

# Workplace Rights Advocate



WorkChoices & Workplace Rights in Victoria  
Evidence from the Workplace Rights Information Line



OFFICE OF THE  
**WORKPLACE RIGHTS**  
ADVOCATE

A Victorian  
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initiative



# ***WorkChoices & Workplace Rights in Victoria***

**Evidence from the Workplace Rights Information Line**

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***Report to the Office of the Workplace Rights Advocate***

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## A. Summary of Findings

This Report was commissioned by the Office of the Workplace Rights Advocate (hereafter the "OWRA"). Our brief was to investigate the extent to which the *Workplace Relations Amendment (WorkChoices) Act 2005* (hereafter "the *WorkChoices Act*") has changed industrial relations practices in Victorian workplaces.

The *WorkChoices Act* undermines a range of workplace rights, previously protected by law. The primary concern, therefore, was to investigate how employers had, in the months since the *WorkChoices Act* has taken effect, used the new prerogatives the legislation provides to them to change their industrial relations practices.

In particular, we are concerned with identifying the types of issues where employees feel they have been treated by their employer in an inappropriate or unfair manner, or even in a way that breaches the legal obligations owed by an employer to their employees.

The primary means by which these effects are investigated is through an analysis of data collected from calls made to the Workplace Rights Information Line (hereafter "WRIL"), which was established at the beginning of March 2006.

It should be kept in mind that the research undertaken for this Report does not look specifically at movements in wages or changes in conditions and entitlements in agreements.

The focus here is on calls made by employees: the types of issues raised by employees with the Workplace Rights Advocate through the Workplace Rights Information Line; the characteristics of employees raising concerns about their employment rights; and the types of firms about which these issues are being raised.

There is already growing evidence on how employers are using WorkChoices, including case studies reported in the press, research undertaken by the federal Office of the Employment Advocate, research commissioned by government agencies, as well as opinion poll research. Although none of this research is comprehensive, it does suggest that many employers are willing to use the *WorkChoices Act* to undermine work rights and standards.

The *WorkChoices Act* is likely to have a more immediate impact in Victoria than other States because of the extent of labour market deregulation undertaken during the 1990s and the limited protections given to Schedule 1A workers, compared with federal Award employees.

The WRIL data therefore adds considerably to this emerging picture.

### *Main findings*

The main finding drawn from this research is that, irrespective of gender, age, occupation, industry, length of tenure, and workplaces size, employees are reporting difficulties in maintaining employment standards after *WorkChoices*.

- The major issue of concern by a significant margin is job security and the growing risk of being dismissed. **Around 1 in 5 calls to WRIL relate to dismissal.**

- The next most significant issue that employees are making complaints to the WRIL service about are issues of procedural fairness; i.e., the way an employer deals with them and makes decisions about their conditions at work. **Around 1 in 10 calls relate to procedural fairness.**

#### Gender

- Women and men are equally likely to experience problems, however:
  - men are significantly more likely to report a problem over dismissal, while
  - women were more likely to call about discrimination & harassment issues.

#### Age

- Young workers were significantly less likely to call WRIL.
- Prime aged workers aged between 25 and 44 accounted for around 40 percent of all calls.

#### Occupations

- Labourers and sales and personal services workers were the two largest occupational groups of affected persons (18.8 and 18.7 percent, respectively).
- Around one in five cases involved professionals and managers and administrators.

#### Employment status and tenure

- Over half of all cases involved full-time employees.
- More than one in five cases involved workers with tenure of less than one year.
- Just over one-third of all cases involved workers with tenure of between two and five years.
- A further 23.3 percent of cases involved workers with more than five years tenure.

#### Industry

- Service-based industries accounted for six of the seven most affected industries.
- But manufacturing was the second highest affected industry accounting for 9.4 percent of all cases.

#### Workplace size

- Workplaces with less than 20 employees account for 40 percent of all cases.
- More than 80 percent of all cases involved workplaces with less than 100 employees.

#### The nature of problems faced

- The problem of dismissal and termination dominates: it accounted for around 20 percent of all problems reported to WRIL between March and August.
- Procedural fairness complaints account for a further 10 percent of all calls.

## *WorkChoices and Workplace Rights in Victoria: Evidence from the WRIL Data*

- Underpayments of wages (8.2 percent), leave arrangements (8.5 percent), discrimination and harassment (7.7 percent), along with complaints about common law agreements (9.1 percent) and AWAs (5.3 percent) represent the next largest categories of reported problems.

### Dismissal problems

- A small number of industries account for the majority of dismissal problems reported to WRIL: personal and other services (17 percent of all dismissal problems reported), health and community services (12 percent), government administration and defence (10 percent) and retail (10 percent).
- Individuals on common law contracts account for 25 percent of all dismissal problems reported to WRIL.
- Employees with two to five years service were twice as likely to report a dismissal problem as any other tenure range.
- Workplaces with less than 100 employees account for more than 80 percent of all problems relating to dismissal.

### The changing profile of cases and problems reported

- Both older and younger workers represent an increasing proportion of all cases.
- Reports from workers in small workplaces are also increasing as a proportion of all cases.
- The proportion of cases involving workers with tenure of less than one year has doubled since March.
- Whereas the proportion of cases involving workers with two or more years has remained static.
- Both unskilled and highly skilled occupations account for an increasing proportion of cases.
  - The proportion of all cases involving labourers and other workers, and managers and administrators has doubled since March.
  - The proportion of cases involving para-professionals and clerks has increased by slightly less than three-fold since March.
- The proportion of cases emanating from property and business services has increased from just 3.4 percent in March to 13.8 percent of all cases in August.
- The proportion of problems relating to dismissal not only account for the largest number of problems reported, but are increasing as a proportion of all problems reported.
- A number of other problem categories are becoming increasingly important: discrimination and harassment, procedural fairness, leave arrangements and problems relating to common law agreements.

## B. Background to the study

1. The functions of the OWRA are set out in the *Workplace Rights Advocate Act 2005 (Victoria)*. This law established the OWRA to “provide information about, and promote and monitor the development of, fair industrial relations practices in Victoria.”
2. In pursuit of this objective, the Advocate is vested with a range of functions, including:
  - (a) to inform, educate and consult with Victorian workers, employers and their representatives about rights and responsibilities in relation to work-related matters;
  - (b) to facilitate and encourage fair industrial treatment of workers in Victoria;
  - (c) to promote informed decision-making by Victorian workers and employers;
  - (d) to investigate illegal, unfair or otherwise inappropriate industrial relations practices in Victoria; and
  - (e) to make representations to an appropriate person or body in relation to work-related matters.
3. The formation of the OWRA was a direct response to the Federal Government’s *WorkChoices* policy first announced by the Prime Minister in May 2005, and outlined in detail in October 2005.<sup>1</sup> This policy was subsequently introduced into the Parliament as a Bill to amend the *Workplace Relations Act 1996* on 2 November 2005. The 687 page Bill received royal assent and passed into law on 14 December 2005 as the *Workplace Relations Amendment (WorkChoices) Act 2005* (hereafter, “the *WorkChoices Act*”).<sup>2</sup> While some of the provisions of the *WorkChoices Act* took effect from the date of assent, most of the provisions in the *WorkChoices Act* came into operation from 27 March 2006.<sup>3</sup>
4. This legislation represents the most significant change to Australian industrial laws in more than a century. The *WorkChoices Act* overturns the traditional hierarchy of industrial instruments regulating work and employment. Traditionally, awards and collective agreements took precedent over individual agreements, and limited the ability of an employer to unilaterally reduce terms and conditions below established standards. The *WorkChoices Act*, however, provides employers with extended capacity to displace

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<sup>1</sup> Commonwealth of Australia, *WorkChoices - A Simpler, National Workplace Relations System for Australia*, available at < <https://www.workchoices.gov.au/ourplan/order/>>. Last accessed 20 September 2006.

<sup>2</sup> In addition to the legislation itself, the Minister gazetted three new sets of regulations, which also commenced operation on the same day: The *Workplace relations Regulations (2006)*, the *Workplace Relations (Registration and Accountability of Organisations) Amendment Regulations 2006 (No 1)* and the *Workplace Relations Amendment (WorkChoices) (Consequential Amendments) Regulations 2006 (No 1)*.

<sup>3</sup> Stewart, A and Priest, E *The WorkChoices Legislation: An Overview*, Supplement to *Labour Law* 4<sup>th</sup> edition, The Federation Press, Sydney (2006), available at <[www.federationpress.com.au](http://www.federationpress.com.au)>. Last accessed 20 September 2006.

standards established in awards and collective agreements by replacing awards and collective agreements with individual contracts.

5. Although many of the legislative changes introduced during the 1990s allowed greater capacity to employers and employees to utilise individual and non-union agreements, the law contained a number of important safeguards, such as the “No Disadvantage Test”, which served to prevent a competitive reduction of employment standards or an attempt by one party to force agreement under duress. Most of these safeguards have now been removed by the *WorkChoices Act*.
6. The *WorkChoices Act* does not *require* employers to cut standards. Indeed, the principal purpose of the *Workplace Relations Act* is “to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia”<sup>4</sup>
7. It is not clear how the *Act* creates a ‘framework for cooperative workplace relations’; there are no specific mechanisms which can be viewed as unambiguously doing so. There are significant changes, which might be construed as providing employers with the capacity to develop innovative and cooperative workplace relations. However, these same changes provide even greater opportunity and, possibly, greater incentive, to pursue workplace arrangements designed to reduce labour costs through the removal of benefits and entitlements.<sup>5</sup> In particular, the *WorkChoices Act* provides employers with:
  - greater flexibility in deciding the form of industrial instrument under which they engage employees;
  - greater discretion in determining the terms and conditions of employment, underpinned by a diminished set of minimum terms and conditions;
  - the ability to reduce wages and entitlements as a labour cost cutting measure;
  - the capacity to introduce workplace change without consultation with employees or their representatives; and
  - the ability to change conditions of work, such as working hours, without negotiation or union involvement, even though employees may request such representation or the majority of employees are union members.

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<sup>4</sup> *Workplace Relations Amendment (WorkChoices) Act 2005*, section 3.

<sup>5</sup> A Forsyth, P Gahan, J Howe and R Mitchell, ‘Regulating for Innovation in Production and Employment Systems: A Preliminary Discussion of Issues and Themes,’ Paper presented to the 3<sup>rd</sup> Australian Labour Law Association National Conference, Brisbane, 22-23 September (2006).

8. The overwhelming majority of expert opinion among legal and industrial relations scholars is that the *WorkChoices Act* is likely to undermine workplace standards because of the stripping back of many of the protections and rights previously enjoyed by employees.<sup>6</sup>
9. The central question this study sought to investigate, therefore, was whether employers had taken advantage of this opportunity to change industrial relations practices in Victorian workplaces. In particular, this study was concerned to determine whether employers had used the *WorkChoices Act* to undermine employment standards, and introduce unfair, inappropriate or even illegal industrial relations practices.
10. There is simply no adequate basis on which we can make a conclusive assessment of how employers have used the *WorkChoices Act* at this stage. Although a number of research studies are currently under way around the country, at this point there is no study which provides a systematic assessment of data or available evidence, even in terms of its preliminary effects. This study represents a first attempt to do so using data from the WRIL service.
11. Before the findings of the analysis of this data are described, it is useful to know a little more about the WRIL data and what can, and cannot, be learned from it.

### **C. The Workplace Rights Information Line data**

12. The WRIL service was established by the OWRA to advise both employers and employees about their workplace rights. It commenced operation at the beginning of March this year.
13. WRIL is a telephone, letter and 'walk-in' based service for Victorian employers and employees. WRIL provides information to employees about the federal industrial relations laws, particularly for employees who face reductions in their terms and conditions of employment, or who face unilateral changes in employment arrangements. The information service also provides information to employers about fair industrial relations practices.

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<sup>6</sup> There is already a voluminous published literature on the new legislation. Four Australian journals – *Journal of Australian Political Economy* (Volume 56), *UNSW Law Journal* (Volume 29(1)), *Economic and Labour Relations Review* (Volume 16(2)) and, most recently, *the Australian Journal of Labour Law* (Volume 19) – have all published special issues analysing various aspects of the legislation.

14. Since its inception to the end of August, the WRIL service has received almost 1500 calls. Of these, the vast majority have been from or on behalf of employees. Of these, the overwhelming majority of calls have involved employees seeking advice concerning an employment problem where they feel their employer is behaving inappropriately, unfairly or illegally.

*Definitional issues*

15. For the purpose of undertaking the analysis reported here, records relating to all calls received from an employee and which involved a complaint or disclosure of a problem with an employer action or behaviour are included in our analysis. We do not include calls made by employers. Nor do we include the small number of calls made by either an employee or employer resident in another State.
16. The rest of the report will distinguish between callers, affected persons, calls and problems.
  - **Callers** refer to the person who made the call to WRIL. Typically, the caller was the person directly experiencing a problem at work. This was not always the case, however, as we report below.
  - **Affected persons** refer to the person directly experiencing a problem at work and on whose behalf a call was made. The caller was not always the affected person.
  - **A call or case** refers to a single telephone call or number of calls made to WRIL about the same problem. This Report also refers written communications, 'walk-in' reports as 'calls', so long as they involve reporting a problem or complaint to WRIL.
  - **Problem** is defined as an issue or complaint reported by a caller on behalf of themselves or another affected person. Typically, most cases involved a single problem; however, in more than one third of all cases, two or more problems were reported.
17. The total number of cases analysed for this study is 1367, or an average of nearly 230 cases per month.
  - These 1367 cases reported more than 2100 problems about employer actions which were considered to be inappropriate, unfair or illegal. This represents around 350 problems reported to WRIL per month.
18. Before going on to describe the results of the analysis undertaken, there are two issues worth commenting on, both of which affect how this data can be interpreted: the 'representativeness' of callers to WRIL; and the question of whether it is simply too soon gauge the effects of the *WorkChoices Act*.

#### **D. The representativeness of calls to WRIL**

##### *Non-disclosure of personal information*

19. The task of analysing the data was complicated by the fact that in a relatively large number of cases information about the affected person was not disclosed to WRIL service operators by the person making the call. Typically, around 20 percent of cases did not provide a response to these questions.

##### *The 'fear factor'*

20. WRIL service operators taking calls indicated that this problem of unwillingness to disclose private information in many cases reflected a degree of fear about the potential ramifications of doing so. The primary concern appeared to be a fear that reporting a problem could be risky and costly to the affected person. This fear reflected a perceived risk that the call might be disclosed to the employer involved, who might then take action being against the affected person. Fear of dismissal for reporting a problem appears to be evident in a significant number of cases.
21. It is quite possible that this 'fear factor' means that many more individuals who are facing unfair industrial relations practices will not contact the WRIL to report their problems.
22. This observation, nonetheless, raises questions as to whether the group of affected persons reporting to WRIL are representative of the experiences of all Victorian employees. Given the 'self-selection' of callers, and the potential problem of discouraged callers noted above, it is unlikely that WRIL calls are representative of the experiences of all Victorian workers.
23. Nonetheless, it was possible, to compare the characteristics of WRIL cases with the Victorian workforce overall. This comparison reveals very few differences between WRIL cases and the Victorian workforce in terms of a number of attributes. However, a number of significant differences were evident. Compared with the Victorian workforce,
- a smaller proportion of persons 18 years or younger called WRIL;
  - a higher proportion of unskilled employees called WRIL;
  - a lower proportion of trades persons made calls to WRIL; and
  - a higher proportion of individuals working in service-related sectors called WRIL.

##### *Confusion among employees and employers*

24. There is also evidence that that many employers and employees are confused or have little knowledge about what the changes mean for their legal rights and obligations. A

Roy Morgan survey, for instance, found that 17 percent of workers believe that they have already signed an AWA, whereas data released by the OEA shows that only about 4 percent of the workforce have actually done so. Commenting on the poll, Gary Morgan noted:

*'This implies that a major proportion of the Australian workforce is confused about the type of workplace arrangement they are under... A large number of people don't understand that they are not on AWAs'.<sup>7</sup>*

The poll also revealed that younger workers were particularly confused or ill-informed. Thirty seven per cent of 14 to 17 year olds and 22 percent of 18 to 24 year olds were unable to say what type of agreement they signed. Almost one-quarter of all workers aged between 14 and 17 believed they were on AWAs.

*E. Is it too soon to gauge the effects of the WorkChoices Act?*

25. It is less than 6 months since most of the *WorkChoices Act* has come into operation. Indeed, some of its provisions, most notably, those dealing with 'transition arrangements' for unincorporated businesses and those businesses currently covered by State Awards moving to federal arrangements, are yet to fully take effect.<sup>8</sup> It is also still unclear how the recommendations from *Award Review Taskforce* will be implemented,<sup>9</sup> or how the Australian Fair Pay Commission will re-fashion the safety net which underpins all types of Workplace Agreements.
26. For these reasons it is reasonable to conclude that insufficient time has passed for the *full* effects of the *WorkChoices Act* to be felt in Australian workplaces. Nonetheless, there are a number of important grounds for undertaking an assessment of the effects of the *WorkChoices Act* on industrial relations practices in Victoria at this point in time.

*The value of assessing the early effects of the WorkChoices Act.*

27. Commenting on the likely effects of the *WorkChoices Act*, Professor Andrew Stewart noted that it:

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<sup>7</sup> Tracy Ong, 'Workers confused about their IR terms,' *The Australian*, 13 July 2006.

<sup>8</sup> Stewart, A and Priest, E *The WorkChoices Legislation: An Overview*, Supplement to *Labour Law* 4<sup>th</sup> edition, The Federation Press, Sydney (2006), available at [www.federationpress.com.au](http://www.federationpress.com.au). Last accessed 20 September 2006.

<sup>9</sup> Award Review Taskforce, *Award Review Taskforce Final Report on Rationalisation of Wage and Classification Structures*, July 2006. Available at [www.awardreviewtaskforce.gov.au](http://www.awardreviewtaskforce.gov.au). Last accessed 20 September 2006.

*'remains to be seen just how quickly employers will move to exploit the opportunities the new legislation offers, given its complexity, opposition from unions, and indeed the natural pragmatism or conservatism of many managers.'*<sup>10</sup>

This view is consistent with early evidence from a small number of firms surveyed by *The Age*.<sup>11</sup> This survey of 12 major employers suggested that few large businesses had plans to use the *WorkChoices Act* to push workers onto individual contracts, de-unionise their workforce or cut conditions substantially. This evidence is consistent with the view that it is more reasonable to conclude that the *WorkChoices Act* is unlikely to result in a 'big bang' effect. It is more likely the effects will change and evolve over time, as individual firms experiment with new arrangements, and emerging practices are diffused within businesses operations and between firms. For this reason alone, it is crucially important to gain an understanding of the early effects to fully appreciate how practices are evolving over time.

*The available evidence on the effects of the WorkChoices Act.*

28. A number of case studies reported in the press and by unions reveal some employers are willing to take advantage of the freedoms provided to them to undermine employment standards and to avoid obligations they may have previously owed employees. In particular there have been an increasing number of reports of older workers subject to dismissal without proper cause, as well as use of duress in the altering of employment conditions (see Exhibit 1 below). Just how much has changed, and how many employers have done so, remains less clear. We therefore need better evidence which allows us to assess these issues in a more systematic way.
29. This anecdotal evidence is, nonetheless, consistent with research undertaken by the federal Office of the Employment Advocate. In evidence to the Senate Estimates Committee, the Advocate reported that their own analysis of a sample of AWAs revealed all employers using AWAs had sought to use the *WorkChoices Act* to alter their employment and industrial relations arrangements, sometimes in significant ways. This research also found that, in a significant minority of cases, employers had either intentionally or unwittingly imposed illegal terms and conditions on their employees (see summary in Exhibit 2).
30. This research proved controversial and considered only a small sample of all AWAs lodged with the OEA in the first full month since the *WorkChoices Act* came into effect. In a subsequent press release, the Employment Advocate stated that:

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<sup>10</sup> A Stewart, 'WorkChoices in Overview: Big Bang or Slow Burn?' (2006) 16 *Economic and Labour Relations Review* at p. 25.

<sup>11</sup> Michael Bachelard, 'Big firms shun IR revolution,' *The Age*, Wednesday June 28.

*'It is important that people understand that the information which I provided to the Senate Estimates Committee relates to only 250 AWAs... Further it is misleading to look at particular employment conditions in isolation – for example, protected award conditions which may have been excluded – without also taking account of other provisions the parties have negotiated'.<sup>12</sup>*

31. Unfortunately, the Employment Advocate does not appear to collect statistics on a larger sample of all Agreements; nor does the OEA publicly release more comprehensive information about the content of AWAs or other types of agreements which would allow for a more holistic assessment of the impacts of the new legislation.<sup>13</sup>
32. There is also some evidence from surveys which examine people's attitudes and knowledge about the *WorkChoices Act*. In a survey of 1000 Victorians undertaken on behalf of Industrial Relations Victoria, the Australian Research Group found that the majority of Victorian workers were 'worried about what the workplace changes might mean for them', and 'felt less secure as a result.'<sup>14</sup>
33. In summary, then, there is already some evidence that significant changes are already beginning to emerge in Australian workplaces as a direct consequence of the *WorkChoices* reforms. However, this evidence is still not systemic or sufficient to enable us to draw strong conclusions about the actual effects of the *WorkChoices Act* on workplace rights. Further research, which considers employees in existing jobs, on existing agreements, and across different types of arrangements, is needed. This study provides an important opportunity to contribute to this task.

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<sup>12</sup> Office of the Employment Advocate, 'Employment Advocate urges caution on statistics,' Press Release, 30 May 2006. Available at <[www.oea.gov.au/graphics.asp?showdoc=/news/2006/news\\_060530.asp](http://www.oea.gov.au/graphics.asp?showdoc=/news/2006/news_060530.asp)>. Last accessed 20 September 2006.

<sup>13</sup> We can, however, say that the results reported by the Employment Advocate are consistent with an analysis of the content of AWAs and certified agreement prior to the *WorkChoices* changes coming into effect and the abolition of the 'no disadvantage test.' See, R Mitchell and J Fetter, 'Human resource management and the Individualisation in Australian labour law,' (2003) 45 *Journal of Industrial Relations* at p. 292; and P Gahan, R Mitchell, K Creighton, T Josev and J Fetter, 'Regulating for Performance? Certified Agreements and the Diffusion of High Performance Work Practices,' Paper presented at the Australian Labour Law Association 2<sup>nd</sup> National Conference, 'Employment Regulation for the Changing Workplace', 24-25 September (2004), The University of Sydney Law School.

<sup>14</sup> Australian Research Group, *Quantitative Research on Bargaining Power and Choice in the Workplace*, Report to Industrial Relations Victoria, Melbourne, February (2006).

## **Exhibit 1: Case Study Evidence on WorkChoices**

### ***WorkChoices in the Spotlight***

One of the earliest cases reported in the media concerned Spotlight, a Melbourne based chain of 100 fabrics and homewares stores, owned by the Fraid brothers. Spotlight reports annual sales of around \$600 million and employs approximately 6000 staff. The company offered some of its employees new AWAs which remove shift penalties and other benefits worth around \$90 per week, in return for a new rate of pay, which amounted to a 2 cents an hour wage increase. Faced with a public outcry, Spotlight withdrew the AWA in its current form.

*Source:* Peter Hatcher, 'Finally, the monster is unleashed,' *Sydney Morning Herald*, 2 June, 2006

### ***Working for no pay***

Management at Heinemann Electric refused to pay 54 workers for five days of work last month despite having worked 38 hours. These workers had worked a full week, but had placed a ban on working overtime in their campaign to reach agreement over a new Workplace Agreement. This is despite the worker's overtime ban being approved by the Industrial Relations Commission and considered a legal action under WorkChoices. Overtime was not compulsory at the factory.

*Source:* Dan Silstone, 'All work and no pay labelled immoral, but company says its legal,' *The Age*, 8 Sept. 2006

### ***Union busting to cut costs***

Flight attendants on Qantas' budget carrier, Jetstar, will be required to sign AWAs under which commissions from the sale of food and pillows will count towards their pay. Qantas announced it was introducing AWAs as part of its strategy to cut costs. The five year contracts will see part of the cabin crew's pay treated as a productivity bonus, which includes extra hours worked and commissions from selling on-board food and entertainment.

*Source:* Steve Creedy, 'Jetstar to break union hold,' *The Australian*, 14 August, 2006.

### ***Sacked on sick leave***

A Melbourne store manager was sacked while in hospital with a severe chest infection. The 42 year old manager was called by his manager and told not to bother returning to work because he no longer had a job. Mr Mead said he had worked at the store of 21/2 years and had rarely taken sick leave. He had been given no notice before being sacked.

*Source:* Tanya Giles, 'Sacked while on sick leave,' *Herald Sun*, 25 July, 2006.

### ***Fire-fighters threatened with sack over AWAs***

Fire-fighters at a Victorian defence base are being forced to sign AWAs which will cut their annual pay by up to \$8000. The fire-fighters were threatened with losing their job unless they signed AWAs.

*Source:* John Masanauskas, 'Firefighters in AWA row,' *Herald Sun*, 28 July 2006.

### ***Mine worker sacked for refusing AWA***

A NSW mineworker was sacked after refusing to sign an AWA that required employees to give 12 hours notice of being sick, or face a \$200 fine. A manager of MEMS, the contractor at the mine which employed her, threatened that if she did not sign she would not be able to work in the Hunter Valley again. *Source:* John Masanauskas, 'Sacked women refused AWA,' *Herald Sun*, 5 July.

### ***Lufthansa call centre leans on employees to sign AWAs***

A Lufthansa call centre rejects allegations that it applied duress to get employees to sign AWAs. The Australian Services Union, which had members at the call centre reported that the company refused to deal with the union and employees are scared of losing their jobs if they speak out. The AWAs, which have been offered to about 80 percent of employees in Melbourne, offset wage cuts with bonuses based on how much sick leave they take. The Victorian Workplace Rights Advocate investigated this matter and has asked the federal Office for Workplace Services to investigate whether duress was applied to get employees to sign AWAs.

*Sources:* Mark Skulley, 'Call centre rejects claims it leaned on its employees,' *Australian Financial Review*, 11 August; and Meaghan Shaw, 'Wage offer may be illegal,' *The Age*, 28 June.

**Exhibit 2**

**The OEA Reports on the Early Impacts of the *WorkChoices Act*.**

In evidence tabled at the Employment, Workplace Relations and Education Legislation Senate Committee hearing, the Office of the Employment Advocate (OEA) has reported that up to 30 April 2006, 6,340 workplace agreements covering 10, 257 employees were lodged with the OEA. Of these, 6263 were AWAs, 43 were non-union Collective Workplace Agreements, 16 were union Collective Agreements, 16 were employer Greenfields Agreements and two were union Greenfields Agreements.

In evidence to the Committee, the federal Employment Advocate reported that the OEA does not review or check agreements prior to approval to ascertain if the terms comply with legal requirements or whether they include prohibited content.

However, of all AWAs lodged with OEA during April, the Advocate reported that the OEA has analysed a sample of 250 agreements (i.e., 4 percent of all AWAs lodged).

These AWAs were analysed for, among other things, protected award conditions, their compliance with the Australian Fair Pay and Conditions Standard (AFPCS), family friendly provisions, workplace flexibility provisions and wage increases.

In evidence tendered to the Senate Committee, the OEA's analysis of this sample of AWAs revealed:

84 percent provided for a wage rate (weekly or hourly) above the AFPCS.

89 percent provided for annual leave conditions equal to or better than the AFPCS.

6 percent provided for annual leave conditions which were less than required by the AFPCS. Of these,

3 percent sought to cash out more than the 2 week maximum provided by the AFPCS;  
and

3 percent did not meet the AFPCS or did not provide for cashing out of any lost annual leave entitlement.

80 percent provided for hours of work less than or equivalent to the AFPCS.

14 percent of AWAs covering casual employees provided for a casual loading less than the AFPCS.

100 percent excluded at least one protected Award condition. Of these,

16 percent expressly excluded *all* protected Award conditions;

64 percent excluded leave loading;

63 percent excluded penalty rates; and

52 percent excluded shiftwork loadings.

Of the sample of AWAs analysed:

31 percent modified the protected Award condition dealing with overtime loading;

29 percent modified the protected Award condition dealing with rest breaks; and

27 percent modified the protected Award provision dealing with holiday pay.

40 percent excluded declared public holidays. Of these:

54 percent provided for an alternative day instead of the declared public holiday.

22 percent did not provide for any wage increase during the life of the Agreement.

**Source:** Evidence to the Employment, Workplace Relations and Education Legislation Committee (Estimates), by Peter McIlwain, the federal Employment Advocate, Monday, 29 May 2006.

*The potential diversity of changes across workplaces and sectors.*

34. A great deal of evidence gathered over many years of research demonstrates that industrial relations practices vary significantly between industries and across firm characteristics. These differences reflect a range of factors, including the composition of firms that make up an industry, location of businesses, the nature and intensity of product market competition, the capital intensity of production, firm size, the age of workplaces, and so on.<sup>15</sup>
35. It is therefore very likely that the *WorkChoices Act* will have differential impacts on different sectors and different types of firms. Some sectors and some firms are also likely to be early adopters. This research should provide us with a basis to assess this question.

*The effects of the WorkChoices Act in Victoria.*

36. The Victorian labour market was significantly deregulated as a consequence of the *Employment Relations Act 1992*. Then, following the referral of most of Victoria's industrial powers to the Commonwealth, Victorian employees not covered by federal awards were covered by the 'Schedule 1A' provisions of the *Workplace Relations Act 1996 (Commonwealth)*.<sup>16</sup> These reforms provided Victorian workers with fewer protections than any other State system.<sup>17</sup> Research commissioned by Industrial Relations Taskforce, which reported to the Victorian Government in August 2000, found that these changes were associated with greater inequality and fewer protections than employees with Federal award coverage.<sup>18</sup> These 'Schedule 1A' employees are likely to be vulnerable, compared with employees in other States where State Awards still play a significant role in the transition arrangements.<sup>19</sup> For this reason, it might be expected that the early effects of the *WorkChoices reforms will be larger in Victoria than other States*. In addition, those Schedule 1A employees who benefited from the operation of

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<sup>15</sup> A Morehead, M Steele, M Alexander, K Stephen and L Duffin, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey* Longman, South Melbourne (1997); and see the various Research reports released as part of the 'State of Work Victoria project, available at <[http://www.business.vic.gov.au/BUSVIC.196890/STANDARD/1594682290/PC\\_61049.html](http://www.business.vic.gov.au/BUSVIC.196890/STANDARD/1594682290/PC_61049.html)>. Last accessed 20 September 2006.

<sup>16</sup> See B Creighton and A Stewart, *Labour Law: An Introduction*, The Federation Press, Annandale, NSW (2006)

<sup>17</sup> M Pittard, 'Victorian Industrial Relations: from Deregulated to Devolution,' in D R Nolan, editor, *The Australasian Labour Law Reforms: Australia and New Zealand at the End of the Twentieth Century*, The Federation Press, Annandale, NSW (1998) 172 at p. 188; and P Gahan, 'The Future of State Industrial Regulation: Can We Learn From Victoria?,' *Australian Review of Public Affairs*, November 2005, <<http://www.australianreview.net/digest/2005/11/gahan.html>>. Last accessed September 19, 2006.

<sup>18</sup> Victorian Industrial Relations Taskforce, 'Part 2: Statistical; Research on the Victorian Labour Market,' (2000) Victorian IR taskforce Melbourne. These findings were later confirmed by the Victorian Workplace Industrial relations Survey, conducted in 2002. See Industrial Relations Victoria 'The Low Paid in Victoria,' *The State of Working Victoria Project Information Paper No 2*, Department of Innovation, Industry and Regional Development, Melbourne (2003).

<sup>19</sup> I Watson, 'Kennett's industrial relations legacy: impact of deregulation on minimum pay rates in Victoria,' (2001) 43 *Journal of Industrial Relations* at p. 294.

Common Rule Awards in Victoria from 2005<sup>20</sup> now face the prospect of the removal of Award benefits and greater vulnerability than workers in other States.

37. The Office for the Employment Advocate advises that *WorkChoices Act* will operate in Victoria 'with some differences. This is because it referred its industrial relations powers to the Commonwealth in 1996.'<sup>21</sup> Employers covered by Schedule 1A, will have their wages and conditions determined by the Schedule 1A conditions for each sector, rather than protected Award conditions.
38. Moreover, given the referral of power to the Commonwealth, employers who are not constitutional corporations will be able to make a federal Workplace Agreement. This option is not available to non-constitutional employers operating in other States.
39. In summary then, the more vulnerable position of employees in Victoria would suggest that Victorian employers have greater opportunity to make use of the *WorkChoices Act*. It is therefore imperative that an assessment of the Victorian situation be made as early as possible and, subsequently, on a regular basis.

## F. Key Findings

40. In this section of the Report the key findings of our analysis of the WRIL data are presented. This include an analysis of
  - demographic and other characteristics of affected persons making calls to WRIL;
  - the characteristics of businesses employing these affected callers;
  - The nature of the problems reported to WRIL; and
  - The changing profile of affected persons, business involved and the nature of problems faced by affected persons.

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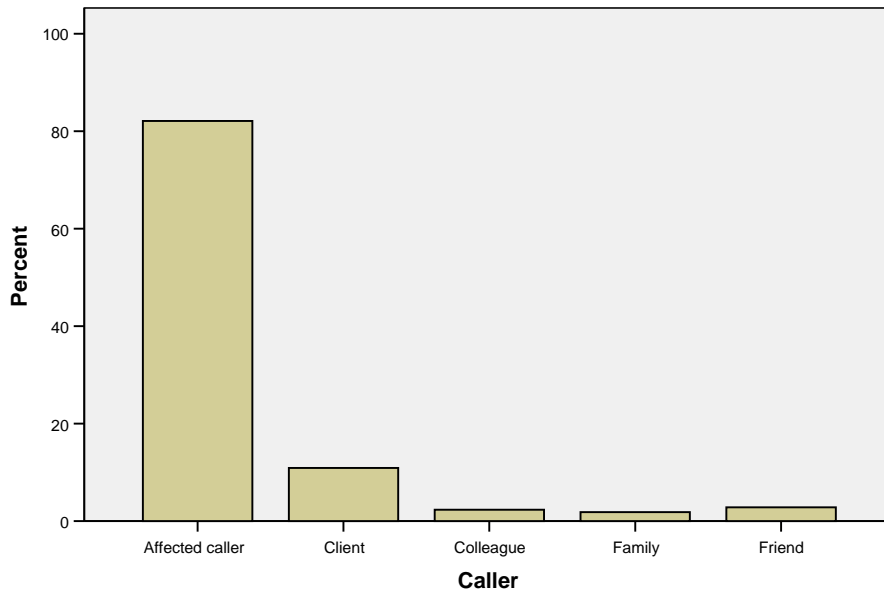
<sup>20</sup> Common Rule Awards were created as a consequence of the *Federal Awards (Uniform Systems) Act 2003*. This Act was passed by the Victorian Parliament with the direct intention of clawing back some of the lost benefits that resulted from the Schedule 1A reforms. This provides for the extension of federal awards to Victoria as common rule employees upon application to the Victorian Civil and Administrative Appeals Tribunal.

<sup>21</sup> Office of the Employment Advocate, 'WorkChoices operating in Victoria,' Available at <[www.oea.gov.au/tes.asp?showdoc=/employers/WorkChoicesoperatinginVic.asp](http://www.oea.gov.au/tes.asp?showdoc=/employers/WorkChoicesoperatinginVic.asp)>. Last access 20 September 2006.

*Who calls WRIL?*

41. Calls to WRIL were made by a diverse group of individuals. In around 20 percent of all cases, the call was made on behalf of the affected person by a colleague, friend or family member (Figure 1).

**Fig 1: Who Calls WRIL? (Percent of all calls, March-August 2006)**



*The gender profile of affected persons*

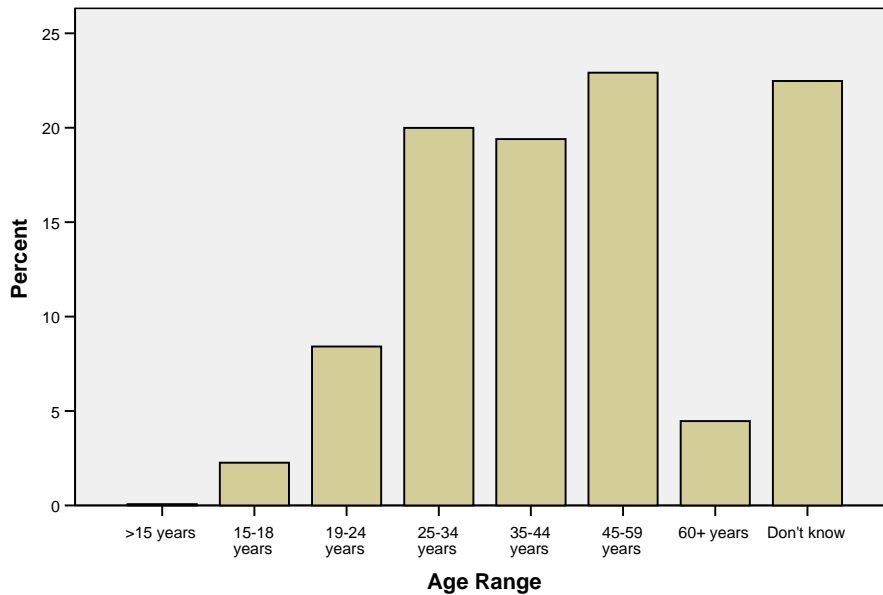
42. Of all cases over the entire period included in this analysis, the affected persons included almost equal proportions of women and men (48 and 52 percent, respectively). These proportions closely reflected the make-up of the Victorian workforce.

*The age profile of affected persons*

43. Figure 2 provides an age profile of all affected persons about whom calls were made, for the period March to August 2006.
- Younger workers were significantly less likely to call WRIL than their presence in the Victorian workforce might suggest. Less than 9 percent of calls were made by employees under the 25 years of age (compared with 17.7 percent of the Victorian workforce);
  - Prime aged employees (i.e., aged between 25 and 44 years) represented just under 40 percent of all calls;

- Employees aged between 45 and 59 accounted for slightly less than 1 in 4 calls (23 percent);
- Employees aged 60 years or more accounted for the smallest proportion of calls (4.5). This however, was consistent with the make up of the Victorian workforce.

**Fig 2: Age profile of affected persons (Percent of all calls, Mar-Aug 2006)**



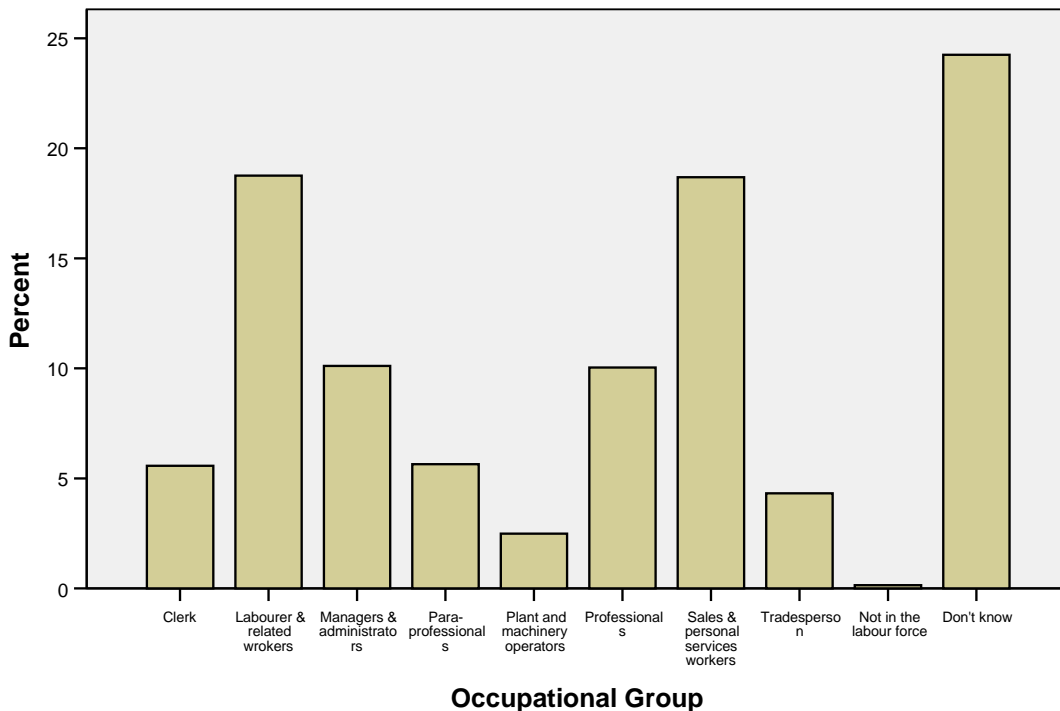
*The occupational profile of affected persons*

44. Affected persons were also drawn from the full spectrum of occupational groups (Figure 3). It has already been noted above that, compared with the Victorian workforce, a number of occupational groups were either over represented or under-represented. Unskilled workers were over-represented, while skilled tradespersons were under-represented compared with the proportion of the workforce that come from this occupational group. It is not possible to determine what accounts for this pattern.
45. Of all affected persons,
  - Labourers and related unskilled occupations, with sales and personal services workers accounted for almost identical proportions of calls (18.8 and 18.7 percent, respectively).
  - Slightly more than 1 in 5 calls were made by professional occupations and managers and administrators. Although at first glance this may appear surprising,

it largely reflects the make-up of the Victorian workforce, where these groups represent 28.3 percent of the workforce.

- The least likely occupational groups to lodge a call with WRIL were plant and machinery operators (2.5%), and tradespersons (4.5%).

**Fig. 3: Occupations of affected persons (Percent of all calls, Mar - Aug 2006)**

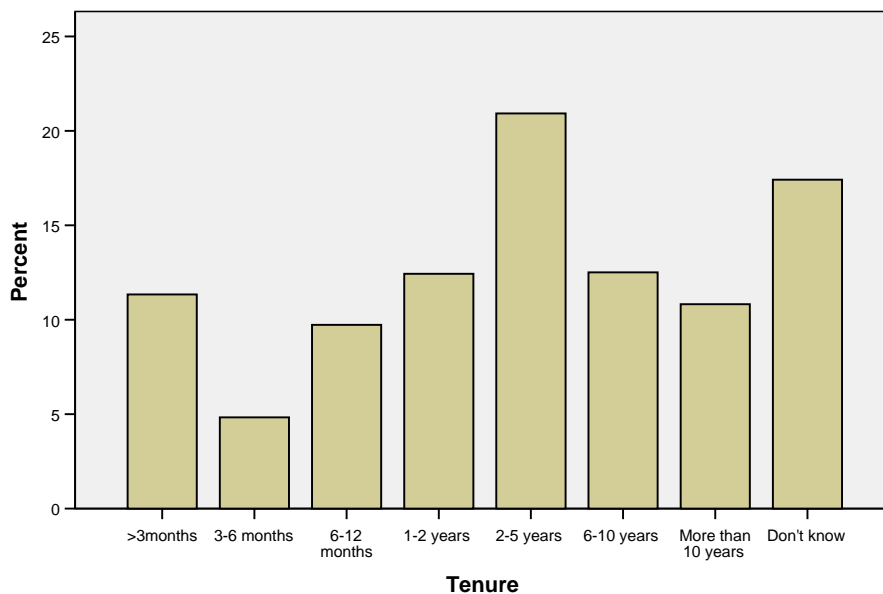


*Employment status and tenure of affected persons*

46. The distribution of cases by employment status was as follows:
- Over half of all calls (approximately 56 percent) were made by full-time employees.
  - This compares with 12.4 percent for part-time employees, and 13.1 percent of calls made from casual employees.
  - Few calls were made from employees on fixed term contracts (1.2 percent) or workers working as independent contractors (2.7 percent).
47. Again, the distribution of cases based on tenure or length of employment was not expected. Calls were distributed fairly evenly across both employees in relatively new positions, those that had been employed for a significant period and those employees that had been in the job for a long period of time.

- 25.8 percent of all calls were made in relation to employees who had been employed for less than 12 months.
- 33.1 percent of calls were made by employees who had been in their job for between 2 and 5 years.
- A further 23.3 percent of calls were made by employees who had been employed for 5 or more years.

**Fig. 4: Tenure of affected persons (percent of all calls, March - August 2006)**



*Is there a 'typical affected person'?*

48. Do these figures suggest that a 'typical' affected person lodging a call with WRIL is identifiable? In short, the answer is no; but the data does reveal some patterns worth noting.
49. To begin with, the data suggest that irrespective of age, occupation, employment status or tenure, there is a sense of vulnerability among many groups of employees. Surprisingly perhaps, this was true of employees irrespective of the length of employment in their current job. As we shall see below, this sense of vulnerability is driven by, among other things, a sense of job insecurity borne from a significant risk, or threat, of dismissal.
50. Having suggested that this sense of insecurity appears to be relatively pervasive, the data nonetheless reveal the some groups of workers are more likely to experience problems than other groups. In particular, prime age workers, unskilled workers and

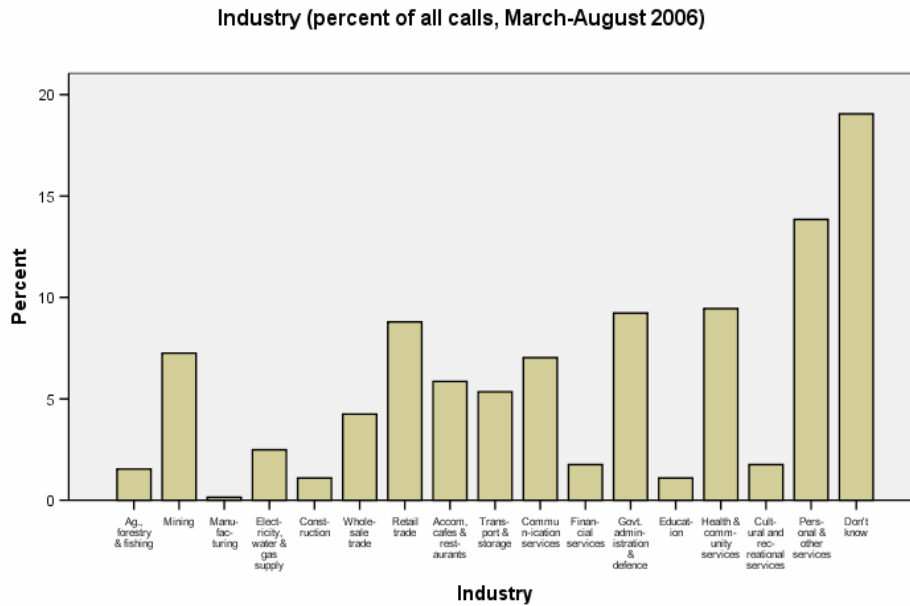
workers in service occupations, along with workers with a record of service with their current employer have all been found to be more likely to report a problem with their employment arrangements than other groups.

*The characteristics of businesses employing affected employees*

51. The WRIL service also collected some information about the workplaces and businesses of employees reporting problems to WRIL. The two workplace characteristics for which data is available are industry and workplace size.

*Industry profile of workplaces*

52. Workplaces were drawn from a diverse range of industry groups, again confirming that, if calls to WRIL can be taken as indicative of the problems associated with the *WorkChoices Act*, then problems are being felt across all industries. This was borne out by a comparison with the Victorian workforce which, with a number of exceptions, showed that the distribution of calls by industry was also reflective of the industrial distribution of all firms in Victoria.
53. The exceptions to this general comparison with the Victorian workforce suggested that employees in service-related industries were significantly over-represented among the affected persons presenting to WRIL. This is confirmed by analysis of the industrial distribution of WRIL calls, shown in Figure 5 below. This figure shows of the seven most significant industry sectors, 6 were service related industries:
- Property and business services (13.8 percent of all calls);
  - Health and community services (9.2 percent);
  - Retail services (8.8 percent);
  - Accommodation, cafes and restaurants (5.9 percent);
  - Transport and storage (5.3 percent); and
  - Wholesale trade (4.2 percent).
54. Manufacturing made up the second highest group of calls to WRIL (9.4 percent of all calls); again reflecting its relative importance to the Victorian economy.

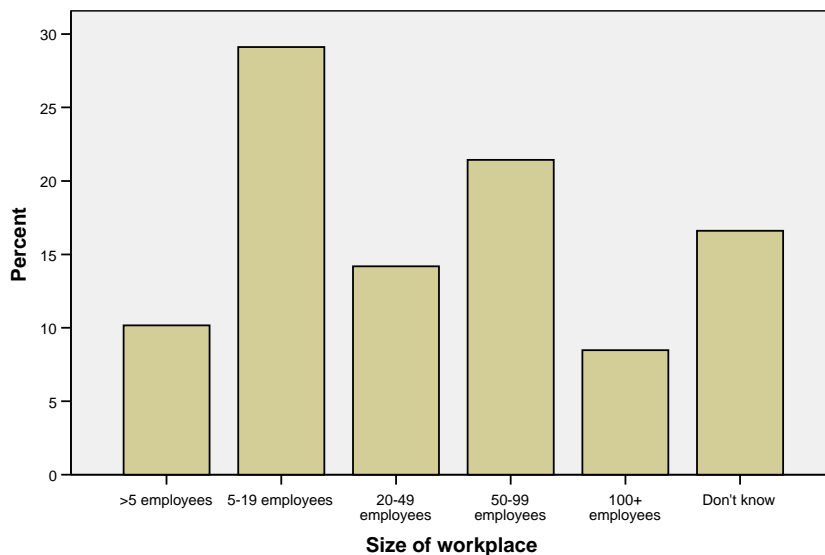


Workplace size

55. The data also provides a profile of cases by workplace size. Small and medium sized workplaces present as the most significant sources of problems for employees in Victoria.

- Workplaces with less than 20 employees account for slightly less than 40 percent of all calls. Of these workplaces, those with 5-19 employees account for three-quarters of all complaints.
- Just over 1 in 3 calls came from employees working in workplaces with 50 or more employees. Of these, two-thirds account for workplaces with 50 to 99 employees.

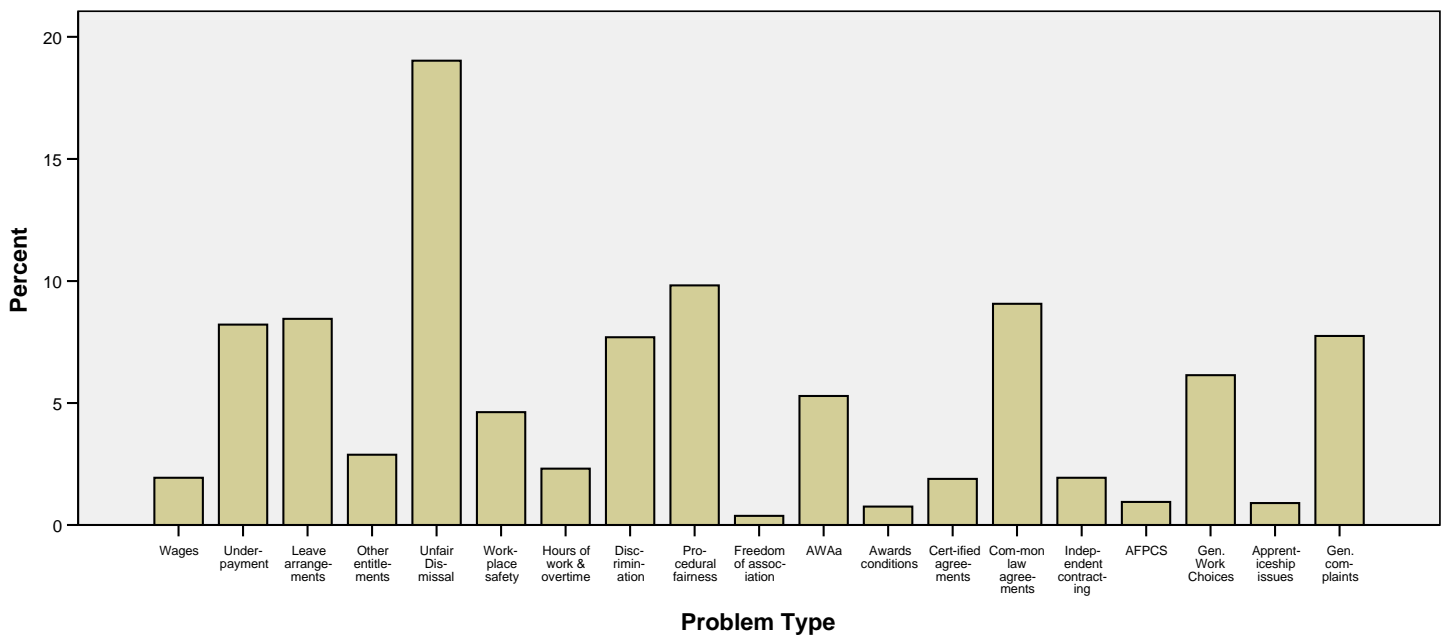
**Fig 6: Distribution of affected persons by workplace size (Mar-Aug 2006)**



*The nature of problems faced by affected persons*

56. So far, little has been said about the nature of the issues or problems reported to WRIL. The 1367 calls made to WRIL generated around 2100 complaints. Figure 7 provide a break down of problems reported by categories. These categories include the major areas of complaint as well as two general categories. The first, General *WorkChoices*, includes concerns reported about *WorkChoices* which related to the general effects of the new laws or about issues which could not be otherwise categorised. The second general category, General Complaints, were general issues which were not directly related to *WorkChoices*.

**Fig. 7: Problems experienced (March - August 2006)**



57. Overall, complaints made to WRIL were varied. But a number of specific issues dominate the majority of cases.

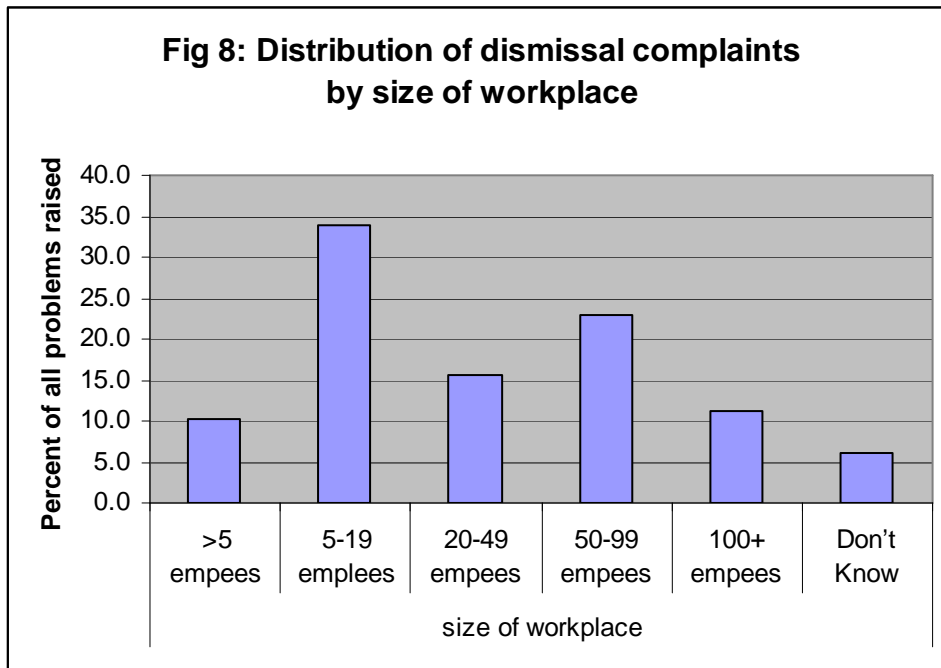
- Reports relating to *dismissal and termination* dominate. This issue alone accounted for almost 1 in 5 calls (19 percent).
- The next most significant category relates to matters of procedural fairness (9.8 percent of all calls). This category included reports of attempts by employers to change conditions of work, working arrangements or entitlements unilaterally without discussion, consultation or negotiation with employees. A significant

minority of these calls included refusal by an employer to recognise a request to be represented by a union.

- Underpayment of wages (8.2 percent), leave arrangements (8.5 percent), discrimination and harassment (7.7 percent), along with complaints about the use of common law agreements (9.1 percent) and AWAs (5.3 percent), represent the largest categories of reported problems after dismissal and procedural fairness.

### Dismissal

58. Further analysis of the dismissal reports revealed that a small number of industries accounted for a disproportionate of calls relating in this category:
  - Personal and other services account for 17 percent of reports over dismissal;
  - Health and community services (12 percent);
  - Government administration and defence (10 percent); and
  - Retail trade (10 percent).
59. Individuals employed on common law agreements accounted for 25 percent of all dismissal related calls.
60. Employees with between two and five years service were twice as likely as any other tenure group to face a dismissal problem.
61. Figure 8 below shows the distribution of dismissal problems by workplace size. Employees in workplaces with less than 20 employees accounted for 44 percent of all calls relating to unfair dismissal complaints, while workplaces with less than 100 employees account for 82.6 percent of all dismissal complaints.



*The Changing Profile of Cases*

62. In order to identify possible impacts of *WorkChoices* as it unfolds during its first year of operation, cases were also analysed to identify changes over time. In order to this, data were re-examined on a month by month basis.

*The changing profile of affected persons by age group*

63. Pronounced trends in terms of the age profile of affected persons are not readily discernable from the data. However there is some evidence of a “bifurcation”; that is to say:
- The proportion of calls from older workers (45-59 years old) appears to be steadily increasing.
  - The proportion of calls from young people (15-19, and 20-24 years old), which started from a low base, is also increasing slightly.

*The changing profile of cases by workplace size*

64. There are stronger trends evident in relation to workplace size, although they could not be described as overwhelming.

- There is a discernable increase in the number of calls from individuals working in smaller workplaces. This trend is strongest in the case of workplaces with 5 to 19 employees.
- There was a significant jump in complaints relating to workplaces with 20 to 49 employees; however the proportion of calls from these workplaces appears to have stabilised over time.

*The changing profile of affected persons by tenure*

65. When the profile of affected persons is examined on the basis of tenure in their job, a much clearer *WorkChoices* affect is discernable. Workers with limited tenure in their job are feeling increasingly vulnerable.
- The proportion of cases involving employees with a short period of tenure (less than 12 months) has almost doubled between March and August from 18 percent of all calls to 30 percent of all calls.
  - Cases involving affected persons with between one and two years in the current job have increased by 3.5 fold between March and August (up from 4.5 to 15.8 percent of all calls).
  - In contrast, for cases involving workers with two or more years in their job, the proportion of cases has remained almost static (from 40 percent of all calls in March to 43 percent)

*The changing profile of affected persons by occupation*

66. There are also more clearly discernable patterns when the occupation of affected persons is examined. Both skilled and less skilled occupational groups have shown an increasing propensity to complain.
- Para-professionals account for significantly higher proportion of cases over time (increasing from 3.4 percent of all calls to 10.9 percent).
  - Cases involving managers and administrators have also increased significantly (from 6.8 percent of all calls to 12.6 percent).
  - Cases involving clerks have increased from 3.4 percent of calls in March to 13.1 percent of all calls during August.
  - Sales and personal services workers have increasingly relied on WRIL, increasing as a proportion of all calls from 10.2 to 16.4 percent of all calls.

- The proportion of all cases involving labourers and related workers has almost doubled over the period, increasing from 12.5 to 21 percent of all calls.

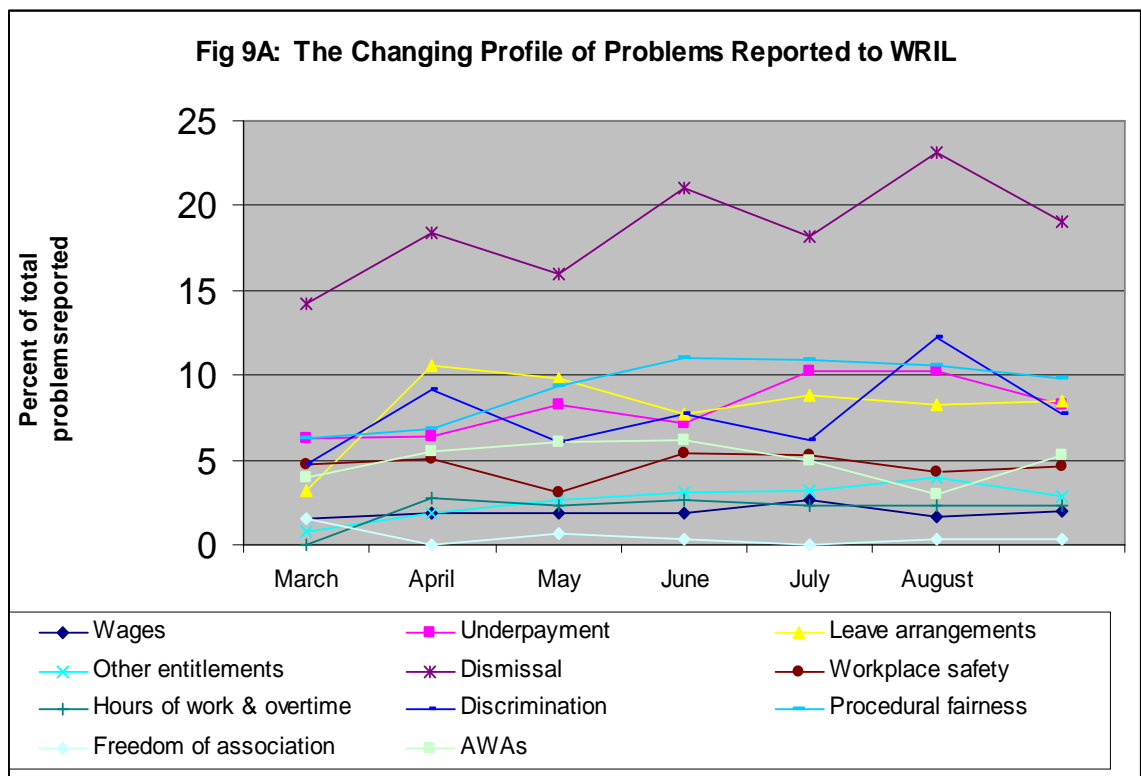
*The changing profile of cases by industry*

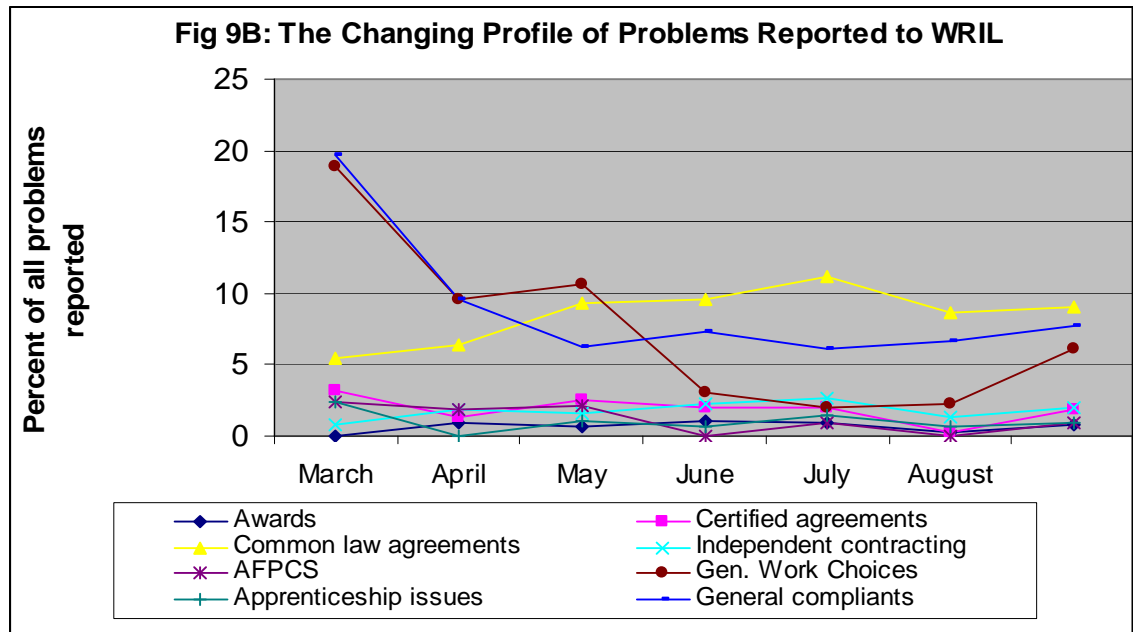
67. With few exceptions, there have been no great changes in the profile of cases by industry.
- The most significant exception to this observation is the property and business services sector, where the proportion of cases have increased from just 3.4 percent of all cases to 13.8 percent of all cases, representing a four-fold increase.
  - Smaller, but still significant, increases are evident in:
    - wholesale trade (1.1 to 4.2 percent of all cases);
    - manufacturing (5.7 to 9.5 percent of all cases);
    - health and community service (6.8 to 9.2 percent of all cases); and
    - accommodation, cafes and restaurants (2.3 to 5.9 percent of all cases).

*The changing profile of cases by problem reported to WRIL*

68. Figure 9 below provides an overview of the changing pattern of problems reported to WRIL during each month of operation to the end of August. (This figure is broken into two panels, Figures 9A and 9B, give the number of categories to be examined.)
- The most obvious result is again the prominence of dismissal issues for callers (Figure 9A).
  - An *increasing proportion* of cases involve workers experiencing problems with dismissal issues: increasing from 14 percent of reports to just under 20 percent.
  - The overwhelming majority of these cases involve individual working in workplaces with fewer than 100 employees. Unfortunately, we cannot ascertain from the data whether these workplaces are also businesses with fewer than 100 employees.
69. This, however, is not the only problem which is becoming increasingly prevalent overtime.

- An increasing proportion of problems are accounted for by discrimination and harassment issues (Figure 9A). Closer analysis also revealed that this problem category was made of calls made by on behalf of women experiencing problems.
  - Matters relating to procedural fairness; for example, where an employer unilaterally changes conditions of work or working hours with consultation (Figure 9A).
  - Leave arrangements have accounted for an increased proportion of all calls, although the data suggest this proportion has levelled out over time (Figure 9A).
  - The proportion of all problems reported concerning common law contracts has doubled from 5 to around 10 percent of all problems reported to WRIL (Figure 9B).
70. Figure 9 also shows that, for most problem categories, the proportion of calls that each accounts for remains relatively stable. In the case of general complaints about an employer as a proportion of all calls fell significantly (Figure 9B). In the case of general complaints about *WorkChoices*, the proportion of all problems reported made up by this category actually fell dramatically between March and June, but only to increase significantly for the rest of the period to the end of August. Overall, the proportion of all problems related directly to specific changes brought about by *WorkChoices* has increased.





## G. Conclusions

This study reports an attempt to gauge the early effects of the *WorkChoices Act*. Although it is less than 6 months since the Act came into operation, there are good reasons to believe that it is already beginning to have significant impacts on employment and industrial relations practices in Australian workplaces.

Case study evidence and some statistical evidence show that growing numbers of employers are seeking to reduce labour costs by removing employment rights and entitlements. There is also reason to believe that these effects are likely to be more pronounced in the Victorian context where, compared with other States, labour market deregulation was pursued most vigorously.

For these reasons, it is timely to begin to undertake a more systematic assessment of the *WorkChoices Act* on Victorian workplace rights and standards. This study is one attempt to do so.

This study, it should be noted, cannot measure the true *extent* of the impacts of *WorkChoices*, but by using data collected from calls made to the WRIL service, we can begin to map out the characteristics of workers most affected, the characteristics of workplaces where affected workers are employed, and the range of issues which are most likely to be subject to change. The data also allow for an analysis to be conducted assessing how these patterns are changing over time.

The central finding of the study suggests that, if the report of problems can be taken as a measure of growing concern about the diminution of employment protections, then the numbers of workers experiencing problems is on the increase. Moreover, we can say that no typical affected worker emerges. Irrespective of gender, age, tenure, occupation and skill level, industry and workplace size, a wide range of problems are being reported on a daily basis.

Principal among these problems are reports of threats made to job security. Dismissal and termination matters accounted for the largest group of problems reported, and this proportion is increasing. There seems little doubt that this is a direct consequence of one of the most significant changes introduced by *WorkChoices*, namely the removal of unfair dismissal protection for workers in businesses employing less than 100 employees, for workers on probation, and for casual and fixed term employees.

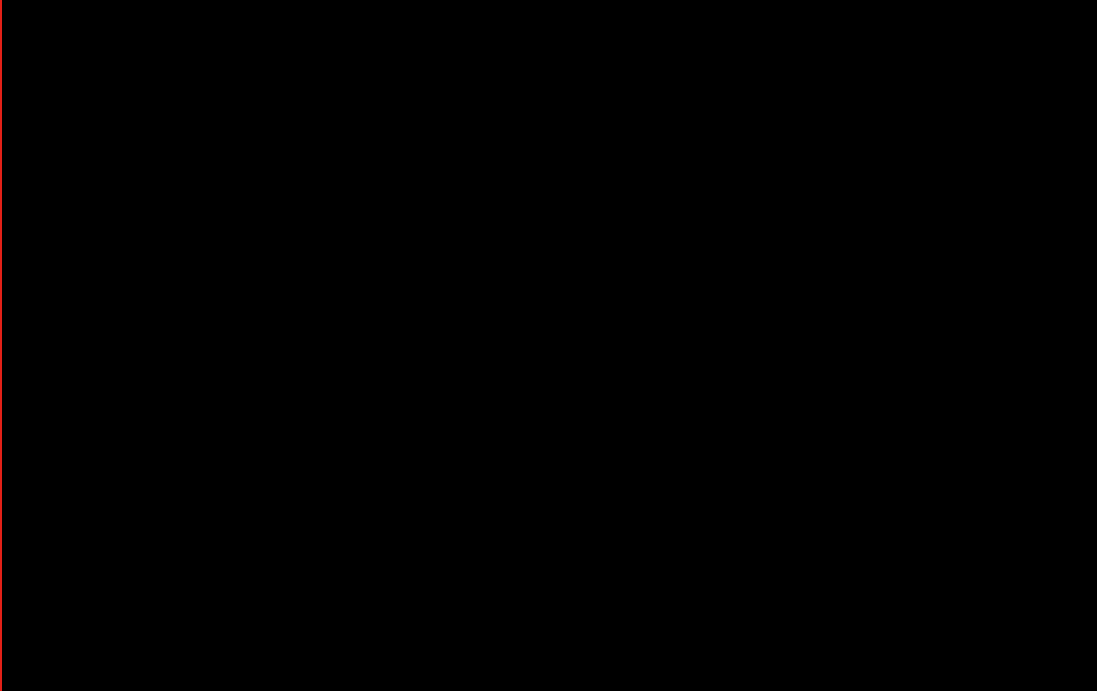
Another significant consequence of the changes related to the growing incidence of reports relating to fairness in the workplace, particularly in terms of the way that employers make decisions without consultation or adequately advising employees. Unilateralism and managerial prerogative are clearly being extended to areas previously subject to 'joint regulation' by managers, employees and unions.

The Report also points to a whole host of problems experienced by Victorian workers. Most relate to the removal of entitlements or, in a significant number of cases, illegal action by employers to under provide legal entitlements, including underpayment or non-payment for work done.

In his evidence to the Senates Estimates Committee, Employment Advocate Peter McIllwain noted that, as a rule, the OEA does not check agreements to determine whether the terms contained in them meet even the core minimum standard set out in the AFPCS.

This approach encourages growing numbers of employers, driven by cost competition, to undercut standards. Thus not only does the current federal system fail to adequately protect work rights, the very few rights enshrined in legislation and supposedly subject to protection of the law, remain unprotected through a strategy of neglect by federal government agencies whose primary purpose is to ensure employee rights are protected.

This is likely to be a key driver for the continued diminution of employment rights for Victorian employees into the future.



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