

Attachment 1

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**Fair Agreements under Work Choices? A Closer Look at Bargaining
Outcomes**

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Fair Agreements under Work Choices? A Closer Look at Bargaining Outcomes

There are multiple ways in which the Work Choices Act has shifted the balance of bargaining power away from employees. The introduction of a Fairness Test in 2007 was designed primarily to address the erosion of monetary conditions through agreement-making. This paper draws on template collective agreements in the retail and hospitality industries to illustrate the loss of non-monetary conditions, such as the loss of employee control over hours of work, rostering, duties and job location. The paper also highlights the ways in which the legal framework for institutional supervision of agreements has permitted agreements to be approved which fall below the safety net. By broadening the benchmark against which agreements are measured, and requiring agreements to be reviewed before they are approved, it is anticipated that legislative changes to be introduced by the Federal Labor Government will address some of these problems.

Introduction

In the lead up to the 2007 federal election, a number of research reports documented the poor bargaining outcomes for employees which had emerged since the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices Act), particularly in low paid sectors such as retail and hospitality (Evesson et al, 2007; OWRA, 2007) and in employer greenfields agreements (Gahan, 2007). This paper builds on those reports by exploring some examples of poor bargaining outcomes which have not been addressed by the introduction of a Fairness Test in July 2007.

The first section of the paper will outline some of the changes to the legal framework for agreement-making which have provided the context for the erosion of employee conditions in workplace agreements. The second section of the paper will identify examples of common clauses, sourced from retail and hospitality template agreements, which significantly erode the non-monetary conditions of employees. This section will also highlight gaps in the legal framework which have permitted the approval of agreements containing provisions which fall below the safety net. The paper will conclude by pointing to some aspects of the Labor Government's proposals for reform which are intended to provide additional protection against some of these bargaining outcomes.

The Legal Framework

There are multiple ways in which the Work Choices Act has shifted the balance of bargaining power away from employees: see Sutherland (2007b). Perhaps the most far-reaching of these changes was the removal of the 'no disadvantage test' which required that employees not be worse off overall under agreements compared with the terms and conditions which would otherwise apply under any relevant award or law. In place of this test, the Work Choices Act introduced into the Workplace Relations Act (WR Act) a new set of minimum conditions, the Australian Fair Pay and Conditions Standard (AFPCS), which contained minimum rates of pay, maximum hours of work, annual leave, personal/compassionate leave, and parental leave

entitlements. These conditions are ‘protected by law’ in the sense that they must be provided to all employees by employers who are covered by Work Choices. The AFPCS prevails over any provision in a workplace agreement or contract to the extent to which the AFPCS provides a more favourable outcome for the employee (WR Act, ss 172-3). Despite a framework which relies on employer compliance with the rules largely through self-regulation, the law does not require the employer to correctly express employees’ legal entitlements under the AFPCS in agreements. For example, it is quite lawful for an employer to make an agreement with employees which sets out a minimum rate of pay which is less than the applicable rate under the AFPCS. The law is only breached where the employer pays the employee less than the legal minimum rate in practice.

Where an employee is covered by an award (or transitional State instrument) prior to entering into a workplace agreement, certain conditions in that award are ‘protected’ under the Work Choices Act (WR Act, s 354). These ‘protected award conditions’ are rest breaks, incentive-based payments and bonuses, annual leave loadings, public holidays, overtime or shift loadings, some monetary allowances, penalty rates and outworker conditions. However, prior to the introduction of a Fairness Test in July 2007, the extent of the protection under Work Choices was weak. It did not guarantee that these conditions would be retained, or that employees would be left no worse off despite the removal of some or all of these conditions. It only required that the employer explicitly set out in the agreement that the protected award conditions were to be removed or modified, otherwise the conditions were deemed to be included in the agreement.

The Work Choices Act also weakened the procedural rules which apply to agreement-making. The legislation removed the requirements for employers to explain the effect of an agreement and for the employee to genuinely approve the agreement. The Work Choices Act also weakened the prohibition against including false or misleading statements in an agreement or in the information accompanying an agreement. The new provision requires the applicant to demonstrate that the false or misleading statement caused the applicant to enter into the workplace agreement (WR Act, s 401). This means that an employee, or the Office of Workplace Services (OWS), cannot take action via the WR Act against an employer solely on the basis that an agreement, or information provided with an agreement, misled the employee in relation to his or her current or future entitlements. It is also necessary for the employee to demonstrate that he or she relied on that information when deciding to make the agreement.

Most importantly, the Work Choices Act introduced a ‘streamlined’ approval process whereby agreements are ‘rubber stamped’ after lodgement with the Office of the Employment Advocate (OEA), without any requirement for that institution to scrutinise agreements or the employer statutory declarations which affirmed compliance with the agreement-making rules. This is significantly different from the system which operated prior to Work Choices where agreements were checked for compliance with substantive rules, and the employer was required to demonstrate compliance with procedural rules, as a prerequisite for certification or approval of agreements.

The introduction of a Fairness Test in July 2007 was intended to ‘provide significant additional protection for employees, reassuring them that when they enter into a workplace agreement, it will be a fair one that has been assessed by an independent statutory office’ (DEWR, 2007). Yet the legislation does not require the successor to the OEA, the Workplace Authority (WA), to scrutinise agreements against any legislative rules other than the Fairness Test (WR Act, s 344(5)), nor does it require the WA to assess whether agreements are ‘fair’

in comparison with employees' existing conditions under an agreement or award. The test is limited to a requirement that 'fair compensation' is provided for the loss of any protected award conditions, or that the employer's or employee's circumstances justify the WA passing an agreement that does not otherwise provide 'fair compensation'. It follows that employees will inevitably be misled by the promise of fair agreement-making under the new framework: see further Sutherland (2007a).

Evidence of employee outcomes under Work Choices

The extracts from template collective agreements in retail and hospitality presented in this section highlight some of the ways in which the opportunities provided by Work Choices for undermining employee control in the workplace have been utilised in practice. The provisions provide examples of the loss of employee control over work location, job functions, rosters, and hours of work, while managerial prerogative has been enhanced through the incorporation of company policies. This section also highlights the failure of the Work Choices system to ensure that agreements are consistent with the minimum standards in the AFPCS.

Loss of employee control

Under the legal framework which was in place prior to Work Choices, research into the operation of the 'no disadvantage test' suggested that the primary focus of the institutions applying the test, the Australian Industrial Relations Commission (AIRC) and OEA, was the exchange of monetary entitlements, resulting in a considerable loss of employee control over workplace conditions, through the removal of non-monetary benefits in agreements (see Mitchell et al, 2004). The Work Choices framework has exacerbated this problem, with the removal of any requirement to offset employee losses with benefits, and the overall effect of the framework on employee bargaining power. The addition of a 'Fairness Test' has done little to address this issue because the majority of the protected award conditions relate to monetary benefits rather than employee rights to control in the workplace.

The extracts from collective agreements in this section are not isolated examples of the types of provisions which are being used in agreements. Most of these extracted provisions are taken from templates which appear in multiple agreements. The source of these templates is not always identifiable, although the dispute resolution clause in one of these templates contains a signpost to the source, an industrial relations consultancy called Enterprise Initiatives (EI).

The templates which are extracted in this section are those which have been used in a high proportion of agreements in the retail and hospitality industries. The templates have been identified from a random sample of 36 retail agreements and 40 hospitality agreements lodged during the first year of Work Choices. All agreements have been sourced from the Workplace Authority Agreements Database. From the sample of 36 retail agreements, 9 agreements, or one quarter of the sample, were based on the EI template. This sample also included an agreement used by a popular retail franchise which applied to all outlets of the franchise in Queensland (Retail Franchise template). The template was also used for agreements made by the franchise Victoria and New South Wales. From the sample of 40 hospitality agreements, five were based on Hospitality Template A and six were based on Hospitality Template B.

The prevalence of template agreements, particularly in retail and hospitality, has been highlighted in other research: see Evesson et al (2007), OWRA (2007). Evesson et al found

that the EI template was the source of one quarter of a sample of 242 retail and hospitality agreements and that 53 per cent of the agreements sampled were based on some form of template (2007: 25-26). The templates therefore provide a useful insight into the sorts of arrangements which are being included in retail and hospitality agreements. The prevalence of these template agreements suggests that very little genuine bargaining is taking place in these industries.

The following examples of loss of employee control are evident in the template agreements: the loss of a fixed work location; the loss of control over the duties to be undertaken by the employee; the loss of control over, and advance notice of, rosters and minimum and maximum hours; and the increase in control by employers through the incorporation of company policies.

The loss of a fixed work location

As might be expected, some of the clauses which provide for a variation of the location of employment ensure that an employee's personal circumstances are taken into account. However, having consulted with employees, it is ultimately open to the employer to transfer the employee to another location of the business. In the case of the retail franchise, this could involve moving substantial distances to another store location across the State.

Retail Franchise Template - Clause 44 Transfer of Employment

The Employer may relocate you from 1 store location to another on a permanent basis to accommodate the Employer's business needs, but will first consult with you to ensure that any such relocation takes into account your personal circumstances.

Where the Employer transfers you from one township to another, the Employer shall be responsible for and shall pay the whole of the moving expenses, including fares and transport charges, for you and your family. This amount will be capped as per the Employer's policies.

Enterprise Initiatives Template - Clause 4 Contract of Employment

4.4 Employees may be reasonably required from time to time to work at sites operated by the Employer other than their regular place of employment...

Loss of control over job functions

The loss of the right to insist on a particular work location often coincides with the removal of fixed duties. As illustrated in Hospitality Template A, the removal of employee control over work location and job functions is often dressed up as an opportunity for the employee. However, a workplace agreement is not needed to provide employees with the *option* of changing their job functions, the workplace agreement is only necessary if the employer wishes to impose a change on the employee without their consent. In some circumstances, the effect of such a provision will be to remove an employee's existing rights, under his or her individual contract of employment, to continue to perform duties which are consistent with his or her current role.

Hospitality Template A - Part 2 – Contract of Employment 2.3 Job Rotation

In recognition of the operational and efficiency requirements of the Employer, and to create more varied and interesting work, the Employer may rotate you from one location to another to perform functions outside your usual duties, provided that you have the training and competency to do so and the transfer is reasonable taking into account your personal needs and circumstances.

Retail Franchise Template - Clause 8 Introduction

- 8.1 You are expected to willingly accept flexibility of jobs and duties throughout your employment, and to work on any range of tasks to the extent of your individual skills, competence and training. You must take all reasonable steps to achieve quality, accuracy and completion of any reasonable job or task assigned to you.
- 8.2 The job classifications set out in this Agreement should not be read in such a way as to preclude flexible working arrangements. You may be required to undertake tasks which are described under other job classifications. This interaction of tasks at the various levels of work, between production and sales in bakeries, is a key feature of the Employer's multi-skilled workplace approach.
- 8.3 A reasonable change in duties to accommodate the Employer's business needs will not attract any extra payment and will not be grounds for the termination of your employment.

Loss of control over rosters and hours of work

Agreements which provide for employers to set rosters without consulting employees, and/or with little notice to employees of their rostered hours, have a clear impact on the ability of employees to balance their work and life commitments. These provisions suggest that employees may not only be asked to work unsocial hours (for little or no extra pay), but may also be asked to work these hours at short notice.

Hospitality Template A - Clause 4.3 Rosters/Scheduling

4.3.2 When is the Employer required to post your roster?

Rosters will be drawn up and where practicable posted 3 days in advance of the commencement of the roster cycle.

4.3.3 How can the Employer change your roster?

Rosters may be changed either before or during a roster cycle on giving you at least 24 hours notice or such lesser period as mutually agreed between you and the Employer. Provided that in the case of emergency, unforeseen operational contingency, absenteeism, or sickness the Employer is required to give you no notice provided they take into account your individual needs and circumstances.

EI template - Clause 8. Rosters

- 8.1 As far as practically possible, the Employer will draw up a roster 1 week in advance. Changes to rosters may occur with 24 hours notice or, subject to the availability of the Employee, with less notice if by mutual consent.

This clause from the EI template appears in the context of an agreement which contains no restrictions on the span of hours in which the employee may be required to work, and which allows the maximum of 38 ordinary hours of work per week to be averaged over 12 months. An agreement used by a fast food franchise contained a similar clause allowing for changes to the rosters with 24 hours notice in some circumstances. Again, the clause was combined with a very broad span of hours (6am to 2am Monday to Friday) for which the hourly rate was the minimum rate under the relevant pay scale.

Removal of minimum hours and a regular salary for part-time workers**Hospitality Template B - Clause 11 Hours of work - Part-time/Casual Employees**

- (a) The arrangement of hours of work for part-time/casual employees is flexible, up to a maximum of 152 hours per 4 week period, unless otherwise agreed upon by the employee and employer. All part-time/casual employees will be paid for the hours worked per pay period on an hour for hour basis.
- (b) As our business experiences fluctuations in the demand for our services the Restaurant may require employees to work in excess of 152 hours per 4 week period.

This template agreement for restaurants and cafés provides an extreme example of the flexibility offered by ‘part-time’ employees. Under this agreement, part-time employees are paid at the minimum level required under the relevant pay and classification scale. These employees are offered no guarantee of minimum hours, or regular hours, and their pay fluctuates according to the hours worked in a pay period. However, if required to do so by the employer, the part-time employees are expected to work up to full-time hours (152 hours over a 4 week period or 38 hours per week on average), *plus* reasonable additional hours. There is little incentive for an employer to pay a casual loading to employees under such an agreement where the part-time provisions provide the same level of flexibility without the addition of a loading.

The Fairness Test may, to some extent, rein in the widespread practice of removing penalties and other allowances for working unsocial (or extended) hours, without providing any compensation for the loss of these benefits. However, these other provisions - which diminish the power of employees to exert some control over their work location, duties and hours of work – will not be addressed by the Fairness Test because these matters do not form part of the protected award conditions.

Increased employer control

At the same time as agreements are eroding employee rights of control in their workplaces, these agreements are increasing the managerial prerogative of employers. The effect of agreements is to override awards which would otherwise apply at the workplace. Given that the effect of an award is usually to restrict the rights of employers, the replacement of an award with an agreement will usually grant increased control to the employer as a matter of course. In other words, even where an agreement is silent on employer rights to control in

the workplace, the agreement will automatically override any provisions in an award which restrict that control – subject, of course, to the rules requiring any removal of protected award conditions to be expressly set out in the agreement.

In addition to this automatic transfer of control to the employer, many agreements seek to enhance this managerial prerogative by including a clause which incorporates company policies into the agreement. These clauses often specify that the employer may amend the policies ‘from time to time’, with or without employee agreement or consultation.

Enterprise Initiatives template - Clause 4 Contract of Employment

4.3 Employees must read and comply with all written Company policies and procedures, as notified and amended from time to time.

Bargaining outcomes below the safety net

One of the stated advantages for employees of the Work Choices Act was the introduction of the AFPCS, a set of five minimum standards in the legislation which cannot be bargained away. However, the removal of a process requiring compliance with the rules as a prerequisite for the approval of agreements has resulted in agreements coming into operation which fall below the safety net floor. Although these agreements are unenforceable (to the extent they fail to comply with the AFPCS), it is left to the affected employee to identify any inconsistency, and to enlist the services of the Workplace Ombudsman (WO), or initiate proceedings at their own expense, to recover any lost benefits.

Gahan’s study of 411 Employer Greenfields Agreements detected non-compliance with the AFPCS in the following areas: 3.6 per cent of agreements provided for a casual loading below the AFPCS; 2.2 per cent of agreements contained provisions for personal leave entitlements which were inconsistent with the AFPCS; 9 per cent of agreements contained provisions for unpaid carer’s leave which were inconsistent with the AFPCS; and 10 per cent of agreements provided for maximum ordinary hours greater than the maximum of 38 hours specified by the AFPCS. In relation to a smaller sample of 165 Employer Greenfields Agreements, the study found that 23 per cent of the agreements provided for minimum pay rates for the lowest paid job classification that *fell below* the applicable minimum rate in an Australian Pay and Classification Scale; and 36.3 per cent of these agreements contained rates for the highest paid job classification which fell below the minimum pay rate (Gahan, 2007: 8-11).

Non-compliance with the AFPCS has also been detected in AWAs. In May 2006, the OEA released data (McIlwain 2006: 132-137) which identified the following compliance issues in a sample of 250 AWAs: 6 per cent provided for inferior annual leave entitlements to the AFPCS; 20 per cent provided for hours of work which breached the 38 hour maximum in the AFPCS; 14 per cent provided for a casual loading inferior to the 20% minimum standard.

Additional data from the OEA, which was leaked to the Sydney Morning Herald in April 2007, appeared to confirm this potential for non-compliance with the safety net floor. From a sample of 5,250 AWAs lodged between May and October 2006, the OEA held concerns that 27.8 per cent might have undercut the AFPCS in relation to rates of pay and/or basic leave entitlements (Davis, 2007). In subsequent evidence to the Senate, Mr McIlwain revealed that from an audit of 3,250 AWAs lodged between April and July 2006, 1700 were referred to the OWS for further investigation (McIlwain 2007: 31).

The OEA's response to this lack of compliance illustrates one of the consequences of a fragmented institutional framework: a demarcation of functions which may lead to delays in the investigation of compliance issues and gaps in the supervision of agreement-making. In this case, it appears that the OEA assumed no direct responsibility for compliance with the AFPCS. In May 2006, the Employment Advocate disclosed that his office did not write to inform the relevant parties where non-compliance with the AFPCS was detected in workplace agreements. Instead, the OEA referred the agreements to the (then) OWS (McIlwain 2006: 134).

By May 2007, the WA had ceased undertaking any further audits of this kind, because the investigations of the OWS had revealed 'high levels of compliance at the workplace level' and therefore no prosecutions resulted from these investigations (McIlwain 2007: 32). However, the OWS (by this stage, renamed the WO) revealed that these were high levels of compliance only in the sense that the OWS was satisfied that the majority of employers were prepared to apply the AFPCS in practice. For employers who had lodged agreements which misled employees about the terms of the AFPCS, or provided inferior benefits compared with the AFPCS, the consequences were not at all severe. The OEA had referred 1711 agreements to the OWS. The OWS established that fifty of those agreements complied with the AFPCS without the need for further investigation. In relation to 1187 of those agreements, the OWS was satisfied, based on internal policy documents, or statements from the parties, that the AFPCS was being applied in practice. In relation to 200 or so of those agreements, the employer provided a 'compliance undertaking' or lodged an amended AWA which complied with the AFPCS. Seven agreements provided for rates beneath the AFPCS, and the relevant employers subsequently complied with the AFPCS on a voluntary basis. Finally, in relation to 256 of those agreements, the investigations had not been completed, but the OWS only expected to issue breach notices in relation to two of these agreements, and in neither case was the breach of 'sufficient gravity' to warrant litigation (Wilson 2007: 137-8).

This suggests that the OEA and OWS (and their successors, the WA and WO) will not necessarily take action to rectify agreements where they set out terms which are inferior to the AFPCS. In some cases, an employer may lodge an amended agreement or provide an undertaking to comply with the AFPCS. But in the majority of cases, it will be sufficient for employers to provide the minimum conditions in the AFPCS to employees in practice. This only highlights the flaw in the legal framework: it is *not unlawful* for an employer to lodge an agreement which undercuts the AFPCS. It is only unlawful if the employer goes on to provide conditions which are less than the AFPCS. In most cases it will be left to the affected employee to identify any inconsistency and obtain assistance from the WO where the employer is not providing the minimum entitlements in practice. If the WO's investigation detects an underpayment, the consequence for the employer will be a requirement to provide back pay to any affected employees. There will usually be no penalty or public embarrassment, provided the employer is compliant in response to the investigation. If an employer is not compliant, the OWS or WO will only prosecute where the breach is sufficiently serious. For employees who are affected by a less serious breach, the only remaining option is to initiate proceedings themselves if they wish to pursue the underpayment.

The approach taken by the OWS/WO in relation to this issue is clearly framed by its statutory obligation to ensure compliance with the legal rules (WR Act, s 150B(1)(b)). However, the gap in the legal framework which permits agreements to set out conditions which are inconsistent with an employee's minimum entitlements appears to undermine another important function of the WA and the WO: to provide education, assistance and advice to

employees (and employers) in relation to their rights and obligations under Commonwealth workplace relations legislation (WR Act, s 150B(1)(a),(b); 166B(1)(a),(b)).

The process followed by the OEA in the past suggests that the WA's new function of assessing agreements against the Fairness Test will *not* overcome these problems of non-compliance with the AFPCS. It is more likely that the WA will adopt a narrow approach to its functions, taking note only of those aspects of the agreement which are relevant for assessing 'fair compensation', and overlooking clauses which are otherwise unenforceable, misleading or ineffective.

Conclusion

This paper has outlined some of the ways in which employee conditions are being eroded under workplace agreements. In particular, the paper has highlighted a number of template collective agreements which are being used to erode non-monetary conditions of employment for retail and hospitality workers. Following a reduction in the involvement of traditional third parties in agreement-making (ie, the AIRC and unions), these templates have been adopted (often without alteration) by many employers. The effect is to allow an alternative third party - the industrial relations consultant - to exercise significant influence over the content of agreements.

The widespread replication of these template collective agreements in the retail and hospitality industries suggests that there is very little genuine bargaining taking place. A study of the templates themselves reveals the extent to which it is possible for an employer to reduce and remove employee benefits through the powerful mechanism of the Work Choices workplace agreement.

This paper has also highlighted some of the problems which have arisen because of the removal of a certification or vetting process before agreements are approved. The existence of provisions in agreements which fall below the 'safety net', or which mislead employees about their legal entitlements, suggests that the new framework is failing to ensure compliance with the basic legal rules.

It is anticipated that the changes to the agreement-making rules proposed by the new Labor Government (Rudd and Gillard, 2007) will address some of the ways in which the Work Choices Act undermined employee bargaining power. In particular, the re-introduction of a review process for all agreements prior to their approval by a new institution (Fair Work Australia) should increase compliance with the agreement-making rules. Labor's version of the fairness test, the 'genuinely better off overall' test, expands the range of award conditions which provide the benchmark against which agreements are assessed. The inclusion of matters such as rostering and dispute resolution clauses in this benchmark should go some way towards addressing the loss of employee control permitted by current arrangements.

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