FOR EVERYTHNG THERE IS A SEASON: WORKPLACE FAIRNESS AFTER THE HOWARD GOVERNMENT – THE NO DISADVANTAGE TEST AND CO-OPERATIVE FEDERALISM

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> *For everything there is a season and a time to every purpose under heaven…A time to break down and a time to build up.*[1]

Most of the changes that have occurred in Australian labour law over the last twenty or thirty years have been the subject of hyperbole.[2] But it seems that with the Work Choices' changes, almost Biblical zeal could appropriately be used to describe the shift in the law. Although, as Stewart notes, Work Choices did not adopt the Victorian or New Zealand 'Big Bang' approaches of abolition of awards and substitution

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1 Ecclesiastes, 3: 1,3. *The Holy Bible*

2 Louise Floyd, *Glass Houses and Rock Solid Guarantees* (PhD thesis, University of Sydney, 2005) 144, citing Richard Naughton, 'The New Bargaining Regime under the *Industrial Relations Reform Act'* (1994) 7 AJLL 147, 147-169.

with common law contracts,[3] Work Choices nonetheless made fundamental systemic changes to Australian labour and employment law. Of particular importance for this study were:

- the introduction by Work Choices of the concept of agreements that were *binding on lodgment* (as opposed to the previous position of requiring certification by the Australian Industrial Relations Commission or AIRC after a consideration of the fairness of agreements); and
- the *covering of the field by the federal legislation* so as to remove vast swathes of the workforce, formerly covered by, for example, the Queensland jurisdiction, from the purview of that State system.

The purpose of this article is, first, to analyse those Work Choices' changes and the political framework in which they operated (exemplified by Prime Minister Howard's 1996 Rock Solid Guarantee Speech); and, secondly, to highlight the legal opposition to those original core features of Work Choices. That opposition now finds expression in:

- the *Reintroduction of a No Disadvantage Test* (This test disposes of the notion of agreements being binding on lodgment after only private agreement between the parties to the employment relationship. It is interesting that such a 'binding on lodgment' notion was modified by the Howard government, itself, in its final days in office, through the introduction of a Fairness Test, which the new No Disadvantage Test replaces and strengthens), and
- the *revival of the State jurisdiction* through the introduction of child employment laws, and a range of other policy and legislative measures which seek to influence workplace culture through the introduction of the Queensland Workplace Ombudsman, State purchasing policy, and the low-cost, common-law jurisdiction. The States have not just defended the past (state arbitration) system. Instead, their measures (as outlined) have laid the foundation for a dialogue between the Queensland government and the new federal Rudd government for a form of co-operative federalism. (The present State laws

[3] A Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?' (2006) ELR Rev 25.

may change over time but, in the view of the present writer, they have given the States a platform from which to argue their continued relevance in industrial relations).

Through that above analysis and discussion, the present writer argues that the severity and unilateral nature of the Work Choices' changes made the former federal government's industrial agenda inherently flawed and self-defeating. Rather than shaping workplace culture, Work Choices galvanized its opponents by, for instance, ignoring the context in which its provisions would operate. Continuing the Biblical metaphor, the present writer argues that the combined effect of the validity of the criticisms of many aspects of Work Choices and the positive manner in which the State governments responded to that federal regime, fostered a 'rebuilding' of Australian employment law, in which fairness and flexibility are balanced, and in which the States have built a strong case for their maintaining an important and interesting role.[4]

I The Rock Solid Guarantee – The Purpose of Work Choices was to Abolish the Traditional Pillars of Employment Law

For some people, Work Choices was the product of the unexpected 2004 election result, which saw the Liberal-National Coalition gain an unexpected majority in both Houses of Parliament. But in real terms, the seeds of Work Choices were sown many years before the somewhat self-contradictory title 'Work Choices' was even coined.[5]

On Monday, 8 January 1996, in a speech to the 28th Convention of the Young Liberals at the Australian National University, Mr John Howard, who was then the leader of her Majesty's Opposition, uttered these famous words: 'I give this rock solid guarantee. Our policy will not cause a cut in the take-home pay of Australian workers.'[6]

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4 This article concentrates largely on the Queensland Government's response to Work Choices. Important contributions have been made by most states, e.g. Victoria and New South Wales. The positive analysis of the Queensland approach is relevant to the approaches of the other states.

5 See below for discussion of the self-contradictory nature of the title at pages 38 and following.

6 John Howard MP, 'Address to 28th Young Liberal Movement Convention' (Speech delivered at the Australian National University, Canberra. 8

This statement, made just prior to the calling of the 1996 federal election was, by Mr Howard's own reckoning, a political 'ploy' or 'tool'.[7] The Liberals had lost the supposedly 'unloseable' election of 1993 in some part due to its *Fightback Policy*.[8] This policy espoused the *direct* negotiation of terms and conditions of employment between employers and employees. It caused concern that there would be a reduction of entitlements if workers were left to 'fend for themselves'—no express guarantee preventing such reduction having been given.[9]

In 1996, Mr Howard gave that guarantee. But the guarantee was limited. It only protected take-home pay (in the bargain compared to the award). Other conditions of employment and the key structural features of the Australian system were outside its grasp. Indeed, Mr Howard insisted the industrial relations debate should centre on *structural change* in Australian industrial relations, which would enable Australians to gain 'better work for better pay'.[10]

Essentially, Mr Howard was arguing that the decentralisation of the Australian industrial relations system, already in place under the *Industrial Relations Act* 1988 enterprise bargaining laws, should be progressed—dramatically. That system already allowed for *direct* agreements between employers and employees, both with unions (certified agreements) or *without union involvement* (enterprise flexibility agreements (EFAs)). But the latter were not widely used. Likewise, both types of agreement could only take effect if certified by the Industrial Relations Commission. For such to occur, the Commission had to be satisfied that the t*erms of the agreement, considered as a whole, did not place the employee at a disadvantage compared to the award* (the no-disadvantage test).

January 1996). (Copy supplied by Prime Minister's Office and on file with author). Speech also cited in: Ron McCallum, 'Australian Workplace Agreements – An Analysis' (1997) 10 *Australian Journal of Labour Law* 59, 50-61; and first reported in Lenore Taylor, 'Howard's Guarantee: No Pay Cut', *The Australian*, (Australia) 9 January 1996, 1.

7 Howard, above n 6, 4.

8 Liberal Party of Australia, 'Fightback! It's your Australia' (Online Offset Printers, Canberra, 1992) 38, 1-67.

9 Howard, above n 6, 4. See also Lenore Taylor, 'Bullets removed from IR gun' *The Australian* (Australia) 9 January 1996, 1.

10 Howard, above n 6, 4; and Taylor, above n 9, 1- 4.

Mr Howard described EFAs as a 'total failure'[11] that were 'riddled with inflexibility and complexity'.[12] He saw union involvement generally in the system as 'unwanted, uninvited, and unnecessary', and the certification process of the Commission as 'cumbersome'.[13] Consequently, he championed systemic change that would develop the use of that non-union bargaining stream, lessen the power of unions, and curtail the role of the Australian Industrial Relations Commission.[14] The cornerstone of his new system would be Australian Workplace Agreements (AWAs), in which unions could only represent the employee if such invited them to do so (and even then unions could never be a party to the agreement, itself). AWAs were not to be approved by the Commission. Instead they were lodged with a new body called the Office of Employment Advocate. The outline of the new system was in these terms:

> [Australian Workplace Agreements] will provide a flexible, less complicated, direct mechanism for employers and employees to enter into arrangements between each other which better promote the cause of the enterprise.
>
> They will, of course, need to observe a number of principles which I will spell out very, very clearly. To start with, take-home pay must not be less than that prescribed under the Award, and this will include amongst other things ordinary time earnings, overtime penalty rates, and leave loadings. So that if you worked the same hours during the same time as if under the Award, you cannot be remunerated any less than you would be remunerated under the Award…
>
> That agreement does not need to be approved by the Industrial Relations Commission. That agreement will not involve a trade union as a party to the agreement, and the only circumstances in which a trade union will be involved in that agreement, or in the negotiation of that agreement, will be if the trade union is invited by the employees to participate in the negotiations…
>
> It is the intention of the Coalition to establish a new office called the Office of the Employment Advocate and the role of that will be to act as a guardian for the rights of employees under workplace agreements. It will also be available to

[11] Howard, above n 6, 5.
[12] Howard, above n 6, 5.
[13] Howard, above n 6, 5.
[14] Howard, above n 6, 4.

> provide advice to employers as well as employees about the operation of industrial relations law generally and, most particularly, the operation of the law so far as it applies to the new Australian workplace agreements. All workplace agreements will be required to be filed with the Office of the Employment Advocate and it will be open to any person under a workplace agreement who believes that he or she has in some way been disadvantaged or not paid or remunerated under that workplace agreement in the same way as would have been if that person had been covered by an award.
>
> It will be open to that person to go to the Employment Advocate and, without any expense to the person making the complaint, if there is a case, the Employment Advocate will pursue that case on behalf of the aggrieved employee and recover any money that is owing to the aggrieved employee in precisely the same way as money unpaid under the provisions of existing industrial relations awards can be recovered to the benefit of an aggrieved award employee…[15]

The speech also set out further significant elements of the proposed raft of reforms. Freedom of Association laws were to be introduced, removing from the legislation the preference afforded to trade unionists, emphasising the right not to join a union, and introducing enterprise unions. Secondary boycotts prohibitions were to be reintroduced into the *Trade Practices Act* (s 45D). The unfair dismissal laws were also to be repealed.

In terms of the justification for these changes, Mr Howard placed the need for labour market reform in the context of globalisation and trade. Despite her rich endowments, Australia, he argued, was falling behind her neighbours in the Asia-Pacific region. Referring to a system he later described as 'arthritic, old fashioned…[and] the biggest single impediment…to removing the speed limits on economic growth',[16] Mr Howard spoke of the Australian Industrial Relations system as one that '[owed] its origins to the mores of pre-World War One Australia' and insulted the intelligence of most workers by implying they were not capable of reaching agreements by themselves. What was needed was greater flexibility facilitated by broad ranging reform.[17]

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15 Howard, above n 6, 5.

16 John Howard, 'Speech to the Bennelong FEC' (Speech delivered at Sydney, 23 August 1996).

17 Howard, above n 6, 7.

Obviously, Mr Howard did win the 1996 election, and labour law reform was an immediate, legislative priority. But, as Mitchell notes, Mr Howard's labour reform agenda, although advanced, was not fulfilled:

> In the lead-up to the [1996 election] the [Liberal] Party revealed very few specifics on its labour law platform. It made a general promise, however, to the effect that awards would be retained and that 'no worker would be worse off in overall terms' as a result of any labour market reforms.
>
> It is necessary to appreciate the practical significance of this latter commitment. The Liberal-National Party Coalition was elected to power in 1996 with an overwhelming majority in the lower house (the House of Representatives), but was in a minority in the upper chamber (the Senate). Consequently, the government's labour market programme was subjected to close scrutiny by the minor parties in the Senate, and the 'no disadvantage' commitment was utilised as the yardstick against which much of its policy and subsequent legislation was judged. As a result the *Workplace Relations Act* 1996, whilst giving effect to the most far reaching changes ever made to the compulsory arbitration law, was necessarily a compromise measure.[18]

II Work Choices–From Agreements Binding on Lodgement to the Fairness Test and the Re-instated No Disadvantage Test

Prime Minister Howard, when first elected, therefore, was left with an industrial relations conviction, but his need to be pragmatic, in a political sense, was axiomatic. The Prime Minister, who openly craved a free market system, had no political choice but to retain a hybrid system of bargaining, in which enterprise agreements were adjudged by the AIRC against the No Disadvantage Test. Given that the Prime Minister saw these latter features as 'impediments…on economic growth', it is significant, for the purposes of this discussion, to appreciate how Mr Howard modified this hybrid over time. Such modifications are considered immediately below.

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[18] Richard Mitchell, 'Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia' (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations,* 122, 113-135.

A *The Original No Disadvantage Test – Under the Industrial Relations Reform Act*

The steps toward introducing some level of decentralisation (i.e. moving from an industry based award/union system towards a system in which the individual differences of businesses were acknowledged) into Australian labour law had been first taken in the late 1980s.[19] But the most well known initial enactment of enterprise bargaining and the No Disadvantage Test (NDT) occurred in 1993-1994 with the *Industrial Relations Reform Act* changes to the *Industrial Relations Act* (which is now renamed as the *Workplace Relations Act*). The No Disadvantage Test read (s 170MC and NC *Industrial Relations Act)*:

> [T]he Commission must (approve implementation of an agreement) and must not do so unless it is satisfied that...the agreement does not, in relation to their terms and conditions of employment, disadvantage the employees who are covered by the agreement.
>
> An agreement is taken to disadvantage employees in relation to their terms and conditions of employment only if:
>
> (a) [approval of implementation of the agreement] would result in the reduction of any entitlements or protections of those employees under:
>
> i. an award; or
>
> ii. any other law of the Commonwealth or of a State or Territory that the Commission thinks relevant; and
>
> (b) in the context of their terms and conditions of employment considered as a whole, the Commission considers that the reduction is contrary to the public interest.

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[19] Ron McCallum and Paul Ronfeldt, 'Our Changing Labour Law' in Ronfeldt and McCallum, *Enterprise Bargaining – Trade Unions and the Law,* The Federation Press, Australia, (1995) 10, 1-30; *National Wage Case March 1987* (1987) 17 *Industrial Reports* 65; and *National Wage Case August 1988* (1988) 25 *Industrial Reports* 170 – the Restructuring and Efficiency Principle and the Structural Efficiency Principle; Louise Floyd, *Glass Houses and Rock Solid Guarantees* (PhD thesis, University of Sydney, 2005) 102 and following.

1 *Theory and Policy Behind the NDT*

At a theoretical level, the NDT was sympathetic to the Higgins Tradition. In *Ex parte McKay*[20], known as the *Harvester* award or decision, Higgins J, President of the former Commonwealth Court of Conciliation and Arbitration, emphasised a basic premise of Australia's approach to settling wages and conditions—that was to acknowledge the power imbalance between employer and employee, such that some mechanism was needed (such as the Conciliation Court or latterly the AIRC) to ensure fair outcomes for the common man. The example that was used in the judgment was that even an honourable employer may feel compelled to reduce the wages and conditions of labour in difficult business conditions, just as those business people would seek a lower price for raw materials. As a consequence, some independent mechanism was required to ensure fairness for workers in bargaining: '*The remuneration was not to be left to the usual, but unequal, contest, the "higgling of the market" for labour, with the pressure for bread on one side and the pressure for profits on the other*'[21]

But the No Disadvantage Test was also cognizant of the changing world in which industrial relations were being conducted. Towards the end of the 1980s, going into the 1990s, banking and the Australian dollar were being deregulated. This was being done by the then Hawke-Keating government, so that Australia could compete in a fast-changing world and gain from opportunities arising from globalisation and the technology boom. The old award system and the industry-wide grip of unions were seen as making the Australian industrial system too cumbersome. As the Business Council of Australia was to suggest, rather than looking always to industry standards:

> [T]he *enterprise* is the right economic unit for winning in competitive markets because it is able to shape itself to the needs of those markets. The great strength of enterprises is that their shape and composition is constantly changing. When consumers' tastes change, or technology improves, or costs vary, activities are grouped or regrouped, added or deleted, contracted or expanded. Re-organisation of the process or creating goods and services is a continuing part

[20] (1907) 2 CAR 1.
[21] (1907) 2 CAR 1.

> of successfully serving changing customer needs. *Industries are likely to be far too cumbersome and slow-moving to do this well…*[22]

2 *Legal Operation of the NDT*

One of the interesting aspects of the No Disadvantage Test, then, was that it was both a protection for those who bargained, and also a catalytic agent for those who embraced this new system. Although encouraging workers and unions to bargain for conditions relevant to the workplace, the benchmarks against which the test adjudged bargains was something unions and workers knew—awards examined by an independent AIRC. Under the alternative Coalition (Opposition) policy of the day, namely statutory minima, there was a fear those award conditions could be largely 'expropriated', depending on the strength of the bargaining parties. In the second reading of the *Industrial Relations Reform Act,* then Minister for Industrial Relations, Hon Laurie Brereton, referred to the problems of abruptly changing to a system of only statutory minimum conditions in the following way. (Interestingly, the substance of his concern came to be leveled as a criticism against Work Choices more than ten years later).

> This Bill starts with a confession that it is based on a humanitarian interpretation of the principles and obligations which form the very basis of civilised society. It leaves to its opponents the creed whose God is greed, whose devil is need, and whose paradise lies in the cheapest market.
>
> …
>
> It is the award that guarantees unionists and non-unionists alike legal protection for the conditions they currently enjoy. To remove the award is to remove employee bargaining power. And, where the award is replaced by minimum standards, as the Opposition proposes, then everything not covered by those standards is no longer the employee's to trade. That is not bargaining. Employers do not have to negotiate with their employees on working conditions; the government removes everything but the basics, and does so at no cost to the employer. Under those circumstances

[22] Business Council of Australia, 'Enterprise based Bargaining Units – A Better Way of Working' (Vol One) BCA (1989) 3-4.

> employees do not start the bargaining process with their existing conditions, they start with the bare minimum.[23]

Through the operation of the NDT, working hours became more flexible and the strictures of ordinary hours and the calculation of overtime gave way to higher basic salaries paid to workers who would work longer and more flexible hours in return. Other 'trade offs' from the old award system included the 'cashing in' of some forms of accrued leave in return for higher salaries or the introduction of some non-monetary benefits, like education leave, in exchange for the introduction of new tasks for a worker. (See, for example, *Lillianfels,*[24] *Tweed Valley,*[25] and the *EFA Test Case)*.[26]

B *The No Disadvantage Test Under the Original Howard Government Reforms*

As noted by the present writer's analysis of Prime Minister Howard's Rock Solid Guarantee Speech, and also through Mitchell's observations, the No Disadvantage Test was only included in the original *Workplace Relations Act 1996* changes by the Howard government through political necessity. The intention was always complete systemic change: the reduction in influence of collective agreements, the AIRC, awards, and unions—the preferred model being their replacement with individual agreements underpinned by statutory minimum conditions.

Although only grudgingly retained, the NDT did, however, continue to operate, although in a revised and broader form, which made it easier to pass. The Howard government NDT could be stated in these terms (s 170XA(1) and (2) *Workplace Relations Act*):

1. An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment…

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23 Sir Alfred Deakin cited by Hon Laurie Brereton MP, Minister for Industrial Relations, Second Reading of the Industrial Relations Reform Bill 1993, *Cth Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) 2777.

24 *Re Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (AIRC Print 4744, 16 January 1995).

25 *AFMEPKIU v Tweed Valley Fruit Processors* (1995) 61 IR 212-235.

26 *EFA Test Case* May 1995 (1995) 59 IR 430-477.

2. An agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those under:
    a. relevant awards or designated awards; and
    b. any law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant.

There was some provision for the certification of agreements for public interest reasons in a different portion of the *Workplace Relations Act 1996* (s 170LT).

There are obvious differences between the original NDT and that enacted under the *Workplace Relations Act*. As mentioned, under the Howard government's *Workplace Relations Act 1996,* the No Disadvantage Test was broader and easier to pass:

- Instead of being anchored to the line-by-line consideration of awards, with consideration of the public interest only after that exercise was undertaken, the Howard government Test was *global*.
- Under s 88 and s 89 of the *Workplace Relations Act 1996*, awards had been simplified so that only 20 or so conditions of awards were used in the No Disadvantage Assessment —not all the conditions as was previously the case.
- Further, the public interest consideration was in a different part of the *Workplace Relations Act 1996* to the No Disadvantage Test. It was not a part of the No Disadvantage Test itself, but rather another mechanism through which agreements could be *deemed* to have passed the Test (even if they had failed the Test on initial application).

Another important consideration in assessing the effectiveness of the Test was the fact that there had been much structural change to the Australian IR system through the *Workplace Relations Act*. There was no longer trade union preference (through the repeal of s 122); there was the introduction of individual agreements (AWAs); and, in the case of those agreements, it was a new body called the Office of Employment Advocate (OEA) which would apply the No Disadvantage Test (behind closed doors as opposed to the open hearing of the AIRC). AWAs were

only referred to the Commission in the event that the OEA had concerns as to whether the Test had been met by the agreement.

Some scholars, such as Merlo, were roundly critical of the Howard government No Disadvantage Test, essentially arguing that the Test was such a global discretion that it was almost nebulous.[27]

However, in the view of the present writer, the Test was both valuable to employees and in keeping with the changing needs of the Australian labour system to adjust to the global economy. While broader than its predecessor, this No Disadvantage Test was still a strong protection. Award conditions—twenty in number—were still extensive and covered key entitlements like leave and penalty rates. The OEA adopted computer software for the largely mathematical calculation of assessing the cashing in of leave. The Registry of the Industrial Commission favourably acknowledged that approach. The Commission, when exercising the discretion for collective agreements, could rest on its many years of experience assessing agreements. Finally, there were instances when Commissioners had got actively involved in reassessing proposed agreements against awards to ensure fairness.

So, for instance, in *Bermkuks Pty Ltd Certified Agreement 2003*[28]*,* Commissioner Deegan had grave concerns about whether a predominantly young workforce was adequately compensated by the proposed agreement. The term against which overtime was to be calculated was, according to the Commissioner, ambiguous or difficult to understand. In such circumstances, it would be difficult for the workforce to discern whether or not they were being correctly paid. Further, these supposedly part-time employees were almost being encouraged to work a 38 hour week without having access to paid leave. In the view of the present writer, the capacity to have an impartial Commission examine such an agreement was an enormous protection for a workforce, especially when that workforce was young and may not know its rights, and when it was largely employed on a part-time basis and perhaps, therefore, less protected from exploitation.

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27 Omar Merlo, 'Flexibility and Stretching Rights: The No Disadvantage test in Enterprise Bargaining' (2000) 13 *Australian Journal of Labour Law 208,* 207-235. These critiques are fully examined by the present writer in her PhD *Glass Houses and Rock Solid Guarantees* 171-229.

28 Australian Industrial Relations Commission per Deegan C, Print 43124, 28 January 2004 1-21 at especially 40.

C *Work Choices Agreements Binding on Lodgment –Abolition of the No Disadvantage Test*

With the introduction of Work Choices in March 2006, the No Disadvantage Test was repealed, and in its stead stood the new concept: agreements were now binding on lodgment. There was no longer any scrutiny of agreements by an impartial third party before an agreement became binding. (Refer, for example: former sections 338-347 *Workplace Relations Act 1996*). The assumption was that parties were equal to each other in bargaining, so that parties should rely on statutory minimum conditions and a few 'protected award conditions', with no supervision by an external third party to ensure bargains were fair. In other words, the theory, policy, and basic assumption behind labour law in this country changed. Importantly, the proposed changes, while long the aspiration of Prime Minister Howard, were not directly put to the Australian people in the 2004 election. In other words, there was no direct political mandate for Work Choices.

The change to the system of agreements 'binding on lodgment' was enormous of itself. But the problems it raised for workers were compounded by further reforms to the bargaining process. These further factors have been discussed by numerous authors from Stewart[29] through to Sutherland in her 2007 study, *Agreement Making under Work Choices: The impact of the legal framework on bargaining practices and outcomes*.[30] These further factors include:

1. Although agreements were adjudged against a standard of statutory minima, as well as some 'protected award conditions' (e.g. rest breaks, loadings), those 'protected award conditions' (especially for AWAs) could effectively be contracted out of by parties (without any guarantee that workers would be adequately compensated for their loss). Consequently, and importantly, although, as Stewart notes, the Howard government sought to retain the political advantage of avoiding a 'big bang' reversion to common law individual contracts with no awards and no third party intervention, the award protection available to workers was flimsy.

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29 Stewart, above n 3.

30 Office of the Victorian Workplace Rights Advocate (October 2007).

2. Despite the title 'Work Choices', the 'levers of choice', as noted by McCallum, in terms of whether workers should work under a union collective agreement or an individual (non-union) AWA, were increasingly in the hands of employers.[31]
3. Further, if the option of working under an AWA was taken by a worker, then the worker could not normally return to the former collective agreement at the end of the AWA (Sutherland).[32]

The practical difficulties these bargaining changes caused, along with further systemic changes that weakened the position of workers, meant that the fears alluded to years earlier by then Minister Brereton had come into being. Some of these additional practical problems included:

a. First, in the absence of the involvement of the AIRC or the OEA, workers had to calculate their own rights and entitlements. Given that this exercise had seen the old OEA rely on computer software to work out how a worker's entitlements could be valued and traded off, one can well express incredulity at the thought of seeing a precariously employed, especially unskilled, young, or foreign worker undertake this assessment.

b. Second, unfair dismissal was no longer available to those employed by corporations with less than 100 staff (s 643). It was surely unrealistic to think that especially unskilled workers could forcefully assert their rights in bargaining in the absence of those dismissal protections. Yes, we live in a boom through which some workers can pick and choose employment, but there is no guarantee how long that will last—and there are some vulnerable, unskilled workers, who will never really have the luxury of unlimited job choice.

c. Finally, one of the main protections Work Choices was said to have retained for workers was the prohibition on AWA duress. However, that defense was always limited and became even more circumscribed under Work Choices. It is discussed briefly below.

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31 *cf* Ron McCallum, 'Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws' (2002) 57 *Relations Industrielles* 225-249.

32 Office of the Victorian Workplace Rights Advocate (October 2007).

1 *AWA Duress*

From the advent of AWAs under the original Howard government *Workplace Relations Act 1996*, it was never illegal for an employer to offer employment simply on the basis of an AWA. This was clarified in the case of *Schanka v Employment National (Administration) Pty Ltd* [33]. The only time Australian AWA duress provisions were transgressed was when, for instance, a worker was being forced onto an AWA in order to keep the job they already had. As Joo Cheong Tham notes in 'Take it or Leave it AWAs: A Question of Duress?'[34] this approach shows Australia's reliance on the common law definition of duress. There need not only be pressure, but there must be some illegitimacy to that pressure for duress to arise at law.

The further problem with Australian duress laws, and the reason why Work Choices is a self-contradiction, was highlighted by the luminous judgment of Justice Marshall in *Electrix.*[35] In that case, His Honour noted that many AWAs are not individually bargained for. Rather, the employer produces a standard AWA to numerous employees and all those AWAs are in identical terms. Noting the Parliamentary debate that underlined the legality of offering employment only on the basis of *an* AWA, Justice Marshall made the canny observation that the law on AWA duress operated so restrictively that, at a practical level, employment was offered on the basis of *the* AWA. He questioned, therefore, whether the practise contradicted the legislative intent of the Howard government and the legal theory and policy of individualism it was supposed to champion.[36]

The further valuable criticism of AWA duress laws was made after *Bernie Ports,* where the court observed that employees on AWAs were 'saved' from unfairness (despite the limited definition of duress and lack of genuine bargaining) due to the operation of the No Disadvantage Test, which prevented the certification of an unfair AWA.[37] With the

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[33] (per Moore J) (2001) 105 Industrial Reports 271-315.

[34] Joo Cheong Tham, 'Take it or Leave it AWAs: A Question of Duress?' (1999) 12 *Australian Journal of Labour Law* 142-148.

[35] *Australian Services Union v Electrix Pty Ltd* (1999) 93 Industrial Reports 211.

[36] The views of Marshall J were subsequently supported by, e.g. the research of R Mitchell and J Fetter in 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 JIR 292-325.

[37] See also Shae McCrystal and Renata Grossi, 'Duress and Australian

abolition of the NDT by the original version of Work Choices, surely the question to be raised was whether the restrictive definition of AWA duress and lack of genuine bargaining for AWAs became unsustainable (that is, something that left vulnerable Australian workers with too great a bargaining imbalance to be acceptable).[38]

2 *The Fairness Test (as a 'relative' of the No Disadvantage Test) and the Industrial Relations Fact Sheet*

The lack of choice and the potential unfairness of the 'binding on lodgment' notion in the original Work Choices changes caused such a level of political disquiet that the Howard government changed the

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Workplace Agreements – the *Schanka* Litigation and Other Developments' (2002) 15 AJLL 184-197.

38 Refer Floyd L, *Glass Houses and Rock Solid Guarantees: A Legal Analysis of the Commonwealth No Disadvantage Test (PhD Thesis,* University of Sydney, 2005). Note: another area in which workers were weakened in their bargaining power was through the large scale curtailment of trade union security laws. Work Choices introduced numerous statutory provisions and regulations that limited union power, e.g. Work Choices embraced the new concept of 'prohibited content' through which employers were not allowed to even freely agree with unions on some matters. In a discussion between the present writer and Professor Mack Player of the Santa Clara University in the United States (Queensland Bar Association CLE Program presentation 18 October 2006), the point was made that in the United States (which is the most free market system in the world), there are few limits on what unions and employers can agree to include in bargains. Australia, therefore, is something of an unusual, self-contradictory system that claims to promote free bargaining and yet expressly limits what those free bargains can do. Obviously, these matters are important and yet they have been deliberately included by the present writer only in this footnote. The present writer has done this because her opposition to the curtailment on union security law has complex limits. The present writer has consistently written throughout her career that trade unions (although necessary and capable of acting extremely responsibly and positively) have, on some significant occasions, abused their own power and failed to represent the interests of their members at those particular times. The present writer, therefore, favours a system of *responsible unionism*, in which union are accountable, whilst also being free to operate without unfair obstruction. It is the complex nature of striking that balance that has lead the present writer to deal with union law in a separate, subsequent article. (Refer to the present writer's PhD - Note 2 of this article at, for instance, page 300 – and the discussion of the UK-EU decision in *Young, James and Webster* (A/44) [1981] IRLR 408, and also *Dollar Sweets*.

laws in mid-2007 to introduce measures to fortify workers' rights. These measures meant that: all employers were to provide employees with an Industrial Relations Fact Sheet which set out their workplace entitlements (s 154A, B, C *Workplace Relations Act 1996*); and new agreements were required to pass a Fairness Test (refer in particular sections 346B, M, ZD and ZF *Workplace Relations Act 1996*).

Crudely put, the Fairness Test was a watered down version of the old No Disadvantage Test. A new agreement was assessed for fairness to ensure, for example, that an employee gained fair recompense for sacrificed 'protected award conditions' like breaks. The test was expressed in these terms:

> s 346M (1) A workplace agreement passes the fairness test if:
>
> (a) in the case of an AWA--the Workplace Authority Director is satisfied that the AWA provides fair compensation to the employee whose employment is subject to the AWA in lieu of the exclusion or modification of protected award conditions that apply to the employee; or
>
> (b) in the case of a collective agreement—the Workplace Authority Director is satisfied that, on balance, the collective agreement provides fair compensation, in its overall effect on the employees whose employment is subject to the collective agreement, in lieu of the exclusion or modification of protected award conditions that apply to some or all of those employees.
>
> (2) In considering whether a workplace agreement provides fair compensation to an employee, or in its overall effect on employees, the Workplace Authority Director must first have regard to:
>
> (a) the monetary and non-monetary compensation that the employee or employees will receive under the workplace agreement, in lieu of the protected award conditions that apply to the employee or employees under a reference award in relation to the employee or employees; and
>
> (b) the work obligations of the employee or employees under the workplace agreement.

In considering compensation, the Workplace Authority could take into account the personal circumstances of the workers and also the position of the industry or location of the business in the public interest.

If an agreement failed the fairness test, employees were to be compensated for any period in which they were working on inadequate pay (s 346ZD). Importantly, it is an offence to fire an employee because they pressed their rights under the fairness test. This at least gave some protection in the absence of unfair dismissal laws. (Refer: s 346ZF).

3 *Political and Legal Theoretical Significance of the Fairness Test*

Sutherland has amply considered the problems and criticisms of the Fairness Test.[39] The Fairness Test was compared to a smaller range of award conditions than its predecessor the NDT—it was measured against 'protected awards conditions' such as breaks, loadings etc (refer: 346M); and it was applied by the Workplace Authority (the body that replaces the old Office of Employment Advocate) and not in an open hearing before the Industrial Relations Commission. Similarly, from a practical point of view, many lawyers, such as the Brisbane legal firm McCullough Robertson, highlighted the practical uncertainties involved in assessing what was, for instance, adequate compensation.[40] Further, the delays in assessment of agreements against the fairness test became notorious.[41]

Notwithstanding all of those valid critiques, it is the view of the present writer that the advent of the Fairness Test was exceptionally important and a real benefit for workers. Even if it was only adopted by the former federal government due to electoral pragmatism, through the fairness test, Coalition policy came to accept *some* level of bargaining imbalance and *some* need for intervention. In adopting the Fairness Test, Mr Howard retreated from his lifetime conviction of openly deriding third party intervenors and was politically forced to give them a place at the bargaining table. (This was the beginning of the end of his 'rock solid dream'). While it is true that the Coalition and Labor are still at broad

39 Sutherland, above n 30, 15 et seq.

40 McCullough Robertson, Annual IR Conference August 2007, Mooloolaba, Queensland.

41 The length of time it took agreements to be assessed by the government agencies was discussed in a number of editions of the electronic daily industrial news letter *Workplace Express* – as were the terms of some high profile agreements that were said to or were likely to fail the Fairness Test.

variance on employment and labour policy, the opposition to Work Choices embodied in the Fairness Test means that the parameters of debate on industrial relations between the two political parties are now narrower than they might have been. Indeed, the traditional Australian penchant for fair workplaces is being rebuilt.

4 *The Election of the Rudd Labor Government and the Forward with Fairness Policy:*

(a) Re-instatement of the No Disadvantage Test

At the time this article was going into press, the new federal Labor government had just passed the *Workplace Relations (Transition to Forward with Fairness) Act 2008.* As the name suggests, this is the first in a series of proposed legislative changes designed towards implementing Labor's election platform, *Forward with Fairness*, and phasing out some key elements of Work Choices (and the Howard legacy), such as Australian Workplace Agreements. Importantly, so far as this article is concerned, this legislation introduces a global No Disadvantage Test as a stronger replacement for the Fairness Test. Some of the key provisions include s 346D(1) and (2), which determine when an agreement passes the No Disadvantage Test:

> [An agreement passes the test if it] would not result, on balance, in a reduction in the (employee's) overall terms and conditions of employment under any reference instrument relating to the employee

Significantly, a 'reference instrument' embraces a broader range of employment conditions than was encompassed by the Fairness Test. This is because the 'reference instrument' seems to include potential consideration of broader awards and collective agreements and standards (not just, for instance, a concentration on 'protected award conditions') (refer: s 346E).[42] The phasing out of AWAs lessens the problems of duress, discussed earlier in this article.

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[42] See also: Joe Catanzariti 'Navigating through the new industrial relations landscape' Australian Industrial Law News CCH Australia (Issue 2, 6 March 2008). For a more fulsome, technical discussion of the new NDT refer to the present writer's forthcoming work: Floyd L 'Chapter Thirty-two: Employment and Industrial Law' in Turner C, *Australian Commercial Law* (2008 edition Forthcoming – Law Book Company). It is worth noting that these recent NDT changes exist within a system that continues to be reviewed by the federal government.

It is extremely important that the Liberals, now in Opposition, have abandoned many aspects of Work Choices as official policy and did not substantively block the Labor No Disadvantage Test legislation in the Senate.[43] Perhaps the clearest support of the basic thesis of this article may be found in those actions. Indeed, as highlighted by the Hon Julia Gillard MP, Minister for Employment and Workplace Relations, in the second reading of the Transition to Forward with Fairness Bill 2008, there is a mandate for fairness and change:

> Almost three months ago the Australian People voted for change. They voted for a change of government. And, in so doing, they voted for a change to our workplace relations laws…"[44]

III Reinvigorated Queensland Contribution to Employment Law[45]

It almost goes without saying that Work Choices 'covered the field' of employment law in Australia by relying on the Corporations power of the *Commonwealth Constitution* to legislate on working conditions for Australian constitutional corporations. The *Workplace Relations Act 1996* itself provided for that in its own opening sections: for example, sections 3 and 16. To the extent there was any doubt that those sorts of provisions, based on the use of the Constitutional Corporations power, could be legally valid, the High Court reaffirmed the breadth of such Commonwealth control in *NSW V Cth*[46]. This means that State laws on employment are excluded for constitutional corporations except in specifically enumerated categories such as child employment and occupational health and safety.

While there is no question that the reach of the old State labour (arbitration) systems is greatly and forever curtailed by the new national system, the State governments were extremely clever in their use of new legislative and policy measures to fill 'gaps' left by the

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43 Refer: Steven Scott and Laura Tingle 'Coalition caves in on workplace agreements' in Australian Financial Review 20 February 2008 at 1.

44 Hon Julia Gillard MP Second reading of Forward with Fairness Bill 2008, 13 February 2008.

45 Dr Louise Floyd, 'Reinvigorated Queensland State Employment Law' (Speech delivered at The Brisbane Institute Work Choices Employment Law seminar, Brisbane, 17 July 2007).

46 November 2006 HCA

Work Choices' changes and to initiate legal and policy measures that kept labour theories and measures (which were an alternative to the pure free market model) alive. As an adjunct to the past model of state industrial law, the 'new' types of measures that the State government of Queensland adopted included:

- *Child Employment Act* 2006 –This legislation is designed to ensure, for example, that work does not interfere with a child's schooling and that children are prevented from performing work that may be harmful to their health and safety. The act applies to all children under the age of 18 years, and also means that children may be able to access State unfair dismissal laws even if they are employed by a constitutional corporation.
- Queensland Workplace Rights Ombudsman – Introduced by the *Industrial Relations Act (and Other Legislation Amendment) Act* 2007, the Ombudsman gives independent advice to businesses and employees on both State and Federal industrial issues. An important difference between the State Ombudsman and its Federal counterpart is that the State Ombudsman advises on appropriateness and *fairness* of workplace practices. It is not limited in its operation to advising only on legal rights or compliance with the law. The other main difference is that the State Ombudsman cannot take carriage of prosecutions. However, it can investigate and report on matters, and it can refer possibly illegal conduct to appropriate authorities.
- Low-Cost Common Law Jurisdiction – Another change ushered in by the *Industrial Relations Act (and Other Legislation Amendment) Act 2007* facilitates a low-cost procedure for employees (earning up to $98 200) claiming breach of contract to access the Magistrates' Court.
- State Contracting and Purchasing Policies – Essentially businesses dealing with the State government or government owned Corporations are encouraged to observe fair workplace practices in their treatment of employees.

(Further issues that remain governed by the State Department of Employment and Industrial Relations Portfolio include revamped workplace health and safety laws and inspections.)

By legislating in this way—as stated, by keeping alive labour legal theories that embrace *Higgins* and fairness, but doing it creatively,

instead of just defending the past arbitration system—the State government has, in the view of the present writer, made the following valuable contribution to labour law in this country. First, in a very practical sense, it has provided workers with accessible rights. Second, it provided policy 'incubators' for the Labor Party at a time when that party had been out of federal office for eleven years. Finally, it has underscored the importance of giving State governments a 'voice' on important topics of law and policy at a time when the Howard government had increasingly centralised power in the Commonwealth Parliament.

At the time of writing, the new Rudd federal government was conducting discussions with all State governments on the nature of the new Australian labour system that is being crafted in the wake of the Federal Coalition loss and attendant rejection by the electorate of Work Choices. There is clearly merit in adopting some form of national approach to employment law in an era of national corporations and given Australia's small population. (And it may well be that the State laws outlined above will be modified over time). However, in the view of the present writer, the response of states like Queensland to Work Choices make the idea of adopting a system of *co-operative federalism* (as opposed to the abolition of State input) worthy of development. As Professor George Williams notes in *Working Together: Inquiry into Options for a New National Industrial Relations System,* his landmark review of States' constitutional rights and industrial relations:

> There is a strong case for involvement by the States in the establishment and ongoing governance of a national industrial relations system. The Work Choices experience is a salutary reminder of what can happen where a collaborative approach is rejected in favour of the unilateral imposition of a new national industrial relations system. In a national cooperative scheme in which all Australian jurisdictions have a significant stake, ideological policy extremes can be avoided as there is a broad based diffusion of political power accompanied by a much greater measure of democratic accountability. Such a scheme is more likely to achieve a fair balance between the interests of employers, employees and other significant stakeholders.[47]

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[47] November 2007, New South Wales Government Final Report at pages 35, especially and also 7, 33, 58-9, 72-3, 86-8.

Professor Williams further points out that State governments are separate polities; they are distinct governments charged with responsibility for running their own State economies, and the manner in which industrial relations is conducted in a State is an important part of that. So, for instance, Queensland is a large State with a population that is disparate and diffuse. The enforcement structures provided by the State Wageline service are sufficiently varied to deal with the problems of city and country workplaces, from the far north tourist strip of Cairns, through to the mining port of Townsville, through to the business centre, Brisbane, and the farming belt of the west.

Work Choices changes sought to 'break down' the State systems. As noted throughout, even the new State laws on employment may evolve overtime, but these recent innovative State industrial relations developments have built the State up into a significant position, where they can carve out for themselves an important and innovative role.

IV Concluding Remarks–Lessons in Rebuilding and also Renewing a Fair Cooperative Model

When former Labor Prime Minister Paul Keating addressed the Australian National Institute of Company Directors in 1996, he said the following:[48]

> Let me describe the model of industrial relations *we are working towards.* It is a model which places primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals. It is a model under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net…*Over time, the safety net would inevitably become simpler.* We would have fewer awards with fewer clauses…We would have an Industrial Relations Commission which helped employers and employees reach bargains, which kept the safety net in good repair, which advised government and the parties on emerging difficulties and possible improvements, but which would rarely have to use its compulsory arbitral powers. Instead, parties would be expected to bargain in good faith…[W]e need to find a

[48] As quoted by Terry Ludeke in 'The Evolving Industrial Relations Regime: The federal system 1992-1998' (1998) 72 *The Australian Law Journal, 865,* 863-870.

> way of extending the coverage of agreements from being add-ons to awards, as they sometimes are today, to being full substitutes for awards. [Emphasis added].

There is no doubt that the Australian industrial system would have continued to deregulate to some appreciable extent after 1996, irrespective of whether Mr Howard had won office or not. And, in the view of the present writer, there is no doubt that Australia has benefited and will continue to benefit from the broad notion of decentralistaion.[49] However, there are different ways of decentralising and there are different extents to which a system can and should be deregulated in any one suite of legislative amendments. It has long been this writer's view that Work Choices went too far, too fast.[50] Rather than following the steadfast path towards decentralism by increments and in a manner that considered the interests of all Australians, Work Choices sought to impose former Prime Minister Howard's ideological obsession on the Australian people. The severity and unilateral nature of that change understandably saw the electorate rail against a prime minister who had seemed invincible politically, but ended up loving his ideals to death.

Throughout this article, the irony of the title 'Work Choices' has been noted. In the view of the present writer, the final, ultimate irony of that legislation is that it sowed the seeds of its own demise. Work Choices took individuals and the State governments to the precipice, and caused those individuals and the State governments to recognise the value of the conditions they were about to lose. Work Choices sought to break down a system, but ironically only served to reinvigorate it and build it back up.

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[49] The present writer hopes that the Rudd government seizes upon these words to note that there was never any guarantee from his side of politics that labour law in this country should never have changed beyond its state in 1996. The present writer hopes that the new federal government will examine the good and the bad of the current system and the further ideas which could combine to create a modern, vital Australian labour system which is both fair *and flexible*.

[50] Louise Floyd, 'Work Choices' (Speech delivered at the University of Queensland Industrial Relations Conference into Work Choices, at Customs House, Brisbane, July 2005. In support of the idea of incremental change see also: Ron McCallum and Paul Ronfeldt, 'Our changing labour law' in R McCallum and P Ronfeldt eds, *Enterprise bargaining Trade Unions and the Law* (The Federation Press Australia 1995) 6 et seq, 1-30.