New Zealand Journal of Employment Relations 37(1): 3-21

Australian Labour Law in Transition: The Impact of the Fair Work Act

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Introduction

The last two decades have seen almost constant change in Australian labour law. Since the Hawke Government replaced the Conciliation and Arbitration Act 1904 with the broadly similar Industrial Relations Act 1988, there has scarcely been a year without some substantial proposal for legislative reform, at either federal or State levels, or both.

However, since 2005 in particular, the pace of change has quickened dramatically. We have seen two major rewrites of federal industrial law. The first, the Howard Government's 'Work Choices' amendments, brought thousands of Australians onto the streets in protest, set off an advertising war, and ultimately helped to bring an end to 11 years of conservative government. The second, the Labor Government's 'Fair Work' legislation, has disappointed unions and employer groups alike – yet holds out the welcome prospect of a return to stability in labour regulation.

This paper outlines the changes effected by the Work Choices and Fair Work legislation, and the values and objectives underlying these two important and contentious sets of reforms. In order to put them in their proper context, however, it is necessary to start by explaining a reform process that began over 20 years ago.

Background: From Compulsory Arbitration to Enterprise Bargaining

Back in the 1980s, labour regulation in Australia was still dominated (as it had been for much of the twentieth century) by the idea of industrial tribunals using compulsory powers of conciliation and arbitration not just to resolve workplace disputes as they arose, but to set minimum standards on wages, working hours and other conditions of employment[1]. Those standards were expressed in awards, legally binding instruments that could (and often did) apply across entire industries or occupations. The Commonwealth and each of the States had their own tribunal systems, with no clear or predictable delineation between them. Because the federal system was based on the Commonwealth's constitutional power to provide for the conciliation and arbitration of industrial disputes that crossed State boundaries, its reach was limited by the propensity of parties to become involved in (or indeed deliberately create) 'interstate' disputes[2] (Guidice, 2007). Some industries

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This paper is an updated version of a piece that originally appeared as "Labour Law in Transition: From Work Choices to Fair Work" in P Sadler (ed) *Contemporary Issues in Law & Policy* (Applied Law & Policy, Perth, 2010) 73.

[1] As to the origins and development of the conciliation and arbitration systems, see S Macintyre and R Mitchell (eds) *Foundations of Arbitration* (Oxford University Press, Melbourne, 1989); J Isaac and S Macintyre (eds) *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, Melbourne, 2004).

[2] See G Giudice "The Constitution and the National Industrial Relations System" (2007) 81 Australian Law Journal 584 at 591–595.

tended to be covered by federal awards, some by State instruments, and others still by a mixture of the two. There were also certain matters that were regulated by State legislation, even for workers covered by federal awards, such as occupational health and safety.

In practice, it was common for employers and trade unions to negotiate as to the content of awards, and, indeed, to strike enterprise-level deals that improved on award conditions or dealt with local issues. However, that bargaining took place under the shadow of conciliation and arbitration procedures that could be unilaterally invoked at any time. The arbitration systems gave Australian unions a role and influence that went beyond their capacity to organise at individual workplaces. Whether or not an employer was prepared to negotiate over employment conditions, a union with a recognised interest in the relevant industry or occupation could notify a dispute to a tribunal and seek new or varied award standards to cover that business – regardless of whether it had members there or not. Unions could also seek, in various ways, to protect their organisational security, including seeking award provisions and giving their members 'preference' in employment over non-members[3].

During the 1980s, the conciliation and arbitration system came under increasing fire from a number of academics, business groups and conservative commentators. Although there were a range of criticisms, the most damning charges included that the system privileged unions, imposed unnecessarily high labour costs, and was generally too centralised in its focus.[4] Importantly, and under the influence of the likes of John Howard and Peter Costello, the Liberal Party became committed to the idea of a radical 'deregulation' of the labour market that would severely limit the influence of both unions and tribunals, and restore the prerogative of management to set conditions that suited the needs of their business. It was a vision based firmly on the *individualisation* of employment relations.[5]

In only one instance did such thinking lead to the complete dismantling of an arbitration system; that was in Victoria, where in 1992 the Kennett Government – very much taking its lead from New Zealand's Employment Contracts Act 1991 – introduced a system of individual employment agreements, underpinned by a set of limited statutory standards.[6] The reforms had only limited success, not least because many unions sought federal award coverage so as to override the new State laws. In 1996, the Government abandoned the experiment and instead entered into a deal with the newly elected Liberal/National Government headed by John Howard to refer almost all of the State's industrial powers to the Commonwealth[7]. Since then, with certain exceptions, Victorian workers have been subject only to federal industrial laws.

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[3] See generally P Weeks *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (Federation Press, Sydney, 1995).

[4] See eg H R Nicholls Society *Arbitration in Contempt* (H R Nicholls Society, Melbourne, 1986); R J Blandy and J Sloan "Escape From the Banana Republic: Labour Market Reforms" 98 National Institute of Labour Studies Working Paper Series (Flinders University, Adelaide, 1988); J Niland *Transforming Industrial Relations in New South Wales: A Green Paper* (NSW Government Printing Office, Sydney, 1989); Industrial Relations Study Commission of the Business Council of Australia *Enterprise-Based Bargaining Units: A Better Way of Working* (Business Council of Australia, Melbourne, 1989). See also C Mulvey "Alternatives to Arbitration: Overview of the Debate" in R Blandy and J Niland (eds) *Alternatives to Arbitration* (Allen & Unwin, Sydney, 1986).

[5] See generally S Deery and R Mitchell (eds) *Employment Relations: Individualisation and Union Exclusion* (Federation Press, Sydney, 1999); D Peetz *Brave New Workplace: How Individual Contracts are Changing Our Jobs* (Allen & Unwin, Sydney, 2006); B Dabscheck "The Contract Regulation Club" (2006) 16 Economic and Labour Relations Review 3

[6] Employee Relations Act 1992 (Vic).

[7] See Commonwealth Powers (Industrial Relations) Act 1996 (Vic).

Elsewhere, there was agreement – even on the part of supporters of the arbitration system – that greater emphasis must be placed upon bargaining at the enterprise level than had hitherto been the case.[8]A particular objective was to use enterprise bargaining to lift the productivity and, hence, competitiveness of Australian businesses. This is a goal that was embraced by the Australian Labor Party (ALP) and the peak union body, the Australian Council of Trade Unions (ACTU), as much as by the conservative parties and the employer groups. During the 1990s, Labor and conservative governments at the federal level, and in every State, enacted legislative amendments to give their industrial laws a greater focus on the enterprise.[9] Aside from in Victoria, these reforms followed a common pattern. They permitted parties to register enterprise-level agreements which, if they met certain criteria, could take effect for what was nominally a fixed period. During that period, the agreements would not only override any awards that would otherwise be applicable, but also preclude the relevant tribunal from exercising its arbitral powers in relation to the matters covered. In effect then, the amendments created a limited right to 'opt out' of the various conciliation and arbitration systems. At the federal level, it was also accepted that workers should have the right to take 'protected' industrial action in support of a new enterprise agreement. Prior to that, strikes and other forms of industrial action had almost invariably been illegal, although extremely prevalent in practice.[10]

Despite the common pattern, there were key differences between the legislative models favoured by the Labor and Conservative parties. The ALP's preferred option was to impose a 'no-disadvantage' test. This allowed almost unlimited freedom to bargain *upwards* from the wages and conditions set by existing awards (now thought of as a 'safety net' rather than the primary form of regulation), while preserving the tribunal's capacity to reject agreements which undercut those conditions.[11] Labor also accepted – albeit over the opposition of the union movement – that collective agreements could be struck between an employer and a group of workers without the involvement of a union; but it endeavoured to hold the line against allowing employers to strike deals with individual workers that overrode awards. The conservative parties, by contrast, tried in most jurisdictions not just to 'strip back' awards, so that they dealt with a more limited range of matters than had previously been the case, but to make it easier for agreements to reduce the award conditions that remained. They sought to achieve this objective in a number of ways, including by replacing the no-disadvantage test with a requirement that an agreement comply with a small number of basic minimum standards. They also attempted to accord primacy to individual agreements over collective agreements, to outlaw any form of discrimination against non-unionists, and, more generally, to reduce the power and influence of the tribunals.

The Howard Government's first wave of reforms in 1996 achieved most of these objectives, including the introduction of a system of individual Australian Workplace Agreements (AWAs)[12], but the Liberal/National Coalition's lack of control of the Senate meant that it was forced to enter into a compromise with the centrist Australian Democrats to secure the passage of its legislation. In particular, it was compelled to accept the retention of a no-disadvantage test for both AWAs and

[8] See generally A Stewart "Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation" (1992) 5 Australian Journal of Labour Law 101; D Macdonald, I Campbell and J Burgess "Ten Years of Enterprise Bargaining in Australia: An Introduction" (2001) 12 Labour & Industry 1.

[9] See generally D R Nolan (ed) *The Australasian Labour Law Reforms: Australia and New Zealand at the End of the Twentieth Century* (Federation Press, Sydney, 1998).

[10] See B Creighton "Enforcement in the Federal Industrial Relations System: An Australian Paradox" (1991) 4 Australian Journal of Labour Law 197.

[11] See eg the reforms introduced by the Industrial Relations Reform Act 1993 (Cth).

[12] See Workplace Relations and Other Legislation Amendment Act 1996 (Cth), which amended the Industrial Relations Act 1988 (Cth) and renamed it the Workplace Relations Act 1996 (Cth).

certified (collective) agreements. Over the next eight years, the Howard Government put forward various proposals for further reform,[13] but only a few of these were passed, and then in amended form.[14] The more contentious measures failed to progress, notably in relation to the exemption of small businesses from the need to act fairly in terminating employment.[15] This last measure was said to be necessary in order to generate job growth, although no hard evidence was ever advanced to substantiate the assertion that unfair dismissal laws were deterring employers from hiring workers who would not otherwise have found a job.[16]

The Work Choices Legislation

The Coalition's opportunity was to come in 2005, when it unexpectedly gained control of the Senate. In May 2005, after a lengthy internal debate about just how far to go in dismantling the existing system, John Howard announced a package of reforms that was eventually given the brand name 'Work Choices' and marketed to the public at considerable expense.[17] It was claimed that the reforms would "create a more flexible, simpler and fairer system of workplace relations for Australia", one which would "improve productivity, increase wages, balance work and family life, and reduce unemployment."[18]

In November, a massive and hastily-drafted Bill was put before the Parliament – not, as might have been expected, to replace theWorkplace Relations Act 1996 (WR Act), but to amend and renumber it. After a cursory Senate inquiry, the Bill was passed with nearly 300 amendments, all proposed by the Government itself and most correcting oversights or errors. It passed into law as the Workplace Relations Amendment (Work Choices) Act 2005 and was proclaimed to take effect on 27 March 2006, together with a hefty new set of regulations.[19]

Given the controversy that surrounded their enactment, it is hardly surprising that the Work Choices reforms were described as "radical" or "revolutionary" by many commentators.[20] However, in many ways, they fell short of the "big bang" that might have been expected.[21] What the Coalition chose to do was to retain many of the existing institutions and processes, but undermine them in various ways.

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[13] See eg Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (Cth).

[14] See eg Workplace Relations Amendment (Termination of Employment) Act 2001 (Cth); Workplace Relations Amendment (Genuine Bargaining) Act 2002 (Cth); Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004 (Cth).

[15] See eg Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004; and see S O'Neill "Unfair Dismissal and the Small Business Exemption" Background Note (Parliamentary Library, Canberra, 2008).

[16] See P Waring and A de Ruyter "Dismissing the Unfair Dismissal Myth" (1999) 25 Australian Bulletin of Labour 251; W Robbins and G Voll "The Case for Unfair Dismissal Reform: A Review of the Evidence" (2005) 31 Australian Bulletin of Labour 237.

[17] The validity of the appropriation of the A$55 million that was eventually spent on the campaign was challenged in the High Court, but upheld in *Combet v Commonwealth* (2005) 224 CLR 494.

[18] Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) 1.

[19] See especially the Workplace Relations Regulations 2006 (Cth).

[20] See eg J Murray "Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law" (2006) 35 Industrial Law Journal 343; R Hall "Australian Industrial Relations in 2005 — The WorkChoices Revolution" (2006) 48 Journal of Industrial Relations 291.

[21] See A Stewart "Work Choices in Overview: Big Bang or Slow Burn?" (2006) 16(2) Economic and Labour Relations Review 25. The changes were certainly not as fundamental as those adopted by the Keating Government in 1993: see R Mitchell, P Gahan, A Stewart, S Cooney and S Marshall "The Evolution of Labour Law in Australia: Measuring the Change" (2010) 23 Australian Journal of Labour Law 61.

This was particularly true in relation to the national industrial tribunal, and the Australian Industrial Relations Commission (AIRC). Its powers to set and adjust minimum wage rates were transferred to a new body, the Australian Fair Pay Commission, whose five members were appointed on limited term contracts. It was widely assumed that this group would be more sympathetic to the Government's desire to hold down wage increases in order to create greater incentives for employers to hire low-paid workers.[22] The AIRC also lost responsibility for the approval of collective workplace agreements, which, like AWAs, were now lodged with the Office of the Employment Advocate (OEA). Most significantly, its compulsory powers of conciliation and arbitration were almost entirely removed. Leaving aside certain functions in controlling the use of industrial action, the AIRC was now expected to compete with private mediators and arbitrators in providing voluntary dispute resolution services; although the fact that its services were freely available, and that it retained the support of most of the major employers and unions, gave it a significant edge in that regard.[23]

Awards, too, were retained, though provision was made for further 'simplification' and 'rationalisation' of their content and coverage. Crucially, the no-disadvantage test for registered agreements was removed, meaning that awards no longer functioned as a safety net for workplace bargaining. Certain award provisions were designated as having 'protected' status – for example, any requirement to pay overtime or other 'penalty rates' for long or anti-social hours of work. But even a protected award condition could be modified or removed by clear enough words in a workplace agreement. Hence, there was nothing now to stop employers from engaging workers on sub-award conditions, especially through AWAs. Indeed, the legislation made it clear that employers could require job-seekers to sign an AWA as a condition of being hired. Furthermore, once an employee became subject to an AWA or collective agreement, the bulk of any otherwise relevant award would no longer apply to them, even if the agreement was subsequently terminated and not replaced. The true safety net was now provided by the Australian Fair Pay and Conditions Standard (AFPCS), a set of five minimum conditions that applied to all federal system employees, except those covered by pre-Work Choices agreements. The AFPCS required employers to observe a basic wage rate (in most cases derived from an award), and refrain from expecting employees to work more than 38 hours per week plus reasonable additional hours. It also obliged employers to provide four weeks' annual leave, various forms of personal leave, and 12 months' unpaid parental leave.

Other significant reforms introduced by Work Choices included an exemption from unfair dismissal claims that extended well beyond 'small' businesses. Employers with 100 or fewer employees were now entirely immune from any complaint that they had acted harshly, unjustly or unreasonably in dismissing a worker; and even larger employers could resist any claim by pleading a 'genuine operational reason' for a dismissal.

There were also amendments that further restricted the capacity of trade unions to organise protected industrial action, or to enter workplaces to hold discussions with current or potential members. The new rules on industrial action included a requirement to conduct a secret ballot of members to obtain their authorisation for the action to proceed. In addition, there were limitations on the kind of terms

[22] See eg P Waring, A de Ruyter and J Burgess "The Australian Fair Pay Commission: Rationale, Operation, Antecedents and Implications" (2006) 16(2) Economic and Labour Relations Review 127. In the result, most of the Fair Pay Commission's decisions awarded minimum wage increases that broadly matched what the AIRC had been granting over the previous decade. It was only in its final decision in July 2009, which imposed a wage freeze in response to the recession brought on by the global financial crisis, that the Commission performed to expectations: see *Wage Setting Decision July 2009* (2009) 183 IR 1.

[23] See A Forsyth "Dispute Resolution under Work Choices: The First Year" (2007) 18 Labour & Industry 21.

that could be included in a workplace agreement, with prohibitions aimed specifically at provisions commonly sought by unions. A separate but related initiative involved the enactment of special legislation to regulate bargaining and industrial action in the building industry.[24] Among other things, this established the Australian Building and Construction Commission (ABCC), a body with extensive powers of investigation and enforcement, whose task was to combat the culture of "lawlessness" in the industry identified by the Cole Royal Commission.[25] Employers in the industry were required to conduct their employment relations strictly in accordance with the Government's National Code of Practice for the Construction Industry if they wished to bid for publicly funded work. In a similar vein, the threat of funding cuts was used to force universities not just to offer all staff individual agreements, but to rewrite all their policies and procedures to remove any guaranteed role for unions.[26]The "command and control" mentality[27], evident in these and other restrictions on agreement-making stood in stark contrast to the Howard Government's rhetorical commitment to "freedom" and "choice" in bargaining.[28]

Perhaps the most far-reaching changes introduced by the Work Choices legislation concerned the coverage of the federal system. Instead of operating by reference to interstate industrial disputes, the new system's application was dictated primarily by the nature or location of each employer. In particular, the corporations' power in s 51(xx) of the Constitution was used to regulate all trading, financial or foreign corporations and their employees. In addition, all other employers in Victoria and the Territories were covered: the former as a result of the 1996 referral of powers, the latter by reliance on the Commonwealth's general power in s 122 of the Constitution to make laws in relation to the Territories. Added to the Commonwealth's control of its own agencies, this brought somewhere between 75 and 85% of the Australian workforce within the scope of the federal system.[29] The WR Act was now specified to operate to the complete exclusion of State or Territory industrial laws, except on 'non-excluded' matters, such as workers compensation, occupational health and safety, discrimination, training and long service leave. Therefore, for most purposes, federal system employers could only now be subject to federal regulation. Where a State award or agreement had previously applied to such an employer, it was given effect as a federal instrument. A subsequent measure, the Independent Contractors Act 2006, also prevented the States and Territories from subjecting contractors engaged by corporations (or by Commonwealth agencies or in a Territory) to anything in the nature of 'industrial' regulation.[30]

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[24] Building and Construction Industry Improvement Act 2005 (Cth); and see A Forsyth, V Gostencnik, I Ross and T Sharard *Workplace Relations in the Building and Construction Industry* (LexisNexis Butterworths, Sydney, 2007).

[25] See T R H Cole *Final Report of the Royal Commission into the Building and Construction Industry* (Commonwealth, Canberra, 2003).

[26] See Higher Education Legislation Amendment (Workplace Relations Requirements) Act 2005 (Cth); S Rosewarne "Workplace "Reform" and the Restructuring of Higher Education" (2005) 56 Journal of Australian Political Economy 186

[27] See J Howe "'Deregulation' of Labour Relations in Australia: Towards a More 'Centred' Command and Control Model" in C Arup et al (eds) *Labour Law and Labour Market Regulation* (Federation Press, Sydney, 2006) 147; S Cooney, J Howe and J Murray "Time and Money under Work Choices: Understanding the New Workplace Relations Act as a Scheme of Regulation" (2006) 29 University of New South Wales Law Journal 215.

[28] See Stewart "Work Choices in Overview", above n 21, at 35, 52; Murray, above n 20, at 365. The reaction by many employers and unions to the government's restrictions was to negotiate informal 'side' deals on matters that could not lawfully be included in registered agreements: see A Stewart and J Riley "Working Around Work Choices: Collective Bargaining and the Common Law" (2007) 31 Melbourne University Law Review 903.

[29] There have been varying estimates of this coverage, none of them precise. For more recent figures, see Explanatory Memorandum, Fair Work Amendment (State Referrals and Other Measures) Bill 2009 (Cth), v–vi.

[30] See J Riley "A Fair Deal for the Entrepreneurial Worker? Self-Employment and Independent Contracting Post Work Choices" (2007) 19 Australian Journal of Labour Law 246; A Forsyth "The 2006 Independent Contractors Legislation: An Opportunity Missed" (2007) 35 Federal Law Review 329.

The Fight Against Work Choices

The immediate response by the States and Territories to the federal 'takeover' was to mount a constitutional challenge to the Work Choices legislation; but in November 2006, the High Court rejected that challenge on all counts.[31] Other legal responses by some of the States, each of which, at the time, had Labor Governments, proved more successful.[32] These included 'de-corporatising' certain public sector agencies or local councils, so that they fell outside the scope of the new federal system;[33] and also legislating to extend their regulation of federal system employers in some of the 'non-excluded' areas still left to them.[34] A further tactic was to establish inquiries or commission research to explore the impact of the Work Choices reforms on workers and their families.[35] Victoria, indeed, created a new public office, the Workplace Rights Advocate, with the specific objective of promoting the 'fair industrial treatment' of Victorian workers.[36] A number of other States and Territories followed suit.[37] Some also introduced procurement guidelines that effectively required government suppliers or contractors not to use the federal changes to cut working conditions.[38]

The most significant campaign waged against Work Choices, however, was the one conducted by trade unions and various community groups, under the banner of 'Your Rights at Work'.[39] Featuring some highly effective TV advertising, it highlighted the potential for employers to exploit the new legislation to remove entitlements and dismiss workers with impunity. One particular advertisement had a major impact. It showed a mother, 'Tracey', being threatened with the sack unless she came in to work at short notice, despite being unable to make any arrangements for the care of her children.[40]

With the economy growing strongly at the time, unemployment low and skilled labour in short supply, there was, in truth, little incentive or opportunity for most employers to use the new legislation to their full advantage. Nonetheless, evidence began to emerge of low-wage workers in industries, such as retail and hospitality, seeing their take-home pay fall under standard or 'template' agreements (both individual and collective) that lowered or removed 'protected' award conditions.[41]

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[31] *New South Wales v Commonwealth* (2006) 229 CLR 1: see A Stewart and G Williams *Work Choices: What the High Court Said* (Federation Press, Sydney, 2007); S Evans, C Fenwick, C Saunders, J-C Tham and M Donaldson "Work Choices Case: Analysis and Implications" in *Work Choices: The High Court Challenge* (Thomson, Sydney, 2007) 1.

[32] See I Landau "Legislating on the Margins of the Federal Takeover: Victoria's Response to WorkChoices" (2008) 21 Australian Journal of Labour Law 30; A Stewart "Testing the Boundaries: Towards a National System of Labour Regulation" in A Forsyth and A Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, Sydney, 2009) 19 at 29–32.

[33] See eg Public Sector Employment Legislation Amendment Act 2006 (NSW); Statutes Amendment (Public Sector Employment) Act 2006 (SA); Local Government and Industrial Relations Amendment Act 2008 (Qld).

[34] As, for example, in relation to child labour: see eg Industrial Relations (Child Employment) Act 2006 (NSW); Child Employment Act 2006 (Qld) Parts 2A - 2B.

[35] See eg Industrial Relations Commission of South Australia *Inquiry Into the Impact of Work Choices in SA – Report* (Adelaide, 2007).

[36] See Workplace Rights Advocate Act 2005 (Vic).

[37] A Workplace Rights Ombudsman was created in Queensland, a Fair Employment Advocate in Western Australia, and a Workplace Advocate in the Northern Territory.

[38] See J Howe and I Landau "'Light Touch' Labour Regulation by State Governments in Australia" (2007) 31 Melbourne University Law Review 367 at 382–383.

[39] See K Muir *Worth Fighting For: Inside the Your Rights at Work Campaign* (UNSW Press, Sydney, 2008).

[40] The ad can be seen at http://www.youtube.com/watch?v=1WvMTAci5nU

[41] See eg D Peetz *Assessing the Impact of 'Work Choices' — One Year On* (prepared for the Department of Innovation, Industry and Regional Development, Victoria, 2007); J Evesson, J Buchanan, L Bambery, B Frino and D Oliver *Lowering of Standards Report: From Awards to Work Choices in Retail and Hospitality Collective Agreements* (Workplace Research Centre, Sydney, 2007); B Pocock, J Elton, A Preston, S Charlesworth, F MacDonald, M Baird, R

A much-publicised example of this was the retailer, Spotlight, offering an increase of two cents per hour in basic wage rates, while abolishing penalty rates and paid rest breaks.[42] Suspicions were also aroused when it emerged that the Government was suppressing data collected by the OEA with regards to the content of workplace agreements.[43]

With community unease over the reforms growing, and facing a resurgent Labor Opposition now led by Kevin Rudd and Julia Gillard, the Howard Government was forced into a retreat. Declaring that it had never intended its new system to be used to strip away award conditions, it announced in May 2007 a series of changes that were subsequently given effect through amendments to the WR Act.[44] The changes included a new 'fairness test' for workplace agreements, which required 'fair compensation' to be provided to an employee in the event that any protected award conditions were changed. The task of processing agreements and determining whether they passed the fairness test was given to a new agency, the Workplace Authority, which replaced the OEA. Responsibility for ensuring compliance with awards and other standards was also transferred. The Office of Workplace Services, formerly a unit within the Department of Employment and Workplace Relations, was transformed into the Office of the Workplace Ombudsman, with a specific brief to be more visible and active in enforcing the WR Act.[45] The Government also sought to drop all reference to the unpopular term 'Work Choices', even going so far as to instruct call centre staff responsible for handling public enquiries about the new laws to used 'workplace relations' instead[46].

Despite these changes, and support from business-funded advertising that sought to portray 'workplace reform' as being under threat from a union-dominated ALP,[47] the Coalition lost office in November 2007. Industrial relations featured strongly during the election campaign as one of the key points of difference between the major parties.[48] John Howard became only the second serving Australian Prime Minister to lose his own seat, after Stanley Bruce in 1929. In a curious parallel, he, too, had suffered defeat over the issue of reforming the federal industrial system.

There seems little doubt that what brought the Work Choices reforms undone was a combination of an effective scare campaign, and the Howard Government's unwillingness to come clean about both the nature and likely consequences of its changes. For example, the Government constantly referred to 'higher wages' under the new system, even though the abolition of the no-disadvantage test meant that take-home pay could be reduced by the cutting of penalty rates under agreements. It claimed that award conditions would be 'protected by law', when they could be removed by a single line in the fine print of an agreement. It spoke of empowering employers and employees to 'sit down together' and negotiate conditions that suited their mutual needs, when it must have known that in

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Cooper and B Ellem "The Impact of 'Work Choices' on Women in Low Paid Employment in Australia: A Qualitative Analysis" (2008) 50 Journal of Industrial Relations 475.

[42] See "Spotlight AWAs could cut retail workers' pay by up to $100 per week: ALP" *Workplace Express* (Australia, 25 May 2006).

[43] See M Davis "Revealed: how AWAs strip work rights" *Sydney Morning Herald* (Australia, 17 April 2007) at 1. The information in question was later released by the Rudd Government: see "Gillard says statistics prove AWAs ripped off workers" *Workplace Express* (Australia, 13 March 2008).

[44] Workplace Relations Amendment (A Stronger Safety Net) Act 2007 (Cth).

[45] As to the impact of this change, see T Hardy "A Changing of the Guard: Enforcement of Workplace Relations Laws Since Work Choices and Beyond" in Forsyth and Stewart, above n 32, at 75.

[46] "Federal Government deletes more references to Work Choices" *Workplace Express* (Australia, 17 May 2007).

[47] See M Lyons "'Lies, Damned Lies and Statistics': The Business Coalition for Workplace Reform Campaign of 2007" (2007) 18(1) Labour & Industry 119.

[48] As to the significance of industrial relations in the lead-up to the 2007 election, see R Hall "The Politics of Industrial Relations in Australia in 2007" (2008) 50 Journal of Industrial Relations 371 at 373

the real world employment conditions are generally imposed rather than negotiated.[49] When independent research and analysis highlighted the likely impact of the Work Choices changes on low-paid and vulnerable workers, or questioned the need for reform at all,[50] the Government's response was generally to vilify those concerned, rather than to engage with the substance of their work.[51]

It is interesting to speculate what might have happened if John Howard and his colleagues had shown the courage of their convictions on industrial relations. This might have involved admitting straight up that the purpose of their reforms was to shift the balance of power in favour of employers, accepting that some workers would be worse off as a result, but then seeking to show how this would create economic and social benefits for the community. As it was, the Government found itself caught up in an advertising war it could not win.It was the ACTU's image of workers under pressure from uncaring bosses that captured the public mood, rather than the Government's glossy vision of smiling workers shaking hands with their supervisors, or the business groups' attempts to show small retailers being menaced by union 'thugs'. The Coalition was also outflanked by a Labor policy that was more effective in claiming ownership of the concept of 'fairness' in labour regulation.

Forward with Fairness

The ALP's 'Forward with Fairness' policy was carefully crafted during 2007,[52] with two main objectives in mind. One was to capitalise on the widespread anti-Work Choices sentiment; to that end, Labor promised to abolish AWAs, end the capacity of employers to offer agreements that undercut award standards, and restore access to unfair dismissal claims. It also undertook to expand the statutory safety net of minimum conditions, and impose an obligation on parties to bargain in good faith when negotiating collective agreements. To reinforce the impression of a new beginning, there was a promise of a new agency, Fair Work Australia (FWA), to replace both the AIRC and the various other bodies created by the Howard Government.

The second objective, on the other hand, was to reassure both the business community (in particular, the mining sector) and the wider electorate that Labor's changes would be 'responsible' rather than radical. Forward with Fairness promised to retain 'tough' laws on industrial action, right of entry and freedom of association. There would be special recognition for the position of small businesses in the new unfair dismissal system. A lengthy transitional period before many of the main changes were introduced would allow employers ample time to adjust. In addition, Labor promised to

[49] See M Westcott, M Baird and R Cooper "Reworking Work: Dependency and Choice in the Employment Relationship" (2006) 17(1) Labour & Industry 5; and see also M Gardiner "His Master's Voice? Work Choices as a Return to Master and Servant Concepts" (2009) 31 Sydney Law Review 53. The typical lack of bargaining in most employment relationships was evident in the tendency for AWAs to be standardised documents that did not vary from worker to worker: see P Waring and J Burgess "The Privileging of Individualism in Australian Industrial Relations" (2006) 14 International Journal of Employment Studies 61 at 70–71.

[50] See eg G Considine and J Buchanan *Workplace Industrial Relations on the Eve of Work Choices: A Report on a Survey of Employers in Queensland, NSW and Victoria* (Workplace Research Centre, Sydney, 2007), suggesting that most employers were in fact content with the existing system, and that the changes were being driven by 'fears', 'imagined problems' and 'a preoccupation with isolated pockets of union militancy': Ibid, at 23.

[51] See A Stewart and A Forsyth "The Journey from Work Choices to Fair Work" in Forsyth and Stewart, above n 32, 1 at 15.

[52] See K Rudd and J Gillard *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces* (ALP, Canberra, 2007); K Rudd and J Gillard *Forward with Fairness: Policy Implementation Plan*, (ALP, Canberra, 2007).

complete two tasks left unfinished by the Howard Government. It would seek the co-operation of the States to create a single, national system of industrial regulation, at least for the private sector, and it would also modernise the award system, offering new scope for employers and individual workers to vary the effect of selected provisions.

The pervasive theme in Forward with Fairness was that of restoring *balance*– between 'fairness' and 'flexibility', and (implicitly) between the interests of workers and employers. The very fact that elements of the policy attracted criticism from both unions and business groups was treated as some sort of proof that Labor must have 'got the balance right'.[53] There are those who would have preferred to see the ALP take the opportunity to start again and design an entirely new system of regulation, based on fundamental rights and values,[54] but for all the rhetoric about 'tearing up' or 'burying' Work Choices, it was apparent that Forward with Fairness was promising incremental rather than radical change – and that significant aspects of the Howard Government's reforms would survive.[55]

The Fair Work Legislation

The Rudd Government's first move on taking office was to secure the passage in March 2008 of a number of key amendments to the WR Act.[56] Among other things, these reintroduced a no-disadvantage test in place of the more limited 'fairness test', and precluded employers from offering any further AWAs – although those who had been using such agreements were permitted to offer Individual Transitional Employment Agreements instead, at least until the end of 2009. The amendments also initiated a process for the AIRC to review and modernise the award system again by the end of 2009.

With those changes out of the way, the Government moved to draft the 'substantive' measure that would give effect to the bulk of its proposed reforms and replace the WR Act. In marked contrast to the Work Choices legislation, the Government consulted widely over its new legislation and was prepared to make changes in response to stakeholder submissions, although it generally resisted pressure to depart from the central commitments in its Forward with Fairness platform. The Government also made a conscious effort to make the new legislation more accessible to users. Over the preceding two decades, the federal industrial legislation had become lengthy and excessively complex. A significant reason for this was the lack of trust that successive governments had shown in the AIRC and the courts. Rather than allowing decision-makers to use their judgement in interpreting and applying the legislation, those governments had sought to anticipate and provide for every eventuality.[57] By contrast, Labor's avowed aim was to make the new legislation 'simple and

[53] See A Stewart "A Question of Balance: Labor's New Vision for Workplace Regulation" (2009) 22 Australian Journal of Labour Law 3 at 45–46. Cf The "third way" rhetoric adopted by the Blair Government in the UK: see eg H Collins "Is There a Third Way in Labour Law?" in J Conagahan, R M Fischl and K Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press, Oxford, 2002) at 449.

[54] As for example with the proposal from the Australian Institute of Employment Rights for a 'charter' of rights: see M Bromberg and M Irving (eds) *Australian Charter of Employment Rights* (Hardie Grant Books, Melbourne, 2007); and see further R McCallum "Australian Labour Law After the Work Choices Avalanche: Developing an Employment Law for our Children" (2007) 49 Journal of Industrial Relations 436; C Fenwick "Decency and Fairness in Labor Standards: An Australian Perspective on a Canadian Proposal" (2008) 29 Comparative Labor Law & Policy Journal 491; J Riley and P Sheldon (eds) *Remaking Australian Industrial Relations* (CCH Australia, Sydney, 2008).

[55] See generally Forysth and Stewart, above n 32.

[56] Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth).

[57] See A Stewart "A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation" (2005) 31 Australian Bulletin of Labour 210 at 216–219; Stewart "Work Choices in Overview", above n 21, at 26–27.

straightforward to understand', and to avoid 'micro-regulation' by 'conferring broad functions and appropriate discretion on Fair Work Australia.'[58]

The outcome of the consultation and drafting process was the Fair Work Bill 2008, which was tabled in Parliament in November 2008. Following a series of last-minute compromises to secure the support of the crossbenchers in the Senate, it eventually passed in March 2009, becoming the *Fair Work Act* 2009.[59] The bulk of its provisions were proclaimed to take effect on 1 July 2009. Two important parts, however, were given a delayed commencement. These were the new 'safety net' provisions in Part 2-2, setting out the National Employment Standards (NES) that prescribe minimum conditions for all employees covered by the Act, and Part 2-3, dealing with modern awards. In accordance with the timetable set while Labor was in opposition, these provisions took effect from 1 January 2010.

Where Forward with Fairness envisaged a single regulatory body to oversee the new regime, the FW Act created two. FWA has replaced the AIRC, the Fair Pay Commission and the Workplace Authority. Structured in a way that is broadly similar to the AIRC, it has also inherited that tribunal's President and most of its members.[60] Its work is complemented by a separate body, the Office of the Fair Work Ombudsman (FWO). This has not only taken over the compliance and enforcement functions of the Workplace Ombudsman, but also assumed responsibility for the provision of information and advice on workplace rights and responsibilities. Labor also proposed that the ABCC be replaced by a Fair Work Building Industry Inspectorate, with more limited powers, though the necessary amendments failed to pass in the Senate.[61]

Besides the safety net provisions mentioned above, other features of the FW Act included:

- a new system of 'enterprise agreements' between employers and groups of employees, covering either single or multiple enterprises;
- an obligation on the part of employers, unions and other 'bargaining representatives' to negotiate new enterprise agreements in good faith, with provision for FWA to intervene in various ways to resolve bargaining disputes;
- provision for FWA to conduct annual wage reviews, plus four-yearly reviews of modern awards;
- a new set of 'general protections' against discriminatory and other wrongful treatment at work, subsuming (and expanding upon) a range of provisions in the WR Act concerning matters, such as freedom of association, coercion, misrepresentation and unlawful termination;
- a revamped system for employees to complain of unfair dismissal, subject to a requirement to complete a 'minimum period' in employment of six months, or 12 months in the case of an employer with fewer than 15 workers; and
- a right to take protected industrial action in relation to a proposed single-enterprise agreement, subject to similar requirements as under the WR Act.

[58] Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [r.4].

[59] For an overview of the legislation, see Stewart "A Question of Balance", above n 53.

[60] As to the similarities and differences between the AIRC and FWA, see the symposium on 'Fair Work Australia and the Legacy of the Commission" (2011) 53(5) Journal of Industrial Relations.

[61] Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (Cth). A similar proposal is currently before the Australian Parliament, but on present indications seems unlikely to fare any better: see Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 (Cth). The government needs support either from the Liberal/National Coalition, which opposes any changes to the ABCC, or the Greens, who want to see an end to all special regulation for the building industry. At present there is no compromise in sight that would secure the votes of either group.

The FW Act is complemented by a number of related measures,[62] the most important being the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (TPCA Act). This has repealed the WR Act; other than two schedules relating to the registration, rules and internal affairs of trade unions and employer associations. Those schedules have survived as a renamed *Fair Work (Registered Organisations) Act2009*. The TPCA Act has also preserved the operation of selected other provisions in the WR Act for transitional purposes. While many of the arrangements in the TPCA Act will shortly be of historical significance only, the main exception is Schedule 3, which provides for the continuing operation of pre-FW Act awards and agreements as 'transitional instruments'. These can generally continue to operate until supplanted by modern awards or new enterprise agreements.

For the most part, the rights and obligations created by the new Fair Work legislation apply in relation to 'national system employers' and their employees. According to s 14 of the FW Act, those employers include trading, financial and foreign corporations, Commonwealth agencies and other employers that operate in a Territory. The term 'national system employer' is separately extended to include any other type of employer in a 'referring State', subject to any limitations imposed by that State.[63] Towards the end of 2009, New South Wales, Queensland, South Australia and Tasmania agreed to join Victoria in referring powers to the Commonwealth,[64] with effect from 1 January 2010. Only Western Australia, now in the hands of a Liberal government, has refused to co-operate in creating a national system. Apart from Victoria, the referring States have determined that they will retain their own industrial legislation and tribunals to deal with State government agencies and (except in Tasmania) local councils. However, non-governmental employers and employees are now almost entirely subject to federal regulation.

As was the case under the WR Act, even national system employers can still be regulated by State or Territory laws in relation to 'non-excluded' matters, such as training, discrimination and child labour. Labor has not moved to take over responsibility for these areas,[65] but in some cases it is seeking to promote the harmonisation of State or Territory legislation. In relation to occupational health and safety, for example, it has secured general agreement to the adoption of a 'model' law,[66] and created a new agency, Safe Work Australia, to oversee the reform process.[67] It is also seeking to develop a new national standard on long service leave,[68] though less progress has been made to date on that front.

[62] See eg Fair Work Regulations 2009 (Cth); Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009 (Cth).
[63] See Fair Works Act, Part 1-3 Divs 2A, 2B, as amended or added by the Fair Work Amendment (State Referrals and Other Measures) Act 2009 (Cth).
[64] See Industrial Relations (Commonwealth Powers) Act 2009 (NSW); Fair Work (Commonwealth Powers) Act 2009 (Vic); Fair Work (Commonwealth Powers) and Other Provisions Act 2009 (Qld); Fair Work (Commonwealth Powers) Act 2009 (SA); Industrial Relations (Commonwealth Powers) Act 2009 (Tas).
[65] Except in relation to rules regarding the payment of wages: see FW Act Pt 2-9 Div 2, replacing State legislation such as the *Victorian Workers' Wages Protection Act 2007* (Vic).
[66] See Australian, State, Territory and New Zealand Workplace Relations Ministers' Council, WRMC 83 Communiqué (25 September 2009). The model Work Health and Safety Act was supposed to be enacted in each participating jurisdiction in time to take effect from 1 January 2012, though at the time of writing it appears that only the Commonwealth, New South Wales, Queensland, the Australian Capital Territory and the Northern Territory will have passed the necessary legislation by then.
[67] See Safe Work Australia Act 2008 (Cth).
[68] See Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [r.76].

The Fair Work Legislation in Operation

At the time of writing this paper, the new Fair Work regime has been in operation for over two years. There have certainly been some significant changes – though their practical impact has been muted. For example, although the new NES are important, most were already available to workers under the WR Act.[69]

One exception is the entitlement of up to 16 weeks' severance pay on redundancy, under s 119 of the FW Act. This was previously a standard benefit under awards and enterprise agreements, but has now been extended to managerial and professional employees not covered by awards.[70] There is also a right under s 65 for (some) working parents to request flexible work arrangements to accommodate their caring responsibilities, but there is, in most cases, no way of challenging the reasonableness of any refusal by the employer.[71] Research suggests that in any event, such flexible arrangements were already a common feature of employment relationships in Australia, albeit by consent rather than legal right.[72] Perhaps a more significant initiative in this area has been the introduction of a 'paid parental leave' scheme, remedying a long-standing gap in Australia's labour standards.[73] However, this was not done as part of the NES, which continue to provide an entitlement only to *unpaid* parental leave. There is, instead, a separate statute, the *Paid Parental Leave Act 2010* – though its title is a misnomer, as rather than provide for leave as such, it offers a government-funded payment, set at the national minimum wage, that can be spread over up to 18 weeks. For eligible employees, any right to take leave must still depend on the NES, or require the agreement of the employer.[74]

The advent of the 'modern award' system has brought more substantial changes. To the surprise of many seasoned observers, the AIRC completed the massive task of reviewing more than 1500 federal and State awards in time for the new system to commence in 2010. There are now 122 modern awards, almost all of which are structured to apply to a specified industry. Importantly, however, most have transitional provisions that are designed to phase in the modern award wage rates over a period that will end in mid-2014, so that, for the time being, many 'old' awards remain relevant in determining minimum conditions and setting a safety net for enterprise bargaining. (Unsurprisingly, employer groups have tended to complain about the wage or penalty rates that are steadily being phased up, while saying little about the many that are being phased down). There are also a large number of 'enterprise awards' that can continue to apply to a single business, at least until the end of 2013.[75] In theory, these can be 'modernised' by FWA and continue in operation after that date, although in practice FWA has signalled that it will take a great deal of convincing that the

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[69] See J Murray and R Owens "The Safety Net: Labour Standards in the New Era" in Forsyth and Stewart, above n 32, at 40.

[70] See B Creighton and A Stewart *Labour Law* (5th ed, Federation Press, Sydney, 2010) at [18.57]–[18.61]. Note that there are various exclusions and exemptions, so that for instance the entitlement does not apply to anyone working for an employer with fewer than 15 staff.

[71] See Creighton and Stewart, above n 70, at [13.94]–[13.97].

[72] See N Skinner and B Pocock "Flexibility and Work-life Interference in Australia" (2011) 53 Journal of Industrial Relations 65.

[73] See Productivity Commission *Paid Parental Leave: Support for Parents with Newborn Children* (Inquiry Report No 47, Melbourne, 2009).

[74] The eligibility requirements for the two schemes (the NES unpaid leave entitlement and the Paid Parental Leave Act) are somewhat different, so that complex issues arise as to their interaction: see generally E McCarthy, E Jenkin and A Stewart *Parental Leave: A User-Friendly Guide* (Lawbook Co, Sydney, 2012).

[75] See TPCA Act, Sch 6.

employers concerned should not fall back to the relevant industry award.[76] FWA has also been reluctant, to date, to vary modern awards, other than to correct errors or remove ambiguities,[77] although it is about to embark on an interim review of the modern award system required by the legislation.[78]

In relation to wage fixation, FWA's new Minimum Wages Panel has, to date, completed two of the annual reviews it is required to undertake.[79] Its decisions have resulted in modest adjustments to award rates of pay, and also to the National Minimum Wage Order that protects award-free workers. The National Minimum Wage now sits at A$15.51 per hour. Perhaps of greater significance, however, has been the use made of the pay equity provisions in Part 2-7 of the FW Act. These permit FWA to make 'equal remuneration orders' for specified groups of employees. Unlike equivalent provisions in previous legislation, which were never successfully invoked, the new provisions focus on the need for equal pay for work of equal *or comparable* value, and there is no requirement to establish that existing pay rates have been set on a discriminatory basis.[80] A test case brought by the Australian Services Union to secure wage rises for the largely female workforce in the social and community services sector has resulted in a finding that their work is significantly undervalued.[81] At the time of writing, no orders have yet been made, FWA having requested further evidence and argument as to the scope and timing of any increases. However, the Commonwealth has committed to providing at least $2 billion in funding to permit organisations in the sector – many of whom rely heavily on government funding to provide their services – to afford any resulting pay increases.[82]

As for the new enterprise bargaining regime, any initial expectations that the new obligation to bargain in good faith might have a major impact have been quickly dispelled. Under Division 8 of Part 2-4 of the FW Act, FWA can make 'bargaining orders' to resolve concerns about a failure to negotiate in good faith. These have been most commonly used to prevent employers from rushing to put an agreement to a vote of the relevant group of employees without first giving unions or other bargaining representatives a reasonable opportunity to negotiate.[83] However, in other respects FWA has been fairly conservative in using its new powers, ruling, for instance, that an employer may legitimately bypass unions and communicate directly with its workforce as to the progress of bargaining.[84] In a number of cases, it has issued 'majority support determinations', forcing recalcitrant employers to bargain where a majority of employees in a workplace or enterprise can be

[76] See eg *Re Bank of Queensland Agents Award* (2010) 195 IR 358; *Yum! Restaurants Australia Pty Ltd v Full Bench of Fair Work Australia* [2011] FCA 1315. In both these cases FWA elected to terminate enterprise awards rather than modernise them.

[77] For a significant exception, see *Shop, Distributive and Allied Employees Association v National Retail Association Ltd* [2011] FWAFB 6251, agreeing to reduce the minimum shift length for young shop employees who want to work a short shift after finishing school. An earlier attempt to secure a more general change to the shift length provisions in the General Retail Industry Award 2010 had been rejected: see *Appeal by National Retail Association Ltd* [2010] FWAFB 7838.

[78] See TPCA Act, Sch 5 item 6; *Award Modernisation* [2011] FWA 7975.

[79] See *Annual Wage Review 2009–10* (2010) 193 IR 380; *Annual Wage Review 2010–11* [2011] FWAFB 3400

[80] See M Smith and A Stewart "A New Dawn for Pay Equity? Developing an Equal Remuneration Principle under the Fair Work Act" (2010) 23 Australian Journal of Labour Law 152.

[81] *Equal Remuneration Case* [2011] FWAFB 2700.

[82] See "Gillard commits $2 billion to fund SACS equal pay increases" *Workplace Express* (Australia, 10 November 2011).

[83] See eg *Australian Municipal, Administrative, Clerical and Services Union v Queensland Tertiary Admissions Centre* (2009) 185 IR 371.

[84] See eg *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* (2010) 195 IR 58. Cf A Bukarica and A Dallas *Promoting Good Faith Bargaining under Australia's Fair Work Act 2009* (Construction, Forestry, Mining and Energy Union, Sydney, 2010).

shown to want that.[85] It should be emphasised, however, that, unlike the position in New Zealand, s 228(2) of the FW Act makes it clear that parties cannot be required to reach agreement, or to make particular concessions. There has been nothing to suggest that the new provisions will do much to spread collective bargaining, except in those rare cases where an employer is facing an organised workforce but still refuses to recognise the union(s) in question.[86]

Despite all this, Australian employer groups have been increasingly vocal in attacking what they claim to be an increase in 'union power' under the Fair Work legislation.[87] There have been particular complaints about the 'barriers' that the new legislation is said to impose on attempts to lift productivity.[88] There are at least two problems, however, with such arguments.

The first is the absence of any credible link between labour productivity and labour regulation, as a number of recent studies have pointed out.[89] During the 1990s, Australia experienced what is generally regarded as a surge in productivity, under both Labor and Conservative governments. For the past decade, productivity has declined; notwithstanding the dramatic shifts in regulatory policy. There is little, if any, evidence to support the Rudd Government's claim that the renewed emphasis on collective bargaining in the Fair Work legislation would lift productivity,[90] but nor, by the same token, is there anything to suggest that the current laws are 'sapping productivity across the country'.[91] As the President of FWA has pointed out, "much of the debate about productivity seems to be based on political positioning rather than on hard analysis."[92]

The second point is that even the most superficial scrutiny of the employer group complaints reveals that their primary concern is not productivity, but *profitability*. This is especially true of the persistent attacks by retailers on the 'archaic penalty rate structure' that continues to be embodied in the modern award system.[93] Being able to pay shop workers less for working on evenings or weekends would, undoubtedly, lower labour costs – but it is hard to see how it would make those workers more productive.

Another area in which there has been a great deal of hysteria and overreaction has been the regulation of industrial action. As previously noted, Labor has largely retained the Howard Government's restrictive laws on industrial action, ensuring that Australia remains in flagrant breach

[85] See eg *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Cochlear Ltd* (2009) 186 IR 120.

[86] Division 9 of Part 2-4 does have some interesting provisions that are intended to facilitate multi-employer bargaining in 'low-paid' sectors. But only one application has been made to date under these provisions and their practical value is open to question: see R Naughton "The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?" (2011) 24 Australian Journal of Labour Law 214.

[87] See eg "It's all going unions' way, says AiG" *Workplace Express* (Australia, 30 November 2011), referring to a speech by Heather Rideout from the Australian Industry Group.

[88] See eg P Anderson, Chief Executive, Australian Chamber of Commerce and Industry "Employer Flexibility versus Job Security" (Workforce Conference, Sydney, 5 September 2011); G Bradley (President, Business Council of Australia) Address (Australia–Israel Chamber of Commerce, 12 September 2011).

[89] See eg "Working by Numbers: Separating Rhetoric and Reality on Australian Productivity" ACTU Working Australia Paper (Melbourne, 2011); K Hancock "Enterprise Bargaining and Productivity" (Twenty Years of Enterprise Bargaining Workshop, Melbourne, 5 November 2011).

[90] See Explanatory Memorandum, Fair Work Bill 2008 (Cth), [r.194]–[r.198].

[91] Australian Mines & Metals Association "Tsunami of consensus building for IR change" (5 September 2011).

[92] G Giudice, Address (Australian Labour and Employment Relations Association National Conference, Fremantle, 7 October 2011) at 7.

[93] See eg Australian Retailers Association "Retailers call for IR review after PC says Fair Work deters employment" (press release, 5 August 2011).

of international labour standards.[94] Working days lost to industrial action remain at historical lows,[95] and if the public might be inclined to believe otherwise, it would only be because disputes are so rare today that almost every incidence of industrial action gets reported by the media! Despite this, the super-profitable mining industry remains so concerned at union 'militancy' that it is calling for the FW Act to be changed to outlaw industrial action where union claims are considered to be 'extravagant', or where the workers concerned are earning more than $118,100.[96]

If changes to the laws on industrial action are to be made, however, they may well take a different form – and purely because of one high-profile dispute. Qantas had been, unsuccessfully, negotiating for some months with three groups of its workers (long-haul pilots, flight engineers and ground staff), when, on Saturday 29 October 2011, it took the dramatic step of announcing that it would lock out those workers. While the lockout was set to commence in two days' time, it opted to ground its entire fleet with immediate effect, stranding many passengers around the world. The Federal Government immediately applied to FWA to have all industrial action at Qantas terminated under s 424 of the FW Act, on the basis that an indefinite work stoppage at Australia's major airline would be likely to cause significant damage to important parts of the economy, such as the tourism sector. Some 30 hours later, and following two late-night sittings, the order was made.[97] The parties were given 21 days to negotiate new agreements. When that deadline passed, the matters were listed for compulsory arbitration in early 2012.[98] FWA will be required to make a 'workplace determination' under Part 2-5 that effectively resolves each bargaining dispute and has the same force as a registered enterprise agreement.

At one level, the Qantas affair played out in an entirely predictable way. The unions representing the three groups of workers were seeking commitments on job security that management was not prepared to give, having adopted a business strategy that involves offshoring many of its operations, both to reduce costs and to open up new markets in Asia. All three groups had been taking sporadic industrial action that, at least in the case of the engineers and baggage handlers, was costing the airline money and driving customers away. Qantas was perfectly entitled, under the legislation, to respond by taking protected industrial action of its own; and by initiating a complete shutdown, it would have known that an application to FWA to send the matter into arbitration was inevitable – just as would have happened had any of the unions commenced an indefinite strike. It was clearly banking on getting a more favourable outcome from arbitration than from a negotiated settlement induced by many months of damaging but low-level industrial action. Few other organisations could have adopted a similar strategy. The route to 'last-resort' arbitration under s 424 is available (as it has been since 1993) only in the case of major threats either to the economy, or to public health and safety. There are not many employers, at least outside the essential services, that have that kind of impact. FWA has, in any event, tended to interpret s 424, and other provisions dealing with the

[94] See S McCrystal *The Right to Strike in Australia* (Federation Press, Sydney, 2010).

[95] See eg the figures extracted in Giudice, above n 92, at 6. A 'spike' in the most recent data, showing 10.1 days lost per thousand employees over the third quarter of 2011, is put in context by comparing it with the figures of over 50 (and in some cases 80) recorded in 1990–91: see Australian Bureau of Statistics *Industrial Disputes, Australia, September 2011* Catalogue Number 6321.0.55.001 (ABS, Canberra, 2011). The great part of the recent increase was in any event attributable to an industrial dispute involving New South Wales public servants – who are not covered by the Fair Work legislation.

[96] Australian Mines and Metals Association "The Fair Work Act – Meaningful Change Required" (press release, 26 September 2011). The dollar figure chosen is the same as the 'salary cap' for unfair dismissal claims, as discussed below.

[97] *For Tertiary Education, Skills, Jobs And Workplace Relations* [2011] FWAFB 7444.

[98] See "Qantas-TWU arbitration to begin in March, as ALAEA asks members to consider status quo on job security" *Workplace Express* 25 November 2011.

suspension or termination of protected industrial action, as requiring something more than the ordinary kind of loss or disruption that is the very point of taking or threatening such action.[99]

Despite this, the aftermath of the Qantas action has seen a clamour for the law to be changed. This partly reflects a sense of outrage about two particular features of the airline's conduct: its failure to give any advance notice of its actions (though nothing in the Act forced it to do so);[100] and the fact that it could, in effect, inflict 'self-harm' in order to seize what it perceived as a strategic advantage. However, there have also been suggestions that the threshold for compulsory arbitration should be lowered.These issues are likely to be ventilated in an independent review of the FW Act that will commence in 2012, in accordance with a commitment given before the legislation was passed. Since its narrow re-election in 2010, what is now the Gillard Government has generally been reluctant to contemplate changes to the legislation but, in the wake of the Qantas affair, it seems to have rediscovered an appetite for reform. It has announced that it is prepared to look at the idea of a legislated 'code of conduct' for bargaining,[101] and also supported a change to Labor's policy platform calling for FWA to be given greater powers to intervene in bargaining disputes.[102]

While employer associations have been vociferous in their attacks on the modern award system and the bargaining regime, less has been said about the issue of unfair dismissal protection. Relief from such laws undoubtedly remains a core objective for the small business sector. But in truth, the new unfair dismissal system is operating in a way that creates few difficulties for employers. With the restoration of eligibility for those working for employers with 100 or fewer staff,[103] the annual number of claims of 'harsh, unjust or unreasonable' dismissal has jumped from 8,000 to just under 13,000.[104] Over a quarter of these now involve employers with less than 15 workers,[105] though importantly, FWA is administering the new procedures in such a way that the overwhelming majority of claims are settled within a few weeks, usually after a conciliation conference conducted by telephone.[106] Information collected about settlements reveals that 58% involve payouts of less than $4000.[107] Few applicants are reinstated to their old jobs. Therefore, in effect, the unfair dismissal laws are not delivering industrial justice, so much as a modest severance payment.

There has been greater employer concern about the new 'general protections' against victimisation at work. The redrafting of these provisions has created a deal of uncertainty as to their operation,[108] although it, as yet, hard to find examples of genuinely new forms of liability being imposed.[109] The

[99] See eg *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd* (2010) 198 IR 360.
[100] Section 414 of the FW Act requires employees to give at least three clear working days' notice of any protected action. But employers taking 'response' action must merely give written notice immediately before a lockout starts. The same applies if employees then in turn respond.
[101] See "Minister flags bargaining code" *Workplace Express* (Australia, 9 November 2011).
[102] See "ALP considering easier access to arbitration" *Workplace Express* (Australia, 3 December 2011).
[103] Note that non-award employees (principally managers and professionals) earning more than A$118,100. per year are still excluded, as they have been since 1994: see Creighton and Stewart, above n 70, at [19.39]–[19.43].
[104] See *Annual Report of Fair Work Australia, 1 July 2010–30 June 2011* (FWA, Melbourne, 2011) at 10, 81
[105] See "FWA says investigations on track, President defends his speech in fiery Estimates" *Workplace Express* (Australia, 19 October 2011).
[106] See J Acton "Where Have All the Cases Gone? Voluntary Resolution of Unfair Dismissal Claims" (Australian Labour Law Association National Conference, Adelaide, 19 November 2010).
[107] See "Three-quarters of conciliated unfair dismissal claims involve money" *Workplace Express* (Australia, 20 October 2010).
[108] See eg S Rice and C Roles "'It's a Discrimination Law Julia, But Not as We Know It': Part 3-1 of the Fair Work Act" (2010) 21(1) Economic and Labour Relations Review 13.
[109] Cf *Barnett v Territory Insurance Office* [2011] FCA 968, ruling that an employee may not claim under s 340 that adverse action has been taken against them because of a 'workplace right', where the only right in question arises under their employment contract.

decision that has generated most controversy, that of the Full Federal Court in *Barclay v Board of Bendigo TAFE*[110] could have arisen under any previous version of these provisions. It involved a union delegate who was disciplined for sending an e-mail alleging corrupt behaviour by management without following proper procedures. Even though it was accepted that his employer believed it was taking action against him for breaching his employment obligations, the majority of the court ruled that, on an objective basis, the 'real reason' lay in his activities as a union official. It remains to be seen whether the High Court, which has granted leave to appeal, will agree with this fairly radical reinterpretation of the protections for union members and delegates.

What has been particularly worrying employers has been the increasing number of dismissal-related general protections claims that are being lodged with FWA under s 365 of the FW Act. The legislation provides for the compulsory conciliation of such complaints, over 500 of which were made in the third quarter of 2011 alone.[111] FWA cannot make a formal decision in relation to these claims, which, if they are to be pursued, must be taken to the Federal Court or Federal Magistrates Court; but the conciliation conference is still an opportunity to confront the employer and seek some form of settlement. Anecdotal evidence suggests that many of these proceedings involve tenuous allegations, and are really unfair dismissal claims that have been lodged out of time.[112] It seems likely that there will be calls during the forthcoming review of the Act for some form of 'filter' to be applied to such applications.

Looking Ahead

Despite the increasingly strident calls for change from Australian employer groups, there is a real prospect of a period of stability in Australian labour law for the first time in over 20 years. There are still some adjustments to be made, as the transition continues from the WR Act to the new Fair Work regime; but it seems unlikely that the next several years will be anything like as turbulent as the past five have been.

As far as further reforms are concerned, there are undoubtedly some in the Liberal Party with a sense of unfinished business. Since the failure of Work Choices, the pragmatic view has been that it would be better to steer away from radical changes to labour regulation. Indeed, Liberal leader, Tony Abbott, has declared Work Choices 'dead, buried and cremated',[113] and went into the 2010 election promising no immediate change to the Fair Work legislation. However, pressure is growing from sections of the party to re-think this stance – and also from the employer groups, whose salvoes against the current system are quite clearly framed with the Opposition in mind, not so much the Government. Nevertheless, even if the Coalition is persuaded to revive elements of its former policies, it seems likely that the left-leaning Greens will continue to hold the balance of power in the next few Senates, as they have done since mid-2011. That hardly bodes well for any proposal to reintroduce individual statutory agreements, reduce unfair dismissal protection or create new forms of 'flexibility' for employers.

As for Labor, there is still a great deal of pressure from the union movement (and indeed many backbenchers) to go further than it did with the Fair Work legislation, especially in freeing up the

[110] (2011) 274 ALR 570.
[111] See *Unfair Dismissals Report Jul–Sep 2011* (FWA, Melbourne, 2011).
[112] Under s 366(1), a dismissal-related general protections claim must be filed within 60 days of the termination, whereas the time limit under s 394(2) for a claim of harsh, unjust or unreasonable dismissal is a much tighter 14 days.
[113] See "Abbott refuses to say "never, ever"; reform needed, says business" *Workplace Express* (Australia, 19 July 2010).

controls on industrial action. However, there seems little inclination on the part of the ALP's current leadership to move in that direction. Labor has proclaimed a willingness to give primacy to collective bargaining, and its new laws have certainly created a more level playing field for trade unions.[114] Its policies and legislation remain primarily concerned with the rights and freedoms of individual workers. Unionism is tolerated, but not actively encouraged – certainly not the 'militant' variety.[115] In its second term, it has been willing (among other things) to propose increases to compulsory employer contributions to superannuation schemes,[116] new forms of protection for vulnerable outworkers in the clothing industry and long-distance truck drivers,[117] and a new (though very limited) payment for fathers and other 'secondary carers' taking leave on the birth or adoption of a child.[118] Overall, however, there seems every reason to suppose that Labor will continue to practise the 'politics of balance' that carried it into office, and that has been so evident in its handling of workplace relations to date.

[114] See A Forsyth "'Exit Stage Left', now 'Centre Stage': Collective Bargaining under Work Choices and Fair Work' in Forsyth and Stewart, above n 32, at 120; C Fenwick and J Howe "Union Security After Work Choices" in Forsyth and Stewart, above n 32, at 164.
[115] See further Stewart "A Question of Balance" , above n 53 at 47–9.
[116] See Superannuation Guarantee (Administration) Amendment Bill 2011 (Cth).
[117] See Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (Cth); Road Safety Remuneration Bill 2011 (Cth).
[118] See *Paid Parental Leave: Dad and Partner Pay* (Australian Government, Canberra, 2011).