Industrial Relations

Address by
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At a Breakfast Function by Robert Clark, Shadow Treasurer, Victoria

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I want to thank Robert for his boldness in inviting me to talk on this subject. I say boldness because he has done this in the face of a High Court judge's public characterisation of me as an "industrial ayatollah". I am referring to Justice Michael Kirby's speech at the centennial celebration last year of Australia's compulsory conciliation and arbitration arrangements, when he also proclaimed that "there is no room in this nation for industrial ayatollahs….who see no future whatever in the Australian Industrial Relations Commission", who want it "closed down, lock stock and barrel"…

Fortunately, the judicial sword has yet to strike.

But the Government's decision to retain the AIRC might seem to have given His Honour something of a victory. I say "might seem" because the Government's announcements of changes to workplace relations regulation have left many important details unclear, including the precise future role of the AIRC. Indeed, one is tempted to say that the reform gun was only half-cocked when it was let off in May.

Before considering some of the pellets that have fallen out of the reform gun barrel, it is relevant to recall that 20 or so ayatollahs wrote to the Prime Minister last November (and subsequently) to suggest the Government establish a Commission of Inquiry to report on the advantages and disadvantages of giving workers and employers maximum freedom to negotiate the terms of employment contracts. We proposed such an inquiry because we felt there would be extensive opposition to labour market deregulation and that the supporting arguments needed to be well canvassed in advance in the public arena. We judged that, particularly absent Peter Reith, government ministers could have difficulty in getting across the rationale for the changes. Our proposal was rejected. But why - and what has been the outcome?

With the benefit of hindsight and odd whisperings from Canberra, my belief now is that the Government did not commission a public report or issue a white paper as it had already decided it would be too risky politically because it assessed there would be insufficient support for deregulation from the business community, as well as the usual opposition from most of the media. The Prime Minister admitted recently that the proposed changes "are not radical" and that, after they have been implemented, "Australia's labour market will still be more regulated than those in the UK and New Zealand".[1] He omitted to mention the even less regulated US labour market. To my mind this admission is a pretty damning indictment of the proposals, particularly given current political circumstances in Canberra.

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[1] Address on "Workplace Relations Reform: The Next Logical Step", Sydney Institute, 11 July.

It is not often that I agree with ACTU Secretary Greg Combet but his assertion that the Government has not put the economic case for the changes is not the complete ambit claim unions are wont to make. Much of the government's supportive publicity consists either of a defensive response justifying the changes on the remarkable basis that many existing regulations will remain or denials of ACTU claims.

One possible reason for not promoting positive effects may be that the potential increase in labour demand is expected to be small. The Government has *not* argued that the participation rate[2] will increase and no revision has been made to the prior Budget forecasts of a *fall* in that rate in 2005-06 and a *slower* increase in employment over the next three years. Yet in the election campaign the Prime Minister rightly emphasized that increasing workforce participation would make an important contribution to reducing the so-called "generation gap". So Mr Howard has had to fall back to justifying the changes by generalisations, such as that they will "remove impediments to further job creation" and create "a new burst of productivity"[3] or, more recently, that unemployment will fall below 5 per cent (from its existing 5.1 per cent), which appears to run counter to the Budget estimates.

Indeed, although Ministers have made frequent reference to the $3.6 billion expenditure on the 16 Welfare to Work measures, the Budget papers do not suggest any expected net addition to the supply of labour and last week's Estimates hearings failed to extract any figure from officials. What we do know, however, is that the Budget provides over the next three years for a 29 per cent increase in assistance to the unemployed and no reduction in total social security spending from the extraordinarily high proportion of GDP already allocated (9.4%). In short, on the basis of the Budget it seems we can expect an *increase* in unemployment and in welfare numbers generally.

The limited extent of the changes in workplace relations, and the lack of detail about them, has also increased the difficulty of "selling" them. But enough has been said to allow unions and the Labor Party to run a scare campaign. Moreover, the apparent continuation of a considerable amount of regulation is making it easier for Labor to say that it will reverse many of the changes.[4]

The decision to continue determining the minimum wage on a not dissimilar basis to the existing one is probably the worst feature of the proposals. Of course, taking it away from the economically and socially illiterate AIRC cannot help but be *an* improvement. And the Government says that decisions of the new Commission will be guided by parameters set in legislation to "establish a better balance between fair pay and employment". This, it claims, will avoid the existing adversarial process.

But this is highly misleading. Whatever parameters are legislated will not avoid controversy over the weight that should be given to this or that guideline. Moreover,

[2] ie the proportion of the labour force in employment.
[3] Ibid.
[4] For example, with the retention of the AIRC and a tribunal-determined minimum wage, Labor's promise to give the minimum wage decision back to the AIRC appears little more than a "tweaking" whereas a promise to restore an abandoned and outdated institution would be much more open to attack.

the naming of the new body as a Commission to determine "fair pay", the requirement that it balance fairness against employment[5], and the suggestion that it will operate along the lines of the UK Low Pay Commission,[6] indicate Australia will continue to have a minimum that is high relative to the average wage. At 58 per cent of the median Australia already has the second highest minimum after France amongst OECD countries and much higher than in Spain (30 per cent), Japan (32 per cent) or the US (34 per cent). And, while the UK minimum is lower at 43 per cent of the median, the latest LPC decision leaves it at exactly the same relative rate as when that body was established.

The key point here is that the maintenance of a high minimum in Australia will severely limit the scope for increasing the employment of those looking for work. ABS surveys show that, in addition to the 550,000 unemployed, there are another 550,000 under-employed *plus* a further 800,000 who are *not actively* looking for work but say they would be able to start within four weeks if jobs became available. In short, almost 2 million want work or more of it. But as many of these are unskilled, their capacity to obtain jobs is importantly dependent on employers being legally able to offer a wage commensurate with their lower productivity. Such employment would in turn provide the training that would offer the potential for higher wages to be earned down the track.

Moreover, the opportunity is being missed to remove the charade that the minimum wage is an important social policy instrument. To the contrary, it is grossly unfair to have a regulation that actually *inhibits* the legal employment of many at the bottom of the income spectrum. At present, no wage is allowed to be paid between the minimum of around $25,000 a year and the unemployment benefit of close to $11,000 (for a single adult) and the proposals hold out little prospect of a significant change in this situation. And social unfairness will remain, with the minimum wage continuing to be provided to the more than half of low wage earners who are in the top half of household incomes. The Prime Minister implicitly acknowledged this unfairness when he said "minimum wage workers are not concentrated in low-income households. A significant proportion live in households with relatively high incomes".[7]

The serious problems with the minimum wage proposal also raise a question about continuing to regulate wages *above* the minimum. At present the AIRC makes an absurd number of awards setting some 20,000 separate wage rates that purport to provide a safety net that, unbelievably, extends to wages in excess of $1000 per week. The Government says it will hold an inquiry into this situation and Minister Andrews has indicated that he hopes the number of awards could be reduced to "a few hundred". But in this day and age it is passing strange for an Australian Government

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[5] This will make it difficult for the Commission to reach a decision that would increase wages less than inflation.

[6] Minister Andrews has argued that the fact that the LPC has *increased* the UK minimum wage by 30 per cent supports the establishment of a similar organisation such as the FPC.

[7] Ibid. Nor does the minimum do much to help households with incomes in the bottom quintile. In fact, wages constitute less than 10 percent of incomes of households in that quintile. It is obvious that assisting those on low incomes should not be part of wages policy but should be provided through social welfare and tax policy, as already happens in various ways.

to be establishing a new body to outguess the flow of demand and supply in a substantial part of the labour market.[8] What will the FPC do if, say, people start to offer themselves at a wage below the new award for office clerks?

The most hopeful features of the promised new regime are that it will exempt businesses with up to 100 employees from unfair dismissal claims and make it easier to enter into less-regulated individual and collective agreements. Indeed, the Prime Minister indicated that the first objective of the changes is to "encourage the further spread of workplace agreements".

Accordingly, there will be a replacement of the existing requirement that agreements must contain no overall reduction in the terms and conditions set by awards – the so-called "no-disadvantage" test. In its place agreements will be required only to meet the minimum "protected" conditions to be laid down in legislation, plus of course the minimum wage set by the FPC. These protected conditions cover "4 weeks annual leave, personal/carers leave, parental leave, and a maximum number of 38 ordinary working hours per week". This reduction in award-imposed requirements certainly seems an improvement, although it remains to be seen to what extent workplace negotiations on new agreements result in a diminution of existing award conditions, such as leave loadings and RDOs.

There is also a question as to whether unions will be able to force a literal interpretation of the legislated minima for leave and hours. Will employers and employees be able to continue existing arrangements under which 21 per cent of existing employees work for no paid leave and 4.5 million people work over 38 hours? Or will the legislation make some provision for exemption from the protected conditions?

A highly important associated question arises as to what roles the "new" AIRC and the Federal Court will play. For the Government to say that the AIRC will now "focus on disputes" tells us nothing of substance because that is exactly what it has been doing for the past century! Both the AIRC and its Federal Court soul mate have engaged in decision-making on workplace relations that has been based on assumptions and beliefs that have had serious adverse effects on employment and productivity. These decision-makers have operated on the totally erroneous basis that tribunals and courts have social policy responsibilities independently of Parliament and that they need to play an interventionist role because they perceive a major imbalance of bargaining power between employers and employees. [9]

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[8] The AIRC minimum wage awards are said to cover about 1.5 million employees but only about 150,000 are estimated to be on the minimum wage itself.

[9]See my article on "How the Judiciary Continues to Undermine Labour Market Deregulation" in Australian Bulletin of Labour, Vol. 13 No 1 2005, which argues that recent decisions, especially those by AIRC commissioners, indicate increasing interference or failure to interfere when obviously necessary. Such decisions have included failures to protect employers against violent and intimidatory union action, a widening in the definition of industrial action so as to allow more arbitration, an extension of the circumstances in which unions have the right to strike and to enter business premises, a widening of the safety net beyond its objective, an apparently less favourable treatment of non-union agreements and an increasing attempt to restrict employers' use of non-union labour. The imbalance of power assertion is also, of course, a key argument advanced by the union movement, and the Labor Party, in support of the need for regulation and the retention of the AIRC. It is however an assertion

If, as seems almost certain, the new legislation continues to contain extensive regulatory clauses, it seems likely that there will continue to be considerable scope for disputes over its interpretation and for one-sided interpretive judicial decision-making. The fact that the right to strike will be maintained will in itself ensure the AIRC has an on-going role unless the new legislation imposes some watertight limit to its capacity to intervene. A similar problem could arise in regard to disputes over the trade union rights to enter business premises under, for example, states' occupational health and safety legislation.[10] And, even if its role is limited, will anything be done to stop the Federal Court extending its already large role in "interpreting" not only the new workplace relations legislation but other existing legislation and court decisions that are relevant?

This is pertinent to unfair dismissals claims, a large proportion of which are not contested in courts because of the widespread belief that judicial attitudes do not favour employers. Media commentary suggests much ignorance about the possible effects of the exemption from such claims where an employee has a substantive case for breach of contract. Employees may, for example, be able to bring what are in effect claims that they received "unreasonable notice". Even with the unfair dismissals regime in place, each year a large number of such claims are made against Victorian employers, with around 1000 a year actually going to courts and, contrary to ACTU assertions, costs are awarded if cases are sustained. There are also an increasing number of cases under the Trade Practices Act seeking to convert pre-contractual representations into promises that must be fulfilled.[11] Finally, the Federal Court will retain an "unlawful" termination jurisdiction on grounds of discrimination (ie including sex, age, disability, etc). Given current attitudes in the AIRC and the Federal Court, the concern here is that attempts will be made by the judiciary to extend these jurisdictions as substitutes for unfair dismissal exemptions.

In short, whether the proposal to exempt a large proportion of businesses from unfair dismissal claims will have much substantive effect is unclear given the on-going problem with the existing judicial arrangements. The Federal Government's proposals give no indication of even recognising that this is a very serious problem that significantly limits the scope for improving Australia's economic and social situation. And the advertised undertaking to provide "assistance to workers who have been unlawfully dismissed" only adds to the doubts about the effectiveness of the exemptions.

Finally, there is a question of whether the proposals justify establishing a national workplace relations regime by using the corporations power, which if successful then over-rides the application to companies of state regulatory legislation and state

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with no substance: there are over one million employers competing with each other for workers and, strange as it may seem to some, employers need workers in order to run their businesses.

[10] In Victoria, for example, it appears that, after being trained by WorkCover, 35 union members of the CFMEU have qualified as health and safety inspectors to inspect workplaces and more than 100 union members have done the training needed to obtain a permit. The Premier has defended the right of entry provisions in the new Victorian Occupational Health and Safety laws as being similar to those in the federal Workplace Relations Act.

[11] Such a claim might take the form, for example, of "I was promised a great job with great prospects. You terminated me, though I was performing well. Thus the initial promise was untrue".

industrial commission interpretations. Understandably, this has added to growing concerns in some quarters at the increasing tendency for the Commonwealth to centralise decision-making in Canberra. However, if a genuinely deregulated national system of workplace relations was being proposed I would see it less as an attack on the powers of States and more as an attack on the rampant protectionism that surrounds the labour market.[12] Such a national system would in my view be as important an advance as the implementation of free trade between states and, if able to operate for a few years, would be unlikely to be reversed by a Labor Government. The problem with the existing proposals is that they continue a centralised system of extensive regulation of the labour market that will be readily increasable by an incoming Labor Government.

In summary, from what we know of the proposed changes they are a serious disappointment and will offer only a limited increase in the flexibility in relations between employers and employees that Australia sorely needs. A labour market expert from the US, Professor Charles Baird, recently visited Australia to advise on the extent of regulation in the US and to inform himself on Australian situation. I conclude with his final words in an article in the Australian Financial Review on 14 July:

"Many liberals hoped that with control of the Senate, Howard would move towards significant deregulation of the labour market …Their hopes have been dashed. A golden opportunity has been lost for want of moral clarity and political courage".

[12] The increasingly regulatory policies of existing State Governments would add to the justification for national action.