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The "Reform" Misnomer Under the Fair Work Regime

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Last weekend a long-standing ALP government in NSW was collared by an electorate whose impatience to be rid of an incompetent administration was palpable. No surprises there.

In my view the central problem with the NSW ALP government was that it did not govern for all the people of NSW. It did not or was not allowed to make decisions for the benefit of the State as a whole. It governed according to the diktat of a few powerful union officials. Electricity privatisation was its nadir.

The Federal sphere mirrors this same problem. The success of the unions' *Your Rights at Work* campaign before the 2007 election cemented the debt the ALP owes the unions. The soothing "don't frighten the horses" words of the ALP's *Forward With Fairness* policy morphed into a Rudd/Gillard approach to workplace relations that is unconcerned with the national interest.

I am asked to give an employer perspective of the Fair Work regime, most of which has been in operation for nearly two years, a reasonable period to judge its merits. My suggested brief is to look at its costs and benefits. If the brief had been limited to benefits to industry and the economy from the Fair Work Act, I'd have nothing to say.

Employment

The Australian approach to workplace relations regulation is puzzling. There is little consensus in the political parties about what is or should be the enduring goal of the workplace relations system. The Coalition's Work Choices, and the ALP's Fair Work Act, might be argued as demonstrating that the pendulum of whether the employers or the unions are favoured by the system swings according to the colour of the government of the day.

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The real questions to be answered by our system should be: does it create jobs? Does it promote productivity so as to create more jobs? Does it at least not stand in the way of job creation?

The Fair Work Act manifestly fails to deliver on these questions. Originality does not underpin this remaking of workplace relations (even the name is borrowed from the South Australian equivalent). The Fair Work legislation attempts to prescribe, proscribe, control, and compel down to the most minute detail just what can and cannot be done in the workplace. The statutes and regulations run to thousands of pages. It is a classic case of Rudd/Gillard bureaucratic government, entirely concentrating on process rather than outcomes. In practice, the Fair Work legislation contributes nothing towards productivity improvement, jobs growth, flexible workplaces and wealth creation, and the job security that can only come from productive and profitable businesses. In fact the Fair Work Act impedes these goals. Its "modern" awards are the antithesis of modern. They are reminiscences of the old days of cherry-picking by compulsory arbitration. It is a perversion in the 21st Century for "modern" to mean that an award can prevent the entry of young people to the workplace, or cause young people to lose their after-school jobs. The Federal Government has responded to these failures with inactivity. The unions laugh behind their hands. No-one protects the interests of those who do not have a job, or those who lose their job because of systemic failure.

Unemployment is relatively low across Australia as a whole, and we are told that there is an escalating shortage of skilled labour. While there is a resources boom underpinning the economy, the faults of the Fair Work regime are hidden. Australia can get away for a time with a system that reverts to the ways of protectionist earlier days. But if the Fair Work regime does not answer the longer term employment creation questions, it is a fool's paradise.

The unions, of course, agitate for further "improvements" to the Fair Work Act, particularly with right of entry, good faith bargaining, lifting restrictions on protected industrial action, removing limitations on the content of enterprise agreements, and the abolition of the ABCC so that the type of lawlessness connected to the Westgate Bridge project here will again be common. This is the "squeaky wheel" principle of political lobbying: if you pretend often enough how unsatisfactory things are, you might get some more of what you want. I venture

that if you ask a union official off-record to tell you what they think of the Fair Work Act, they will say that it is a pleasure to work with. Ask them how it is by comparison to Work Choices, and they will tell you it is union Nirvana.

Compulsory Enterprise Bargaining - Without Enterprise Benefits

Which politician said, "If we win I want to give unions more bargaining power. We'll legislate to entrench enterprise bargaining"?[(1)] It sounds like it might have been Kevin Rudd before the 2007 election. In fact it was Prime Minister Paul Keating speaking to ACTU Secretary Bill Kelty before the 1993 federal election.

The 1993 Industrial Relations Reform Act then introduced by the Keating government had many faults, but one thing it made available and which gets little comment now is the first introduction of workplace agreements that could be made without a union being involved.[(2)]

This non-union stream met with the most hostile union response imaginable. But it remained available until the Fair Work Act in 2009.

Since 2009 a union will be involved in an enterprise bargain if just one employee nominates it as a bargaining representative, or even if no employee nominates it. A union is a default bargaining representative as long as it has one or more members employed at the workplace.[(3)] So the presumption has become that a union will be involved. The union is not even required to represent the views of those it purports to represent,[(4)] so its own agenda is what matters, not what its members want, nor those employees' combined interest with their employer in the success of the enterprise.

One would expect that there must have been either a national interest imperative or that there had been bizarre results which demanded that the former law be overturned -- that the Keating government's non-union agreements, and the Howard government's continuation of them, should be set aside after 15 years in operation. Not so. And here I am talking about collective agreements, not AWAs.

The Rudd/Gillard reformulation makes no concession to those workplaces where the majority of employees want to deal with their employer directly. It is not their choice. It is the union's choice, based on having just one member in that workplace.

It might be explained away as paternalism gone wrong, that the workers have to be protected from themselves. But it's more deliberately targeted than that. Like the ALP government in NSW, the Rudd/Gillard government has done as instructed by the unions. The reward for the *Your Rights at Work* attack on the Howard government and Work Choices in particular has been that the unions are returned by the new system to centre stage, as was their place for most of the 20th Century; and more than 15 years of reform and choice since the Keating government allowed employees to decide if they wanted a union involved has gone.

Philosophically that result is bad enough on its own, but it combines with the fact that the Fair Work Act requires no degree of responsibility at all from unions in how they exercise their enhanced bargaining power. Employers are caught by an absurd pincer: they are compelled to negotiate with unions, while at the same time many unions actually see their role as using enterprise bargaining to prevent the enterprise from performing better.

The Fair Work Act gives lip service to productivity gains, but creates no obligation on unions to accept productivity improvements as part of an enterprise agreement.

The Federal government has abandoned its post as guardian of the national interest by allowing a workplace relations system that does not promote productivity growth at all. The 20th Century's compulsory arbitration has been replaced with compulsory enterprise bargaining, compelled by unions, but without any safeguards to ensure that there are enterprise benefits.

<u>No Productivity? Then No Protected Industrial Action</u>

The Keating government's 1993 Reform Act also introduced the first incarnation of "protected" industrial action in support of a certified agreement.

Putting aside a discussion of the wisdom of handing this loaded gun to the Left unions in Victoria,[5] the availability of largely unfettered protected industrial action has revealed the principal failing of the Fair Work regime.

It is a peculiar system that allows results which see unions boast that they can stand in the way of productivity improvement. A couple of examples:

Total Marine Services operating in the offshore oil and gas sector was subjected to a campaign of protected industrial action over very large wage claims. It conceded in February 2010, reportedly up to $50,000 per annum in wage increases. MUA National Secretary Paddy Crumlin proudly declared there were "no productivity trade offs", and with typical union public relations skills he responded to criticism by name-calling, describing AMMA's chief executive as a "dinosaur" who did not understand the industry.[6] Crumlin shortly after formulated a lengthy exposition of how productivity measurement in this industry had moved on since the 1980s and that the "idea of productivity trade offs became irrelevant when the industry regarded performance as a team-based whole-of-enterprise approach dealt with as a constant review."[7] Perhaps so, but one wonders why it was important at the point the agreement was reached for him to crow about no productivity trade offs.

Australian Air Express (a joint venture of Qantas and Australia Post) was also targeted and in November 2010 reportedly conceded wage increases over 3 years of 14-21%. The TWU's National Secretary Tony Sheldon confirmed there were "no productivity trade-offs" and that the agreement was a "benchmark and a precedent."[8] Sheldon's public relations skills in briefing the media linked this agreement to the rising profitability of unrelated companies and the growth of executive salaries in unrelated companies since the end of the GFC.

These are not isolated examples.[9] The union movement seems unconcerned with the productivity growth and resulting profitability of these companies that are in the unions' sights. New job generation does not enter the equation. The short term aim is to use protected industrial action to achieve major concessions as a "precedent". No thought is given to the longer term.

The Productivity Commission speaks with independent authority on this topic. Its Chairman Gary Banks observes that growth in "labour productivity accounted for around 80 per cent of

the growth in per capita incomes of Australians over the past four decades", but that productivity has slumped in the 2000s back to pre-1990 levels. The economic affect on incomes of this slump has been cushioned by the resources boom, however "both history and economic logic tell us that this cannot go on indefinitely."[10]

Under the Fair Work Act, Fair Work Australia can terminate protected industrial action if the action threatens to cause significant economic harm to the employer,[11] but the action must have been taken for a "protracted period".[12] The Fair Work Act allows the intervention of the Minister for Workplace Relations to make a declaration which terminates protected industrial action, but only on very limited conditions such as that the action threatens to cause significant damage to the Australian economy or an important part of it.[13] Therefore an employer can sustain great damage before FWA has any role, or before the Minister could act.

A stated object of the Fair Work Act is that enterprise agreements are to "deliver productivity benefits",[14] but this is a platitude unsupported by the statutory force needed to ensure it is factually the outcome.

A union's refusal of the enterprise's productivity aims does not invalidate "good faith" bargaining nor the protection of destructive industrial action.

It is not apparent how it can be in the national interest to protect a union determined to take damaging industrial action at the same time as the system allows that union to rebuff the enterprise's productivity needs.

My thesis today is this: A more balanced and intelligent system would insist that the productivity objective can be met by a protected industrial action ballot order application to FWA being refused if the employer's reasonable productivity improvements sought as part of the bargaining have been rejected by a union or other bargaining representative.

This proposition hardly creates a burden for unions and their members. But if unions are so resistant to what should be among the most obvious imperatives of enterprise bargaining -- the profitability of the enterprise and its resulting capacity to create more jobs -- then the unions' right to lead their members into industrial action should be carefully scrutinised and circumscribed.

Fair Work Australia should be more than a traffic cop showing unions the direction to take protected industrial action. If we are to have an industrial tribunal with a central role in adjudicating on enterprise bargaining,[15] FWA's utility ought to be to ensure that the productivity objects of the Fair Work Act are met, not merely to be a rubber stamp for protected industrial action that damages the employer's business without delivering productivity gains. This is an issue that rests squarely with government to promote as fundamental to the national interest.

Another productivity issue where the storm clouds gather is the unions' agenda on restricting the use of contracting. This is cloaked with the superficial insistence that "job security" is its motivation. However it is portrayed, unions oppose contracting in principle, because unions get nothing from contractors. Someone might be able to explain why a union should be able use protected industrial action to stop a business organising its labour resources, directly employed or not, in the most effective way it can.

Unfair Dismissal

This perennially aggravating jurisdiction reached a new low of resistible logic in a Fair Work Australia full bench majority decision late last year in *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth.*[16]

The majority determined that an employee who knowingly and deliberately acted in breach of safety requirements at a mine in NSW should be reinstated.

The compulsion on an employer under OH&S law to ensure that it has a safe and healthy workplace free of risk, and that (in NSW) it is *prima facie* guilty of a criminal offence and must prove its innocence if it does not remove risk, is not as important to FWA as the dismissed employee's interests. FWA discounts managerial legal responsibility. The majority of the FWA bench decided that the effect of the dismissal on the long-serving employee is more important than the employer's immutable obligations under OH&S law.

The decision is remarkable for its sophistry.[17]

It demonstrates yet again that the unfair dismissal regime is not balanced, and its application even at appellate level in FWA is subjective. FWA exercises a discretion that is unavailable to the employer, which must comply with OH&S law and act positively to eliminate risk.

Particularly for small business, the unfair dismissal bogey remains a disincentive to employing people.

Adverse Action

The term "adverse action" is new to workplace relations nomenclature, arriving with the Fair Work Act.

A couple of brief points to be made about it. First, as presently interpreted by FWA, an employer withdrawing "discretionary" benefits, such as paid union meetings, in response to protected industrial action is taking "adverse action." What was once discretionary for the employer is no longer, according to FWA.(18)

Secondly, it is interesting to see how those from and acting for unions treat the adverse action jurisdiction. There appears to be an attitude that the adverse action provisions of the Fair Work Act are available as a means to attack employers. In a recent paper to a annual labour law conference, a Sydney labour barrister talked of the election a union might make on behalf of its dismissed member, whether to take an unfair dismissal or adverse action claim. The barrister observed: "The main disadvantage of proceedings in the Federal Court or the [Federal Magistrates Court] under the General Protections is that a prohibited reason must be shown. Even if the dismissal is shown to be extremely unfair, the claim will fail unless it is for a prohibited reason."(19)

So suing the employer under the Fair Work Act has the rather irritating inconvenience of having to prove that the dismissal was for a reason that is against the law.

The ideological underpinnings of the Fair Work Act are evident in this type of analysis. The objects of the Act do not state the reality. Nowhere does it support employment, job creation, flexibility, productivity improvement, or encourage or promote business, nor reduce government and other outside interference. Its assumption is that the employer is a villain to

be regulated, restricted and prosecuted. It is an extraordinary indictment of a government that plainly has no understanding of business.

The "Reform" Misnomer

Presumably when our political leaders use the word "reform" in virtually every sentence, they are speaking of it in the sense of improvement and progress over what went before. Unfortunately, in workplace relations it has come to mean only something re-formed -- different, but not better. Stagnation and regression have replaced progress.

This is not a criticism only of the Federal government. The Coalition left the workplace relations playing field in the 2010 election campaign. It is frightened by the ghost of Work Choices. Every mention of Work Choices reminds the Coalition of how it reinvigorated the unions and contributed to the loss in 2007.

The Coalition has deliberately chosen not to engage in a debate that articulates how important labour economics are to Australia. Is it really the case that the Coalition has nothing to contribute to workplace relations? Will it be any different in 2013, or whenever the next election may be? Or will Work Choices rise from the ashes of being dead, buried and cremated to again spook the Coalition at the next election?(20)

Employers regard the Fair Work regime as a challenge and impediment to be overcome. It is remarkable that our industrial relations system can be so poorly formulated to have such a result. It is not comprehensible how a national government can think there is wisdom in acting only for the narrow interests of unions and against the interest of those who employ 9½ million people in the private sector in this country. The reason for it is well-understood. The ALP's interests and the national interest do not coincide.

If the present Federal government cannot or will not do what is right for Australia, the Coalition must force the issue and re-enter the game. The lame position it took to the 2010 election cannot continue. Its statement that business must make the case for change in workplace relations is not tenable. The Fair Work Act is a bad law that is damaging to Australia's national interest.

Gary Banks of the Productivity Commission rightly points out that new government regulatory impositions should not erode productive performance. In the important areas of the Australian economy that require careful scrutiny, he says that:

> "Among these, industrial relations regulation is arguably the most crucial to get right. Whether productivity growth comes from working harder or working 'smarter', people in workplaces are central to it. The incentives they face and how well their skills are deployed and redeployed in the multitude of enterprises that make up our economy underpins its aggregate performance. It is therefore vital to ensure that regulations intended to promote fairness in Australia's workplaces do not detract unduly from their productivity."[21]

This perfectly summarises the Fair Work Act -- the vehicle for the national interest to be sacrificed to union interests, dressed up under a rubric of "fairness" in the workplace.

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[1] According to Paul Kelly in *The March of Patriots: The Struggle for Modern Australia* (p.139).
[2] Known as "enterprise flexibility agreements", as distinct from "certified agreements" made with unions.
[3] *Fair Work Act* 2009 (Cth), s.176(1)(b).
[4] *Total Marine Services Pty Ltd v MUA*, [2009] FWAFB 368 at [34].
[5] In recent years, the left unions in Western Australia have shown a similar militancy, well demonstrated on Woodside's Pluto gas project in late 2009.
[6] Reported in *The Australian*, 3 February 2010.
[7] *The Facts About the Offshore Agreements - Truth, Lies and Misrepresentations*, published on the MUA website 15 February 2010, p.5.
[8] Reported in *The Australian*, 25 November 2010.
[9] The CFMEU was reported in February 2011 as saying that its push in the construction industry would be for pay rises of 24% over 4 years and would be without "trade offs". Mr Dave Noonan, the union's divisional national secretary, said the employer response was "the sort of hysteria that employers have gone on about for 150 years", reported in *The Australian*, 21 February 2011.
[10] Banks, G. 2011, *Successful Reform: Past Lessons, Future Challenges* (Annual Forecasting Conference of the Australian Business Economists, 8 December 2010), Productivity Commission, Canberra.
[11] Section 423(2).
[12] Section 423(6).
[13] Section 431(1).
[14] Section 171. To "promote productivity" and "achieving productivity" are also among the main objects of the Fair Work Act - s.3(a) and (f) .
[15] And FWA's role in enterprise bargaining is already considerable -- policing "good faith" bargaining, determining majority support declarations and scope orders, approving agreements, etc.
[16] [2010] FWAFB 10089, 24 December 2010. Coal & Allied is seeking to appeal the decision.
[17] Footnote 6 to the majority decision states that suspension is an alternative to dismissal, but that "some employers" (i.e. the comments are not about Coal & Allied and whether it had a right to suspend) may not have a legal right to suspend an employee. The majority goes on a flight of fancy to suggest a formulation for the employer to overcome having no right to suspend: by dismissing the employee but agreeing to re-employ the employee at the end of an agreed period; an agreement on continuity of employment; and the employee's agreement that the employer would not pay out the employee's "entitlements" on dismissal. Nothing is offered by the majority as to how an employer can not pay entitlements on dismissal as required by the law. Nor does the majority deal with what happens when the employee does not agree to these fantastical propositions.
[18] *TWU v TNT Australia Pty Ltd*, [2011] FWA 1543. Fortunately, the reasoning in the decision is flawed and will not survive review at Full Bench level. There is also a split in the Federal Court over how the Fair Work Act operates to protect industrial activities undertaken by union workplace delegates acting in that capacity. The delegate's activities included alleged misconduct: an email sent by the delegate that was damaging to the employer's reputation. The issue was whether the employer's disciplinary response to the alleged misconduct was because of the industrial activities and therefore adverse action. At present the law is that this is adverse action -- *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14.

(19) *The General Protections Provisions of the Fair Work Act 2009*, by Claire Howell, Denman Chambers, paper to the Union Lawyers and Industrial Officers NSW Annual Labour Law Conference, reported in *Workplace Express* 25 February 2011.
(20) Work Choices was even given a run in the NSW election campaign just gone, with one ALP television commercial boldly declaring that if Barry O'Farrell was given a "blank cheque" he would bring back Work Choices. Those who sanction such advertising must think the electorate is extraordinarily ignorant.
(21) Ibid, p.16.