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The NSW Green Paper Twenty Years On: A Reflection on the Future

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The 1989 Green Paper *Transforming Industrial Relations in New South Wales,* advanced 99 recommendations across a range of concerns. Some were quite prosaic, such as the scope for legal representation in tribunal proceedings and redrafting the regulations to the enabling legislation. Other measures, such as those to do with union amalgamations, OH&S in small business, and pay equity addressed problems specific to a system that was, at that time, the least reviewed in Australia. A third group of recommendations, which are more interesting in the current Australian policy climate, addressed the key design features of how an industrial relations system could be best made fit for purpose in a competitive world.

Most of the proposed changes were implemented, either through ministerial actions or through two pieces of legislation: the *Industrial Arbitration (Enterprise Agreements) Act 1990* and the *Industrial Relations Act 1991*. By applying a green paper process, these changes followed periods of submission-taking and considerable consultation, with extensive debate.

The general effect of these reforms (or retrograde steps in the eyes of some) was subsequently described as 'the thoroughgoing decentralisation of the NSW industrial relations system', boosting the place of enterprise bargaining and the 'radical curtailment of the Commission's own role' (Shields 2005: 3). To O'Brien (1990: 546–47), 'the Niland project … can be located somewhere between the overt ideological and common law based assaults on the third party system of the New Right … and the model of managed change, pursued by the ACTU and the Federal government … '. To Shaw (1992: 35) it was a 'new path to conflict' and Gittens (1991) spoke of enterprise bargaining as a 'snake oil for the national malaise', while to O'Donnell (1995: 203) it was all 'a journey up the garden path'. Not to be outdone in colourful imagery, I saw enterprise bargaining as 'the light on the horizon' (Niland 1990: 182–201).

The integrating theme throughout the Green Paper was the need for a lower centre of gravity for processing industrial relations, primarily through devolving responsibilities where possible and encouraging enterprise bargaining. Certainly this approach contrasted with the more 'tribunal-friendly' reviews

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of the era: the Kelly Report (1978) for Western Australia; the Cawthorne Report (1982) for South Australia; the Hancock Report (1985) for the Federal system; the Marshall Report (1986) for Victoria; and the Hangar Report (1988) for Queensland. This should have come as no particular surprise, given where I had been in the collective bargaining versus compulsory arbitration debates among industrial relations academics in the 1960s and 1970s (Isaac 1979).

For obvious reasons, editors do not ask authors to review their own books and perhaps the same should apply to the agents of public policy reviews! Be that as it may, I am pleased for the opportunity offered to reflect on the key elements in the Green Paper, and to link these, where relevant, to the current policy climate in Australia. This can be addressed through four of the main themes, each a building block for a lower centre of gravity.

1. An enterprise focus, by developing a framework of institutions, skills and practices to promote collective bargaining at a decentralised level, with minimal pattern setting.
2. An 'industrial calendar' which recognised the reality of the right to strike by allowing certain direct industrial action at particular times of the bargaining and agreement cycle.
3. A balancing of equity and flexibility by assigning to the tribunal responsibility for setting certain minima, and vetting non-union agreements before they can override awards.
4. A rationalisation and integration of the Federal and State systems of industrial regulation.

Enterprise Bargaining

The rationale for the emphasis on enterprise bargaining was to introduce a process more likely to produce better relations and productivity in a workplace by focussing on that workplace, away from the 'one size fits all' tendency characterised in the hallowed principle of comparative wage justice.

The beginnings of greater variability in wage outcomes was evident as early as the 1983 National Wage Case decision. There followed the seminal decision in 1986, whose distribution of national productivity into superannuation benefits laid the foundation for Australia developing the highest incidence of per capita share ownership. The 1987 and 1988 decisions confirmed the breaking of the comparative wage justice mould, and brought further decentralisation through the effects of award restructuring. These developments, and the system reviews of the 1980s mentioned above, reflect a growing acceptance in Australia of the need to overhaul key elements of the framework for industrial relations. But virtually all these efforts, reinforced by the strategy of the ACTU at the time, were tribunal-centric.

The approach in the Green Paper was to see the conciliation and arbitration model as fundamentally less effective than it had been in its first 50 years. In NSW, the process had become cumbersome and top-heavy. Arbitration brought a wider catchment area of coverage and encouraged a mentality of comparability. The whole tribunal approach and culture were removed from the ken of

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those who would live with any new industrial instrument. The process of negotiation offered a dramatically different dynamic. It is easier to encourage and manage change programs at the local level than to bring change from above. Equally important, the shift to a bargaining mode carries the greater possibility of attitude change about change itself, and the prospect of a more measured approach to strikes and various forms of indirect action.

A range of arguments were mounted against these propositions, led by the Labor Council of NSW (Easson and Shaw 1990). Generally speaking, from a labour perspective there was anxiety about an adverse shift in the power balance, particularly from the curtailment of industry standards and the breakdown of inter-industry comparability. It is also fair to say that the role of head office changes when enterprise bargaining becomes the standard process.

To some business groups the changes proposed did not go nearly far enough in lowering the centre of gravity: why stop at a collective arrangement at the enterprise level when the reforms should be pushing on to non-collective arrangements at the level of the individual worker and the individual employer?

Other lines of resistance were that any shift to an enterprise focus would remove the steadying hand of the tribunals; would invite even greater industrial disputation; would bring unfair outcomes for particular groups such as women and minority workers. And in any event, the benefits of what was proposed were unproven, and until there was proof, we should stay with what we had and knew!

It seems to me that there is a somewhat different outlook about enterprise bargaining twenty years on. Refinements to what is workable have been made. Greater clarity about the implications of living and competing in a globalised world has helped shift attitudes. Also at play is what we might see as a reform acclimatisation effect.

Through the effluxion of time and the wash of experience, a policy proposal which initially might appear wrongheaded, even grievously flawed, at a later point in time can take on a more positive patina and be accepted, even advocated, by its erstwhile opponents. Such seems to be happening now with enterprise bargaining. Perhaps this is because the forecast disasters do not eventuate and the promised benefits (or enough of them) become clearer in light of changing world circumstances, such as globalisation. Or perhaps further waves of reform push towards arrangements that are even more reviled. The first scenario played some role in relation to the Green Paper, with most State Governments and even the Keating Labor Government enshrining more and more of an enterprise focus in the early 1990s (Niland, Brown and Hughes 1991). More telling, however, was the stance of the Howard Government in mandating individual contracts over collective negotiation, culminating in the WorkChoices legislation. Thus, over the longer run, enterprise bargaining is becoming more mainstream because it shifts the balance toward greater flexibility in a globalised world, but with a degree of equity protection through the collectivity element and mandated minimum standards. Without the shock wave of WorkChoices, this may not have happened.

Industrial Action, Compliance and Enforcement

The dynamics and the culture of enterprise bargaining are quite different from those in tribunal-based conciliation and arbitration and the former cannot simply be folded into the institutional and regulatory framework of the latter. A new set of ground rules and institutional arrangements are needed.

Stable collective bargaining entails not just direct and mature exchanges across the negotiating table, but also clarity on the rules of engagement, specifically direct action. The prevailing outlook at the beginning of the last century was that the 'new province for law and order' should mean, in the words of Justice Gallagher, there was no such thing as the 'right to strike'. This had a perverse effect over time. By imagining that no strikes need occur, society ignores the inevitable and denies itself the ability to inject fundamental stability into the industrial relationship. Hence, the Green Paper promoted the distinction between interest disputes and rights disputes (however they are termed in the Australian lexicon), and the need to embed this distinction in legislation.

Interest disputes, essentially, are those that arise in the process of establishing a new award or agreement. Rights disputes occur during the life of the award or agreement and involve matters of interpretation, and the application of terms and conditions already in place. This principle, which was not at all well understood in the 1980s, enables a more coherent approach for the parties and the Commission in handling industrial action and determining what form penalties should take. Equally important, when applied, the distinction gives some greater certainty to the flow of economic activity. Experience had shown that in a tribunal environment where all strikes were technically illegal, the practical outcome was that none in effect were illegal. A system that accepts the distinction between interest disputes and rights disputes is more realistic, and sets in place a critical building block for enterprise bargaining.

While there were particular conditions and caveats, the essential theme in the Green Paper was that interest disputes (in the first phase of the industrial calendar) should be acknowledged as lawful, but rights disputes (in the second phase) should be unlawful and attract the probability of penalties and sanctions. In their submissions during the period of consultation, many employers were unhappy with a recognition that any strikes could be legal. And quite a few union commentators opposed the practical limitation in any form, particularly the concomitant need to lay out penalties to operate in the event of breach. Other commentators worried that the tribunals would have to stay their hands even as interest based strikes became drawn out, and the media and opposition politicians would clamour for an arbitrated solution.

There had been isolated instances in the late 1980s of 'no stoppage' clauses for the second phase operating successfully in registered agreements for important construction projects set to fixed-cost schedules (Shields 2005: 4). But in the end, the Greiner Government baulked at the 'balancing' provision, and the ensuing legislation did not embed the right to strike in the first phase of the process. Through time, however, there came an acceptance of the idea that some industrial action would be 'protected' while other action would draw penalties. In this respect, the Federal industrial relations legislation from the mid-1990s

better supported the framework for enterprise-level bargaining. This has, in my view, helped shift the culture on industrial action in Australia, and in part accounts for the downward trend in Australian strike activity (which for much of our industrial history was at appallingly high levels).

Balancing Equity and Flexibility

Has the unique provision in the Australian Constitution for the regulation of industrial disputes, even when augmented by other sections, been a sound base for developing industrial relations systems that are fit for purpose? There is a rich history of debate, from the era of 'the new province for law and order' at the turn of the twentieth century, through the 'collective bargaining versus compulsory arbitration' exchanges in the 1960s and 1970s (Isaac 1970), then on to the emergence of 'enterprise collective bargaining' in the 1990s, through to the *WorkChoices* experiments at our entry into the twenty first century. The academic literature is prolific by international standards, and this area is a traditional battle ground for political parties. A spectacular marker of just how pivotal this policy area can be is its centrality in the only two federal elections when a sitting prime minister lost his seat: Sidney Bruce in 1929 with a proposal to abolish the federal tribunals and John Howard in 2007 with his insistence on maintaining WorkChoices.

While the particular tension points vary from era to era, a common thread is how to define, implement and protect 'fairness'. This is unsurprising in a society which prides itself on an egalitarian ethos (however the reality plays out). Just where the balance should settle between equity and efficiency dominated the exchanges between supporters and opponents of the Green Paper recommendations. The same can be said of the exchanges 20 years later with WorkChoices. But there is a significant point of departure. The Green Paper set a lower centre of gravity, to the enterprise level, and assigned the safety net function to the tribunals, newly reshaped. On the other hand, AWAs and then WorkChoices radically reshaped the point of equilibrium, to the level of the individual. One emphasised collective bargaining to produce a group-wide industrial instrument, while the other favoured the setting of individual contracts.

Much hinges on the architecture of the safety net: how it is set; by whom; through what process; at what levels; in respect to which elements; the scope for internal trade-off among the safety net elements; and their auditing and enforcement. Over the past twenty years, from the Green Paper era to that of WorkChoices, these questions have been addressed in various ways. The elements to be covered and their effective minima will be settled as the policy debate ebbs and flows. When the time comes to review and adjust minima, those with a role include the tribunals, special agencies and legislatures. The experience in the United States suggests that minima set and varied through legislation is a fraught process and should be avoided in Australia. Just how the role is best assigned between tribunals and special agencies is an important design feature. It is also something that should be part of the policy mix in the shift toward a unitary system of industrial regulation.

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Federal/State Co-ordination and Comity

The Green Paper mulled the dimensions of the challenges thrown up by jurisdictional overlap in matters to do with the workplace. Forum-shopping was one area of concern, as was recognition and coordination between tribunals, State and Federal. Within New South Wales the jurisdictional tussles were also evident between tribunals dealing with industrial relations and human rights. To complicate the dynamic, these sometimes spilled over into the Federal system. The Green Paper looked at various suggestions for addressing demarcation tussles between the tribunals dealing with industrial relations and human rights disputes. Looking beyond the State, the Green Paper simply recommended complimentary legislation 'to facilitate greater co-ordination between federal and state industrial tribunals' and the development of a strategic plan between the New South Wales and Federal governments 'to lead the way towards a fully integrated industrial relations system'.

On reflection, this presents as a rather limpid position. Still there was the political reality that Labor parties held office federally and in most states. It should also be said that to push for a handover of a fair slice to the Federal system, as the Kennett Liberal Government did in Victoria in 1997, would have invited such a backlash from interests directly affected as to risk putting the whole transformation exercise into a very large pigeon hole. As it was, when Labor came to power in NSW in 1995, the Carr Government rolled back some of the enterprise focus and reinvigorated the power of the State tribunal. So did the Bracks Government when Labor won power in Victoria several years later.

Perhaps the greatest burden endured by Australian industrial relations is the multiple jurisdictions ordained by the Australian Constitution. Now, with Labor governments in all jurisdictions, and with growing clarity on the problems generated, the opportunity is there for a bold transition to a unitary system, at least for the private sector.

Now, the challenge is not so much to move in this direction, but to outmanoeuvre recidivism further down the line. The lobbying power of industrial relations players — unions, business bodies and tribunals — are often too strong to resist in a tight political environment. The lesson is that the moves to a unitary system by the Rudd Government must somehow provide a reflux valve; a poison pill, so to speak, against reverse takeover. The abandonment of WorkChoices is only part of the story in the continuing (some might say never ending) transformation process. The big question is what takes its place? Experience from the Green Paper exercise suggests it is much more than a nip here and a tuck there. An integrating theme or philosophy is essential, and this has yet to be articulated. For my part, an enterprise focus and a bargaining culture have much to offer. But whatever the tenor of the next phase, nothing is more critical than setting the post-WorkChoices world into a national, unitary framework, secured against reversion to state jurisdictions.

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Conclusion

In a country of strong industrial traditions and institutional rivalries the proposed shift to enterprise bargaining certainly found its active opponents, often from within the labour movement on the basis of an unfair rebalancing between equity and flexibility. Business interests and conservative governments were troubled by the recommendations to recognise the general right to strike in contract negotiations. And tribunal members saw their diminished role as an assault on the prospects of law and order. In a critical but elegant review of the Green Paper in 1990, O'Brien wrote:

> Perhaps the Niland proposals … will sink under the 'weight of history' that Hancock found so immovable. On the other hand, developments in New South Wales may usher in an era of Australian industrial relations that constitutes a radical break from the past. (1990: 557)

Now, nearly 20 years on, much of the hostility to these propositions has subsided. Indeed, many of those who saw enterprise bargaining as the thin edge of the American wedge today seek to re-establish this approach as WorkChoices is dismantled. There is, of course, debate over the details, but the policy climate in Australian industrial relations has shifted remarkably in just two decades. Whether this will amount to an enduring radical break from the past is yet to be settled. Certainly, with the reform acclimatisation effect and the trauma of the WorkChoices era, we are breaking free from the deadening weight of history.

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