Institute for Private Enterprise
Director: Des Moore **Address:** 6/112 Millswyn St Sth Yarra 3141 VIC Australia
Ph/Fax: (03)9867 1235 **email:** ipe@ozemail.com.au **web:** www.ipe.net.au

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A World at Work: Challenges and Opportunities for Workplaces
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by Des Moore[1]

I feel a bit like the Seventh Day Adventist who knocked at my friend's door offering to talk about God and then, somewhat to his surprise, was asked inside for a drink. But when my friend gave him the drink and invited him to have his say, the Seventh Day preacher went dry. 'Look', he said, 'I'm not sure what to say because I've never got this far before'.

Of course, I do have something to say and I have even addressed an Industrial Relations Society before, way over in Western Australia a few years ago. The problem is that addressing an Industrial Relations Society today makes me feel I'm in danger of being compared with that blockhead Charlie Brown in the *Peanuts* comic strip. Charlie is of course portrayed as a perennial loser, as someone who keeps on trying to kick a football which the very bossy Lucy Van Pelt holds in place—only to pull away every time at the very last moment.

Whenever Charlie flies spectacularly through the air and lands painfully on his back, Lucy always has a clever justification for pulling the ball away as he followed through. She resorts to excuses like 'you have to learn to be trusting' or 'I'll give a million dollars to try again' or 'your shoes were dirty'

Well, my shoes are certainly dirty from trying over the last 25 years or so to persuade governments to deregulate the labour market and industrial relations societies to change their views and help dismantle what is sometimes described as the industrial relations club. But like Charlie I seem to have acquired the habit of being unable to kick the football.

That may sound a bit surprising to those who have been persuaded by comments published by unions, and widely swallowed by an extraordinarily deficient media, suggesting the WorkChoices legislation reflects a deregulatory policy biased against workers. Indeed, according to the Opposition, if a balanced position is to be restored between employers and employees it should be torn up.

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[1] Des Moore is Director, Institute for Private Enterprise (ipe@ozemail.com.au) and was formerly Deputy Secretary, Commonwealth Treasury. He is also on the board of ARIA and on the council of the Australian Strategic Policy Institute

But I am not here today to support the WorkChoices and associated legislation. To the contrary, I agree that legislation should be torn up but not for the reasons advanced by the Opposition. I believe WorkChoices is not the flexible, simple and fair system that the Government has claimed it to be. And even though the Opposition claims it would introduce its own—but better—version of a fair, flexible and simple system I believe their proposal is even further away from such a system. In short, both sides are using highly misleading language. I propose to say something to say about the serious defects in the systems being pursued by both major parties.

It follows that my main concern is that, whichever party is returned, there is now no hope in the foreseeable future of moving to a deregulated labour market in which, subject mainly to observing normal legislated or common law contractual requirements, the terms of employment agreements are basically settled between employers and employees. I should point out that support for a less regulated market is not confined to a small group of free-marketeers in Australia. Although the OECD 2006 Economic Survey on Australia, for example, welcomed the WorkChoices Act as moving "towards a simpler, national system", it pointed out "the system is still complex: federal legislation runs to nearly 700 pages, distinct federal and state systems remain, and businesses have complained about compliance costs".[2] Since that report the passage by the Government of the stronger safety net legislation has further added to the complexity and the Opposition's proposed plans could not be more complex.

It is appropriate to recall that in November 2004 I sent a letter to the Prime Minister, signed by a group of prominent Australians, advocating extensive further deregulation and suggesting a commission of inquiry to examine, inter alia, measures that would "guarantee employees their right to exercise freedom to choose their terms and conditions of employment". The Prime Minister's rejection of such an approach sealed the fate of deregulation and, as he acknowledged in July 2005, "Australia's labour market will still be more regulated than those in the UK and New Zealand".[3] My own conclusion at the time was that the legislation "is less flexible in many respects … is still grossly unfair … and demonstrably fails to understand the role of the market in balancing bargaining power".[4]

This paper evaluates workplace relations policies primarily from the perspective of an economic and social analyst rather than an industrial lawyer. My contention is that the opponents of a freer labour market have largely ignored the potential for both economic and social benefits. Where the opponents have not simply been self-serving, their pleas that extensive regulation ensures a "fair go" for the workers have overlooked the unfairness of much of that regulation, as well as largely neglecting the implications of the structural changes in society over the past twenty or so years.

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[2] OECD Economic Surveys Australia Volume 2006/12 – July 2006, page 17, Paris OECD 2006.

[3] Address to Sydney Institute, 11 July 2005. Specifically, the group of prominent Australians had suggested it would help the cause of deregulation to have a major national debate on the issue and, to that end, the Government establish "a Commission of Inquiry, chaired by an eminent Australian, which will hear submissions, give consideration to all of the various social and economic forces which are in play, and produce a Green Paper to assist the Government and the Parliament in this historic task".

[4] *"WorkChoices" (Sic) Less Flexible, More Complicated and Still Unfair? A Failure to Understand that the Market "Balances" Bargaining Power*, Address to ALSF Conference, 3 December 2005 www.ipe.net.au

Two major structural changes have largely been disregarded by those who espouse the cause of a regulated market for what they perceive as social justice reasons.

One of those has been the increasing acceptance that the most appropriate form of economic organisation is a market economy and that, in such an environment, individuals can generally make their own employment decisions without fear of being exploited by employers and without resort to union actions. Unsurprisingly, union membership has declined to 15 per cent of private sector employees and 90 percent of businesses have no employees with union members.[5] Despite this the union movement continues to be widely regarded as the institution which represents the interests of workers.

Second, governments have for many years now assumed direct responsibility through an extensive social security system for helping those judged unable to obtain employment or otherwise disadvantaged. This system provides a protective bulwark for those at the bottom end of the social spectrum. However, many judges[6] have consistently left the clear impression that, independently of Parliament or the legislation it passes, the judiciary should play a major role in determining social policy and in ensuring what they perceive as "fair" or socially desirable outcomes of employment negotiations.[7] This despite the fact that s.51 (xxxv) says nothing about safety nets or human rights: their intrusion into the process of settling industrial disputes reflects the judiciary's adoption of a social justice role. Mr Justice Kirby, who has been a leading advocate of that role by the judiciary, has even claimed that where there is no law on a subject judges should prescribe it[8].

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[5] The proportion of the workforce that is union members would probably fall further in a less regulated environment. The strong growth of independent contractor arrangements and the increase in Australian Workplace Agreements despite the regulatory constraints on those agreements, plus the wide range in weekly hours worked, are other indicators of greater flexibility.

[6] While Commissioners are obliged under the legislation to have regard to the "equity fairness and the substantial merits of the case", their interpretation of what is fair is open to question, particularly in regard to the treatment of those outside the job market.

[7] A major example is the series of widely-reported public interviews given in February 1996 during the federal election campaign by Justice Murray Wilcox in which he criticized the Coalition's plans to amend unfair dismissal laws (for further references to Wilcox J, see Forbes, John, *"Just Tidying Up": Two Decades of the Federal Court*, Proceedings of the Tenth Conference of The Samuel Griffith Society, August 1998). Again, in a paper to the XX1st Conference of the HR Nicholls Society in May 2000 (see www.hrnicholls.com.au), leading industrial barrister Stuart Wood presented an analysis of judgments by several Federal Court judges, most notably that of Justice North in the important case of Australian Paper Ltd v CEPU (1998, 81 IR 15), that clearly suggested tortuous interpretations of Section 127 of the Workplace Relations Act designed to render largely ineffective the legislative provisions directed at preventing unlawful industrial action. Wood also pointed out that, although the Industrial Relations Court had effectively been abolished, ten judges of the Federal Court (including a number of ex-union barristers) had largely operated a de facto Industrial Relations Court through the administrative mechanism of the "industrial" docket system. In an interview with Workplace Express on his retirement last year as Deputy President of the Commission, Justice Munro implied that the judiciary must keep Parliament and the Government in line because "the number [of ministers] who actually know what goes on has been fairly few, and a lot of advisers know even less." By contrast, the Commission has been doing the hard yards by "getting with the parties and trying to get them to work through problems". Justice Gray's comments on the decision by the ACCC in the Transfield/Patricia Baleen case are also relevant (see my paper to the HR Nicholls XXV Conference).

[8] A report in the Herald Sun of 26 November 2003, "Kirby Calls for Judicial Activism", included the following quotation from a lecture by Justice Kirby in England on law-making by judges: "If there is no apparent law on a subject, the judge is duty bound to create it, based on past precedents. Citizens

Let us suppose for a brief moment that social and economic circumstances 110 years ago and for the following 80 odd years could be said to have justified the extensive prescriptions of employment conditions and applications of social justice that applied then. The changes in the last twenty five or so years, producing a market economy and a social security system, should have long since led to recognition that workers in modern societies no longer need special legal protection against employers, let alone dictation by outsiders of what employment conditions are socially "appropriate".

This is not to deny that there has been some reduction in labour market regulation in recent years or that, since it came into effect in March 2006, WorkChoices itself has contributed to the fall in unemployment from 5.0% to 4.3% (in June) and increase in employment of over 360,000, (or about 3.7%). Of course, the externally induced expansion in the mining industry has played an important underlying role in this improvement[9] as have Coalition policies to effect increased immigration (with the now large program of temporary skilled migrants) and reduced marginal tax rates. But the improved labour market regulatory arrangements have contributed to the increase in the supply of labour without creating inflationary pressures. Only a true believer of the industrial relations club would deny any contribution from WorkChoices through the easing of the unfair dismissals regulation, the increased resort to individual agreements encouraged by that legislation, the bar on the further exercise of compulsory arbitration, and the continued limitations on industrial disputation. The establishment of the ABCC to counter union restrictive practices in the construction industry has also markedly improved the functioning of that industry's labour market.

This brings me back to the designated subject of this talk—"A World at Work: Challenges and Opportunities for Workplaces". My general response to this is that, whichever party is returned, the greatest challenge faced today by all those involved in the regulation of employer/employee relations, including those in government-established institutions using judicial and/or quasi-judicial powers, is to recognize that the vast body of workplace legislation and regulations should be interpreted in the context of the major changes in economic and social circumstances over the past 20-25 years. In short, although the *structure* of the "system" is moving a long way back in time to one in which regulatory institutions have extensive interventionist power, the successful functioning of the labour market will depend importantly on whether

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need to know and face these realities. So do the bullies who cry judicial activism". In his Kingsley Lafferty Industrial Relations Memorial Lecture at the University of Sydney on 23 April 2002, Justice Kirby quoted approvingly a remarkable assertion by Professor Alistair Davidson that the adoption of s51 (xxxv)"effectively put the major issue of social rights on a national scale – the relations between capital and labour—into the hands of a court". Justice Kirby further indicated that "where the common law has no exact precedent, where a statute is ambiguous and, in my view, where the Constitution yields competing interpretations, universal principles of international law may be used to resolve the uncertainty". Justice Kirby went on to praise the NSW Industrial Relations Commission for its decision to "establish a new equal pay remuneration or equal pay principle intended to provide remedies for gender affected under-valuation of wage and salary rates involving workers in the State of New South Wales under the jurisdiction of the Commission" and for "founding its decision squarely on a human rights approach …I am aware of no more explicit recognition by an industrial tribunal in Australia of the significance of international human rights norms for Australian industrial relations law and practice".

[9] However, note that the direct contribution of the mining industry to GDP fell from 5.8% in 2000-01 to 4.9% in 2005-06 and employment in that industry accounts for only about 1.5% of total employment.

those institutions adopt interpretations of the legislation consistent with modern economic and social circumstances

Collective Bargaining, Bargaining in Good Faith and Bargaining Powers Generally.

Let me turn now to the underlying rationale for the acceptance by both sides of the need for extensive legislation to protect workers on the basis of the perceived strength of employers' bargaining power. In his Second Reading Speech introducing the stronger safety net bill, Minister Hockey asserted, for example, that its rationale included "employers cannot coerce existing employees into modifying or removing protected award conditions".

In similar vein, Labor also expounds the need for detailed regulation to prevent exploitation. However, whereas the Coalition's attitude on respective bargaining powers is primarily responsive to polling, Labor's is clearly driven by its close association with the union movement and the latter's justifiable fear of a further diminished role in a less regulated labour market. Hence the extensive proposals by Labor designed to limit the bargaining role of individuals and employers and to promote collective bargaining. Where, for example, a majority of employees wants to bargain collectively,[10] employers would be required to comply and the new Australian Industrial Relations Commission—Fair Work Australia—would even be empowered to determine the extent of support for it.

My view is that the need for special legislation to prevent exploitation by employers is based on false premises.

For one thing employees are protected under the common law and ordinary contract and criminal legislation. Like everyone else employers are legally obliged to observe contracts including those containing agreed wages and conditions. Nor are the parties to employment negotiations able to avoid the normal criminal law applying to actual or attempted exercises of violence and duress and the legislation requiring no racial, sexual, age or disability discrimination would also continue to apply.[11] It is relevant that the ordinary common law provides protection against (some forms of) abuse and contracts will not be upheld if procured by force, fraud, or undue influence. Contracts deemed to have been entered into in a manner that is "unconscionable" may also not be enforced.

While objections would be raised by both employers and unions to any proposal to abandon the cost free disputation situation in tribunals under workplace relations arrangements, it is questionable whether taxpayers should be subsidising court costs in workplace disputes.[12] One possible alternative approach would be to establish a body with functions similar to those given to the Advisory Conciliation and Arbitration Service (ACAS) in the UK. That body is widely used in voluntary

[10] The process of obtaining a majority could be started by the requirement that an employer could be compelled to bargain in good faith where only one employee requests this.
[11] Whether it would be necessary to legislate at the federal level on occupational health and safety, would depend whether states ceased to use their legislation to implement quasi workplace relations policies.
[12] Although under WorkChoices a private body can be used to mediate, this is rarely done.

mediations/conciliations and has established itself as impartial as between employers and employees and as open to an individual agreement approach. Unlike experience with the AIRC, It provides extensive advisory services to both employers and employees at a low cost.[13]

The imbalance of bargaining power argument also fails to take account of the competitive environment in which employers operate today. Australia now has more than 800,000 businesses competing with each other and operating with workforces totalling over 10 million. 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. When 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. ABS data on Labour Mobility[14] suggest that similar numbers of persons leave their jobs voluntarily and involuntarily (because they are retrenched or their employer goes out of business), with around 20 per cent of persons who leave a job voluntarily doing so mainly because they assess their working conditions as unsatisfactory.

Small businesses, which comprise around 90 per cent of all businesses and account for about 35 per cent of total employment, have very limited bargaining power. If they attempt to "exploit" workers in some way, they are exposed to serious risk of loss of staff and difficulty in operating a business.[15] It is sometimes forgotten that businesses need competent staff if they are to operate successfully.

It is also often overlooked that individual employees have bargaining power. They not only have the capacity to readily quit jobs if they feel badly treated by their particular employer or for any other reason—but well over a million do so *voluntarily* each year.[16] Individual employees are also increasingly either bargaining for themselves or obtaining advice from the many employment and legal agencies, associations, and government inspectorates rather than relying on unions. During the period of reduced

[13] ACAS was formed in 1974 to take over the industrial relations functions previously carried out from within the Department of Employment at the height of the collectivist approach to labour relations. It has performed four main activities. The most public of its roles is its conciliation involvement in industrial disputes. But it has also helped in organising arbitrations and, as individual rather than collective conciliation has grown, it has played an increasingly important role in individual conciliation. But its most extensive activity by far is its advisory work.

[14] Labour Mobility, ABS Cat No 6209.0, Feb 2006 (Reissue). The data relates to the year ended February 2006. The data suggests that there is considerable flexibility in the labour market, with about 1.35 million leaving jobs voluntarily and about 640,000 leaving involuntarily in circumstances where total employment was increasing and unemployment falling.

[15] Australian Industry, ABS Cat No 8155.0, 2004-05. Potential competition for labour also exists from the *additional* 1,550,000 owner-run businesses that are would-be employers and, hence, also judges at the margin of the regulatory arrangements. With close to 2,500,000 employers or potential employers, this further adds to the risk of loss of staff/difficulty in operating a business from attempted exploitation. The composition of the business sector also changes significantly each year. In 2005-06, of the total of 808,000 businesses that employed work forces at the end of the year, about 102,000 became employing businesses during the year and 80,000 ceased to be employers. Of the employing businesses about 720,000 were "small" businesses ie employing fewer than 20 people (ABS Cat No 8156.0, Table 1.1).

[16] Labour Mobility, February 2006, Canberra, Dec 2006 Re-issue (ABS Cat. No 6209.0) shows that, of the nearly 2 million of employees who left their jobs in 2005-06, over two thirds did so voluntarily and only about 11 per cent were retrenched.

regulation in recent years, average *hours* of work[17] and industrial disputation fell while real wages increased, which scarcely suggests employees bargaining powers would weaken in a deregulated labour market.

This is not to deny that moving to a less regulated labour market would cause some employees to experience *reduced* compensation and/or working conditions. But any substantive reductions would need to be assessed against the circumstances in which they were obtained. Although much attention has been given in the current debate to reductions experienced by some workers who accepted AWAs, little or no assessment has been made of the *economic* basis of the awards under which those workers were previously employed, let alone the availability of persons out of a job to work for conditions different to those required by the award. The fact that over 4,000 awards continue to exist indicates the difficulty faced by regulators in determining what conditions should apply and the difficulty experienced in trying to "rationalize" awards all point to the need to allow market forces to apply.

It is quite likely that many awards now being used in the fair compensation test were out of line with market conditions, particularly in industries employing relatively low skilled workers. Past experience also suggests that some awards have reflected the provision of wages and/or conditions made by tribunals in circumstances where claims by unions were based on the actual or threatened use of industrial power that unions were allowed to exercise but should not have been. The outcome of the waterfront dispute illustrated vividly the existence then of extensive unwarranted protection of union power of an unfair nature[18] and a similar situation obviously existed in the construction industry before the ABCC was established.[19]

In this regard it is worrying that Labor's support for collective bargaining, leading to its policy of abolishing AWAs, includes the policy statement that "all bargaining participants will be obliged to bargain in good faith". There is no such requirement in the WorkChoices legislation and Labor's policy effectively means employers seeking an employment agreement or a change in an existing one would have to involve unions if requested. Opposition spokesperson, Julia Gillard, has claimed the "obligations are simple" and only require such things as attendance at meetings "at reasonable times", timely "disclosure of relevant information", and "timely responses to proposals". But these and other requirements are far from simple in the overall scheme of things.

In practice, the obligation to meet and to disclose relevant information could involve a lengthy process imposing costs on employers and making it difficult for them to avoid agreeing to the "reasonable" going rate, particularly if the relevant division of Fair

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[17] As reported in the AFR ("Families first, workers say", AFR 27 June 2007), research by the Melbourne Institute suggests the reduction in average working hours since the peak in 1994—when enterprise bargaining was introduced—may partly reflect a reaction to the growth in real wages. To the extent this is a trade-off by *employees*, it indicates a degree of relative bargaining strength.

[18] Although Patrick did not succeed in replacing its unionised work force, that workforce was reduced by about half as a result of the dispute.

[19] The failure of police forces to enforce the law has also been an important element in providing such protection. For an analysis of the failures of the Victorian police force in the waterfront dispute, see *Keeping Things Peaceful or Keeping the Peace: Police at the Pickets* by industrial barrister, Stuart Wood (www.hrnicholls.com.au). There is little doubt that, had the police enforced the law, the attempted breaking of the MUA labour supply monopoly would have succeeded.

Work Australia adopted an interventionist approach involving a continued ordering of meetings and information disclosure. Thus, under a regime of mandatory collective bargaining and bargaining in good faith, employers could effectively be forced through Fair Work Australia to pay the "reasonable" going rate or apply the "reasonable" condition, as the costs of paying the condition would be cheaper in the short run than continuing to bargain in good faith. Recalcitrant employers would be forced to spend un-commercial amounts to protect their bargaining position and this would lead others to fall into line, resulting in the gradual adoption of conditions which would over time result in loss of productivity. [20]

Labor's interventionist policy on bargaining powers and bargaining in good faith would also risk a return to the situation in which rogue unions under the supposed protective regulatory system have been allowed to exercise quasi-monopoly powers to the detriment of employers and fellow workers. Although the Opposition Leader claims Labor has a no-violence/no-threat of violence policy in regard to the activity of unions, and has expelled of one or two abusive union leaders from the party, Labor's establishment of extensive regulatory arrangements supervised by new appointees to the new Fair Work Australia would almost certainly increase union power in practice. The power to compel bargaining is particularly important. The archives of the HR Nicholls Society are replete with examples of the "exploitation" of employers despite regulatory arrangements supposedly designed to provide such "balanced" outcomes.

By contrast, although (regrettably) WorkChoices retains the award system and operates what amounts to an industrial police force to enforce the detailed regulation of employer-employee relations, it contains no obligation to bargain in good faith, leaves it completely open to employers and employees to decide whether to bargain on a union or non-union basis, and allows individual agreements that meet fewer conditions and have protection from industrial action.

In short, both parties have paid insufficient regard to the circumstances in which bargaining has been occurring in today's competitive economy—and would occur in a less regulated labour market. The idea that such regulation would protect workers in the event of a recession fails, of course, to recognize that the lack of flexibility works to undermine their job security. But Labor's approach is by far the most worrying in terms of its potential adverse effects on employment and productivity, not to mention individual freedom.

The Institutional Framework

The acceptance of the imbalance of bargaining power argument has inevitably led both major parties to the view that special authorities or tribunals are needed to administer the supposedly protective legislation.

[20] An example of what could happen may be found in the behaviour of the AIRC over a considerable period prior to WorkChoices in requiring employers to accept claims for the insertion into agreements of redundancy obligations well in excess of the 13 weeks standard supposedly set in 1983. During this period some employers "agreed" to redundancy obligations of 120-140 weeks and Telstra's acceptance of 84 weeks required it to include about $1 billion for redundancy during T1. Although this was the same amount as it promised for the environment, only the latter received any press coverage. While the Commission no longer has the power to compulsorily arbitrate the settlement of disputes and hence require the insertion of provisions into agreements, it may still have an influence where both employers and unions have agreed to nominate it as the arbiter in disputes.

Thus, in addition to its new Fair Pay Commission determining a minimum wage, and the maintenance of the ABCC and the Australian Industrial Relations Commission (although in a more limited role), the Coalition has created a Workplace Authority that will reportedly have no less than 700 employees whose responsibilities include administering the fairness test. Also established is a so-called Workplace Ombudsman, with a staff of 250-300 to advise on the obligations of employers and employees, monitor observance and investigate or prosecute contraventions. As mentioned, the Coalition has in effect created an industrial police force and, although Labor says it would have a one stop shop[21] in the form of Fair Work Australia, in reality that body or its divisions would take over the police force and the roles undertaken by the institutions established by the Coalition.

This has significant implications for the operation of the award system, some of which have already emerged. Hitherto, although the numerous awards have been complex, they were often not fully enforced and the unions (the primary enforcers) tended to use any award breach they found more as a bargaining weapon in negotiating workplace agreements or in regard to other "deals", such as the establishment of a closed shop such as appears to have been the case in the current reported arrangement between the TWU and labour hire firm Blue Collar. This limited application of awards was particularly important for small businesses in the service industries, such as hospitality, restaurants, security, cleaning and tourism, which operated more in a de facto deregulated labour market. Now, however, the Coalition has established well-funded bodies to *ensure* awards and other regulations are enforced and that will continue if Labor takes over. This is the first time that this has happened in Australian industrial relations. Importantly, it creates significant potential for a major clash between award provisions and market conditions, with the now much stricter enforcement of awards leading to reductions in employment and the cessation of small businesses.

As already mentioned, and as I have written elsewhere,[22] the historical record of courts, tribunals, commissions and authorities in administering workplace relations laws is a poor one, even in achieving its supposed principal objective (the prevention and settlement of industrial disputes). This gives rise to an additional major concern if Labor is elected. The new Fair Work Australia institution would completely replace existing institutions and appointees to it may well exclude those with a more moderate approach made by the Coalition and substitute instead those with approaches similar to members of the industrial relations club.

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[21] Labor has acknowledged that Fair Work Australia will have an "independent" judicial division. It has also indicated a preparedness to negotiate with the states on the possible exclusion of the public sector from FWA. If this were to occur, it would of course contradict the notion of a uniform national system.

[22] See, in particular, *Judicial Intervention The Old Province for Law and Order,* Samuel Griffith Society 2001 and *Overmighty Judges –100 Years of Holy Grail is Enough,* HR Nicholls Conference 2004 www.hrnicholls.com.au . Also, my article on *"How the Judiciary Continues to Undermine Labour Market Deregulation"* in Australian Bulletin of Labour, Vol. 13 No 1 2005, refers to various decisions, especially those by AIRC commissioners, which suggested increasing interference—or failure to interfere when obviously necessary. Such decisions included failures to protect employers against violent and intimidatory union action, widening the definition of industrial action to allow more arbitration, an extension of 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 debate to date about differences between the two parties' proposals seems largely to have overlooked this important aspect. Assurances that this or that issue would be dealt with "in the legislation", frequently given by Shadow Opposition Minister Gillard, could have limited significance if the appointees to statutory bodies are members of the industrial relations club. Labor has already announced the existing President of the AIRC, Justice Giudice, will be asked to head Fair Work Australia. However, did Giudice receive advance notice of this invitation and would he accept if any of his fellow AIRC commissioners were not appointed?

The Minimum Wage and Fairness

The Coalition's policy of continuing to set, and to prevent any reduction in, minimum wages is among the worst features of the WorkChoices legislation. Moreover, the "guidelines" given to the Fair Pay Commission, including that it "have regard to" providing a safety net for the low paid,[23] virtually ensure Australia's minimum will continue close to the highest amongst OECD countries relative to the average wage.

Labor's policy of having its Fair Work Australia appointees determine an annual minimum wage is cause for similar if not greater concern. The adverse reaction of Opposition Shadow Minister to the 5 July increase by the FPA[24] confirmed that concern and implied Labor fails to understand the inequity in current arrangements. Under Labor the FWA would apparently have wider minimum wage responsibilities, including an annual updating of minimum wage rates for all awards under an award system that would be more extensive than at present. Given that the FWA would have a well-funded enforcement arm, the difficulty of obtaining employment for those outside the job market would likely increase.

The reality of the minimum wage system is that it not only misuses the wage system as a vehicle of social welfare policy but applies it unfairly. Households with incomes in the bottom quintile receive only a small proportion of their income from wages (around 10 %) importantly because they are lesser skilled and find it more difficult to obtain jobs at the minimum wage levels that are set. These households therefore become reliant for income on government pensions and allowances and the taxpayer foots the bill for higher welfare payments.

By contrast, many of those receiving the minimum wage are women or young workers living in households that have high incomes with no need for an income supplement.[25] The determination of minimum rates for those with wages both on the minimum *and* well above it, totalling in all about 1.2 million employees,[26] also

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[23] This makes it difficult for the Commission to make any decision that would increase wages less than inflation. The Commission has 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".

[24] The Australian ("Pay tribunal fights claims of government bias", 6 July 07) reported Ms Gillard as welcoming the decision but claiming it was unlikely to compensate many low-income earners for the rate of inflation and as critical of the FPC for lacking transparency in the way it reaches decisions.

[25] More than half of low wage earners are in the top half of household incomes.

[26] Although about 850,000 were estimated to receive the $10.26 per week increase in the minimum wage announced on 5 July, advice from official sources suggest there are only around 150,000 workers

involves setting wages for many in high income households as well as raising the question of why anyone already earning *above* the minimum needs wage level protection. With over 100,000 separately regulated minimum wage points, the whole minimum wage system (sic) is little short of farcical.

The minimum's high level relative to the median clearly limits the scope for increasing the employment of those looking for work. ABS surveys show that around 1.7 million Australians want work or more of it.[27] But as many are relatively unskilled, their capacity to obtain jobs is importantly dependent on employers being able to offer a wage commensurate with their lower productivity. A minimum over $27,000 a year (not including on-costs), or close to 60 per cent of the median wage, necessarily prevents a significant proportion of lesser skilled being offered employment.

Without such a minimum would the supply of labour be reduced and a higher proportion on welfare benefits? Perhaps, although if employers could offer a wage between the minimum of $27,000 pa and the unemployment benefit of more than $12,000 pa that would surely attract some employees. Any unjustified resort to welfare is surely better handled by tightening the eligibility for benefits, which the Government has recently started to do.

Unfair Dismissals and Individual Agreements (AWAs)

The provision in WorkChoices legislation allowing both individual and collective agreements by *direct* negotiations between employers and employees is an important in-principle recognition of the right of employers and employees to negotiate the terms of employment. However, that principle has been heavily qualified by the introduction of the fair compensation test, which effectively returns to the so-called "no-disadvantage" test under the 1996 Workplace Relations Act's requirement that agreements contain no overall reduction in award conditions.

Beyond that, under WorkChoices all agreements must also comply with mandatory legislated minimum standards. In fact, they apply universally to all employment contracts in Australia, and are unable to be varied or altered even by agreement. These cover "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.

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on the minimum wage of $27,144 pa itself. Yet, astonishingly, the minimum wage increase applied to all receiving less than $36,400 pa. Even more astonishing, an increase of $5.30 per week was "granted" for another 350,000 earning *above* $36,400.

[27] Persons Not in the Labour Force, Australia, Sep 2006 (ABS Cat No 6220.0) shows that, in addition to the 500,000 or so unemployed (4.8%), there were then nearly 700,000 (equivalent to 6.4% of the labour force) who say they would like a job but who do not qualify as "officially" unemployed because they are not ready to start work within four weeks. Also, of the 2.9 million working part time, close to 500,000 would have liked to work more hours. The "official" unemployment rate thus considerably understates the potential for increasing employment. Many recipients of welfare benefits would also become available for work if the eligibility requirements for such benefits were tightened.

The inclusion of these conditions represents a major change compared with the situation already existing in practice in the labour market. Although the leave regulation does not apply to casuals, it is relevant that at the time over 20 per cent of employees were working for no paid leave and 4.5 million were working over 38 hours. As the leave entitlements are now mandatory the only cashing out allowed is 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. As to those currently working more than 38 hours, they may—or may not—be allowed, depending on whether it can be shown "reasonable additional hours" (above 38) are required.

Labor's plan would go much further, with "guaranteed" minimum conditions extended to ten covering (inter alia) no "unreasonable" work hours beyond 38 hours, "flexible" work arrangements for parents with pre-school age children, penalty rates on evenings, week-ends or public holidays, redundancy pay, and long service leave. In addition, Labor's "modern, simple industry awards" would allow up to a further ten minimum employment standards to be compulsorily arbitrated, depending on industry conditions. Moreover, such conditions/standards would apply to all *individual* employment contracts under common law (except for employees "historically award free, such as managerial employees"). Labor would also effectively remove the exemption of small businesses from unfair dismissal claims and, while extending qualifying periods for claims it is not difficult to envisage an expansion in "judicial" interventionism by the enforcement arm of FWA. [28]

The Coalition's acceptance of extensive regulation of individual agreements and its continued application of unfair dismissals to larger businesses has lessened the difference between its policies and those advocated by Labor but has involved another step in the wrong direction. Nonetheless, Labor's policies of abolishing AWAs and removing exemptions from unfair dismissals do represent a much more major wrong step, particularly when account is taken of its extensive regulatory proposals and close association with a trade union movement prepared to use every niche to advance its cause.

Industrial Disputes

Under the Workplace Relations Act 1996 (WRA 96) industrial action may be taken during the *negotiation* of a collective agreement but not during the *operation* of that agreement. Moreover, unions are not able to take industrial action in respect of employees on AWAs. However, the application of the WRA 96 provisions by the AIRC, which remains the body primarily responsible for handling industrial disputes, left a good deal to be desired. Following earlier failed amendment attempts, in 2006 the Coalition succeeded in effecting amendments designed to remove the discretion previously available to the Commission in processing industrial action and termination of agreement cases, which had frequently caused costly settlement delays to employers.

[28] A recent unfair dismissal case provides an example of the potential problems faced by employers in handling such claims. In that instance the AIRC full bench led by Justice Giudice decided to hear an appeal by an employee earning over $100,000 pa against his dismissal for "operational reasons". The appellant, who claimed the dismissal was to allow his position to be advertised at a lower pay, had lost his case before an AIRC commissioner. A possible implication of the full bench decision is that businesses must have a defensible position to justify the dismissal of even employees on high earnings.

Labor's plan indicates that, like the Coalition, it would legislate to forbid industrial action during the life of an agreement and action in support of an industry wide agreement (the so-called pattern bargaining), as well as requiring a secret ballot to initiate allowable industrial action. How this would work out in practice would depend importantly on the detail of the legislation and the discretion given to Fair Work Australia, which "will have the power to end industrial action and determine a settlement". As with some other elements in Labor's plan, this seems to establish a de facto form of compulsory arbitration.

Even more concerning though is Labor's plan to allow union bargaining demands over "any matter", paving the way for strikes over any subject matter contemplated by union officials without even a connection being required to wages and conditions of employment.

Labor has agreed, however, to retaining the outlawing of secondary boycotts as part of the Trade Practices Act rather than the legislation governing workplace relations, which applied under the previous Labor Government and which effectively removed the ban on such boycotts and led to considerable exploitation of employers by unions. Allowing proceedings to occur in a court instead of undergoing a slow arbitration process in the AIRC was an important improvement.

Conclusion

As I have indicated, whichever party is elected the outcome on workplace relations will be retrograde because it will maintain unwarranted restrictions and further reduce the capacity of employees and employers to themselves determine the major components of employment agreements. The effects on employment are likely to be adverse, particularly when the economy slows.

However, from the information available, Labor's policies are truly frightening. The possible return to power of the AIRC for the transitional period to 2010 and the passing to that body of the review of the award system (which I have discussed elsewhere),[29] would itself create considerable uncertainty assuming the Senate passed the necessary legislation. If the Senate then approves legislation to authorize the FWA to start operating from January 2010 that would likely further add to uncertainty by establishing an environment conducive to a major increase in the exercise of union power and to inflationary wage increases. That would occur in circumstances where the FWA would likely have the most extensive set of regulations ever stipulated in legislation giving it, in turn, by far the most extensive ever interpretive and decision-making role. Moreover, with the backing of many millions of budgetary dollars, these regulations and decisions would likely be strictly enforced by an arm of the FWA that would inherit an industrial police force.

[29] See my forthcoming "Who Is The Fairest Of Them All? (With Apologies to Snow White's Stepmother)" in the Centre for Independent Studies journal POLICY for Spring 2007. Given that the AIRC has failed in its two previous attempts to rationalise the award system, it is difficult to see that it would be able to recommend much in the way of substantive change as they would require political decisions involving for some awards whether or not to *reduce* wages or conditions.

That increased interventionism by outside bodies is happening at a time when individuals have considerably increased their capacity to reach decisions on employment agreements, and when the notion of an imbalance of bargaining power in favour of employers is outdated, is highly regrettable. The Opportunities for Workplaces are now very much in the hands of those responsible for interpreting and administering the Pandora's box of regulations.