WORKCHOICES: IS GLOBALISATION REALLY TO BLAME?

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INTRODUCTION

> *"On 26 May 2005… John Howard… unveiled… his Government's plans to establish a new regime of labour law which has become known as the Work Choices system.*[1] *The Prime Minister's vision was… to* [dismantle the former system and] *replace it with a more market-oriented mechanism consonant with… neo-classical economic precepts. The powers of industrial relations tribunals and trade unions were to be curtailed in favour of employer managerial power. The preferred method of determining terms and conditions of employment would be via statutory agreements between individual employers and employees"*[2]

The Government has maintained that Work Choices is necessary to encourage foreign investment by making Australia more competitive in a global market. The critical question, however, is whether Australia truly requires legislation such as Work Choices in order to effectively compete in a global market, or whether the new regime fails to meet not only this, but the other core objectives cited in favour of the legislation's enactment.

This article will begin by briefly outlining the nature of globalization and its relationship with the labour market, detailing the Work Choices regime itself; then proceeding to undertake a critical analysis of whether Work Choices achieves its intended objectives.

GLOBALIZATION AND LABOUR

In crude terms, globalization is the unification of a series of discreet markets into a single, global market.[3] It is therefore the nation states which are the primary engines of globalization (especially through trade arrangements such as the U.S.'

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[1] *Workplace Relations Amendment (Workchoices) Act* 2005 (Cth) (herein '*Work Choices*')

[2] R McCallum, *The New Work Choices Laws: Once again Australia Borrows Foreign Labour Law Concepts* (2006) 19 AJLL 98 at 98

[3] See: A Wood, *North-South Trade, Employment and Inequality: Changing Fortunes in a Skill-Driven World* (Edn, Oxford University Press, 1994) at 211-213 and *Globalization and the Labour Market*, Paper prepared by the UNCTAD secretariat for the meeting of the ILO Working Party on the Social Dimension of Globalization, 12 November 2001

Free Trade Agreements); the major proponents of these engines being technological advancement and the insurgence of neo-liberal economic theory.[4] Consequently, globalization has birthed the network/multinational enterprise, which is characterized as a myriad of intersecting projects and supply arrangements across borders.[5]

This multinational enterprise has profoundly affected labour relations, firstly through the requirement of a more fluid workforce: business requires multi-skilled workers who can perform a variety of tasks as needed and the ability to easily terminate employment where necessary.[6] Many have noted that the by-product of globalization's relationship with labour has been increased employment of skilled workers and decreased opportunities for unskilled labourers in developed countries; the converse is true of developing countries.[7] It has therefore been observed that the knee-jerk response of many developed-nation governments, has been to decimate employee protections in order to make investment appear more attractive to foreign corporations.[8]

This approach has been stridently criticized as short-sighted. A most articulate objection is derived from the International Labour Organisation's website:

> *"Labour standards and institutions can generate positive economic advantages. Far too often it is the short-term results, for example end of the month balance sheets and profit levels, which dictate policy decisions. Thus it becomes expedient to cut labour costs… without careful considerations of the longer term impacts on productivity and profitability. Without labour market regulations or trade unions, competition between enterprises will take the short-term approach."*[9]

It has therefore been asserted that the strategy which will encourage foreign investment *and* maintain economic growth is one which implements initiatives that encourage increased training of workers.[10]

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[4] M Ritchie, *Globalisation vs. Globalism* http://www.itcilo.org/english/actrav/telearn/global/ilo/globe/kirsh.htm Accessed 26th April 2007 and M Camdessus, IMF Working Report 96/13, *The Impact of Globalization on Workers and Their Trade Unions*, prepared 26 June 1997.

[5] Mark Ritchie, *ibid.* and M Rama, *Globalization, Inequality and Labor Market Policies*, Development Research Group The World Bank June 23, 2001 at 2

[6] ILO, *Labour Market Trends and Globalization's Impact on Them*, http://www.itcilo.org/english/actrav/telearn/global/ilo/seura/mains.htm#Globalization%20and%20flexible%20forms%20of%20work, Accessed 26th April 2007

[7] Ritchie, above n 4 and ICFTU, *The Global Market: Trade Unionism's Greatest Challenge*, http://www.itcilo.org/english/actrav/telearn/global/ilo/seura/icftu1.htm Accessed 26th April 2007

[8] *Globalization and the Labour Market*, above n 3 and M Slaughter and P Swagel, IMF Working Paper 97/43, *The Effect of Globalization on Wages in the Advanced Economies*, April 1997

[9] ILO Enterprise Forum 96, *Enterprise and jobs: Increased Productivity and Competitiveness* http://www.itcilo.org/english/actrav/telearn/global/ilo/seura/job.htm

[10] ILO Enterprise Forum, i*bid.* and K Rudd, Media Statement - 28th March 2007

THE WORK CHOICES REGIME

Perhaps the most important changes to the *Workplace Relations Act*[11] are found in Parts 7 through 10. These Parts deal with the following elements respectively: the Australian Fair Pay and Conditions Standard (AFPCS), Australian Workplace Agreements (AWA), Industrial Action and Awards. There are a number of provisions of significance that lie outside these Parts, which will also be considered subsequently.

Under s 171(2), Part 7, Divisions 2-6 are considered to be the minimum standards of the AFPC, which prevail over any term of an agreement that imparts less-favourable conditions.

Sections 225-226 provide the maximum number of hours that an employee can be required to work (38 hours per week), which can be averaged by written agreement over a twelve-month period. Section 232 further provides that an employee accrues annual leave on the basis of 1/13th of every hour worked; whilst s 233, adds that employees now have the ability to 'cash-out' of up to half of their annual leave entitlements and can be compelled to take up to a quarter of their annual leave where they have accrued two years' thereof. Whilst s 233(3) provides that an employer cannot coerce an employee into making such an agreement, it is submitted that not only do practical realities suggest that this is possible, but that workplace culture can have a powerful, coercive effect.[12]
Whilst Work Choices retains the usual 12-month unpaid parental leave option,[13] employers are given greater discretion to refuse extensions of leave, or can keep the employee 'out-of-the-loop'.[14]

There is no longer a right to refuse to work on public holidays unless the employee can prove reasonable grounds for refusal.[15] An employer may not take retaliatory action if reasonableness is proven,[16] however the difficulty is the fact that those workers with the least power[17] are most susceptible to coercion. The risk of losing their job may prove too grave to persuade them to insist on legitimate rights.[18]

Part 8 substantially alters the operation and status of AWAs.

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[11] See above n 1
[12] R Owens, *Working Precariously: The Safety Net after Work Choices* (2006) 19 AJLL 161 at 166-167
[13] For provisions with respect to maternity, paternity and adoptive leave, see *Work Choices*, above n 1, ss 265(1)(b) and 266; 282(1)(b) and 283; and 100(1)(b) and 301, respectively.
[14] Owens, above n 12 at 168-169
[15] *Work Choices*, above n 1 at ss 611-613.
[16] *Ibid. Work Choices*, ss 615-617
[17] Especially those in the retail, hospitality and manufacturing, as identified by Owens above n 12, at 170
[18] *Ibid.* Owens

Under the previous system, employers were obliged to provide a copy of the AWA to the employee and explain its full effect.[19] Under the new s 337, all an employer need do is provide the OEA statement and take reasonable steps to ensure that the employee is given a copy of the Award. Therefore an employee could sign a document without knowing its terms.[20] Furthermore under the old system, a collective agreement prevailed over an AWA; s 348(2) provides the inverse – that even a prior collective agreement has no operation where an Award operates.[21] This difficulty is compounded by *Work Choices*' non-requirement of the fair/equitability of an AWA or consistency of terms across employees.[22] It is submitted that this provision cripples the ability of Unions to intervene as each individual is potentially subject to unique and diverse obligations. In connection, whilst employers are obliged to meet bargaining agents in negotiations[23], they not required to substantively consider their views.[24] Finally, s 400(6) makes employment contingent upon the signing of an AWA and an employee can be locked-out until they sign.[25]

As regards the content of AWAs, whilst certain matters are 'protected allowable matters' (I.e. leave loading, rest breaks, observance of public holidays, overtime and outworker conditions), ss 354-355 have the effect of destroying those protections by allowing employees to contract out thereof.[26] The legislation also sets out to regulate 'prohibited content' in agreements.[27] 'Prohibited content' is defined by the Workplace Relations Regulations 2006 (Cth) to include: restrictions on the use of contractors or labour hire arrangements, clauses providing an employee with a right or remedy for unfair dismissal, allowing for industrial action, renegotiation of a workplace agreement and anything union-related[28]

Part 9 decimates the ability of employees to engage in industrial action. Work Choices, excludes the following forms of industrial action from protection: non-compliance with Australian Industrial Relation Commission (AIRC) orders (s 443), acting in concert with non-protected persons (s 438)[29], organizations acting

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[19] See the former *Workplace Relations Act* 1996 (Cth) at ss 170VO(1) and 170VPA(1); in addition to providing a copy of the Office of the Employment Advocate (OEA) statement, which remains under *Work Choices*.

[20] J Fetter, *Work Choices and Australian Workplace Agreements* (2006) 19 AJLL 210 at 214

[21] C Fenwick and I Landau, *Work Choices in International Perspective* (2006) 19 AJLL 127 at 138

[22] J Fetter, above n 20 at 215

[23] Sections 334(2)-(4), *Workplace Relations Act* 1996 (Cth).

[24] See *Work* Choices, above n 1, s 335(3)-(5). See also A Forsyth and C Sutherland, *Collective Labour Relations Under Siege: The Work Choices Legislation and Collective Bargaining* (2006) 19 AJLL 183 at 189

[25] C Fenwick and I Landau, above n 21 at 137-138 at 137-138. This effectively reverses the original position which provided that an employer couldn't sack an employee for refusing to sign an AWA.

[26] The same does not apply to outworker conditions.

[27] *Work Choices*, above n 1, s 356.

[28] *Workplace Relations Regulations* 2006 (Cth) at rr 8.4-8.7.

[29] The same section defines protected employees as limited to various forms of employees, thereby ousting third parties such as Unions.

without authorization of its management (s 446), action taken before the expiry date of an existing collective agreement (ss 440 and 494-5) and pattern bargaining (s 439, defined by s 421(1)).

The legislation also makes the process of engaging in industrial action convoluted. Only action which is deemed 'protected'[30] is subject immunity from prosecution or employer reprisal.[31] In order for action to be protected s 445 requires employees to have a secret ballot as to whether to engage in industrial action. A ballot can only be had under the authorization of the AIRC (s 451) and at least 50% of the workers entitled to attend must do so, in addition to requiring a +50% result (s 478) for approval. Section 498 allows the Minister to intervene to stop any bargaining between employer and employee in industrial negotiations.[32] Furthermore if any of the individuals involved aren't protected by the legislation, the whole process fails (s 438). It has been suggested that the documentation required to even get to the balloting stage is so onerous that few Unions would have the resources to meet the necessary requirements, in addition to the fact that many temporary employees, if involved, would spell an end to such action.[33]

Finally, an employer is *obliged*, by s 507, to deduct four hours' pay from an employee who engages in strike action for less than four hours, thereby discouraging short-term strike action and increasing economic burdens on employees.

Part 10 dramatically reduces the allowable content of Awards (compare old s 89A with new s 513(1)). Long service leave, jury service, termination, superannuation and matters governed by the AFPC are all removed from Awards and public holidays are more narrowly defined (s 513(1)(d) and (f)). Awards may now no longer provide for a mechanism for casuals to receive more secure employment and there are no restrictions on the number of independent contractors.

The effect of these reforms is to cripple the operation of the AIRC and transfer power to the new AFPC regime, which acts largely at the behest of the government.

Finally, it is worth noting that a 643(10) provides that employees of corporate, Commonwealth or State employers that have less than 100 workers no longer have a remedy for harsh, unjust or unreasonable termination.[34]. Furthermore there can be no unfair dismissal, irrespective of the organisation's size, where

[30] Which is defined by s 435, *Workplace Relations Act* 1996 (Cth)
[31] This is outlined in ss 447-448, *Workplace Relations Act* 1996 (Cth)
[32] See s 498, *Workplace Relations Act* 1996 (Cth)
[33] C Fenwick and I Landau, above n 21 at 141-142
[34] Thereby sweeping away the former s 170CG(3)

the employer cites 'genuine operational reasons' (s 643(8)).[35] Therefore the power to 'hire and fire' has never been stronger.

DOES THE LEGISLATION ACHIEVE ITS AIMS?

In order to consider whether Work Choices achieves its ends, one must necessarily investigate the stated objectives of the legislation. The following ends have been stated as necessary in order to meet the realities of the new global market:

> *"A central objective of* [the reforms] *is to encourage the further spread of workplace agreements in order to lift productivity and hence living standards of working Australians… We need more choice and flexibility for both employers and employees so we can work smarter, reward effort and find the right balance between work and family life."*[36]

Therefore, these three aims – productivity, flexibility and choice – will be considered separately below. Before entering into any such discussion, it is necessary to enter something of a caveat – as the true extent of Work Choices' reach remains unclear, much of the following discourse is necessarily prospective in nature. Furthermore, the following critique will be directly related to the preceding analysis of the Work Choices amendments which, logically, will not be reproduced in detail below.

INCREASED PRODUCTIVITY/EFFICIENCY

It has been noted that the achievement of increased productivity pertains not only to the output of workers, but to streamline process of agreement-making between employer and employee.[37]

Work Choices has, as detailed earlier, largely achieved this end by allowing employees to sacrifice many of their entitlements for increased pay. However, it is difficult to see how the system has become more effective in this regard. As noted above, because collective bargains are now wholly subordinate to individually-negotiated AWAs, it would appear that the bargaining process has, in reality, become more convoluted. Because it is possible that individuals may be coerced into negotiating, this requires a substantial devotion of resources to in fact facilitate negotiations and the preparation of new agreements. However, a number of authors have noted that the restrictions on the content of AWAs have

[35] which is defined as: 'reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business under *Work Choices*, above n 1, s 643(9).
[36] House of Representatives, *Parliamentary Debates*, vol. 18, 2 November 2005, p 17 (K Andrews)
[37] House of Representatives, *Parliamentary Debates*, vol 16, 26 May 2005, p 40 (Hon Prime Minister J Howard)

been heavily reduced.[38] This gives rise to the possibility that the process of agreement-making will be more liberal as employers are more likely to create 'one size fits all' agreements and adopt a 'take it or leave it' stance to negotiations, particularly.[39] In this vein, Work Choices achieves its aims by removing procedural safeguards that were formerly available to employees.[40] Furthermore as employees are more likely to receive lesser wages and fewer benefits, Work Choices will benefit the economy by encouraging foreign investment in unskilled Australian labour. This in-turn will lead to a more productive economy based on the revenue to be derived therefrom.[41]

Work Choices has also made a number of alterations to various areas of labour law that will undoubtedly affect the output of employees. By considerably raising the barriers to entry for protected industrial action,[42] obliging the employer to levy penalties against employees who engage in unprotected action and allowing the Minister to interfere with industrial action and negotiations (particularly where the former causes any form of economic harm, which is a primary aim of industrial action)[43], the legislation severely curtails the capacity of employees to mobilise against harsh employer practices. Indeed, some authors argue that the productivity aim is achieved by ensuring that not only is the facilitation of protected industrial action prohibitively expensive and complex to all but the most sophisticated employee organisations, but also that the penalties for unprotected industrial action are so severe that those who require such action the most will be unwilling/unable to take the economic risk.[44]

Finally, the author suggests that because it has become patently simple for an employer to 'hire and fire',[45] low-wage-earning employees will inevitably become more productive by virtue of their fear of job-loss. This position would appear to be supported by literature to the effect that many employees are unlikely to insist on legal rights for fear of dismissal.[46]

However, there are others who argue that the productivity justification is flawed as making an agreement under Work Choices is not necessarily conducive to productivity; parties can make as unproductive an arrangement as they please.[47] Employers empirically prefer to reduce wages, increase working hours and oust the unions and outsource labour. Work Choices surely ensures the perpetuation

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[38] A Forsyth and C Sutherland, above n 24 at 188

[39] This is compounded by the fact that employers no longer have to substantively recognize bargaining agents: B Hatch, *IR changes herald boom in agents*, *AFR*, 22nd November 2005.

[40] L Johns, *Safety Net Entitlements under WorkChoices* (2006) 80(7) LIJ 36 at 36.

[41] J Fetter, above n 20 at 212

[42] Shae McCrystal gives a particularly detailed analysis of the increased barriers to entry in: S McCrystal, *Smothering the Right to Strike: Work Choices and Industrial Action*, (2006) 19 AJLL 198

[43] *Ibid.* S McCrystal at 208

[44] C Fenwick and I Landau, above n 21 at 142-143 and F Anderson, *WorkChoices Strikes a Blow Against Industrial Action* (2006) 80(6) LIJ 34

[45] On this point see *Work Choices*, above n 1, ss 643(9)-(12)

[46] L Johns, above n 40 at 38-39.

[47] J Fetter, above n 20 at 212

of such practices, although there is no evidence that these practices increase productivity, so much as they ensure the retention of wealth by capital-owners.[48]

It has also been argued that the reduction of wages, downsizing of the workforce and creating a sense of fear for the security of one's employment in fact undermines motivation, productivity and confidence in the employment relationship.[49] It has in fact been argued by a number of individuals and organisations that the true means by which increased productivity is achieved is to encourage constructive relationships between employee and employer and to provide workers with wider training so that they are able to undertake a myriad of tasks when necessary.[50]

In short, it is submitted that regime such as that of Work Choices does promote productivity in the short term, but does not provide for sustained productivity or investment.

INCREASED FLEXIBILITY/BALANCE

With respect to the issue of flexibility, the Work Choices regime has gone a substantial way towards ensuring that employees are required to be more flexible. This is primarily achieved through the averaging mechanism (which could result in employees undertaking inconstant hours of work) and the permissibility of requiring employees to undertake additional hours of work.[51]

In response, a number of authors have argued that the regime creates a number of debilitating outcomes.

Firstly, as there is no requirement that hours worked be reasonable, there is substantial debate as to whether the *Reasonable Hours Test Case*[52] will apply under the new legislation, particularly as the new legislation abrogates many of the implied guarantees found in that case.[53]

Secondly, a number of scholars argue that the legislation does not achieve any kind of balance between work and personal life as employers, who now have the ability to dismiss employees easily, are able to coerce workers to submit to onerous and inconstant working hours.[54] In connection, it has also been suggested that Work Choices creates substantial economic and domestic inflexibility by stifling the ability of workers to meet their necessary domestic and personal commitments due to the fact that they will most likely be required to work hours that will preclude a reasonable structuring of their lives.

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[48] *Ibid.*
[49] ILO Enterprise Forum 96, above n 9.
[50] ILO Enterprise Forum 96, above n 9 and K Rudd, above n 10).
[51] L Johns, above n 40, at 40-43
[52] (2002) 114 IR 390.
[53] For a reasoned argument of the unlikelihood retention of the *Reasonable Hours Case*, see Owens, above n 12 at 164.
[54] *Ibid.* Owens at 165

Thirdly, Forsyth asserts that Work Choices engages in something of an antithetical Robin Hood approach, by robbing workers of protections and transferring more power to employers, who are in a position to offer either onerous conditions or unemployment.[55]

Finally, the legislation has drawn substantial criticism from many advocates of women's rights. It is argued that in creating a scenario whereby the Awards are abrogated by individual AWAs, the government has removed much of the equal opportunities protections (such as maternity leave), which were guaranteed to female workers through blanket Awards.[56] It is submitted that the new system paves the way for abuse by allowing employers to bombastically offer individual agreements that may no longer contain these protections without entering into any negotiations.[57] Again, if women are economically unable to afford time away from work to birth and raise a child/children, this only further undermines the flexibility of the average wage-earner.

The contrary view to those expressed above is somewhat simpler. It is conceded that Work Choices potentially does all of the above; it is argued, however, that the argument in favour of flexibility was only ever conceived of as favouring the employer and therefore achieves its end, irrespective of the workers' entitlements.[58]

The author submits that whilst this is true, it does not address the suggestion that Work Choices will achieve the balance aim unless of course, the government has used the term 'balance' in the context of its feudal connotations.

GREATER CHOICE

The question of choice presents the rather contentious question of whether Work Choices provides for substantive freedom of choice or the mere illusion thereof.
On a superficial level, one could simply answer this issue in the affirmative. The legislation serves to increase the employer's choice at the expense of that of the worker. As AWAs may now include a substantial variety of matters[59] that could potentially deprive the employee of many of their rights, the employer has greater choice as to what terms to include/exclude from these agreements.[60] As noted above, the most likely to be affected are those who lack knowledge/access to knowledge of their legal rights, which coupled with the risk of unemployment, is

[55] A Forsyth and C Sutherland, above n 24 at 190
[56] C Hartigan and R Bryant-Smith, *WorkChoices Act and the New Maternity Leave Provisions: Inconsistencies and Uncertainties* (2006) 11(10) ELB 109 at 109-110
[57] M Smith and M Lyons, *Women, Wages and Industrial Relations in Australia: The Past, the Present and the Future* (2006) 14(2) International Journal of Employment Studies 1 at 1-2 and 11-13
[58] C Fenwick and I Landau, above n 21 at 131-132
[59] Ironically, those matters which are excluded are those which are most likely to benefit workers, as outlined above.
[60] J Fetter, above n 20 at 211

likely to be too great a burden.[61] This situation is compounded by the fact that employers are no longer required to negotiate with prospective employees in good faith.[62]

Conversely, the legislation can be seen to be highly interventionist. For example Fenwick and Landau make particular reference to: the Minister's ability to intervene in industrial action at any stage, the ability to compel parties to engage in individual bargaining, making multiple/sectoral business agreements contingent upon OEA approval and the various grants of power to the AFPC and OEA to vary numerous elements of agreements, such as public holidays, wages and the exclusion of 'prohibited' content.[63] It is submitted that this arrangement stands in stark contrast to Prime Minister Howard's statement[64] that his government trusts employers and employees 'to make the right decision'[65] as the legislation curtails party autonomy.[66]

In this respect the legislation merely creates the illusion of choice: whilst parties are free to agree on a broad variety of terms, the government retains a dormant power that can be activated at the Executive's pleasure.

CONCLUSION

The overall aim of Work Choices is to promote investment in Australia. By stripping employees of entitlements and protections[67], creating an interventionist regime of labour relations and providing the employer with greater scope to engage in questionable employment practices, the legislation has something of a Janus effect. It is readily appreciable that the legislation will increase productivity through fear, flexibility through coercion and choice through transferring power from the needy to the wealthy (whilst also reserving interventionist power for the Executive), the legislation is likely to achieve its tripartite ends in the short-term. However, these reforms are unlikely to give rise to *sustained* productivity, flexibility and choice. They will in fact lead to a deterioration in worker productivity and overall enterprise profitability.[68] When the substratum of the

[61] For an analysis of how these factors were found to predicate the British Low Pay Commission's success, upon which Work Choices was based, see Owens, above n 12 at 173

[62] C Fenwick and I Landau, above n 21 at 131-139. For a consideration of the duty under the former regime, see: *CPSU v Sensis Pty Ltd* (2003) 128 IR 92 and J Shaw, *Observations on Trade Union Recognition in Britain and Australia* (2001) 24 UNSWLJ 214, especially at 215-217 and 219.

[63] These issues have been canvassed above. For a more detailed analysis, see generally Fenwick and Landau, *ibid.*

[64] House of Representatives, *Parliamentary Debates*, above n 37, p 43 (Hon Prime Minister J Howard)

[65] A Forsyth and C Sutherland, above n 24 at 193

[66] C Fenwick, *How Low Can You Go? Minimum Conditions Under Australia's New Labour Laws* (2006) 16 ELRR 85 at 90-1

[67] Particularly because less-intelligent workers may contract out of entitlements without appreciating the repercussions of their actions.

[68] See, for example, ILO Enterprise Forum 96, above n 9.

employment relationship is eroded to the extent that Work Choices permits, employees are unlikely to perform more than their minimum duties when rewards are minimised and will be less accommodating to requests of the employer.

In giving corporations the power to engage in short-term cost-cutting practices, it is almost inevitable that the ILO's prediction (quoted above under GLOBALIZATION AND LABOUR) is a realistic prophecy of Australia's economy.

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