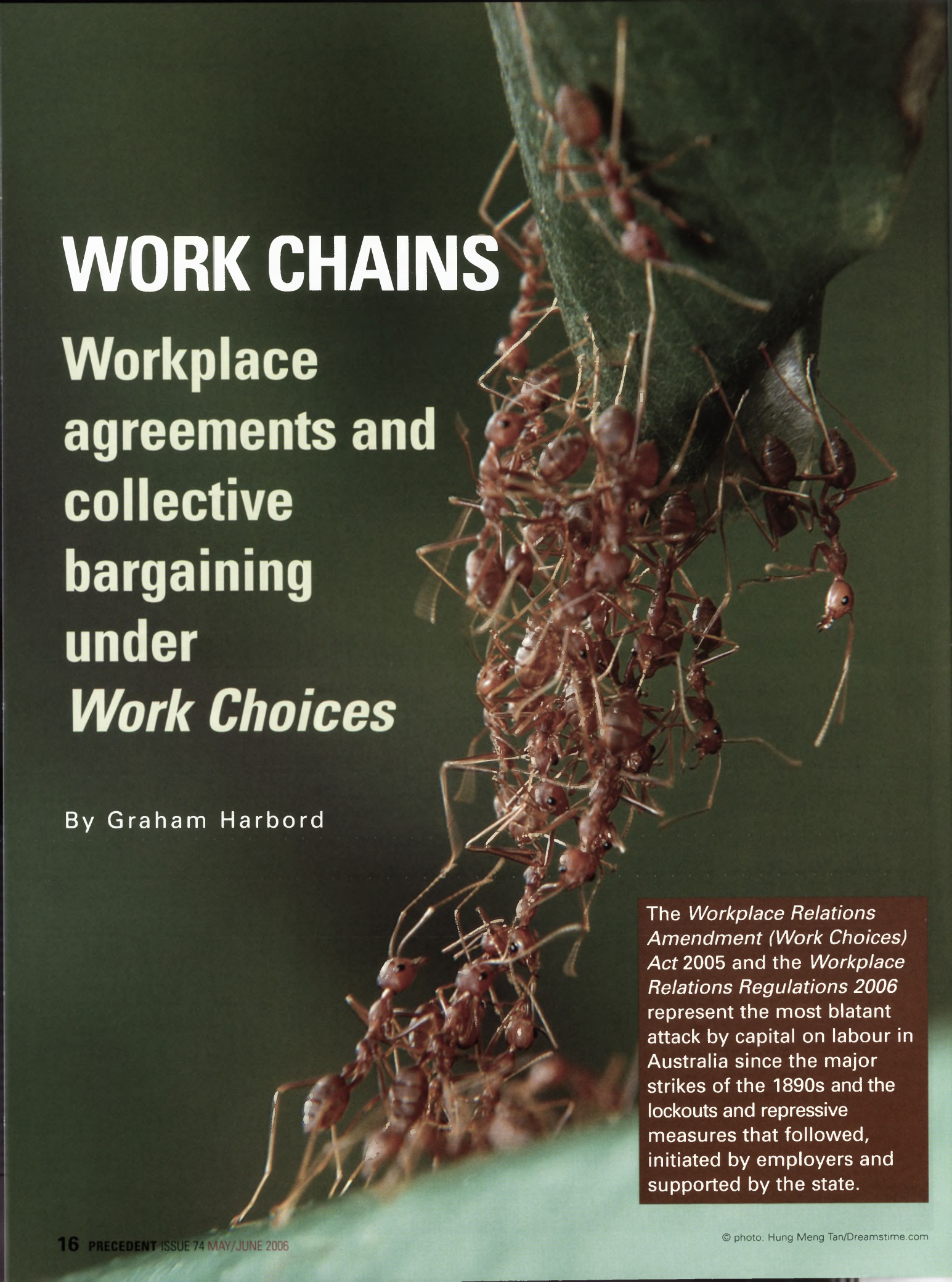
WORK CHAINS

Workplace agreements and collective bargaining under *Work Choices*

By Graham Harbord



The *Workplace Relations Amendment (Work Choices) Act* 2005 and the *Workplace Relations Regulations 2006* represent the most blatant attack by capital on labour in Australia since the major strikes of the 1890s and the lockouts and repressive measures that followed, initiated by employers and supported by the state.

The very term, 'work choices', in the title of the Act, is another example of double-speak by the federal government. The government claims that the Act will simplify and deregulate the industrial relations system. In fact, the Act is an extremely complex and confusing document that substantially limits the freedom of action of workers and their unions to participate in effective collective bargaining with employers. The Act makes it virtually impossible to strike or take other industrial action in support of claims.

This article focuses on 'workplace agreements' as defined by the Act. However, workplace agreements are just one part of the comprehensive assault by the federal government and its supporting employer organisations against the rights of workers and unions.

The principal aims of the Act clearly contradict what many commentators towards the end of the 20th century perceived to be a trend towards a social partnership between capital and labour. This trend probably reached its zenith in South Australia under Don Dunstan, with the developments towards industrial democracy, and nationally with the implementation of the accords between the ACTU and the federal government of the time. The *Work Choices* amendments negate any concept of partnership, but rather put in place a highly regulatory regime giving the government and employers control over employees and unions.

The current federal government has damaged Australia's status and respect on the international stage, and called into question its support of international institutions such as the United Nations and the International Labour Organisation (ILO). Indeed, the Act deliberately undermines Australia's obligations under the ILO conventions, and represents a rejection by the Australian Government of attempts by the ILO to establish fair and uniform rights and conditions for workers.

WORKPLACE AGREEMENTS

It should be noted at the outset that the Act applies to employees of 'constitutional corporations' – that is, trading or financial corporations – and certain other employees, such as those employed by an employer in a territory. The Act does not apply to employers such as charitable associations or sole traders, which may still be subject to state laws and jurisdiction.

The Act defines six types of what are generically termed 'workplace agreements':

1. *Australian Workplace Agreements* (AWAs) are individual agreements between an employer and an employee. Unlike AWAs under the former legislation, the contents of new AWAs will not have to equate to or improve on the safety net of the relevant award and/or certified agreement. Rather, they will have to satisfy only five minimum conditions in accordance with the Australian Fair Pay and Conditions Standard, as provided for in Part VA, Divisions 2 to 6 of the Act:
   (i) basic rate of pay and casual loadings;
   (ii) maximum ordinary hours of work;
   (iii) annual leave;
   (iv) personal leave; and
   (v) parental leave and associated entitlements.
2. *Employee Collective Agreements* are collective agreements between an employer and two or more employees in a particular business. The majority of employees must vote in favour of such an agreement, or at least execute the agreement.
3. *Union Collective Agreements* are collective agreements between an employer and one or more of the trade unions that have members with that employer.
4. *Union Greenfields Agreements* are collective agreements between an employer and a union or unions that are made prior to the employment of any employees by a new business.
5. *Employer Greenfields Agreements* are 'agreements' made by an employer establishing conditions of employment prior to the employment of any employees. The term 'agreement' is really a misnomer, as it is in fact simply a unilateral prescription of conditions by the employer. It has a nominal expiry date of only 12 months.
6. *Multiple Business Agreements* may be collective agreements or greenfields agreements that cover more than one business.

It is important to note that workplace agreements will totally displace awards during the period of their operation. This means that the provisions of a previously relevant award will have no effect, even where they would once have underpinned or provided a safety net in relation to certified agreements. >>

The very title of the Act, 'Work Choices', is another example of double-speak by the federal government.

Furthermore, AWAs prevail over collective agreements. An employer and an employee may make an AWA at any time which, once entered into, will stipulate all of the employee's terms and conditions and replace any collective agreement already in place. The previous 'no disadvantage test', whereby the Employee Ombudsman was supposed to certify that an AWA would have effect only if it did not contain terms less favourable than those in an award or a certified agreement, has been abolished.

By allowing individual agreements to take precedence over collective agreements, and removing any independent scrutiny of the terms of AWAs, the government is attempting to weaken the ability of employees to organise to improve wages and conditions. With its 'divide-and-rule' strategy, the government is seeking to drive down the costs of labour for the benefit of employers and to the disadvantage of workers.

The Act and the Regulations have also prohibited the inclusion of a range of matters from workplace agreements. Moreover, a person is guilty of an offence if they seek to include prohibited content in such an agreement, or even if they are reckless as to whether a term they are seeking to include contains prohibited content.

The Regulations define 'prohibited content' as including:

- deductions from wages for trade union membership subscriptions;
- trade union training leave;
- paid leave to attend meetings conducted by trade unions;
- rights of entry for union representatives;
- restrictions on the engagement of independent contractors of labour hire workers;
- terms that discourage or encourage union membership;
- terms that permit a person bound by the agreement to engage in or organise industrial action;
- terms that provide for remedies for unfair dismissal; and
- matters that do not pertain to the employment relationship.

The Minister has the power to add to these prohibited matters by further regulation.

An employer must not apply duress to an existing employee in connection with an AWA. However, the Act – in another example of double-speak – states that it is not duress to require a new recruit to sign an AWA as a condition of employment.

There are many complex provisions concerning transitional arrangements for federal and state awards and industrial agreements. These are set out in particular at schedules 13, 14 and 15 of the Act. A detailed discussion of these provisions is beyond the scope of this article. In brief, however, a state industrial agreement is deemed to be a 'transitional federal agreement' and its provisions continue to apply for the time being (except for any prohibited content, which is void). It can be replaced at any time, however, by a new federal workplace agreement. A current federal-certified agreement will continue to apply but, again, parties may enter into new collective agreements or AWAs at any time, which will displace any certified agreement.

Workplace agreements may continue to apply for a period of five years, except for employer greenfields agreements, which may apply only for one year. After the nominal expiry date, any party may terminate an agreement upon giving 90 days' written notice.

COLLECTIVE BARGAINING

There is no obligation under the Act for any party to negotiate 'in good faith'. Furthermore, there is no requirement for an employer to negotiate with a union. Under the provisions of the Act, the Australian Industrial Relations Commission (AIRC) will have greatly restricted powers to intervene in a dispute or to arbitrate.

The ability of a union or its members to take industrial action in support of its claims is now severely limited in a number of ways. As with the previous legislation, 'protected' industrial action may occur only during a bargaining period. The bargaining period will commence seven days after notice is given by either party and will end when an agreement is made or notice withdrawn, or when the bargaining period is terminated. Under the Act, the AIRC must suspend or terminate bargaining in a number of circumstances, including where it considers a party is not genuinely trying to reach agreement, or where industrial action is being taken that endangers public safety or the economy or part of the economy. Furthermore, the AIRC must order the suspension of the bargaining period if it considers that industrial action is causing significant hardship to another party. If part of the log of claims includes prohibited content, the industrial action will not be protected.

A further significant change under the Act is that a secret ballot must be held before approved protected action may be taken. A party must give at least three working days' notice before protected action may be taken. The notice must specify the nature of the intended action and the day it will begin. To be valid, at least 50% of the employees eligible to vote must participate in the vote, and more than 50% of those votes must approve the action. Following that ballot, the industrial action must commence within 30 days.

Nor will industrial action be protected if it is taken for the purpose of pattern bargaining – that is, where a union is seeking common wages and conditions for more than one business.

In addition to all the restrictions referred to above, the Minister has the power simply to make an executive order declaring that a bargaining period is terminated or prohibiting certain actions.

IN BREACH OF ILO CONVENTIONS

The ILO was established following World War I, with the aim of promoting fair employment conditions and practices across all member countries. Australia was one of the foundation members and has ratified most of the core ILO conventions. These include the Freedom of Association and the Right to Organise Convention, No. 87, and the Right to Organise and Collective Bargaining Convention, No. 98. A fundamental principle of membership of the ILO is 'freedom of association and the effective recognition of the right to collective bargaining' (ILO Declaration on Fundamental Principles and Rights at Work, adopted at the ILO conference in 1998).

The Act contravenes fundamental rights set out in conventions to which Australia is a signatory. For example, the prohibition of the range of matters that may be included in workplace agreements constitutes a restriction on collective bargaining which is a clear breach of ILO Convention 98.

The prohibition on 'pattern bargaining' breaches ILO Conventions 87 and 98 because it prevents employees and unions from bargaining and initiating industrial action in support of a multi-employer or industry-wide collective agreements.

Furthermore, by eliminating any remedy for unfair dismissal by employees who are employed by corporations with 100 or fewer employees, and in prohibiting the inclusion of remedies for unfair dismissal in workplace agreements, the federal government is also in breach of the ILO Termination of Employment Convention (No. 158).

By undermining such important human rights that are fundamental to these Conventions, the federal government has damaged any moral authority that Australia might otherwise claim in seeking to criticise other countries for their failure to comply with international standards. As Australia has played a significant role in the ILO in the past, its breaches of core standards of the ILO could lead to a serious weakening of the role of the ILO in the future.

CONCLUSION

Significant strikes and industrial unrest have often occurred towards the end of long cycles of economic boom. Employers, generally with the support of the state, have sought to take greater control over the labour process in order to reduce wages and conditions as a result of declining profit rates.

It is likely that the attack on labour, which the Act initiates, is an attempt by the interests of capital to position themselves for the next inevitable economic downturn.

It is also likely that the Howard Government is seeking to implement this new legislation as part of its free trade and globalisation agenda. It is clear that one government objective is to drive down labour costs in this country. In moving to a low-cost basis for competitiveness, however, rather than seeking to promote a smarter and more efficient work environment, it is probable that Australia will become less competitive in the world market over the longer term. It is doubtful that Australia will ever be able to compete simply on a low-wage cost basis with those countries in Asia or Africa that have a much lower standard of living.

The Act is a deliberate attempt to transfer significant power to employers and capital, and amounts to gross injustice to employees and their unions. It remains to be seen if, and to what extent, labour will be able to organise collectively to counteract this injustice. ■

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