted workers to meet with union staff in the workplace to obtain information, advice and assistance. Unions could also enter workplaces to inspect suspected breaches of the law.⁶⁴ No notice was required to be given to the employer, in case the employer tried to cover up evidence of a breach.

Howard's 1996 and 2006 laws significantly curtailed workers' rights to meet with unions. Awards and workplace agreements were banned from dealing with the matter. Instead, a statutory code set out limited rights of entry for discussion and investigation purposes. However:

- (a) unions had to give notice of entry, running the risk that employers would conceal breaches of the law;

⁶³ Section 3(e)

⁶⁴ See *Industrial Relations Act 1988* (repealed) section 286(1)

(b) employers were permitted to dictate where discussions took place. Often, employers deliberately nominated venues that were not private or convenient to access, in order to deter workers from meeting with their union;

(c) workers in sites covered by AWAs or non-union agreements lost the right to receive a visit from unions; and

(d) workers in sites without union members lost the right to have a union visit.

In practice, this meant that hundreds of thousands of workers lost the right to meet with unions in their workplace.

Under the *Fair Work Act*

The *Fair Work Act* significantly improves workers' rights to meet with unions at the workplace. Now, workers can meet with their union at work, whatever the instrument that applies to their workplace. FWA can waive the requirement to give notice of entry, if there are fears that the employer will conceal evidence. Employers can only nominate meeting venues that are 'fit for the purpose', and unions can challenge that decision.⁶⁵ Recently, FWA has confirmed that the lunch room, or other place where workers usually congregate, is the appropriate place for meetings.⁶⁶

The future

Although the *Fair Work Act* significantly improves union right of entry, further reforms are needed. In particular:

- unions and workers should be the ones who determine a reasonable location for a meeting to take place, not the employer. As a minimum, this should be where workers regularly congregate during their breaks;
- the award and bargaining content rules should not inhibit better union entry provisions;
- employers should be placed under a duty to facilitate union entry, for example by notifying workers about the time, date and location of union meetings.

(b) DELEGATES' RIGHTS

Although the *Fair Work Act* is supposedly based on the rights of workers to be represented, it says little about the powers and functions of union delegates, who exercise an important representative role at the workplace.

Under WorkChoices

Before the *Workplace Relations Act*, Awards recognised the fundamental role played by union delegates in representing the workforce. Awards conferred on delegates a number of rights and functions, including the right to attend training during work time.

⁶⁵ See *Fair Work Act*, section 505

⁶⁶ *Australasian Meat Industry Employees' Union v Dardanup Butchering Company Pty Ltd* [2011] FWA 3847.

However, the *Workplace Relations Act* required the AIRC to strip these provisions from Awards. It also banned workers from negotiating ‘delegates rights’ clauses in workplace agreements. In doing so, the Howard government was trying to undermine workers power and voice in their own workplaces, provided by the crucial role workplace delegates play.

The *Workplace Relations Act* and WorkChoices also made it more difficult for unions to protect delegates from dismissal or victimisation. Unions were made to pursue these claims in Federal Court, rather than in the AIRC. The court system is slow, expensive, and relies on proof of an improper motive on the part of the employer, which is often easy to hide.

Under the *Fair Work Act*

The *Fair Work Act* somewhat restores workers’ rights to be represented by their delegate. This is given effect by:

- removing the ban on delegates’ clauses in Awards and agreements;
- requiring businesses covered by an enterprise agreement to consult workers and their representatives on significant workplace changes;⁶⁷
- requiring representation of employees in disputes under workplace agreements;⁶⁸
- stipulating that a refusal to allow a ‘support person’ in internal disciplinary matters may make a dismissal unfair;⁶⁹ and
- making it slightly easier to prove a claim that an employer has victimised a delegate.⁷⁰

The future

What is lacking in our industrial law is a clear and simple positive statement of the rights, functions and powers which a delegate can exercise as part of their representative role.

The union movement is strongly of the view that creating a framework for delegates to carry out their representative role in the workplace is an important step towards achieving some of the key objects of the *Fair Work Act*, and in fact acknowledging the role unions and delegates play in creating productive workplaces.

⁶⁷ Section 205(1)(a) and (b)

⁶⁸ Section 186(6)(a) and (b)

⁶⁹ Section 387(d).

⁷⁰ Sections 360-1.

BUILDING & CONSTRUCTION WORKERS

- Under the Howard Government's *Building and Construction Industry Improvement Act (BCII Act)*, workers risk prosecution for refusing to do unsafe work, and the burden of proof rests on them.
- The Australian Building and Construction Commission (ABCC) can require a person to attend an interview, with no right to silence; if the person fails to attend they could be jailed.
- Fewer than 5.5% of the ABCC's prosecutions have targeted employers, despite the construction industry having some of the highest rates of non-payment of wages and entitlements.

Workers in the building and construction industry are exposed to one of the highest rates of workplace injury. Every year since 1997, at least 37 construction workers have died on the job⁷¹. That's the second highest number of fatal injuries in any industry, and the construction industry has had the fourth highest incidence of workplace injuries overall during the same period⁷².

Under WorkChoices

The *Building and Construction Industry Improvement Act (BCII Act)* was introduced for construction workers in 2005. While paying lip service to improved health and safety outcomes on the one hand, in reality the *BCII Act* established for construction workers a separate and lower class of industrial relations rights and protections than those that applied even under WorkChoices. The *BCII Act* also created a specialist inspectorate, the Australian Building and Construction Commission (ABCC), to enforce the new regime.

The *BCII Act* means:

- workers on the job who are concerned about doing unsafe work and refused to do so, ran the risk of being prosecuted;
- individual workers could be fined up to \$22,000 for taking unprotected action;
- a reverse onus of proof requires that the worker is presumed guilty until innocent, and cases are heard in the more costly Federal Court, where delays are frequent

A specialist inspectorate, the Australian Building and Construction Commission was created, and despite powers to prosecute bad employers, under 5.5% of the ABCC's prosecutions have targeted employers⁷³. The largest category of investigation for the ABCC continues to relate to industrial action, with under 20% of current ABCC investigations related to workers pay and entitlements⁷⁴. Over the six years that the ABCC

⁷¹ Interactive National Workers' Compensation Statistics Databases, Safe Work Australia Online.

⁷² *Ibid.*

⁷³ Answer to Question on Notice, Senate Estimates February 2011, EW0675_11.

⁷⁴ Answer to Question on Notice, Senate Estimates February 2011, EW0712_11.

has existed, it has only managed to sue employers three times for failing to comply with their workers' entitlements⁷⁵.

The *BCII Act* gives the ABCC powers to interrogate workers about even trivial work stoppages. The worker has no right to silence during these interrogations, and failing to attend for an interrogation is a criminal offence⁷⁶. These powers extend to questioning anyone: even bystanders on the street have been compelled to attend secret interviews⁷⁷.

The problems facing workers in the construction industry however go beyond the ABCC and WorkChoices. The Howard Government's *Building and Construction Industry Code* and associated guidelines were a means of using the government's purchasing power in the construction industry to drive its anti-union agenda. They effectively prevented any company from getting government-funded construction work unless they implemented the government's preferred industrial relations regime, which included:

- A ban on employers inviting union officials to the workplace⁷⁸;
- A ban on site allowances⁷⁹;
- Restrictions on the content of collective agreements⁸⁰;
- A ban on the display of union logos at the workplace⁸¹;
- Banning workplace union delegates from investigating suspected breaches of worker entitlements⁸²; and
- Reducing the power of the AIRC to resolve industrial disputes⁸³.

Under the *Fair Work Act*

The Labor Government introduced amendments to the *BCII Act* in 2009, and the Greens have twice moved to repeal it completely, both parties' efforts have been blocked in the Senate. The Government has acted on the Construction Industry Code and Guidelines to ensure that collective agreements for continuing projects made under the *Fair Work Act* will be deemed to be compliant with the Code⁸⁴, and it has lifted content restrictions on agreements for new projects and restored the power of the umpire – now Fair Work Australia – to resolve disputes in accordance with the parties wishes⁸⁵.

But, disappointingly, the government insisted on retaining a specialised inspectorate for the construction industry with coercive interrogation powers. So, whilst two years on workers in the construction industry have been given a share of the benefits in the *Fair*

⁷⁵ Answer to Question on Notice, Senate Estimates February 2011, EW0683_11.

⁷⁶ *Building and Construction Industry Improvement Act* 2005, ss 52-53.

⁷⁷ Sydney Morning Herald Online, 15/12/07.

⁷⁸ *Implementation Guidelines for the National Code of Practice for the Construction Industry* (June 2006), paragraph 8.6.2

⁷⁹ Paragraph 8.1.

⁸⁰ Paragraphs 8.1, 8.10.4.

⁸¹ Paragraph 8.5.3.

⁸² Paragraph 8.6.3.

⁸³ Paragraph 8.7.5.

⁸⁴ DEEWR Press release, 7/10/09

⁸⁵ *Implementation Guidelines for the National Code of Practice for the Construction Industry* (August 2009).

Work Act, they remain exposed to persecution and will continue to be so exposed until such time as the ABCC and all of its discriminatory laws are made history.

The future

Australian Unions believe there should be one law for all workers no matter what industry they work in. To achieve this the *BCII Act* should be immediately repealed and the ABCC abolished.

INSECURE WORKERS

- One in four workers are casual, and do not receive benefits such as sick leave, annual leave, notice of termination and redundancy pay that others take for granted
- Another 10% of the workforce are classified as contractors, many of them dependent contractors who are treated as employees without any of the same rights.
- A rise in sham contracting under the Howard Government, means that some employers are avoiding their obligations such as minimum wages and superannuation in industries like construction, call centres, security and cleaning.

All workers deserve to have their rights at work protected. Over the last few decades the increase of non-standard work has meant that fewer people are in permanent full-time employment.

To date, the Australian industrial relations system has not explicitly addressed the rise of insecure work. This report has examined the *Fair Work Act*, but looking to the future of industrial relations in Australia there is a need to consider non-traditional forms of work and how the rights of these workers are secured.

Australian unions will consider ways to build on the *Fair Work Act* to ensure all workers, no matter how they are employed, receive decent rights at work.

But first we need to understand some of the categories of work that are increasingly prevalent.

(a) CASUALS

Australia has one of the highest rates of casualisation in the developed world, and this trend has not reversed as the economy has recovered from the Global Financial Crisis.

Almost one in four employees (over 2 million workers) are now in casual employment.⁸⁶ These workers are denied important entitlements such as paid sick leave, annual leave and (in some cases) long service leave.

Casual workers are particularly vulnerable to the whims of employers. Under *WorkChoices* many casual workers were pushed to sign AWAs that cut casual loadings, penalty rates and overtime with little or no compensation.⁸⁷ The *Fair Work Act* established a stronger safety net of minimum wages and conditions of employment for all employees, including casual and fixed-term workers, and provides unfair dismissal protections for regular casuals. There is still more that should be done to improve the quality of working life for casual workers.

⁸⁶ ABS, *Forms of Employment*, Cat. 6359.0 November 2010.

⁸⁷ See, eg, C Sutherland, 'Agreement-Making Under *WorkChoices*: The Impact of the Legal Framework on Bargaining Practices and Outcomes', Report prepared for the Office of the Workplace Rights Advocate, October 2007.

(b) DEPENDENT CONTRACTORS

Over 1 million people (nearly 10 percent of the Australian workforce) are classified as contractors.⁸⁸ While many of these contractors have several clients and enjoy good incomes, a choice of work and flexible working conditions, many others are 'dependent contractors': they only have one client, on whom they are economically dependent. These dependent contractors are really in no different position to employees, who are dependent on their employer. The stronger party can usually simply impose its will on the weaker party.

Many dependent contractors would like to be engaged as an 'employee', but the 'client' refuses to hire them outright. In other cases, they prefer to work as a 'dependent' contractor rather than an employee because of tax loopholes, or because the client is prepared to pay them a higher rate of pay (since the client avoids having to pay entitlements such as superannuation, sick leave, etc). However, in both cases there are losses to the community: in the first case, the community loses tax revenue; in the second case, the community must pick up the bill through the welfare system if the contractor gets sick or falls into poverty in old age.

(c) SHAM CONTRACTORS

A sham contractor is a worker who is classified (by their employer, or even by themselves) as a contractor but, in reality, is an employee – because they work under the close control of their employer. In contrast, a genuine contractor (including a 'dependent' contractor) generally has freedom to perform their work as they see fit, without direction from a boss.

Employers engage sham contractors because they seek to avoid employment obligations – whether minimum wages, superannuation or workers' compensation. Without these protections, the worker is extremely vulnerable.

(d) LABOUR HIRE WORKERS

Labour hire workers are workers who are formally employed by a labour hire agency, but who are deployed to work in third party firms. Often they work side-by-side with employees at the firm, but earn less money and have worse conditions. If they speak up about their rights, the firm can 'sack' them by cancelling the contract with the labour hire agency. This does not constitute a 'dismissal', so there is no obligation on the firm to pay redundancy pay, and no liability under unfair dismissal laws.

The future

All workers in Australia deserve to have decent working arrangements. Beyond the *Fair Work Act*, more needs to be done to protect workers who do not fall into traditional forms of employment, and strengthen protections for casuals, labour hire, and contractors, particularly those who are dependent on a single employer.

⁸⁸ ABS, Forms of Employment, Cat. 6359.0 November 2010.

ONGOING THREAT TO WORKERS' RIGHTS

Despite the overwhelming public rejection of WorkChoices, and despite the success of the *Fair Work Act* in contributing to both fairness and economic growth, the business lobby has continued to prosecute a political attack on Labor's laws, hoping to draw in the Coalition.

The Coalition have stayed silent, but there is mounting evidence that if they came to power then would legislate the business lobby's elements, and bring back the worst elements of WorkChoices.

Coalition state governments – in New South Wales, Victoria and Western Australia - have shown, while they will not say anything in the election campaign, once they are in power they will attack workers' rights. The O'Farrell Liberal Government has legislated to restrict public services wages to below the cost of living, and give parliament the ability to cut important conditions, like penalty rates, redundancy pay, and long service leave.

The Barnett Government in WA commissioned a secret report on ways to cut workers' rights and conditions. It also, is refusing to introduce national Occupational Health and Safety laws, which will mean workers in WA will have less safety protections than all other workers.

And as for business, what does business want – or, at least, what are they prepared to state publicly? As revealed before the last federal election, employers want:

- To introduce a 'small business Award' with inferior wages and conditions;⁸⁹
- To remove penalty rates, minimum shifts and loadings from Awards;⁹⁰
- To have more 'flexibility' in applying (ie. avoiding) NES obligations;⁹¹
- To turn Individual Flexibility Arrangements into instruments (like AWAs) that can be imposed on workers, and which can be used to put an end to collective bargaining;⁹²
- To water down the obligation to bargain in "good faith";⁹³
- To exempt small business employers from unfair dismissal laws;⁹⁴

⁸⁹ COSBOA, James Thomson, 'Election 2010: Business wants IR changes but Abbott says no' (19 July 2010) smartcompany.com.au

⁹⁰ See for example The Age, 'Employers oppose minimum hours rule' (23 February 2010); The Age, 'Battle of the Do Nothings' (July 22 2010); Workplace Express, 'Retailers fail in bid to cut minimum hours requirement' (09 July 2010)

⁹¹ AMMA, 'Finding Fairness', 84.

⁹² AMMA, 'Finding Fairness', 35-46. Ai Group Media Release, 'Business looks to election policies that will deliver a robust, balanced and sustainable economy' (17 July 2010). ACCI Workplace Express, 'One year on, has the Fair Work Act delivered?' (1 July 2010).

⁹³ Ai Group, 'Fair Work Act Bargaining Provisions – The First 12 months' (14 July 2011), 26. See also The Age, 'Employers seek help in settling work disputes' (10 August 2009).

⁹⁴ AMMA Letter to Kevin Rudd and Tony Abbott (22 February 2010) 7. ACCI Review, May 2010 No 160. COSBOA Media Release, 'Election 2010: Business wants IR changes but Abbott says no' (19 July 2010). The Age, 'Battle of the Do Nothings' (July 22).

- To ban workers earning more than \$100,000 from going on strike, ban strikes in support of claims which the employer considers “extravagant”; and fine unions every time workers strike, whether or not the union organised the strike;⁹⁵
- To reintroduce Employer Greenfields Agreements (under which an employer can make a collective “agreement” with itself, with no input from workers or unions);⁹⁶
- To permit employers to avoid collective agreements by outsourcing work, by restoring the WorkChoices ‘transmission of business’ test;⁹⁷
- To ban people who aren’t union members from speaking to union officials in their workplace;⁹⁸
- To keep the ABCC forever.⁹⁹

Business groups have brought a number of vexatious claims to FWA to try to achieve some of these objectives. For example, the Victorian Chamber of Commerce and Industry (VECCI) applied to vary 81 modern Awards to make the minimum shift entitlement an ‘optional’ entitlement. The ACTU challenged these applications as vexatious and without merit. In response, VECCI withdrew all but 3 of their applications.

Employer groups also took an opportunistic line in the recent *J J Richards* case. They argued that the *Fair Work Act* should be interpreted so that the new ‘good faith bargaining’ provisions override the right to strike – in other words, that workers cannot go on strike until they have exhausted ‘good faith bargaining’. The interpretation is completely at odds with the government’s policy in introducing good faith bargaining – which was to give workers an *additional* avenue to pursue their industrial claims, not to take away the right to strike. Despite having lost on this point three times, they still complain.

Also mischievous were employer claims that minimum wages should only be lifted by \$9.50 per week in 2011-12, implying a real wage cut for workers. Business also asked for wage freezes in Queensland. FWA wholly rejected these claims, and decided to give a typical Award-dependent worker (classified at the tradesperson’s level) an extra \$23 per week. This is almost 2.5 times what the employers claimed.

Yet, despite these continual knock-backs by FWA, despite the absence of the hoped-for economic evidence to support their argument that the *Fair Work Act* is bad for business, and despite the lack of any public support for their position, the employer lobby have clearly articulated their calls for IR reforms that would dismantle the *Fair Work Act*, and in some cases go even further than WorkChoices. This would have serious consequences for workers and their families.

⁹⁵ AMMA, ‘Finding Fairness’, 55.

⁹⁶ *FW Act* s 172(4).

⁹⁷ Ai Group, ‘Transfer of Business Provisions of the *Fair Work Act* – Negative Impacts Upon the ICT and Other Industries’ (July 2010) 3. See also Workplace Express ‘Major Corporations Fear New Transfer of Business Rules’, (August 25 2009).

⁹⁸ ACCI, Workplace Express, ‘One year on, has the Fair Work Act delivered?’ (1 July 2010). AMMA, ‘Finding Fairness’, 31.

⁹⁹ MBA Media Release, ‘Builders’ Policy Priorities for Next Government’ (17 July 2010). The Australian, ‘Bosses offer politicians priorities for coming election’ (19 July 2010). AMMA Letter to Kevin Rudd and Tony Abbott, (22 February 2010), 6.

CONCLUSION

The *Fair Work Act* restored the rights of work for millions of Australian workers and their families. It represents a major step forward from WorkChoices, which placed millions of workers in vulnerable employment, undermined protections, and led to real cuts to the value of minimum wages.

During the global financial crisis, Australia led the way in showing that a strong economy does not have to come at the cost of fair workplace relations.

However, we should be under no illusions that these gains are always at risk. It remains the agenda of big business and the Liberal Party to deregulate the labour market and hand power to employers to dictate pay and conditions to workers. No amount of clever wordplay by the Liberal Party can obscure this fact.

An illustration of the fragility of the improvements under the *Fair Work Act* comes from the actions of newly-elected state Liberal Governments in New South Wales and Victoria.

Within weeks of winning the 2011 election, NSW Premier Barry O'Farrell had introduced sweeping changes to public sector workplace agreements which undermine collective bargaining and place Australia in breach of its international obligations.

The O'Farrell changes allow the State Government to unilaterally set the pay and conditions of public sector workers, with no rights of appeal to the independent umpire.

In Victoria, the government of Ted Baillieu has announced a new attack on freedom of association by linking funding for government projects to tougher industrial relations principles.

Within the federal Liberal Party, there is a growing groundswell for a return to the hardline industrial relations policies of the Howard era. Tony Abbott will be left with no choice but to re-embrace WorkChoices to calm this internal dissent.

But the reality is – as failed Liberal presidential candidate Peter Reith has confirmed in recent days – that WorkChoices style policies are in the Liberals' DNA. Tony Abbott's decision to avoid an IR policy in the 2010 election was merely a temporary pause of this agenda.

Unions are determined to defend the *Fair Work Act* from these attacks, but to also build on the advances of the Act, so it delivers in practice for all working Australians.

This means that fair and secure work for all workers is crucial if we are going to drive productivity and participation, and build the skilled workforce our growing economy needs. Bargaining should meet the needs of the modern economy and the workers in it, and there must be uniform rights and protections for all workers.

We need to build on the structure of a fairer and more efficient workplace relations system established by the *Fair Work Act* – not step back to the recent dark past of WorkChoices.

THE FAIR WORK ACT

two years on



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