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# Australian Industrial Relations in 2005 – The WorkChoices Revolution

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**Abstract:** Industrial relations in Australia in 2005 were dominated by the introduction of the WorkChoices reforms, the most fundamental recasting of the industrial relations system in over 100 years. This analysis examines the rhetoric and reality of the reforms and identifies and summarizes the main features of the changes. It is argued that the implications of the reforms will include an expanded low wage sector, a contraction in collective bargaining and the greater use by employers of individual contracts. The reforms represent a ‘corporatisation’ of industrial relations (McCallum, 2006), commit Australia to a low road labour market development path and signal a new level of politicization of industrial relations. The rhetorical strategies employed by the principal author of the reforms, Prime Minister John Howard, reveal a distinctive construction of the emergent Australian worker – the ‘enterprise worker’ – that is central to Howard’s vision of the future.

**Keywords:** *agreement-making; industrial relations reform; politicization; rhetoric; WorkChoices*

## Introduction

This introduction to the 2005 Annual Review edition of the *Journal of Industrial Relations* overviews the major industrial relations development of the year, the introduction of the WorkChoices reform. Many of the contributions which follow analyse the WorkChoices reforms and their particular implications for

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specific areas of industrial relations practice and policy in greater detail as well as reviewing other key developments throughout the year. Given the significance of the Australian industrial relations reforms announced in 2005, the remainder of this article is devoted to an analysis and assessment of WorkChoices. This edition also provides summaries and assessments of recent industrial relations developments in two other regions – East Asia (in particular, China and Vietnam) and the United Kingdom.

## **WorkChoices – Rhetoric and Reality**

The passing of the WorkChoices reforms by the government-controlled Senate in December 2005 represents the most fundamental revolution in industrial relations since federation. Fundamental industrial relations reform has been a long-held ambition of Prime Minister John Howard. The Government's surprise majority in the Senate secured at the October 2004 federal election provided Howard with the opportunity to realize that ambition. The details of the reforms which emerged in the latter half of the year suggest that he has not squandered the opportunity.

The WorkChoices reforms strongly reflect the personal ideology of Howard. The Prime Minister has long called for fundamental industrial relations and labour market reform and the key elements of his historic mission – greater flexibility in bargaining, decentralization of the industrial relations system, deregulation of the labour market and the restriction of the unfair dismissals jurisdiction – are all addressed in WorkChoices. The personal power of the Prime Minister's position on industrial relations was confirmed by the discipline shown by his Ministers in faithfully repeating his arguments when promoting the reforms throughout the WorkChoices campaign. It also suggests that it might be worth taking a closer look at the rhetoric employed by Howard in fashioning the case for reform.

The rhetoric of the WorkChoices reforms – authored by Howard, disseminated by his government and promoted through a \$55million taxpayer-funded advertising campaign – emphasizes themes of 'freedom', 'choice', 'flexibility' and 'fairness'. According to the Minister for Employment and Workplace Relations, Kevin Andrews, WorkChoices accommodates

... the greater demand for choice and flexibility in our workplaces. It continues a process of evolution, begun over a decade ago, towards a system that trusts Australian men and women to make their own decisions in the workplace and to do so in a way which best suits them. (Andrews, 2005: 12)

While the WorkChoices rhetoric claims that the reforms directly secure greater freedom, choice and flexibility for employers and employees alike, it turns out that 'fairness' will be achieved indirectly, as a consequence of the new system improving Australia's 'economic strength'. The argument here, developed by Howard in a series of speeches throughout 2005, is that 'fairness at work starts with the promise of a job in the first place'. As Howard has been quick to observe, those are not his words, but 'the words of Tony Blair, a social

democrat ...' (Howard, 2005a: 5). According to the rhetoric, by encouraging 'workplace bargaining' and agreement-making WorkChoices will 'strengthen' the Australian economy, which will in turn make it possible for employers to create more jobs and pay higher wages, thus ensuring fairness.

Briggs and Buchanan (2005) have argued that the rhetoric of increased freedom that pervades WorkChoices contrasts starkly with the reality of increased prescriptions and prohibitions. Indeed, the level of detail in the WorkChoices legislation directed toward specifying what can, must and cannot be the subject of bargaining, what can, must and cannot be included in award provisions, as well as the extent of regulation of unions and industrial action is striking. The final version of the *Workplace Relations Amendment (Work Choices) Act 2005* runs to 762 pages and a great deal of other regulation is left to the Regulations to the Act and the discretion of the Minister. Assessing the reforms on the whole, the 'freedom' and 'choice' of the rhetoric turns out to be the freedom of the employer to choose the form of industrial arrangement they prefer, the freedom to decide whether or not they want to make an agreement or leave wages and conditions to the bare minima of the Fair Pay Commission Standards, the freedom to offer individualized Australian Workplace Agreements (AWAs) and the freedom to dismiss workers with less risk of exposure to the unfair dismissals jurisdiction. Employees, for their part, appear to have few new freedoms under WorkChoices, although they now have a greater freedom to trade-off various award conditions or entitlements for other benefits. In formal terms this represents an enhanced freedom to negotiate. In practical terms workers without strong labour market power or without strong collective bargaining more typically confront employers who have designed a set of 'take it or leave it' terms and conditions.

The conception of freedom in WorkChoices is based on the assumption of a relative power balance between the parties in employment relations. In reality, WorkChoices represents a significant repudiation of the logic of labour law itself. In western democracies labour law emerged out of the recognition of the need to protect workers combining in unions to represent their industrial interests and the recognition that labour contracts are qualitatively different from other commercial contracts. The inequality of bargaining power between workers and employers has long been recognized as an axiom of industrial relations and labour law. WorkChoices effectively reduces the scope of labour law in Australia by extending the opportunities for employers to offer jobs with lower pay and poorer conditions, restricting the power of the Australian Industrial Relations Commission (AIRC) to establish and enforce employment standards and reducing the protections and institutional supports traditionally afforded trade unions.

## Major Features of WorkChoices

As a number of the contributions to this year's Annual Review edition of the *Journal of Industrial Relations* attest, the changes implied by the WorkChoices

reforms are complex, multi-faceted and unlikely to become entirely clear for some time. Nevertheless it is already clear that WorkChoices provides for major changes in six key areas of industrial relations law and practice.

### **Changing Constitutional Foundation**

WorkChoices shifts the constitutional foundation for federal industrial relations legislation from the conciliation and arbitration power to the corporations power. Amongst other things this allows the Commonwealth to directly set minimum terms and conditions of employment without recourse to the making of awards in the settlement of an industrial dispute. The new legislation purports to cover the field of industrial relations and will operate to the exclusion of any state laws with some specified exceptions. However, the federal legislation can only apply to 'constitutional corporations' (trading and financial corporations) and their employees. Unincorporated employers who have operated under a state system will continue to do so, as can employers who are not 'constitutional corporations'. It has been estimated that the corporations power does not cover 15 percent–25 percent of Australian workers (Briggs and Buchanan, 2005). Therefore, contrary to the claims of the Government for a single, national and unified system, state systems will persist albeit in truncated form with much more marginal coverage.

### **The Rationalization, Freezing and Withering of Awards**

No new awards can be created by the AIRC. Existing awards will continue in operation until employers and employees negotiate new agreements. However, these awards will be 'rationalized' such that they are limited to the new 13 allowable award matters and do not include any of the identified non-allowable award matters. Awards are effectively frozen by these reforms. Where current awards have provisions that are more generous than the new five statutory minima (established as the Australian Fair Pay Commission Standards [AFPCS] that apply to all employees) these are preserved but they can not be varied at any time in the future. State awards binding constitutional corporations are absorbed into the new federal system and are treated similarly (for further details see Riley and Sarina in this volume).

### **Less Regulated Agreement Making and the Removal of the No Disadvantage Test**

WorkChoices seeks to simplify the making of agreements (AWAs, employee collective agreements, union collective agreements, employer greenfields agreements and union greenfields agreements) by shortening the period of time required for employers to give notice to employees and introducing a process whereby agreements need only to be lodged rather than certified. Significantly, the no disadvantage test (NDT), whereby agreements could

only be certified if they left employees no worse off 'overall' compared to a relevant award, has been removed. In effect, the only protection for employees negotiating (or confronted with) an agreement is provided by the five AFPCS minima.

### **The Marginalization of the Australian Industrial Relations Commission and the Establishment of the Australian Fair Pay Commission**

WorkChoices dramatically recasts the role of the AIRC by all but removing its compulsory arbitral power. Rather than going to the Commission to resolve disputes the parties are required to agree on a dispute resolution procedure of their own. The Commission no longer has any power to make any orders unless it is expressly granted that power in an agreement. The AIRC has therefore also lost its power to hear Safety Net Adjustment cases (and other test cases) and thus lost its power to set effective minimum award wages and other minimum standards. The power to set minimum wages has now been passed to the Australian Fair Pay Commission (AFPC) which has the power to determine its own processes and procedures for setting minima. Commissioners are appointed by the Government for fixed terms. Wage fixing criteria are predicted to focus on narrow macroeconomic considerations (unemployment and inflation) and to no longer make any reference to 'fairness' (Group of 150 Academics, 2005; House of Representatives, 2005). The five basic conditions of employment that constitute the AFPCS are:

1. a federal minimum wage of \$12.75 per hour (with a 20 percent casual loading);
2. ordinary working hours of 38 hours per week (which can be averaged out over 12 months);
3. four weeks annual leave (of which two weeks can be cashed out);
4. 10 days paid sick leave or carer's leave and two days compassionate leave; and
5. 12 months unpaid parental leave (Stewart, 2005: 13–14).

### **Increased Regulation of Unions and Industrial Action**

The anti-union character of the WorkChoices reforms is underlined by the relatively expansive definition of 'industrial action' applied to union action compared to the comparatively narrow definition applied to employer industrial action. Briggs (2005: 20) has argued that this makes Australia the only OECD country to positively discriminate in favour of lock-outs and against strikes. Protected (ie: lawful) industrial action, which can only be taken during a bargaining period, is now subject to an elaborate set of secret balloting and notice requirements. The Minister can also declare an end to a bargaining period on a wide range of grounds. Union rights of entry to workplaces have also been severely restricted. The exposure of unions, union officials and

employees to increased legal sanctions against unprotected action has also been increased (for further details see Barnes this volume).

### **Restrictions on Employee Protection from Unfair Dismissal**

The right of employees to bring an action for unfair dismissal is severely curtailed by the reforms. The right has been eliminated for employees who work for corporations of fewer than 100 employees. Even large employers are protected from the risk of an unfair dismissal claim where they can establish that at least one of the grounds for the dismissal was a 'genuine operational reason'.

### **The Implications of WorkChoices**

While the WorkChoices changes are dramatic it is likely that many of their most profound effects will take some time to become manifest. For example, some of the most pernicious effects will take years to bite at the lower end of the labour market. The combined effect of the freezing and withering of awards, the passing of the minimum wage fixation power to the Fair Pay Commission and the removal of the no disadvantage test for workplace agreements will, in time, lead to lower real and relative wages for Australia's lower paid workers (Watts and Mitchell, this volume). Those 20 percent to 30 percent of workers currently dependent on awards will also suffer a loss of often hard-won industrial conditions as the range of allowable award matters shrinks and award standards stagnate. As those workers are dismissed, made redundant or change jobs they will confront a labour market where many employers are likely prepared to offer only the bare minima of the AFPCS. Realistically, their chances of bargaining a more satisfactory set of conditions and entitlements will depend on their union's ability to overcome the new obstacles to industrial action and collective bargaining and compel their employer to reach a collective agreement rather than unilaterally offer a 'take-it-or-leave-it' AWA – surely an unlikely scenario in the lower paid sectors where unions have traditionally not been strong and where bargaining remains under-developed.

### **An Expanded Low Wage Sector and Increasing Labour Market Inequality**

Lightening the regulation of labour markets, lowering minimum standards to a set of five very basic conditions, establishing an appointed commission to determine a single minimum wage and further weakening trade unions' capacity to negotiate, bargain and fight for higher wages and better conditions will inevitably lead to an expanded low wage sector and lower wages in that sector. This has been the result of similar reforms in New Zealand, Western Australia and Victoria (Briggs, 2005). The resultant increasing labour market inequality will register not just in the form of steadily increasing wage inequality, but also in the form of greater inequalities in conditions and entitlements. Higher paid professional workers with skills in demand will notice little change, although

work intensification, long hours and work–family balance dissatisfaction will all continue unabated. Lower paid workers, protected only by the minimal AFPCS, confront the prospect of fewer award standard conditions and benefits, or the prospect of being offered casual or contract work with even fewer protections and entitlements. Workers with certified agreements and strong union representation will be able to continue to try to bargain with their employers. However the removal of award standards, and the increased regulation of union action tilts the industrial playing field further in favour of employers even in unionized sectors. Thus, at the time of writing, Qantas was reportedly in heated negotiations with the unions representing their maintenance workers over the company's plan to effectively roll overtime into standard working hours by averaging the standard 38 hours per week over a six-month period (Rochfort, 2005: 19).

### **Growth of Individual Contracts and the Contraction of Collective Bargaining**

In their submission to the Inquiry into the WorkChoices legislation, the Group of 150 Academics argued that the likely effect of the proposed legislation 'is not so much to promote agreement-making as it is to promote the individualization of the employment relationship' (Group of 150 Australian Academics, 2005: 20). The reforms encourage employers to introduce individual contracts in the form of streamlined AWAs, employer greenfields 'agreements' and common law individual contracts. There are now strong incentives for employers to move workers from awards and certified agreements to these arrangements given that the abolition of the no disadvantage test means that individual agreements, which can obviously be offered on a take-it-or-leave-it basis, need only meet the AFPC standards. In hospitality, retail and health and community services where there are large numbers of award-dependent employees it is highly likely that employers will move quickly to offer standardized, bare minimum AWAs with fewer entitlements such as loadings and penalties. Moreover there appears to be little to stop employers at the expiration of a certified agreement from offering stripped-back AWAs and refusing to negotiate a new collective agreement. Finally, the capacity of unions to resist these trends will be compromised by the new restrictions on organizing at the workplace and industrial action.

Together, lower relative minimum wages and greater use of individual agreements are likely to have particularly adverse consequences for young people, gender pay equity and work and family dynamics (Group of 150 Australian Academics, 2005). The changes will strike hardest at the most vulnerable in the labour market, disproportionately women and youth. Centrally coordinated industrial relations systems are known to produce the fairest outcomes in terms of pay equity for women; the further fragmentation of the system, the further growth in casual work, and the increased use of AWAs and individual contracts will increase gender pay disparities (Watts and Mitchell, this volume). Despite the rhetoric claiming that WorkChoices will facilitate more flexibility



and therefore better work and family arrangements, the reforms appear to strengthen the hand of employers, rather than employees, in determining flexible work arrangements. The likely shift over time for many workers from award conditions to arrangements that reflect only the new minimum AFPC standards will exacerbate problems with balancing work and family responsibilities. Workers with care responsibilities also face the prospect of losing award conditions relating to public holidays, rest breaks, and leave, penalty, shift and overtime loadings.

### **The Corporatization of Australian Labour Law**

McCallum (2006) has argued that the changes presage the 'corporatisation of Australian labour law' whereby industrial law becomes a 'subset of corporations law and employees would be regarded as little more than actors in the economic enhancement of corporations'. Under this construction, workers come to be seen not as employees with industrial rights, but as individual contractors whose relationship with their employer is a purely commercial contractual one. Other reforms are entirely consistent with this emerging model: the proposed *Independent Contractors Act* will stimulate the growth of independent contracting rather than employment and facilitate the conversion of at least some workers deemed to be employees to contractor status. Simultaneously, the access of employees to specialist tribunals and commissions has been curtailed under WorkChoices and they are increasingly left to pursue their rights and interests in the regular courts.

### **Limited Impact on Employment and Unemployment**

For all the rhetoric about WorkChoices increasing employment growth, the evidence that can be garnered to support the claims of a positive employment/unemployment effect associated with the reforms is slight and unconvincing (Watson, 2004). There is some evidence that lower wage rates lead to some increase in job creation, but of course, where they do, the growth is in low paid jobs at the potential expense of at least some high paid jobs. Very large reductions in real wages are required to have any impact on unemployment. There is no evidence that current unfair dismissal laws affect employment rates and there is no evidence that their restriction will increase job creation.

### **Encouragement of a 'Low Road' Labour Market Development Path**

One of the Government's central arguments for WorkChoices is that it will improve productivity. Indeed this is the lynchpin of the WorkChoices logic – the forms of agreement-making that will be encouraged by WorkChoices will lead to more productive workplaces that will enable employers to pay higher wages and employ more people. Setting aside the question of what employers might choose to do with the surpluses generated by productivity

improvements, the evidence for the link between level of agreement-making and productivity is limited (Addison and Belfield, 2001; Preston and Crockett, 2004). Productivity growth in Australia did indeed increase in the 1990s following the introduction of enterprise bargaining, as Howard (2005a) in a rare reference to 'evidence' has observed, however as Buchanan (2004) and others have argued this is probably linked to employers' more intensive use of labour under conditions of chronic understaffing. In any event, there is no evidence that productivity is linked to individual contracts. As the submission of the 150 academics argues, Government arguments linking improved productivity to bargaining often conflate individual and collective bargaining under the heading of 'workplace bargaining'. Thus Howard (2005a) refers to BCA research showing that enterprise bargaining firms increased productivity faster than award firms. First, this ignores the impact on productivity of a multitude of other potentially significant variables. Second, enterprise bargaining firms in Australia since the early 1990s have overwhelmingly undertaken collective bargaining rather than individual contracting. WorkChoices, as argued above, works to encourage *individual* contracting rather than *collective* bargaining. Moreover, by facilitating the growth of low paid work, WorkChoices sets Australia more clearly on the 'low road' of labour market development – strong growth in jobs with low skills, low discretion, limited training and development, underdeveloped career paths and limited capacity to add value. Under these conditions employers tend to pursue low cost, rather than high investment, labour usage strategies. Not only is this bad for individual workers in the lower half of the labour market, it is bad for the economy in the long run, and is likely to exacerbate Australia's problems with skill shortages and gaps.

### The Politicization of Industrial Relations

While industrial relations is inevitably political, the WorkChoices reforms mark a new level in the executive's control over this area of policy and a new frontier in Howard's politicization of key Australian public institutions. The marginalization of the quasi-judicial and independent Industrial Relations Commission in favour of institutions such as the AFPC and the Office of the Employment Advocate, which are less independent of government, is one of the remarkable features of WorkChoices. Even more alarming is the extent to which the WorkChoices legislation affords significant discretion to the Minister. For example, as highlighted by Riley and Sarina in this volume, s. 356 of the Act gives the Minister unfettered discretion to declare at any time a matter to be 'prohibited content' for the purposes of agreement making and any attempt to include such content in an agreement attracts a fine of \$33,000. Added to this is the Ministerial discretion to declare an end to a bargaining period thus rendering any further industrial action unlawful.

As noted at the outset of this analysis, by relying on the corporations power in the Constitution, the Howard Government has opened up the way for more direct regulation of the terms and conditions of employment in Australia than

has hitherto been the case. Amongst other things, this also opens up the way for a future government of a different political persuasion to directly legislate on the basis of ILO conventions and to set labour standards that many might see as more appropriate for a modern economy and a civilized society. There would seem no reason why a future Government could not use the AFPC standard as the basic framework for a much more detailed and progressive set of labour standards setting a benchmark for the entire economy, augmented by a more comprehensive set of industry awards.

The WorkChoices reforms represent a new level of politicization of industrial relations in another sense – the legislation almost perfectly implements the key industrial relations reforms proposed by the major employer lobby groups. While the major employer associations have long called for the need for further industrial relations reform, it was only in 2005 as the extent of the Government's willingness to move on IR became apparent that the major employer groups fashioned specific wish lists. As Hearn Mackinnon's chapter in this volume makes clear, the major employer groups were ultimately 'enormously successful' in getting their main proposals implemented. Little wonder perhaps, given that the Department of Employment and Workplace Relations chief counsel conceded that the country's largest law firms, which represent Australia's largest corporations, were seconded to assist the Department in drafting the legislation (Hearn Mackinnon, this volume).

## **WorkChoices – What's Behind the Rhetoric?**

At first glance, then, WorkChoices might appear to be simply a blatant and virulent expression of Realpolitik. Indeed the legislation can be read as a checklist of employer reform proposals and reactions to AIRC and tribunal decisions that have gone against employers. However this may well underestimate the deeper significance of the WorkChoices revolution.

While rhetorical analysis has not been a traditional research method in industrial relations scholarship, a study of the rhetoric employed by Howard in the WorkChoices debate throughout 2005 reveals some distinctive conceptions of the contemporary Australian worker, the role of government and public institutions and the relationship between work and family life.

In a speech on 22 March 2005 Howard argued that substantial industrial relations reform was needed in order to 'consolidate the transition of the Australian economy from an economy governed by a centralized approach to industrialisation [sic] and wage fixation to one that is truly and fully enterprise based'. In a speech on 11 July 2005 Howard linked his notion of the emergent 'enterprise based economy' to his image of the emergent Australian worker, captured in his phrase, 'the rise of the enterprise worker'. In an example of rhetoric that quite remarkably echoes Menzies' famous 'forgotten people' speech of 1942, Howard defines and appeals to this 'new breed' of worker.

These Australians do not fit neatly into categories based on age, or geography, occupation or industry, income level or formal qualification. They are white collar

and blue collar. They work each day in our factories, our small businesses, our great service companies, our farms and our mines. Some choose to be trade unionists, many do not. Most are traditional employees, while a growing number have embraced the independence and flexibility of working for themselves ... [they] include the knowledge workers ... the providers of personalized services reshaping our society with little more than initiative, a mobile phone and a computer... What unites our enterprise workers, and what has helped lift Australia's economic performance, is an attitude of mind. They recognise the logic and fairness of workplaces where initiative, performance and reward are linked together.... They have a long-term focus, knowing that short-term gains without regard to productivity are illusory if the result is inflation and jobs at risk. Most importantly they grasp that high wages and good conditions in today's economy are bound up with the productivity and success of their workplace. (Howard, 2005a: 2)

In this important passage, Howard is using the rhetorical strategy of 'strategic ambiguity' – 'enterprise worker' might be taken to imply a worker who is 'enterprising' in the sense that they have a strong entrepreneurial spirit and sense of self-reliance, or alternatively, a worker who recognizes that their fortunes are tied to the fortunes of the enterprise that employs them. The former construction justifies an industrial relations regime where elaborate protections and industrial rights are regarded as old-fashioned and unnecessary obstacles to entrepreneurial initiative. The latter justifies a privileging of the workplace-cum-corporation as the appropriate site for agreement making and its promotion as the key focus for law and policy. Underlining McCallum's identification of the corporatization of labour law, it follows that Howard sees the advancement of the corporation rather than the protection of the individual worker as the true object of industrial relations policy.

Later in the same speech, Howard draws a distinction between what he terms 'labour market insiders' and 'outsiders'. The former, he suggests, are permanent, full-time, unionized employees who have long been protected by the industrial relations system to the detriment of the 'outsiders' – the unemployed, the battlers, the willing new entrepreneurs who have been shut out of the labour market by archaic industrial relations practices, especially the 'job-destroying unfair dismissal laws'. In similar vein Howard also takes aim at 'the industrial relations club' and praises Gerard Henderson for having been prepared to strip away 'layers of mythology from a system that was failing our country on the scales of prosperity, of fairness and (ultimately) democracy'.

Howard's rhetorical creation of the enterprise worker and the enterprise based economy does not simply end with the new industrial relations system implied by WorkChoices. It also links to his proposed *Independent Contractors Act* which will facilitate the further expansion of the ranks of contractors (Department of Employment and Workplace Relations, 2005), his welfare to work policies which will help feed the labour demand for the increasing number of low paid jobs implied by WorkChoices (Briggs, 2005), and his work and family policies, or lack thereof. In Howard's rhetoric, WorkChoices actually addresses the need for work and family policies. In the first place it promotes a stronger economy and 'economic security is an important ingredient in the

enjoyment of a fulfilling family life' (Howard, 2005b: 4). In the second place WorkChoices better allows workers to negotiate at the workplace level the flexible terms and conditions of employment that will permit them to balance work and family. Ironic then that the reality that gives lie to this central rhetorical claim of individual negotiation at the workplace was conceded by one employer representative at the Senate Inquiry who admitted that 'virtually no real bargaining took place in the non-collective stream' (Hearn Mackinnon, this volume).

Ultimately, while Howard relied heavily on rhetoric in promoting the WorkChoices reforms in 2005, his plan amounts to much more than 'mere rhetoric' or political opportunism. An examination of Howard's rhetoric suggests that it is more than just an (unsuccessful) attempt to persuade the electorate. It reveals the place of industrial relations policy in a broader, more encompassing vision of the role of the state, the market and the family. And this – Howard's vision – is the real revolution at the heart of WorkChoices.

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