

## **INTRODUCTION**

- In a few weeks time new industrial laws take effect in Australia that return our country to a more mainstream or middle-ground position regarding the regulation of industrial relations.
- The extremist experiment known as WorkChoices introduced by John Howard's Government was comprehensively rejected at the 2007 general election.
- Labor's new Fair Work Act is a hybrid of some traditional Australian IR concepts (the Commission and Awards), some elements adopted from overseas (good faith bargaining) and some elements that remain from WorkChoices (restrictions on bargaining and restrictions on unions).

## **BACKDROP**

### **WorkChoices**

- The most radical industrial laws in Australia's history.
- An attempt to place the individual contract between the employer and the worker at the centre of industrial relations regulation.
- An attempt to jettison 100 years of history where the state (via the Arbitration Commission) and registered organisations (trade unions and employer federations) had a major role in the regulation of industrial outcomes.
- A political approach to IR which stemmed from the view that employers should have largely unrestricted rights to do what they like in relation to their businesses and the employees that work within them.
- The ideological bedfellow of neo-liberalism and trickle down economics (which holds that if business owners are successful they will in return grant rewards to their employees).

### **Your Rights @ Work Campaign**

- The radicalism of WorkChoices engendered a passionate and systematic campaign by Australia's trade unions to fight for their future existence.
- The union campaign was planned and executed over 2 ½ years with extensive media strategies and community campaigning the central elements.
- The unions went on an overseas study mission to various developed economies to put together a new industrial relations blueprint that would prove attractive to the public and could be negotiated with the Labor Opposition.

- The YRAW Campaign helped ensure that for the first time in an Australian general election the issue of industrial relations was the dominant political issue in the minds of voters.
- The Liberals chose to sink or swim on their commitment to WorkChoices and were comprehensively defeated with Prime Minister Howard losing his seat.

### **Labor's Election Commitments on Industrial Relations**

- The ACTU and the ALP negotiated a new compact on industrial relations known as Forward with Fairness.
- The new compact and other IR policies such as scrapping the Australian Building and Construction Commission (ABCC) were adopted by the ALP's National Conference in early 2007.
- The employer lobby, particularly the Australian Industry Group (AIG), undertook subsequent negotiations with the Labor Opposition and extracted further changes and concessions.
- In mid 2007, a few months before the elections, Labor announces retention of the ABCC until 2010 and announces other changes to its industrial relations policies which keep some elements of WorkChoices (i.e. Forward with Fairness II).
- After winning Government, Labor consults extensively with employers (BAG) and unions (WAG) and revives the National Workplace Relations Consultative Council as a sounding board.
- Further changes to Labor's policy manuscript evolve, with most changes favouring the employer lobby.

### **The On-Set of the GFC**

- Inside a year of winning Government, the Global Financial Crisis hits and the Australian economy is buffeted towards recession.
- Unemployment and underemployment start to climb as jobs and job security become the dominant concern of the Government and trade unions.
- The Liberal/National Opposition and most employer groups argue that the GFC is a reason to delay or reverse Labor's Fair Work legislation.
- The Rudd Government persists with its new legislation and it passes the Parliament with minor changes negotiated through the Senate.
- Unions argue the legislation is important for the issue of job security in the depressed economic climate (unions advance claims for further changes around job protection/redundancy rights etc).

## **New Issue to the Fore – Climate Change and the Green Jobs Agenda**

- Global Warming and its potentially devastating consequences was, together with WorkChoices, a dominant issue at the 2007 election.
- Most Australians embrace the need for our Government to be pro-active on this critical issue for humanity.
- Howard was marked down by the Australian people because of his do nothing attitude towards this challenge.
- At this time of the GFC many employers argue for softer policies or advocate doing nothing until the GFC is over – the Rudd Government is being impacted by employer concerns and has delayed introduction of its CPRS.
- Some, particularly unions, argue that this is a time of great opportunity where Government (through targeted economic stimulus measures) and employers should be looking to refurbish our industrial base with an acute eye to climate friendly technologies and the widespread growth of green jobs.

## **FAIR WORK ACT**

### ***THE GOOD***

#### **The End of AWAs**

- AWAs were used as an employer pattern ‘bargaining’ document stripping large numbers of already low paid workers in hospitality and retail of their penalty rates and overtime.
- At the other end of the spectrum mining companies used high wage AWAs to de-unionise their workforces in metalliferous mines.
- Collective union agreements in black coal comprehensively out performed these sectors in terms of productivity gains – AWAs failed in their stated aim of boosting productivity but succeeded in their implicit aim of breaking down collective industrial relations.
- The Rudd Government quickly made into law the electorate’s rejection of AWAs – however we are disappointed that existing substandard AWAs are retained.

#### **A Modern Relevant National Award System**

- The Howard Government attempted to consign Australia’s unique award system to the dustbin of history.

- Labor has restored the relevance and centrality of our awards by strengthening the safety net with ten National Employment Standards (NES) and modern awards with features intrinsic to each industry.
- In combination with the National Employment Standards the Rudd Government's creation of streamlined awards is good for business – they benefit from a clear modern set of standards from which to bargain.
- The restoration of consultation rights for workers when major changes at work are contemplated by management – this is a win for fostering trust at work and worker engagement in driving productivity gains that flow from these.
- The new transfer of business provisions are good for employers and workers – workers know that they will have their entitlements and conditions protected, employers know that their competition cannot use legal trickery to undercut them.

### **Good Faith Bargaining**

- Collective bargaining is a central tenet of industrial relations systems that are democratic.
- The right to collective bargaining is one of the five core conventions that have been developed by the International Labour Organisation (ILO).
- The good faith bargaining model that Labor has adopted is a hybrid of the US and British models.
- Labor's good faith bargaining schema sees parties positively encouraged to bargain with penalties and sanctions for those who seek to deliberately frustrate the process.
- While the independent umpire (FWA) cannot arbitrate in other than a small number of unusual circumstances the thematic of requiring employers and unions to resolve their differences at the bargaining table should be good for business and workers.

### **Protection from Unfair Dismissal**

- For workers a secure job is axiomatic to being able to secure a mortgage and raise a family – the restoration of unfair dismissal rights underpins the legitimate desire of workers for certainty in employment and procedural fairness in their dealings with employers.
- WorkChoices undermined this certainty for many workers – the operational reasons provisions saw workers sacked only to see their job re-advertised with reduced conditions.
- For employers new provisions that limit lawyers from taking part in conciliation and make FWA come to them for conciliation proceedings should keep costs and inconvenience to a minimum.
- The qualifying periods will give employers ample time to decide if a new employee fits their business.

- Unions hope that the code for fair dismissals is one that will examine the substance of employer allegations – allowing employees procedural fairness and natural justice in its application.

### **A Strong Independent Umpire**

- Howard took the axe to the AIRC, stripping its powers and effectively removing the tribunal's independence from Government – this created dead end disputes such as Tristar that eroded loyalty and reduced productivity.
- This period also saw the destruction of the time honoured convention of tripartism in AIRC appointments – further diminishing the status of the AIRC.
- Fair Work Australia with new powers to ensure that bargaining takes place restores the notion of an impartial umpire – it gives the parties face saving means to resolve bargaining disputes through conciliation and arbitration as a last resort.
- More needs to be done though – the abandonment of the Constitution's conciliation and arbitration power limits the ability of the new body to settle disputes about the application of the National Employment Standards, awards and collective agreements.

## **THE BAD**

### **Restrictions on Bargaining**

- Unfortunately the Act retains restrictions on bargaining both procedurally and substantially - unions, their members and employers are all consenting adults and we don't need the state regulating our bargaining behaviour.
- Industry and multi industry agreements should be an option for the parties – just as enterprise and workplace agreements are an option now.
- In many contracting sectors small employers will only commit to a collective agreement if their competitors are required to face identical costs, particularly as regards labour rates.
- The retention of 'matters pertaining' provisions is offensive – the parties must have bargaining sovereignty, maintaining matters pertaining will stifle innovation in bargaining, particularly around modern issues like the environment and green jobs.

### **Onerous Penalties and Sanctions on Workers and Unions**

- No cooling off process or period before heavy common law penalties or equitable remedies apply to workers and unions accused of engaging in unprotected industrial action.
- Retention of the 4 hour rule on unprotected industrial action – a typical example of a workforce holding a union meeting in their lunch break who return to work only a couple of minutes late, would trigger such a rule.

- Protected action authorisation procedures – workers and their unions still have lengthy secret ballot procedures to fulfil that employers can frustrate with technicalities, while employer lock outs are minimally regulated, the playing field needs leveling in this crucial respect.
- Enforcing agreements – with no automatic access to arbitration of ‘application’ disputes and no right to take industrial action for enforcement either, the only option is expensive and costly court action.
- Prohibitions on industrial action in support of pattern bargaining – again this is an unjustified restriction on free collective bargaining.
- Ministerial powers to end industrial action – ditto.

### **Restricted Access to Workplaces**

- The 24 hour rule for union entry retained from WorkChoices– in industries such as construction some employers move quickly between jobs making our rights of entry difficult to enforce, coupled with legislative bars on improving access rights in collective agreements these are major impediments to unionisation.
- The ‘fit and proper person’ provision from WorkChoices –there is no justification on restricting whom union members can choose as their representative. The authorised officer system worked well for a century before these restrictions.
- Employer’s ability to direct where union meetings are held – another WorkChoices provision that is unjustified, if meetings happen in workers’ own time then they should have the right to choose where they happen.

### **Dangers with Award Modernisation**

- Potential for the lowering of occupation or industry standards – although ‘take home pay orders’ protect those currently employed, implicit in this is that standards could be lowered for new entrants in the process.
- High income earner loss of award rights – many in the industries the CFMEU cover earn over \$100,000 and have fought for award improvements, they should not be forced to forfeit these rights due to their industrial success.
- Workers on foreign ships in domestic transport – this group are not covered in the award safety net at present, this needs to be rectified to ensure a level playing field for maritime workers.

## **OTHER LEGISLATION**

### **1. The Building and Construction Industry Improvement Act**

- This Orwellian named legislation was the product of the Cole Royal Commission into the Building Industry.
- The legislation like the Royal Commission preceding it was crude union bashing taken to new heights by the Howard Government.
- At the core of this legislation is the policy of maintaining a separate police like apparatus for the building industry which has bestowed on it special coercive investigatory powers to persecute unions and union activists on a constant basis.
- While Labor has indicated that the Australian Building and Construction Commission will close its doors in 2010 the Government is committed to maintaining a special division of Fair Work Australia for the building industry.
- Recently the Government tabled the results of a new Inquiry from retired judge Murray Wilcox which recommends the rescission of the separate Act for the building industry (thus most provisions of the Fair Work legislation will apply to building workers) together with a recommendation that the special interrogation powers be retained for another five years.
- The ACTU and the building unions cannot and will not accept this recommendation from Wilcox, or more particularly the Labor Government, which would have the effect of perpetuating the harassment and discriminatory treatment of ordinary building workers well into the future.

### **2. The Independent Contractors' Act**

- The Howard Government with much fanfare introduced this new piece of industrial legislation to supposedly guarantee the freedoms of sub-contractors shielding them from the malevolent influence of unions and Arbitration Commissions.
- In reality the legislation weakened the rights and remedies that sub-contractors had under pre-existing state and federal laws.
- Labor in opposition said it would restore the right of unions to represent sub-contractors and would also restore user friendly remedies against harsh and unconscionable contracts.
- After 18 months in power Labor has done nothing to address union concerns in this area other than promise a Working Party to examine changes to the legislation. The Working Party has yet to meet and this area of policy represents "unfinished business" to the union movement.

### **3. The Harmonisation of Safety Laws**

- The Rudd Government, like the Liberals before them, have signed up to the business argument that rationalising and harmonising industrial and safety laws across the country will reap business efficiencies and enhanced productivity.

- With regard to safety laws the constitution doesn't stretch as far as some would want and therefore each state will continue to legislate and regulate their own safety and workers' compensation arrangements (at least for the foreseeable future).
- Labor, through the COAG process, has committed itself to harmonising the various safety regimes and to this end established a three person inquiry to make recommendations about harmonised arrangements.
- Unions are neutral on the issue of harmonisation provided the level or standard to which things are harmonised, particularly when dealing with the death or injury to workers, is the highest standard.
- Yet after the OHS Harmonisation panel unveiled its findings it emerged that some of the most stringent safety laws (particularly from the NSW and QLD jurisdictions) are to be omitted from the new harmonised arrangements.
- Unions will not accept the serious reduction in standards that has now been adopted by COAG and the Federal Government – in at least 6 key areas of law or policy unions have vowed to fight to ensure standards are not reduced for millions of Australian workers.

## **SOME CHALLENGES AND MAJOR QUESTIONS**

*Can major employers who embraced WorkChoices with gusto reposition themselves and adapt to the Government's new good faith bargaining agenda?*

- Some notable companies come to mind who embraced the union busting agenda and the question is will they approach good faith bargaining in the way the Federal Government intends or will they pay lip service and continue on their merry way?
- If it is the latter, what action legislative or otherwise will the Government resort to?
- Will the Government use the economic stimulus expenditures to re-inforce its desired industrial relations policies (in the way the Howard Government tied its spending and industrial relations)?

*With the Global Financial Crisis upon us, will the new Fair Work laws enhance job security or the reverse?*

- Obviously job retention, job security and job creation are all critical factors at this time when the economy is in a weakened state.
- Sectional interests will answer this question according to the political or ideological barrow they are pushing.
- Weak industrial relations laws (or anti-union laws) don't necessarily translate into stronger companies or a stronger economy – if this was the case, the United States would not have led the world into the GFC.
- The jury is out on this issue with 1 July not yet upon us.

- The combination of Labor's moderate IR laws (with some measures that strengthen job security) and the Government's massive economic stimulus spend should result in better outcomes for most workers and businesses.

*Will the union campaign for further industrial relations changes succeed or will it cause a serious rupture in relationships with the Parliamentary wing of the labour movement?*

- The union movement established the ALP over 100 years ago and all of us including our esteemed parliamentary representatives have to be reminded of this from time to time.
- The union movement believes there is serious "unfinished business" in regards to the new Fair Work Act and various other key pieces of industrial legislation.
- Naturally the union movement will agitate for further improvements for its membership, nobody including Labor's politicians expects it to do otherwise, and media dramatisation about splits and ruptures with parliamentary Labor should be seen in perspective.
- Almost inevitably changes will occur to the industrial legislation, not so much as a second wave, but as incremental changes that are needed to address deficiencies and problems that become manifest through the workings of the new Act.

*How will the new approach to industrial relations under Rudd Labor impact on the climate change challenge?*

- Labor's Fair Work model is based on the principle that co-operative relationships can be restored between business, unions and the Government.
- Clearly to meet the challenge of climate change a whole-of-community response is needed where a spirit of co-operation, consultation and commitment to serious change is required.
- The introduction of new greener technologies and major structural changes within industries and individual firms will require genuine sign-on by all stakeholders.
- Labor's good faith bargaining agenda is ideally suited to the major exercise in industrial restructuring and the generation of millions of green jobs that lies before us in the decades ahead.

*Will Australia's adoption of the good faith bargaining concept lead to better workplace relationships with stronger firms and a more robust economy or does the voluntary aspect enshrined with it mean that it's doomed to fail?*

- The answer to this is critical to our industrial and economic future.
- Most do not want to see our economic future confined to that of a quarry, a tourist destination and some service sector jobs.

- For Australia to have a sophisticated and integrated economy we need to make products where we can add value through our skills, innovation and advanced technologies.
- Increasingly the products we make and the services we perform will also have to generate a smaller carbon footprint.
- We need an industrial relations system which is consistent with the economic challenges before us.
- There is no guarantee that the good faith bargaining approach central to Labor's new IR model will work.
- It is incumbent on all of us to approach this new era with good will and maturity.

## **CONCLUSION**

The 1<sup>st</sup> July represents the start of a new era in industrial regulation and industrial relationships in Australia.

The Australian people have given their verdict on the extremism of WorkChoices and the task is to now move on to a more co-operative and productive period in workplace relations.

The Fair Work Act and other pieces of industrial legislation fall short of the trade union movement's legitimate expectations (and in some instances explicit commitments we had from Labor).

That being the case the union movement will continue to agitate for improvements while also working to give life to the spirit and intent of the Fair Work Act.

Thank you

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