

How are the aims of ‘protection’ and ‘productivity’ balanced in Australia’s law since the introduction of the *Work Choices* amendments to the *Workplace Relations Act 1996* (Cth).

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1 INTRODUCTION

This essay will discuss how the aims of protection and productivity are balanced in Australia's law since the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amendments to the *Workplace Relations Act 1996* (Cth). Throughout this essay the *Work Choices* amendments to the *Workplace Relations Act 1996* (Cth) will be referred to as *Work Choices*.

In determining why the aims of protection and productivity are not balanced in Australia's law since the introduction of *Work Choices* it is relevant to consider the likely outcomes under the changed industrial relations system. In order to provide a succinct analysis of the balance of the aims it is important to analyse specific groups. This can provide a realistic evaluation of the likely effects rather than relying on general claims that the legislation will increase employment opportunities or provide improved work conditions.¹ This essay will carefully consider the likely impact of the legislation for the labour markets most vulnerable workers, young people and women in precarious employment.

This essay will refer to the neoliberal theory underpinning *Work Choices*. In particular it will have regard to the role of the Australian Fair Pay Commission (AFPC) and its objectives in setting minimum wages. The individualisation of the new labour market and its principle of flexibility will be analysed. In order to expose the imbalance in the aims

¹ Richard Denniss, 'Young People's Attitudes to Workplace Bargaining' (2006) 56 *Journal of Australian Political Economy* 145, 146.

of protection and productivity, examples of the legislative scope to enhance productivity at the expense of protection will be evaluated.

The aim of productivity in *Work Choices* will be analysed. Debate exists regarding how the aims of productivity will be met and whether the amendments will in fact create greater productivity. There is also a case that productivity is important for guaranteeing protection. This essay will also consider the concerns that the failure of *Work Choices* to incorporate International Labour Organisation (ILO) standards may negatively affect Australia's position in international trade, thereby negating the aim of productivity.

1.1 Importance of balancing productivity & protection

*In our society, no single situation is potentially so capable of giving some satisfaction, at all levels of basic needs, as the occupation.*²

It is important that the aims of protection and productivity are balanced in Australia's workplace relations laws. The reason is that participation in paid employment is the paramount representation of social inclusion in our society today.³ Many Australians negotiate reproductive work and paid work.⁴ Work represents financial standing and security and it also represents personal fulfilment. Productivity remains an important factor regarding the success of an economy, but for workers, the working day does not

² T.L. Robinson and A.D. Scott, 'White male identity development: the key model' (2001) 79 *Journal of Counselling and Development*, 415, 417.

³ P. Harris and V. Williams, 'Social Inclusion, National Identity and the Moral Imagination' (2003) 3 *The Drawing Board: An Australian Review of Public Affairs* 205, 209.

⁴ Barbara Pocock, *The Work / Life Collision* (2003) 15.

simply consist of transforming inputs into outputs. It also involves finding some satisfaction in being at the workplace. In order to foster both productivity and protection some form of “mutual assistance” is required.⁵

1.2 Globalisation and neoliberal theory

The impact of globalisation on the Australian economy has consistently figured as a reason to warrant the significant changes to labour relations as introduced by *Work Choices*.⁶ Globalisation refers to a perception that the world is rapidly being moulded into a shared social space by economic and technological forces.⁷ In a speech to the Sydney Institute in July 2005, Prime Minister John Howard said that industrial law changes are imperative to create Australian enterprise workers who would be in a better position to compete in our globalised world.⁸ There are many different ways of thinking about globalisation. The debate surrounding *Work Choices* consistently refers to the neoliberal variant of globalisation. The neoliberal theory of globalisation is defined by principles which aim for the emergence of a single global market, individual autonomy and the market principle.⁹ These neoliberal principles are apparent in the *Work Choices* legislation. The establishment and the role of the Australian Fair Pay Commission

⁵ Australian Centre for Industrial Relations Research and Training (ACIRRT), *Australia at Work Just Managing?* (1999) 33.

⁶ Jill Murray, ‘Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law’ (2006) 35 *Industrial Law Journal* 343, 362.

⁷ David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations Politics, Economics and Culture* (1999) 1.

⁸ John Howard, ‘Workplace Relations Reform - the Next Logical Step’ (2005) 17 *The Sydney Papers* 78. This speech was discussed in Ron McCallum, ‘Australian Labour Law After the Work Choices Avalanche: Developing An Employment Law for Our Children’ Speaking Draft to the Law Society of New South Wales on Tuesday 3 October 2006.

⁹ Held, McGrew, Goldblatt and Perraton, above n 7, 3.

(AFPC) and the individualisation of workers through workplace agreements all encapsulate neoliberal principles.

2 THE AUSTRALIAN FAIR PAY COMMISSION

Work Choices establishes an Australian Fair Pay Commission (AFPC).¹⁰ The AFPC is responsible for setting wages and conducting wage reviews.¹¹ The objective of the AFPC in performing its wage-setting function is to promote the economic prosperity of the people of Australia.¹² In doing so the AFPC must have regard to the capacity for the unemployed and low paid to obtain and remain in employment and employment and competitiveness across the economy.¹³ On this basis, opponents argue that ensuring workers have employment can only be achieved by setting the minimum wage low. The function of the AFPC is only fair in that it provides that workers have employment because wages will be paid at a low level to ensure that employment growth remains high.¹⁴ Wages are set low to create new employment opportunities for those with few labour market skills.¹⁵

Under *Work Choices* the neoliberal theory behind the current wage setting function is apparent. The AFPC rejects social considerations in favour of market forces when setting the minimum wage. According to *Work Choices* the AFPC controls the labour market to ensure economic prosperity and the reduction of unemployment. It does not take into

¹⁰ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 20.

¹¹ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 22.

¹² *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 23.

¹³ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 23(a),(b).

¹⁴ Colin Fenwick, 'How Low Can You Go? Minimum Working Conditions Under Australia's New Labour Laws' (2006) 16 *The Economics and Labour Relations Review* 85, unavailable.

¹⁵ Peter Saunders, 'Unleashing (Labour) Market Forces: The Social Policy Implications of Industrial Relations Reform' (2006) 29 *UNSW Law Journal* 80, 86.

account the public interest or the social protection of Australian workers and their families.¹⁶ The aims of the AFPC are seen to be in direct conflict with the aims of the Australian Industrial Relations Commission (AIRC), which was responsible for setting wages before the introduction of *Work Choices*. Under the *Workplace Relations Act 1996* (Cth) before its amendment by the *Work Choices* the AIRC had the responsibility of maintaining a safety net of minimum wages and conditions of employment.¹⁷ In ensuring this safety net, the AIRC was required to have regard to:

the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community.¹⁸

During the *2005 Safety Net Review*, the Commonwealth Government made submissions concerning the likely economic effects of increases to the minimum wage.

The Commonwealth stressed the effects of safety net adjustments on employment. It submitted that [an increase in the minimum wage] would jeopardise the employment of the low paid and prejudice people looking for work, particularly the long-term unemployed, the unskilled and inexperienced women seeking to return to the workforce. The Commonwealth submission was critical of the Commission's earlier safety net review decisions, and urged the Commission to give employment issues a greater priority than in the past.¹⁹

¹⁶ Fenwick, above n 14, unavailable.

¹⁷ *Workplace Relations Act 1996* (Cth) s 88B (2), amended by *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

¹⁸ *Workplace Relations Act 1996* (Cth) s 88B (2)(a), amended by *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

¹⁹ *Safety Net Review – Wages June 2005* AIRC, PROO2005, 7 June 2005, 160.

The role of the AIRC has been criticised for its failure to take into account economic implications when setting minimum wages. Its role was said to have a bias towards protection. The AIRC's concern regarding wage setting was focused on social policy rather than economic stability. In this case, it is argued that protection outweighed the importance of productivity and therefore failed to balance the aims of both of these objectives.

2.1 Balancing productivity and protection via minimum wages

Low minimum wages are said to encourage productivity. Economists believe that reducing safety net protections such as the minimum wage will reduce the inhibition of businesses to implement structural changes and productivity improvement. This will provide Australian businesses with increased ability to maintain international competitiveness.²⁰ Reducing unemployment is a major factor in increasing the productivity of the Australian economy. The unskilled labour market makes up a large proportion of the unemployed. Existing minimum wages exclude the unskilled from employment. They are 'unable to penetrate the regulatory constraints'. Maximising employment opportunities will offer greater protection than regulating wages.²¹

Furthermore economists make a case that enhancing productivity by setting low minimum wages will not negatively affect protection due to the role of welfare. Instead it is argued that increasing productivity will also guarantee protection. A productive workplace relations system will secure a prosperous economy. In turn this will guarantee

²⁰ Des Moore, 'Policy Forum: Workplace Relations Reform Why Labour Market Players Should Have Freedom to Contract' (2005) 38 *The Australian Economic Review* 192, 197.

²¹ *Ibid.*

protection as a prosperous economy can provide a generous safety net through its welfare system.²²

If this argument is accepted then the AFPC's aim of protection and productivity are balanced. Low minimum wages improve the living standards of low productivity or unskilled workers by maximising their opportunities for employment. For workers who remain unemployed their protection is guaranteed as a productive economy ensures a generous social security system for them to fall back on.²³

3 PRECARIOUS EMPLOYMENT

3.1 Youth

The new labour market is characterised by the significant shift to part time and casual employment.²⁴ This is partly attributed to an increase in the demand for workers in the service industries and a decline in demand for jobs in the manufacturing industries. The expansion of the service sector has not compensated for this decline. Jobs in the service sector are typically low paying and provide part time or casual positions, with limited prospects of long term, permanent, full time work.²⁵ Young people have been the most vulnerable to these changes in the labour market. In seeking full time employment the young jobless usually have to compete with older and more experienced workers.

²² Matthew Ryan, 'Policy Forum: Workplace Relations Reform Workplace Relations Reform, Prosperity and Fairness' (2005) 38 *The Australian Economic Review* 201, 206.

²³ Moore, above n 20, 197.

²⁴ B. Chapman and M. Gray, 'Youth Unemployment: Aggregate Incidence and Consequences for Individuals' in *Centre for Economic Policy Research Discussion Papers*, (2002) Australian National University, 7.

²⁵ J. Bessant, "'Deregulating Poverty': Liberal-National Coalition Government Policies and Young People.' (1999) 34 *Australian Journal of Social Issues* 1, 2.

Evidently they are absorbed into the low paying jobs available in the service industry where wages and conditions are the least attractive.²⁶

3.2 Women

Women make up a majority of low paid workers in low skilled industries. These industries include childcare, hospitality, contract cleaning, community services, clerical and retail.²⁷ The feminisation of these industries reflects the increasing number of women balancing work life and family life. These industries are usually highly casualised and demand labour during unsocial hours.

4 INDIVIDUALISM

Australia's new labour laws are aimed towards minimising collective bargaining and instead implementing individual workplace agreements. Under the *Work Choices* legislation, the labour market expects that workers will negotiate individual rates of pay and working conditions without union or award interventions.²⁸ Individual agreements and amendments to collective bargaining provisions are evidence of the individualisation of the workplace.

Work Choices provides that an Australian Workplace Agreement (AWA) will override a collective agreement.²⁹ Furthermore, an award has no effect in relation to an employee

²⁶ Ibid 6.

²⁷ Mimi Zou, 'Unequal Power: Workchoices and Women' (2006) *Polemic* 20, 20.

²⁸ Anita Harris, *Future Girl: young women in the twenty-first century* (2004) 39.

²⁹ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 348(2).

while a workplace agreement operates.³⁰ *Work Choices* provides protected award conditions which are minimum conditions of employment taken to be included in any workplace agreement. Unfortunately this protection is limited in favour of productivity as these award conditions may be expressly modified or excluded from an individual agreement if a worker agrees to the exclusion.³¹ These protected award conditions include rest breaks, incentive based payments and bonuses, annual leave loadings, public holidays, monetary allowances, loading for working overtime or for shift work and penalty rates.³² Finally, an employer may require an employee to sign a workplace agreement as a condition of engagement.³³

4.1 Collective bargaining

Work Choices aims to balance the right to take industrial actions for the purposes of collective bargaining with the need to protect the public interest and deal with illegitimate and unprotected industrial action.³⁴ In reality the provisions under the new legislation restrict the ability to bargain collectively instead favouring economic stability and productivity.

The right to take industrial action in support of claims for a collective agreement is restricted by strict rules and procedures.³⁵ All employee industrial action must be authorised by a vote taken in a secret ballot. This requires applying to the AIRC for an

³⁰ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 349.

³¹ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 354(2).

³² *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 354(4)(a)-(h).

³³ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 400(6).

³⁴ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 3(i).

³⁵ Rosemary Owens and Joellen Riley, *The Law of Work* (2007), 513.

order for a ballot to be held to determine whether proposed industrial action has the support of employees.³⁶ Furthermore a roll of voters must be created in addition to the administrative information which must accompany the application to the AIRC. Strict notice periods are also stipulated in terms of notifying all parties of the intended industrial action.³⁷ These legislative requirements are expensive and time consuming for employee representatives. Protection for workers is further restricted by the legislative preclusion of industrial action during the term of a workplace agreement, before the nominal expiry date of the agreement.³⁸ Employees cannot take protected industrial action while their workplace agreement is in force. This will apply whether or not the action relates to a matter dealt with in an agreement.³⁹ As workplace agreements can have an expiry date five years out from their commencement, this preclusion can prove detrimental for employees who wish to deal with matters that are raised within the workplace during the course of employment.⁴⁰ These changes have decreased the power of employees to collectively bargain for better working conditions. Instead the aim of productivity has been strengthened by minimising the adverse consequences of industrial action for employers.⁴¹ Further to the point, while employees are unable to take action during the term of an agreement, employers are permitted to offer employees individual workplace agreements that depart from the standard collective agreement in place.⁴²

³⁶ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 451(1).

³⁷ *Workplace Relations Act 1996* (Cth) (*Work Choices*) Part 9, Division 4.

³⁸ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 494.

³⁹ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 494(1).

⁴⁰ Owens and Riley, above n 35, 514.

⁴¹ Shae McCrystal, 'Shifting the Balance of Power in Collective Bargaining: Australian Law, Industrial Action and Work Choices' (2006) 16 *The Economics and Labour Relations Review* 193, unavailable.

⁴² Ron McCallum, 'Australian Labour Law After the Work Choices Avalanche: Developing An Employment Law for Our Children' Speaking Draft to the Law Society of New South Wales on Tuesday 3 October 2006, unavailable.

Proponents view the new legislation as important for increasing productivity within the workplace. The argument is that Australia will become more productive if employers are permitted to offer employment on terms that workers are prepared to accept.⁴³ This is indicative of neoliberal policy of allowing market forces to promote competition and increase productivity. Market forces replace social policy in the pursuit of productivity.⁴⁴ This concept will be successful for workers who have the skills and bargaining power required in the new labour market. Alternatively it will result in fewer protections for vulnerable workers who are unable to compete.⁴⁵

Opponents, however consistently argue that individual contracts do not enhance productivity. While individual agreements may permit business to increase profitability by reducing labour costs in the form of wages and entitlements, this does not amount to improved productivity.⁴⁶

An examples is that

[t]here is no gain in the number of meals served per restaurant employee by abolishing their penalty rates. All that happens in that situation is that the wage cost per meal has

⁴³ Andrew Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?' (2006) 16 *The Economic and Labour Relations Review* 25, unavailable.

⁴⁴ Saunders, above n 15, 90.

⁴⁵ Ibid 81.

⁴⁶ Stewart, above n 43, unavailable. Stewart discusses research conducted by David Peetz.

gone down, and profits go up (and restaurant workers wages go down), even though productivity is unchanged.⁴⁷

The individualisation of the workplace is seeking to strengthen productivity in favour of protection. This will most impact on young people and women in precarious employment.

4.2 Individualism and youth

For young people in the workforce, individual agreements will offer little protection. Confident individuals with sought after skills are more likely to be able to bargain effectively. Conversely young people with little self confidence, poor skills and no training are likely to find it harder to bargain effectively with their employer. Young people have less experience in workplace negotiation. They usually apply for entry level positions so it is difficult for them to articulate their skills and experience and their labour value in comparison to other applicants.⁴⁸ Traditionally young people have relied on pay rises that are collectively bargained or granted through the award system. With little bargaining experience, it is unlikely that young people will achieve increases in pay or conditions as successfully as individuals with the bargaining skills.⁴⁹ The new labour market relies on individual bargaining and young people are unlikely to demand the conditions and security that more experienced employees have come to expect.⁵⁰

⁴⁷ Bradon Ellem, Marian Baird, Rae Cooper and Russell Lansbury, 'WorkChoices: Myth-Making at Work' (2006) 56 *Journal of Australian Political Economy* 13, 22. Further discussion of research conducted by David Peetz.

⁴⁸ Dennis, above n 1, 146.

⁴⁹ Ibid 154.

⁵⁰ Ibid 147.

Individualisation is indicative of neoliberal theory. The attitude that someone can achieve anything if they are committed enough further excludes young people from the social experience of work. Where education, geographical location and family background all work to exclude young people from participation in the workforce, a 'can do' attitude is simply overwhelmed by the realities of the modern labour market.⁵¹ Our culture considers success in the workforce as determined by individual motivation.⁵² It celebrates individual performance and the presentation of the self, where failure is a failure of the self and not labour market conditions.

4.3 Individualism and women

Women in precarious forms of employment in low paid industries are not on an equal footing with their employer when it comes to bargaining.⁵³ Individual agreements need only contain five minimum conditions. These relate to minimum hourly rates, hours of work, annual leave, personal leave and parental leave.⁵⁴ Additional conditions are not guaranteed and need to be individually negotiated by the employer and employee. The conditions that are no longer covered by a legislative safety net include span and spread of hours, redundancy pay, overtime, shift work penalty rates and annual leave loading.⁵⁵ This is particularly disadvantageous for women who have a weaker bargaining position. In that case they may be dependant on the generosity of their employers.⁵⁶ The

⁵¹ Kevin McDonald, *Struggles for Subjectivity: Identity, Action and Youth Experience* (1999) 41.

⁵² Harris and Williams, above n 3, 209.

⁵³ Zou, above n 27, 21.

⁵⁴ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 171(2).

⁵⁵ Zou, above n 27, 20.

⁵⁶ *Ibid* 21.

protections for female workers with caring responsibilities are reduced, while employers are better able to offer agreements that will best suit their productivity aims.

Furthermore, under *Work Choices* employers can make it mandatory for a new starter to sign an individual agreement. This will impact on women who are required to manage both work and caring commitments. They will not have the ability to negotiate the terms of their agreement as it can be offered on a take it or leave it basis.⁵⁷ Given their bargaining power and economic responsibilities they will not have the opportunity to negotiate for improved standards.⁵⁸ It may be argued that the legislation prohibits duress in connection with an AWA⁵⁹. While this is true, duress as contained in *Work Choices* does not take into account the economic pressures which may be brought on female employees.⁶⁰ When workers have economic responsibility for children there is little choice but to accept employment on the employers terms.⁶¹

5 HOURS OF WORK

For women and their families, working hours are a key issue. In particular women are concerned with the rewards and incentives for work at unsocial times.⁶² In this case *Work Choices* has not achieved a balance in the aims of protection and productivity. This is especially true for women in precarious employment.

⁵⁷ Murray, above n 6, 359.

⁵⁸ Barbara Pocock and Helen Masterman-Smith, 'WorkChoices and Women Workers' (2006) 56 *Journal of Australian Political Economy* 126, 132.

⁵⁹ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 400(5).

⁶⁰ Murray, above n 6, 359.

⁶¹ Pocock and Masterman-Smith, above n 58, 132.

⁶² *Ibid* 136.

Traditionally, women are employed in industries which have been governed by industrial awards.⁶³ They have relied on penalty rates provided by industrial awards for incentives for working unsociable or long hours. This protection is no longer guaranteed under *Work Choices*. The legislation permits an employer to require an employee to work reasonable additional hours.⁶⁴ This provides flexibility for the employer who is increasing productivity and requires extra labour. Unfortunately, while the legislation permits reasonable additional overtime it does not guarantee a rate of pay for overtime worked beyond ordinary working hours. Workers will have to negotiate for these overtime rates and as discussed above this bargaining process is particularly difficult for women in precarious employment.

The absence of rights for employees to negotiate their working time or be compensated for unsocial working time is a serious diminution of their ability to achieve personal and family well being.⁶⁵

Without a guarantee of overtime rates of pay women may experience an increase in longer and unsocial hours of work. This flexibility is advantageous for employers during peak productivity periods. On the other hand, women face increased pressure to balance both family and work commitments.⁶⁶

⁶³ Zou, above n 27, 20.

⁶⁴ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 226(1)(b).

⁶⁵ Pocock and Masterman-Smith, above n 58, 136.

⁶⁶ *Ibid.*

5.1 Flexibility

The term “flexibility” has been applied to working hours in the new labour market. Flexible work arrangements allow ordinary working hours to be arranged by agreement.⁶⁷ *Work Choices* provides for flexible working hours. The legislation guarantees a maximum of thirty eight hours per week of ordinary hours of work.⁶⁸ Flexibility in these hours is permitted in that the employer and employee may agree that the thirty eight hours per week may be averaged over a period of twelve months.⁶⁹

It is argued that this flexibility is more likely to be required of workers than their employers.⁷⁰ These work arrangements provide the employer with the opportunity to meet the demands of productivity when business is busy and reduce labour costs when demand is low.⁷¹ Productivity can be maximised by having people available to work only when it suits the business. This is usually during the most productive times when demand is high and workers are forced to work at maximum output.⁷² For vulnerable workers this flexibility does not equate to their individual ability to have a say regarding their work hours. Instead flexibility is linked to workers responding to their employer’s requirements for working hours.

The argument for these flexible work arrangements is that it allows workers to balance other commitments such as family or study during periods when productivity is low. In

⁶⁷ Owens and Riley, above n 35, 308.

⁶⁸ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 225(1)(a)(i).

⁶⁹ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 225(1)(a)(ii).

⁷⁰ Denniss, above n 1, 149.

⁷¹ Owens and Riley, above n 35, 310.

⁷² Rob White and Johanna Wyn, *Youth and Society Exploring the Social Dynamics of Youth Experience* (2004), 177.

reality, the flexibility of work arrangements under *Work Choices* is more likely to be on the employer's terms.⁷³ Vulnerable workers are expected to respond to highly flexible work hours. This will provide little protection in terms of stability as work will only be available during peak productivity times with no opportunity to request regular hours or expect to receive a regular income.

Work Choices has created an imbalance by lowering the protection of the length of hours of work given by the employer in favour of productivity. This is particularly true where these hours are to be worked to suit the needs of production or service provision. Productivity is foremost encouraged by the legislation as hours can be adjusted to suit the demands of the market. On the other hand, protection has decreased. Women in particular have less time in common to share with their families. Young workers and women in precarious employment will face increasingly unpredictable hours of work.⁷⁴

6 MATERNITY LEAVE

With failure to introduce paid maternity leave in the legislation, *Work Choices* does not address the need for women to balance both work and family commitments.

Australia currently exhibits an inferior policy and regulatory regime for working carers and this inhibits their labour market participation. The absence of a national general entitlement to paid maternity leave is a noteworthy shortcoming.⁷⁵

⁷³ Denniss, above n 1, 149.

⁷⁴ ACIRRT, above n 5, 125.

⁷⁵ Pocock and Masterman-Smith, above n 58, 130.

Women in public education and health sectors and larger private companies have some access to paid maternity schemes.⁷⁶ Women working in female concentrated sectors such as the retail and service industries are least likely to have access to paid maternity leave. This lack of protection together with lower wages generally and less bargaining power increases the pressure on women to balance work and family commitments.⁷⁷

Businesses report that they cannot afford to pay maternity leave without government funding. Tony Steven, Chief Executive Officer of the Council of Small Business Organisation of Australia said that:

business is a commercial operation not a social agency. Maternity leave [has] little to do with productivity and if it is forced on small businesses it will kill them.⁷⁸

Women are choosing to start families later in life so that women have spent many years earning before they have children. They are dependant on their earnings and so families are forced to work in combination with caring for children.⁷⁹ In conjunction with increased flexibility in working hours (for employers) and less bargaining power (for women), *Work Choices* failure to introduce a system of paid maternity leave is another example of the imbalance between protection and productivity.

⁷⁶ Lucie Morns and Anna Saunders, 'Time To Deliver', *Marie Claire* (McMahons Point, New South Wales), July 2007, 70.

⁷⁷ Zou, above n 27, 22.

⁷⁸ Morns and Saunders, above n 76, 72.

⁷⁹ Pocock and Masterman-Smith, above n 58, 126.

7 VALUE OF YOUTH LABOUR POWER

A further example of the imbalance between protection and productivity in Australia's law is the junior wage. In performing its wage setting function the AFPC is to have regard to providing minimum wages for junior employees.⁸⁰ Young people have traditionally been subject to lower wages than their adult counterparts. This is based on the ground that young workers have fewer needs relative to adults. They are economically dependant on the role of their parents. Furthermore, young people possess fewer skills, have less formal training and are generally worth less than adult workers.⁸¹ It is important to note however that minimum wages for junior employees disguise the fact that it is the employer who benefits from such an arrangement. The labour value of young people is lower than other workers regardless of the actual labour output of the individual.⁸² *Work Choices* does not address the youth labour that is appropriated by employers. Instead it formalises the productivity advantages that a youth wage provides at the expense of protection for young people in employment.

8 INTERNATIONAL LABOUR LAW STANDARDS

This essay has argued that *Work Choices* fails to balance the aims of protection and productivity in Australian law. The principles underlying the legislation suggest that productivity is the ultimate aim of the workplace reforms. It is argued, however, that the lack of protections afforded for workers may inhibit Australia's international trading relations and therefore impact negatively on productivity.

⁸⁰ *Workplace Relations Act 1996* (Cth) (*Work Choices*) s 23(d).

⁸¹ White and Wyn, above n 72, 177.

⁸² *Ibid* 177-178.

The International Labour Organisation (ILO) has been critical of Australia's workplace reforms. In particular there is concern that the failure of *Work Choices* to encourage collective bargaining conflicts with the ILO *Right to Organise and Collective Bargaining Convention*.⁸³ *Work Choices* clearly places individual workplace agreements above collective agreements and encourages employers and employees to establish individual agreements in favour of collective agreements.⁸⁴ As discussed above, an employer may require an employee to sign a workplace agreement as a condition of engagement.⁸⁵ Furthermore, while employees are unable to take protected industrial action during the term of an agreement, employers are permitted to offer employees individual workplace agreements that depart from the standard collective agreement in place.⁸⁶ Article four of ILO Conventions states that:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.⁸⁷

⁸³ *Right to Organise and Collective Bargaining Convention 1949 (ILO C 98)*.

⁸⁴ McCallum, above n 42, unavailable.

⁸⁵ Workplace Relations Act 2006 (Cth) s 400(6).

⁸⁶ McCallum, above n 42, unavailable.

⁸⁷ *Right to Organise and Collective Bargaining Convention 1949 (ILO C 98)*, Article 4.

Case 1511 reiterated that Article four requires states to put in place measures that 'encourage and promote' collective bargaining.⁸⁸ *Work Choices* has not balanced the aims of productivity and protection regarding collective bargaining and right to engage in industrial action. The legislation is weighted in favour of community welfare and economic stability over the right to take bargain collectively and to take industrial action.⁸⁹

Work Choices failure to provide a system for balancing work and family further departs from the standards of the ILO in relation to paid maternity leave.⁹⁰ Australia's law provides inferior provisions for balancing work and family, relative to many other industrialised nations.⁹¹ Together with the United States of America, Australia is the only other country in the Organisation for Economic Cooperation and Development (OECD) that does not have legislated paid maternity leave.⁹²

Critics argue that Australia will need to take greater account of international labour law to bring our industrial relations laws into line with ILO standards. Australia's position in

⁸⁸ *Complaint against the Government of Australia presented by the International Federation of Airlines Pilots Association (IFALPA)*, Report No 277 of the Committee of Freedom of Association (*Case No 1511*) 1991. For discussion of this case see Rosemary Owens and Joellen Riley, *The Law of Work* (2007), 467.

⁸⁹ McCrystal, above n 41, unavailable.

⁹⁰ *Maternity Protection Convention, 2000 (ILO C 183)*.

⁹¹ Pocock and Masterman-Smith, above n 58, 130.

⁹² Morns and Saunders, above n 76, 68.

international trade could be negatively affected when it is apparent that our labour laws do not adhere to widely accepted standards of international labour law.⁹³

9 RACE TO THE BOTTOM

It is argued that not all employees will abolish penalty rates, or reduce wages and conditions of employment generally. Most employers will recognise that Australia's laws are unbalanced and do not provide fair conditions.⁹⁴ Economists state that employers cannot force unfair conditions on employees, as when work conditions become unacceptable, employees have alternatives. They can fall back on welfare or other employment.⁹⁵ While this may be the case, it must be recognised that as industries become more competitive and are exposed to cheaper competition internationally, the aim of productivity in *Work Choices* provides employers with the ability to bargain down conditions.⁹⁶ Employers may be forced to match other industry working conditions in a 'race to the bottom to maintain profit margins'.⁹⁷

10 CONCLUSION

In conclusion this essay has explored how the aims of protection and productivity are balanced in Australia's law since the introduction of the *Work Choices* amendments. Careful analysis of the impact of the legislation on youth and women in precarious

⁹³ McCallum, above n 42, unavailable.

⁹⁴ Ibid unavailable.

⁹⁵ Moore, above n 20, 194.

⁹⁶ Fenwick, above n 14, unavailable.

⁹⁷ Zou, above n 27, 21.

employment has provided evidence that these aims are not balanced. Youth and women in precarious employment are most likely to find difficulty in the labour market with its neoliberal principles of individualisation and reliance on market forces.

The former role of the AIRC provided protection in Australia's labour law to the detriment of productivity. Instead, the AFPC aims for productivity in its wage setting role. In turn this will result in increased protection for workers in maximising employment opportunities and generating a strong welfare system. If this argument is accepted then proponents of *Work Choices* make a compelling case that low minimum wages may provide greater employment opportunities for these vulnerable workers. Furthermore low wages will encourage protection as a full employment economy can guarantee a generous welfare system for those excluded from the workforce.

Equally the new labour market defined by its characteristics of individualism and flexibility favour the pursuit of productivity to the detriment of protection. While workers with sought after skills and bargaining know how will be rewarded in the new labour market, this cannot be said for vulnerable workers. Young people and women in precarious employment will be disadvantaged in terms of negotiating with employers. Restraints on collective bargaining further add to the difficulties that these vulnerable workers will face. Traditionally youth and women in casual and low skilled jobs have relied on pay rises and conditions of employment that are granted through the award system or collectively bargained via union intervention. Without these agents, employees

face an imbalance of power in negotiating for conditions of employment as it is tilted in favour of the employer.

Hours of work provided under *Work Choices* provide a noticeable imbalance in the aims of protection and productivity. Flexible work arrangements provided by the legislation ‘enhance a flexibility that goes but one way’.⁹⁸ The youth wage is another factor that formalises productivity advantages at the expense of protection for young workers. Young people predominantly work in retail and service sectors. In these industries the work times and span of hours of work generate casual and part time positions. Hours of work are spread over weekends and late nights and so employers are advantaged by having young workers provide the labour.⁹⁹ The advantages of hiring young labour is evident in flexible working hours, minimum rates of pay and the trade off of entitlements for casual rates of pay.

Work Choices fails to address the dichotomy that women face in balancing both productive and reproductive labour. A paid maternity leave scheme has not been provided. This affects the protection afforded for women in the workplace. Together with the legislations collective bargaining provisions and aims for individualisation in the workplace, failure to provide greater protection for families is inconsistent with ILO principles and objectives. Critics of *Work Choices* are concerned that a failure to meet

⁹⁸ Ellem, Baird, Cooper and Lansbury, above n 47, 25.

⁹⁹ White and Wyn, above n 72, 177.

international labour law standards may negatively affect Australia's international trade relationships.

The aims of protection and productivity are not balanced in Australia's law since the introduction of *Work Choices*. The individualised and market driven provisions of the legislation enhance productivity at the expense of protection. Young people and women in precarious employment will be most affected by this imbalance.

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