Workplace Relations in Australia since *WorkChoices*

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Introduction

On 27 March 2006, the Liberal and National Parties Coalition government's *Workplace Relations Amendment (WorkChoices) Act 2005* (Cwth) became operative (Dabscheck 2006). This legislation championed individual agreement making over collective bargaining and, in the process, undermined the safety net, or minimum terms and conditions that had traditionally been provided by awards. Awards are employment instruments determined via negotiations between the parties and ratified by industrial tribunals which cover a wide range of employment conditions. Under *WorkChoices* workers could be employed on individual employment contracts, known as Australian Workplace Agreements (AWAs), which only needed to contain five conditions known as the Australian Fair Pay and Conditions Standard. They were basic rates of pay and casual loadings, maximum hours of work and annual, personal and parental leave.

Following reports of employers taking advantage of *WorkChoices* to reduce workers' employment conditions, the Coalition government enacted the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cwth) which introduced a 'fairness test' for workers who earnt a base salary less than $75,000 per annum. This test was linked to protected award conditions of the relevant employee.

For its part, the Australian Labor Party (ALP) pledged itself to the abolition of *WorkChoices* (ALP 2007 a; 2007 b). It won the federal election on 24 November 2007, with its opposition to *WorkChoices* being seen as one if not the major reason in its electoral victory. Good faith collective bargaining was the centre piece of its proposed reforms.

Following its electoral victory, the ALP passed *The Workplace Relations Amendment (Transition To Forward With Fairness) Act 2008* (Cwth) which abolished AWAs and established a new safety net of ten National Employment Standards and ten items which the Australian Industrial Relations Commission (AIRC) had to include in modern awards (Dabscheck 2008; Appendix). More substantial legislation concerning good faith collective bargaining and other matters would be introduced in the latter part of 2008.

This legislation, in the form of the *Fair Work Bill 2008* (Cwth), released on 25 November 2008, and the economic financial crisis which has engulfed Australia are the major changes which

have occurred to workplace relations in Australia.

The Fair Work Bill 2008

The Bill enshrines the commitment given by the ALP to a workplace relations system based on good faith collective bargaining. It reserves, however, an important role for the supervision of such bargaining by an industrial relations tribunal, as has traditionally been the case in Australia, and at certain strategic points, provides for intervention by the Minister for Employment and Workplace Relations.

Julia Gillard, in her Second Reading Speech in introducing the Bill said 'it is based on the enduring principle of fairness while meeting the needs of a modern age'. She went on to claim, 'It balances the interests of employers and employees and balances the granting of rights with the imposition of responsibilities'. Note the word 'imposition'. The Bill represents a combination of self determination, tribunal regulation and political intervention. It is a lengthy piece of legislation, running to 613 pages. Its saving grace is that it is straight forward and easy to follow (The Senate 2009).

The Regulatory Structure

The Bill creates a new regulatory body entitled Fair Work Australia. It replaces the AIRC. Its functions range from providing assistance to the parties, resolving disputes, helping to determine and ensure compliance with the safety net and other provisions of the Bill (Section 576). Under *WorkChoices*, minimum wages were determined by the Australian Fair Pay Commission, a body which was independent of the AIRC (Dabscheck 2006). *The Fair Work Bill 2008* abolishes this body with its functions being the responsibility of a Minimum Wage Panel controlled by the President of Fair Work Australia (Section 620).

The Fair Work Ombudsman is required to promote and monitor compliance with the Bill and provide education, assistance and advice to employers, employees and their representative organisations (Section 682). In essence, its functions are that of an inspectorate. The Bill requires 'major' judicial matters to be referred to a Fair Work Division of the Federal Court (Section 563) and 'minor' matters to a Fair Work Division of the Federal Magistrates Court (Section 567).

The Safety Net

Functions previously performed by the AIRC concerning the safety net, under the ALP's transitional legislation of 2008 (see above), are now performed by Fair Work Australia. The Bill re-

quires Fair Work Australia to conduct reviews of awards every four years to ensure that workers are being 'appropriately rewarded' (my term) for the work they perform (Section 156). High wage employees, who earn more than $100,000 per annum, indexed, are not covered by awards and do not have the protection of the safety net (Section 47; Gillard 2008).

Good Faith Collective Bargaining

The Bill promotes good faith collective bargaining, 'particularly at the enterprise level . . . that deliver[s] productivity benefits' (Section 171). Such agreements may be made about 'permitted matters' which are defined as pertaining to the relationship between employers and employees and representative organisations and 'deductions from wages for any purpose authorised by an employee' (Section 172). The Bill enables employees to appoint bargaining representatives, such as unions, and specifies that employers 'must not refuse to recognise or bargain' with such representatives (Section 179).

The Bill provides a procedural definition of good faith bargaining. It requires the parties and bargaining representatives to attend and participate in meetings, disclose non–confidential information, respond to each others' proposals in a timely manner, genuinely consider and provide reasons to proposals made and to refrain from 'capricious or unfair conduct that undermines freedom of association [the right to or not to be a member of a union] and collective bargaining'. Good faith bargaining does not require parties to make concessions or reach an agreement (Section 228).

The Bill affords a prominent role for Fair Work Australia in regulating bargaining. Enterprise agreements must be submitted to it for ratification. Such ratification is dependent on the agreement having 'been genuinely agreed' to by the parties, it does not fall foul of the safety net and satisfies a 'better off overall test', contains a dispute resolution procedure (Section 186), a flexibility term to respond to difficult economic circumstances (Section 202) and a consultation term which requires employers to consult with employees about major workplace changes which are likely to have a major impact on employees (Section 205).

Fair Work Australia may ratify an enterprise agreement which fails the 'better off overall test' because of 'exceptional circumstances' which 'would not be contrary to the public interest', as where an agreement 'is part of a reasonable strategy to deal with a short term crisis in, and to assist in the revival of' an enterprise' (Section 189).

In the event that a majority of employees at an enterprise wish to bargain with an employer and the employer has or refuses to bargain, Fair Work Australia can issue a Scope Order requiring the employer to enter into good faith bargaining with the employees concerned and/or their bargaining representatives(Sections 236 and 237). The Bill also empowers Fair Work Australia to issue Low–Paid Authorisations to assist low–paid and low skilled workers and employers who have

not traditionally participated in bargaining to enter into enterprise agreements which enhance enterprise flexibility and the needs of employees (Section 243). Finally, if the parties are unable to reach an agreement Fair Work Australia can make a workplace determination; arbitrate, in resolving the dispute (Sections 266 and 275).

Industrial Action

In seeking to reach a new agreement and/or following the expiry of a previous agreement the parties are free to engage in protected industrial action; that is, a hearing before a common law court prescribing such action. The Bill requires, in the case of employees, that a majority of employees must vote in a secret ballot supporting such action. Industrial action is not allowed in demarcation disputes or for pattern bargaining, seeking the same provisions for two or more employers (Section 409). The prohibition on union pattern bargaining can be contrasted with other provisions of the Bill which enable employers to (pattern) bargain together after obtaining a Single Interest Employer Authorisation (Sections 248 and 249).

The Bill empowers Fair Work Australia to terminate or suspend protected industrial action if it 'is causing, or is threatening to cause, significant economic harm' to the parties involved in the dispute; is endangering 'the life, the personal safety or health or welfare, of the population or of part of it'; will 'cause significant damage to the Australian economy or an important part of it'; and significant harm to a third party (Sections 424–426). Given the breadth of the ability to make orders to stop protected industrial action it is difficult to envisage how the parties, especially unions, will be able to utilise it in pursuing claims under this regime of good faith bargaining.

Unions

The ability of unions to become involved in the negotiation of enterprise agreements is dependent on their appointment as bargaining representatives by the employees concerned (see above). They cannot be a party to the making of an agreement in their own right. Once an agreement has been concluded a union can apply to Fair Work Australia to be covered by that agreement (Section 183).

The Bill provides unions with a right of entry to workplaces to hold discussions with workers and to inspect the records of employers if they 'reasonably suspect that [a] contravention [of the legislation] has occurred, or is occurring', with the onus of proving such a suspicion on the union (Section 481). In doing either the union must have obtained a permit authorising it to make such visits and is required to provide employers with a minimum of 24 hours notice of its visit, and in the case of inspecting records, reasonable time to provide such information. Meetings must be con-

ducted outside work hours (such as a lunch break) and information obtained from inspecting employer records must not contravene the *Privacy Act 1988* (Cwth) (Section 504). Fair Work Australia is empowered to resolve any disputes concerning unions exercising these rights (Section 505).

Unfair Dismissal

The Bill protects employees from being unfairly dismissed once they have worked minimum probation periods. For an employer who employees less than 15 employees this period is twelve months and for an employer who employs more than 15 employees it is six months (Section 383). An unfair dismissal is defined as one that was 'harsh, unjust or unreasonable' and does not include dismissal for 'a genuine case of redundancy' (Sections 385, 387 and 389).

Ministerial Intervention

The Bill empowers the Minister for Employment and Workplace Relations to intervene in the day to day workings of the legislation. The Minister can issue a declaration enabling two or more employers to bargain together (pattern bargain) in negotiating an 'enterprise' agreement (Section 247); issue a declaration terminating protected industrial action (Section 431); intervene on behalf of the government in proceedings before a court and Fair Work Australia if 'it is the public interest to do so' (Sections 569 and 597); apply for a review of decisions of Fair Work Australia (Section 605); and give written directions, which must be complied with, to the Fair Work Ombudsman (Section 684).

Regulatory Regimes and Economic Circumstances

In the last year Australia has found itself caught up in the international economic and financial crisis. There was a 0.5 per cent fall in the 2008 December quarter (Australian National Accounts, 2008). Unemployment has been on the rise with fears that it will increase 'substantially' in the short to medium term. In this worsening economic environment there have been calls to delay or scrape the changes proposed in the Bill (Senate 2009).

Such sources of alarm seem unwarranted. *The Fair Work Bill 2008* seeks to introduce a system of good faith collective bargaining. It does this in an environment where only 19 per cent of the workforce is unionised–with 41 per cent in the public sector and 14 per cent in the private sector (Australian Bureau of Statistics, 2008). It is unlikely that workforces that are not unionised, especially those employed in small business, will find themselves engaging in collective bargaining. Unions, who for approximately two decades have been in decline, lack the wherewithal to organise

and represent new groups of workers in collective bargaining. While the Bill promotes good faith bargaining for low paid workers there are other sections in the Bill which are concerned with the overall survival, health and enhancement of productivity of enterprises. Economic circumstances will need to change dramatically before unorganised workers will be able to make use of collective bargaining opportunities contained in the Bill.

In situations where there is already an established bargaining relationship between employers and employees, good faith provisions of the Bill could be exploited by employers to establish deals which are advantageous to them; deals which enhance the productivity and economic health of their respective enterprises. The Bill's requirements concerning the need to provide reasoned responses to bargaining stances applies equally to employees and unions as it does to employers. It should also be remembered that the Bill empowers Fair Work Australia to terminate industrial action which harms, or may harm, employers, third parties, the health or safety of a part of the community and a part of the economy. The current economic circumstances provide a chance for enterprising employers to bed down this new era of collective bargaining in ways which are favourable to them. The boot would be on the other foot if the economy was experiencing high rates of growth and labor was in short supply.

Objections have been made concerning the entry rights of unions and their ability to inspect the records of employers. With respect to the former, the Bill regulates how such entry can be conducted. Moreover, it is a procedural right. Having 'easier' access to members/employees will not translate into concessions which could have otherwise been granted, especially in the current economic environment. As far as the latter is concerned, a breach of legislation will be discovered, or it will not. If there has been a breach the Bill provides mechanisms for it to be rectified; if not, employers have nothing to fear. Fears concerning unfair dismissal actions seem unwarranted given the probation periods attached to new employees and the ability to terminate employment for reasons of genuine redundancy.

References

Australian Bureau of Statistics, 2008, Australian Social Trends, 2008, Released 23 July 2008, Product 4102.0.

Australian Labor Party, 2007 a, Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces, April.

Australian Labor Party, 2007 b, Forward with Fairness: Policy Implementation Plan, August.

Australian National Accounts, 2008, National Income, Expenditure and Product, December, 5206.0.

Dabscheck, Braham, 2006, 'WorkChoices: Australia's New Industrial Relations Legislation', *The Otemon Journal of Australian Studies,* December, pp.83–91.

Dabscheck, Braham, 2008, 'Industrial Relations under the Rudd Labor Government: Establishing a New Safety Net', *The Otemon Journal of Australian Studies,* December, pp.19–25.

Gillard Julia, 2008, Second Reading Speech, Fair Work Bill 2008, 25 November.

The Senate, 2009, Standing Committee on Education, Employment and Workplace Relations, Fair Work Bill

2008 [Provisions], 26 February.

Appendix

The Two Arms of the Safety Net under the Fair Work Bill 2008 (Cwth)

National Employment Standards (Section 61 (2)).

1 . Maximum weekly hours:
2 . Requests for flexible working arrangements;
3 . Parental leave;
4 . Annual leave;
5 . Personal/carer's and compassionate leave;
6 . Community service leave;
7 . Long service leave;
8 . Public holidays;
9 . Notice of termination and redundancy pay; and
10. Fair Work information statement.

Terms That May Be Included In Modern Awards (Section 139 (1))

1 . Maximum wages, classifications and incentives/bonus payments;
2 . Types of employment, full time, part time, casual etc.;
3 . When work is performed, hours, breaks etc.;
4 . Overtime rates;
5 . Penalty rates:
6 . Annualised payment arrangements;
7 . Allowances;
8 . Leave;
9 . Superannuation; and
10. Procedures for consultation, representation and dispute settlement.