"Work Choices" (Sic)

Less Flexible, More Complicated and Still Unfair?

A Failure to Understand That The Market "Balances" Bargaining Power

Address by
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I hope you are all aware of the risk you have taken in inviting a speaker described by a High Court judge as an "industrial ayatollah". I am referring to the speech by Justice Michael Kirby 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" and who want it "closed down, lock stock and barrel"… Little wonder the National Australia Day Council has recognised His Honour's humanitarianism by naming him NSW Australian of the Year 2006.

Fortunately, the judicial sword has yet to strike the heretical ayatollah.

However, even though the retained AIRC has been stripped of its compulsory powers of conciliation and arbitration, His Honour has won something of a victory once account is taken of the proposed new "Work Choices" extensive legislated regulation of employer/employee relations and the establishment of a new regulatory body with the power to determine minimum and other wages. The claim by the Minister for Employment Relations in his second reading speech that the Government has moved "Australia towards a flexible, simple and fair system of workplace relations laws" is simply laughable. How could he seriously use such a phrase to describe legislation that contains, even for the *main* amendments, 3731 explanatory notes, that is less flexible in many respects, that is still grossly unfair and that demonstrably fails to understand the role of the market in balancing bargaining power?

This new legislation is shot full of contradictions that, on the one hand, purport to "allow Australia's employers and employees the freedom and the choice to sit down and work out the arrangements that best suit them" but, on the other hand, continues to severely constrain that freedom.[1] It reflects an abysmal failure by Ministers to understand (and be able to convey) that, within ordinary law, modern day economies and labour markets operate to balance bargaining power. Any favourable effects on employment or productivity are likely to be marginal at best and the Government has implicitly acknowledged this by failing to present revisions to Budget forecasts for *lower* participation rates this year and a *slower* growth in employment for the next three years. The Budget also provides over the next three years for a 29 per cent increase in assistance to the unemployed and no reduction in total social security

[1] The Financial Review of 11 Nov 05 reported that the changes "promise to be a boon for lawyers" and that legal firms have already received "a huge increase in demand from clients". According to one lawyer, "it will be a lawyer's game".

spending from the extraordinarily high proportion of GDP already allocated (9.4%). In short, an increase in unemployment and in those on welfare seems to be expected.

It might be said that the Government has won a political victory because the Labor Party's predictions of terrible adverse effects for workers – and Mr Beazley's description of the legislation as a greater threat to civil liberties than the anti-terrorism legislation[2] - will be shown by the time of the next election to be so much hot air. But the Coalition could have won that victory if it had implemented substantive *deregulatory* changes instead of fiddling at the edges. In short, it has copped the same barrage it would have got with worthwhile changes. Moreover, the Coalition's acceptance of the need for extensive regulation will make it easier for Labor to run on a platform that provides for an adjustment or reversal many of the changes.[3]

It is relevant briefly to recall that, along with some colleagues, I persuaded 20 or so fellow ayatollahs to write to the Prime Minister in November 2004 suggesting 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 judged there would be extensive opposition to meaningful labour market deregulation and that the supporting arguments needed to be well canvassed in advance in the public arena. The Government judged that it could not proceed down that track and our proposal was rejected.

The result is, as the Prime Minister admitted in July, that "Australia's labour market will still be more regulated than those in the UK and New Zealand".[4] To my mind this failure to take the lead is a pretty damning indictment of the changes now implemented. Where is Australia's Margaret Thatcher?

I don't often agree with ACTU Secretary Greg Combet but his assertion that the Government has not put the economic case for the changes is not akin to the complete ambit claim unions are wont to make. Much of the government's supportive publicity consists either of denials of ACTU claims or defensive justifications based on the fact

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[2] Mr Beazley has also made some other suggestions about the effects of the legislation, viz that it will act like termites, undermining households until "gradually the house falls down and you have nowhere to live"; "you are going to see people presented with slavery conditions"; and that week-end BBQs will cease. NSW Minister for Industrial Relation, John Della Bosca, told a Senate Inquiry that the proposals are "fascistic", would create a working underclass and could lead to riots similar to those in France. The Secretary of the Victoria Trades Hall Council, Brian Boyd, believes indeed that "simply everyone is to get it in the neck…with a 'free-fall' wages framework with the employers having the whip-hand." And La Trobe Professor of Politics, Robert Manne, provided advice for Mr Beazley for the next election, viz to "now offer a non-revocable promise that as soon as Labor is elected, if and when there are the Senate numbers, the Workplace Relations Act will be replaced, the Fair Pay Commission scrapped and a new bill reinstating the rights of wage and salary earners introduced" (Mr Beazley subsequently stated that, under Labor, the legislation would indeed be torn up). Moreover, in a submission to the Senate early in November 151 academics indicated that they "share, grave, common concerns" on the proposed legislation. Finally, Sex Discrimination Commissioner Pru Goward apparently fears that the emphasis on jobs may cause the fertility rate to fall further.

[3] 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.

[4] Address to Sydney Institute, 11 July.

that many regulations will remain. The economic justification is limited to generalised assertions that the changes will improve productivity and living standards, with the only support coming from a highly dubious graph that purports to show that those industries with least reliance on awards achieved higher rates of growth in productivity between June 1990 and June 2004. Coincidence is the more likely conclusion.

A striking absence is any specific claim that employment is expected to increase by more than what would otherwise have occurred. No revision has been made to the Budget forecast that the participation rate[5] will *fall* in 2005-06 or that there will be a *slower* increase in employment over the next three years. Yet in the election campaign the Prime Minister rightly emphasized that increasing workforce participation is needed to reduce the so-called "generation gap".

Moreover, 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. By contrast, the Budget *does* provide 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 other words, an increase in unemployment and in those on welfare seems to be expected.

The decision to continue setting (but not reducing) minimum wages is probably the worst feature of the new legislation. Of course, taking it away from the economically and socially illiterate AIRC cannot help but be an improvement. But, although the legislation provides that decisions of the new Commission will be guided by parameters designed to "promote the economic prosperity of the people of Australia", this will not avoid controversy over where the balance should be struck. Indeed, the naming of the new body as a Commission to determine "fair pay", the requirement that it "have regard to" providing a safety net for the low paid[6], and the suggestion that it will operate along the lines of the UK Low Pay Commission,[7] indicate Australia will continue to have a minimum that is high relative to the average wage. At 58 per cent of the median we already have the second highest minimum after France amongst OECD countries. And while the UK minimum is lower at 43 per cent of the median, the latest LPC decision there leaves it about the same relative rate as when that body was established.

The key point here is that the almost certain 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 almost 2 million Australians want work or more of

[5] ie the labour force (persons employed or unemployed) expressed as a percentage of the population.
[6] This will make it difficult for the Commission to make any decision that would increase wages less than inflation. The Commission will also have to balance this provision against the other three, viz "the capacity for the unemployed and low paid to obtain and remain in employment; employment and competitiveness across the economy; and providing minimum wages for junior employees, and employees to whom training arrangements apply to ensure those employees are competitive in the labour market".
[7] Minister Andrews has argued that the fact that the LPC has *increased* the minimum wage by 30 per cent supports the establishment of a similar organisation such as the FPC.

it.[8] 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. The minimum wage of around $25,000 a year prevents this and means that more people are on the unemployment benefit of around $11,000. Why can't a wage be offered between the two?

The potential for significant additions to the employment of the lesser skilled would have opened up the possibility of a major improvement in the social situation. This potential illustrates the total nonsense often asserted that a major freeing up of employer/employee relations would be "unfair" to workers. It is the existing and new arrangements that are unfair. Why? Because they protect those inside the labour market with jobs but exclude from employment those outsiders who are at the bottom end and unable to penetrate the regulatory constraints. The existence of over 1 million jobless couples, many with children, highlights the problem and the need to introduce reforms (in both workplace relations and social welfare policy) to reduce it.And how could anyone describe as "fair" a system that provides a minimum wage to the more than half of low wage earners who are in the top half of household incomes?

Some argue that, if employers are allowed to offer a wage below the current minimum, those currently on the minimum would either lose their job or experience a reduction in wages and hence in living standards. However, unless those presently employed on the minimum have an inadequate productivity performance, their wages and/or jobs should not be adversely affected.[9] The main outcome of any lowering of the minimum would not be job replacement but additions to employment. Those on the minimum who could sustain an assertion that lower paid workers had "forced" their wages down or caused them to lose their job could scarcely claim to be hard done by; and they would, of course, be eligible for the unemployment benefit if they could not find work at a wage lower than their previous one.

In short, the living standards of lower productivity workers would be "protected" not through wage regulation but by maximising their opportunities for employment or, failing that, through the social security system.

The serious problems with the minimum wage proposal extend to the regulation of 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. Does anyone seriously think that those on $1,000 pw need a safety net?

The Government has announced a task force to "recommend ways of reducing the duplication and complexity of current awards" and Minister Andrews has indicated that he hopes the number of awards could be reduced to "a few hundred". But how

[8] In addition to the 500,000 or so unemployed, there are over 800,000 who say they would like a job but who do not qualify as "officially" unemployed and over another 500,000 who are working part time but would like to work more hours. The "official" unemployment rate of about 5 per cent thus considerably understates the potential for increasing employment. There are, moreover, many recipients of welfare benefits who would become available for work if the eligibility requirements for such benefits were tightened.

[9] Official estimates are that, while the minimum award by the AIRC extends to about 1.5 million employees, only about 150,000 are actually on the minimum. This suggests that, with no minimum, the potential for wages of existing employees to fall below the current minimum is very limited.

will this task force, headed by an AIRC Commissioner, deal with the inherent contradiction that, while the legislation is supposed to increase the freedom to negotiate terms and conditions, existing rights under awards will be retained? Further, while the AIRC will cease to determine award wages and conditions, the passing of that responsibility to the Fair Pay Commission still leaves the absurd situation that Australia will have a body whose responsibility it is to outguess the flow of demand and supply in a substantial part of the labour market.[10]

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 some time ago that the first objective of the changes is to "encourage the further spread of workplace agreements" and the Minister's second reading speech stated that a "central objective … is to encourage the further spread of workplace agreements". The legislation thus provides for both individual and collective agreements to be entered into by direct negotiations between employers and employees and such agreements will come into effect as soon as they are lodged with the Office of the Employment Advocate. This is a considerable and welcome improvement compared with the requirement under the WRA 1996 to pass the so-called "no-disadvantage" test that required agreements to contain no overall reduction in award conditions.

However, such agreements must comply with legislated minimum "protected" conditions and what the government has not explained is that parties to these agreements, even unions, will be able to apply to the Federal Court to assess whether or not they are "reasonable". There is potential for penalties and even "variation" of the agreements, if in that Court's view the provisions applying to the making or variation of such agreements have not been met.

One of the few merits of the WRA 1996 is that the overturning of agreements by the Federal and other courts was relatively rare. Thus, if the agreements were certified, the parties to the agreements could go about their business with a high degree of confidence that the agreement was in place for its term. The converse will now pertain.

Moreover, there are questions regarding the interpretation of the protected conditions. It is astonishing that the Minister has actually boasted that regulatory restrictions are enshrined in federal legislation for the first time, covering "at least 4 weeks paid annual leave per year, at least 10 days personal/carers leave (including sick leave) after 12 months of service, at least 52 weeks of unpaid parental leave (including maternity leave) at the time of the birth or adoption of a child, and a maximum number of 38 ordinary working hours per week". It is stated that "no employee can receive less" than these conditions.

The Minister acknowledges these conditions "may create additional costs for businesses", the implication being that they will deter employment and/or add to problems faced by employers. Indeed, at the time of writing it appears that there will

[10] Although awards apply formally to only around 16 per cent of employees, in practice they have a wider influence than that.

be increased regulation, and potential for increased disputation, in regard to many of the 21 per cent of existing employees who currently work for no paid leave and the 4.5 million people who work over 38 hours. As the leave entitlements are now mandatory the only cashing out allowed will be up to 2 weeks at the express request of the employee and then on a year to year basis, not a once off when the employment contract is made. Clearly existing employment agreements will have to be re-negotiated to change leave arrangements on a less flexible basis than under existing arrangements. As to those currently working more than 38 hours, they may – or may not – be allowed where it can be established "reasonable additional hours" (above 38) are required. But who will decide what are reasonable additional hours for the head of the ACTU? All this adds considerably to the scope for our beloved judiciary to interpret as it sees fit –and very likely in favour of an employee where a dispute arises.

This leads to the important associated question, already noted above, as to what roles the "new" AIRC and the Federal Court will play. On their past record both the AIRC and the Federal Court will use the explicit powers available to them to their fullest possible extent. These bodies have engaged in decision-making on workplace relations 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.[11] It is little short of political negligence that the employment destroying role of these tribunals seems largely to have been overlooked by the Government.

Although the AIRC will no longer exercise compulsory powers of conciliation and arbitration, and except under the transitional provisions it will thus have no capacity to intervene in disputes on its own authority, it is passing strange that the Minister says that the AIRC will now "focus on its key responsibility – dispute resolution". But perhaps the Minister was referring to the discretionary powers the AIRC will continue to have in the issuing of orders that allow "protected" industrial action (which is supposed to occur only during the negotiation of an agreement) and which prevent or stop "unprotected" industrial action. This certainly provides the AIRC with a potentially not inconsiderable role in dealing or *not dealing* with disputes involving strikes.

Moreover, the AIRC retains considerable powers in regard to authorising or *not authorising* unions' right of entry to businesses, including the right to enter business premises under states' occupational health and safety legislation.[12] Further, it

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[11] 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.

[12] In Victoria, for example, it appears that, after being trained by Work Cover, 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

continues to have a role in regard to unfair dismissals by employers with over 100 employees and both it and the Federal Court will also have considerable scope to adopt an interventionist role in regard to cases alleging unlawful terminations of an employee "on the grounds of race, colour, sex, age, union membership or otherwise, pregnancy, family responsibilities, refusing to agree to an Australian workplace agreement and a range of other matters". These provisions foreshadow many disputes[13] and it is scarcely surprising that Justice Guidice has indicated in the AIRC's annual report that the changes "will make significant demands on the members of the commission, at least in the initial stages".

Much attention is paid to the often outrageous decisions made by the AIRC. But the interventionist role of the Federal Court is almost as bad. Some history is relevant.

In 1993 Minister Brereton established the Industrial Relations Court of Australia to implement the first national unfair dismissal legislation. He stacked that court with ten ex-union barrister judges, eight of whom still remain on the Federal Court of Australia, and a dozen or so "judicial registrars" with similar backgrounds, who were given the appearance of authority by being required to wear green smocks. No ex-employer barristers were appointed to the Industrial Relations Court and none has since been appointed to the Federal Court.

It took the next decade to unravel the mess that developed. After 3 months, a cap had to be put on IRC compensation because the judges were prone to making million dollar awards; then, after a couple of years, the AIRC was asked to help with conciliation. After a further couple of years, the jurisdiction was moved holus-bolus to (of all places) the AIRC. The judges and the judicial registrars had done such an awful job that they lost their jobs and the Industrial Relations Court of Australian was disbanded. The judicial registrars had to return their smocks and find alternative jobs with State courts, while the judges went back to the Federal Court, where they have spent much time undermining the intent of the Workplace Relations Act 1996, the Native Title Act and allowing the entry of immigrants on a basis that required the Government to implement major changes that reduced the Court's role.

So, under the new legislation we are going back to very judges (minus their green-smocked accessories) who earlier inflicted such damage on the unfair dismissal regime.

In short, the very extensive regulatory clauses in the new legislation will continue to provide just as much - and, on one view, perhaps more - scope for disputes over its interpretation and for one-sided interpretive judicial decision-making.

This is pertinent to considering the possible effect of changes to unfair dismissals, a large proportion of which have not been contested in courts because of the widespread belief that judicial attitudes do not favour employers. Does the exemption of "small" businesses from such claims mean that their employees are more likely to be subject to some form of exploitation? Media and ALP commentary suggests much ignorance

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provisions in the new Victorian Occupational Health and Safety laws as being similar to those in the federal Workplace Relations Act.

[13] State discrimination laws, which tend to cover a wider field, may also be able to operate simultaneously.

about this matter and indeed about the "vulnerability" of employees more generally under the new legislation.

In the case of wrongful termination claims, employees are already 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 somewhere around 1000 a year actually being issued in the courts and, contrary to ACTU assertions, costs are awarded if cases are sustained. One benefit of this regime is that there is a high degree of legal certainty – perhaps about 1-2 percent of the claims actually issued are litigated. 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.[14] Finally, as already indicated, the Federal Court retains an "unlawful" termination jurisdiction on cases involving discrimination on grounds of sex, age, disability, and so on.

In short, given the on-going problem with the existing judicial arrangements and the scope for using alternative methods of challenging terminations, whether the exemption of a large proportion of businesses from unfair dismissal claims will have much substantive effect is unclear. Moreover, as the Minister says that the Government will provide "financial assistance to workers who have made an unlawful termination application", this only adds to doubts about the effectiveness of the exemptions.

This illustrates the underlying problem that, as with the WRA 1996, the new legislation is predicated on the assumption that, without extensive protective regulations, employers are so much more powerful that they will be able to force workers to accept onerous conditions. The reality, however, is that in our relatively modern competitive economy there are over 1.1 million Australian businesses *and* there is virtually no scope for them to exercise monopsony powers. Nor does it seem to be recognized that, far from looking for an excuse to dismiss or downgrade an employee, businesses actually need them in order to operate their enterprises. Indeed, the 1.1 million businesses actively compete amongst each other for the services of a workforce of around 10 million and that workforce has as a backstop a generous social security system. In such circumstances no valid argument can be mounted that, without prescriptive regulations, employers as a group would force wages down or impose "unfair" conditions on their employees. It is a pity that the establishment by the Government under the new arrangements of a system of private alternative dispute resolution (ADR) practitioners was not seen as means of helping deal with the fallacious imbalance of bargaining power argument and allowing proper deregulation of employer-employees relations.

Of course, employees do leave jobs and do lose them. But, if working conditions are unacceptable to either party, each side has alternatives that, while not necessarily the first best option for either, prevent businesses as a group from being imposers and workers as a group from being slackers. Moreover, workers who lose their jobs are not on their own in trying to find a new one and having to negotiate terms and conditions with a supposedly powerful new employer. Centrelink aside, Melbourne

[14] 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".

yellow pages contain 20 pages of employment agencies whose business it is to match employer and employee needs and to advise on likely terms and conditions on the basis of a worker's skills.[15] Instead of operating as seekers of protection for members against competition from low-skilled (and other) workers even unions themselves could act as employment agencies.

It is relevant that, under Australia's regulated labour market, there has been considerable movement into and out of jobs and ABS surveys indicate that over one third of those who left a job did so voluntarily. This suggests that, at least amongst the insiders, the regulatory arrangements have played only a limited role in providing job security for employees. Moreover, as historical experience indicates, employees have less job security under regulatory arrangements in an economic downturn because there is much less flexibility to vary wages and other working conditions.

Accordingly, with no general imbalance of bargaining power between employers and employees,[16] it would have been in the mutual interests of both workers and employers if the Government had legislated to maximise their freedom to contract employment conditions. Its failure to counter the widespread use of the imbalance argument has led to the inherent contradictions in the new legislation between the claimed freedom to choose and the retention of excessive regulation.

This failure has also allowed unions and media commentators to give unwarranted credibility to the common impression of employer power and to the idea that, where regulation has been reduced, employees will inevitably be worse off. However, even if it were accepted that employers have superior bargaining power, employment contracts procured by the use of force, fraud or undue influence would not be legally enforceable. Nor in most cases would contracts be legally enforceable where deemed to have been entered into in a manner which is "unconscionable", let alone where they are for illegal purposes or involve significant abuse of third party rights.

Finally, there is a question of whether there is justification in 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 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 implemented I would see it less as a reduction in the powers of States and more as an attack on the rampant protectionism that surrounds the labour market.[17] Such a free labour market national system would constitute 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. But the new legislation's continuation of a centralised system of

[15] As the Australian Financial Review pointed out (*IR changes herald boom in agents, 22 Nov 05*), individual bargaining agents "paid anything from $150 to $750 or more per hour could become a regular part of discussions about pay and conditions" under the new legislation. It reported Minister Andrews comment that an agent can include "mum, dad, a family friend, a union official or anyone you can trust" and, once appointed, an employer is even obligated to deal with that agent.

[16] For further consideration of this issue, see Hogbin, G on www.hrnicholls.com.au

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

extensive regulation of the labour market will be readily “adjustable” by an incoming Labor Government.

Let me conclude by quoting Professor Charles Baird, a labour market expert from the US who visited Australia earlier this year to advise on the extent of regulation in the US and to inform himself on Australian situation. His article in the Australian Financial Review on 14 July is still relevant and concluded with the following words:

“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”