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Australian Labour Law and the Rudd Vision: Some Observations

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Introduction

In this brief paper, I offer some observations on what I shall call the 'Rudd Vision of Australian Labour Law'. Before doing so, however, it is appropriate to explain how the WorkChoices laws sought to extinguish the purpose and rationale of labour law.

Labour Law's Purpose and the WorkChoices Laws

I have always regarded the purpose of labour law to be the establishment and maintenance of a series of legal rules to ensure that working women and men receive fair and appropriate wages and other terms and conditions of employment in return for their labour. These labour law rules are necessary because employers, who accumulate capital, almost always possess greater bargaining power than do workers who sell their labour to support themselves and their families. The capacity of employers to accumulate capital enables them to invest in employing enterprises and, of even more importance, to disinvest in undertakings, that is to transfer their capital into other ventures whether in Australia or overseas. Individual employees do not possess the means to match these powers. As Sir Otto Kahn-Freund so eloquently put it three dozen years ago, 'the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination' (Kahn-Freund 1972: 8; Davies and Freedland 1983: 18). In this present era where free market economics and neo-liberal political thought dominate our lives, the imbalance of bargaining power between employees and employers is either dismissed as nonsense or at best regarded as unfashionable. Yet, it has been labour law's focus upon protecting and enhancing the lives of employees by lessening the unilateral power of management — either via conciliation and arbitration or collective bargaining — which has contributed significantly to improvements in the living standards of workers and their families.

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By its very nature, collective bargaining differs greatly from individual contract-making. The latter focuses upon the rights, obligations and duties of the individual employee and the employer. However, collective bargaining is far broader in scope. In large part, it is an accommodation between the social and economic interests of two groups of actors who possess markedly different interests. It is an accommodation between employees as industrial citizens and their employers (Bamber and Sheldon 2001: 550).

When the WorkChoices laws were enacted by the Howard Government in late 2005,[2] in my opinion they were designed to undermine labour law's purpose by further developing mechanisms to decollectivise workplaces. A great deal has been written on these laws,[3] and there is no need for me to recapitulate them in any detail. In my view, the primary vice of the WorkChoices laws was their adoption of individual statutory agreements known as Australian Workplace Agreements (AWAs). These workplace agreements were established to decollectivise workplaces and to enshrine individual contract-making over collective bargaining. In other words, these agreements were designed to legitimate the inherent inequality of bargaining power between an employer and an individual employee. Under the WorkChoices laws, employers were able to sign workplace agreements at any time with individual employees. Even where these employees were bound by an existing collective agreement, nevertheless workplace agreements were valid and could contain terms and conditions of employment better or worse than those in the collective agreement.[4] Another way in which primacy was given to individual agreement-making was that once an employee signed an individual workplace agreement, she or he was unable to return to collectively agreed to terms and conditions of employment.[5] Put another way, when an individual workplace agreement reached its end date and was terminated by the employer, the employee was thrown back onto the Australian Fair Pay and Conditions Standard, that is back onto the WorkChoices' very narrow safety net, which may also include any protected award provisions. Even if all of the employee's co-workers were still governed by an existing collective agreement, our employee was not allowed to choose to rejoin them. Once an employee made the choice to sign an individual workplace agreement, WorkChoices prevented the employee from choosing to rejoin any collective arrangements even where the individual agreement had come to an end.

Enough has been said to show how the WorkChoices laws struck at the heart of labour law by turning it upside down. By elevating individual agreement-making over collective bargaining, the WorkChoices laws sought to set at naught the imbalance of power between employers and their employees. Instead, the WorkChoices laws enshrined individual agreement-making and even increased the bargaining advantage of employers by denying employees remedies for unfair dismissals. WorkChoices employees whose employers employed 100 or fewer employees were no longer able to bring proceedings to seek remedies against dismissals which were harsh, unjust or unreasonable.[6] Even where WorkChoices employers employed more than one hundred employees, they were given power to dismiss employees for operational reasons.[7] As was shown in the *Village Cinemas Case*,[8] 'operational reasons' was so broadly

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defined that it was relatively easy for employers to terminate employees by altering the manner in which some work was performed. In other words, even where WorkChoices employees were permitted to bring unfair dismissal proceedings, employers were given the power to mask their terminations in the garb of operational reasons so as to defeat otherwise meritorious claims.

Collective bargaining was permitted, under the WorkChoices laws, provided it was voluntary and strictly confined to single enterprises. By allowing individual workplace agreements to trump collective arrangements, it was hoped that collective bargaining would gradually diminish as an individualised workforce took centre stage in Australia.

It must be remembered that until the close of the Middle Ages, serfdom, which was a type of slavery, was the lot of most English peasants. In his famous lectures which were first delivered in 1765, Sir William Blackstone showed how English employment was governed by the common law and statutes, where employees had the status of servants who were under strict controls of their masters (Morrison 2001: 325–332; Kahn-Freund 1977). These master and servant laws operated until the commencement of the industrial revolution at the beginning of the nineteenth century (Cairns 1989). With the movement of agrarian workers into factories and mines, the nineteenth century worker became governed by the special features of the employment contract whose implied terms ensured employee obedience, good faith and fidelity. For most of the nineteenth century, English labour legislation was anti-trade union and anti-worker (Hickling 1967: 1–10; Orth 1991). It was not until the 1870s that the English Parliament restricted the operation of these anti-labour laws.

When the British first settled Australia in 1788, all of the English labour laws — whether based on the common law or through statute — became Australian law (McCallum 2006). Up until the close of the nineteenth century, Australian legislatures slavishly adopted British labour legislation, including the harsh master and servant statutes (Quinlan 1989).

The enactment of regimes of compulsory conciliation and arbitration at the beginning of the twentieth century was an unusual approach for a developed nation like Australia. Giving independent labour courts power, failing agreement through conciliation, to specify terms and conditions of employment by arbitration was unusual to say the least. In large part, these enactments were designed to bring about industrial peace after the labour conflicts of the previous decade (Merrifield 1980; Mitchell and MacIntyre 1989). In other words, it was the industrial action of employees, that is, workers 'coming out onto the streets', which played a significant role in bringing forth these more balanced labour laws.

To sum up, for most of our history and that of our ancestors, the law has favoured employers over employees. The advent of a century of conciliation and arbitration has made us forget that the laws of work have favoured those who accrue capital. The WorkChoices laws fitted this well-established pattern by markedly favouring capital over labour.

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The Rudd Labour Law Vision

On 24 November 2007, Prime Minister Kevin Rudd's Australian Labor Party won federal political office. All commentators of whom I am aware agree that the unpopularity of the Howard Government's WorkChoices laws, which had been vigorously and skilfully campaigned against by the Australian trade union movement, was a key factor in its defeat. A century ago, Australian working people and their allies demanded and achieved fair and balanced labour laws via compulsory conciliation and arbitration. In the early years of our current century, the Rudd Government has been elected because Australian working women and men made it abundantly clear that they would no longer tolerate these pernicious WorkChoices laws and that they wish their employment to be governed by more balanced measures.

In response to this demand, it is pertinent to inquire what labour laws will be enacted by the Rudd Government. From the available material, that is the Australian Labor Party's *Forward with Fairness* policy documents (ALP 2007a, 2007b), it is possible to glean the essence of these proposed new laws which I shall call the 'Rudd Labour Law Vision'. It makes little sense to delve into these proposals in great detail because within a relatively short time transitional measures and draft proposals will be available for detailed analysis and discussion. For my present purposes, a skeletal outline of the Rudd Vision will suffice.

The Rudd Vision seeks to create a national labour law for the entire private sector, which is to be developed through discussion and consultation and enacted in time to fully operate in early 2010. The first thing which strikes one about these proposed laws is that they will be palatable to business and especially to large employers. After all, the current laws which make all strike activity illegal, other than when validly engaged in during collective bargaining, will remain in force, and third parties who suffer damage from illegal strike activity will continue to be able to bring actions for damages. Furthermore, the unnecessarily strict right of entry for trade union officials will continue to operate.

However, on the other side of the ledger, the worst feature of the WorkChoices laws, that is Australian Workplace Agreements, will be swept away because no new individual workplace agreements will be able to be made once a transitional bill has been enacted into law by the Parliament. Yet for those businesses who seek greater flexibility — especially in the mining sector — measures will be put in place to give them some latitude. Businesses will be given the capacity to enter into common law agreements, that is common law employment contracts, which may alter terms and conditions in awards, provided that those employees are earning more than $100,000 per annum.

Employees of single enterprises will be able to choose whether or not to engage in collective bargaining, either with or without a trade union. There are four points to note here. First, collective bargaining backed up by economic force will remain confined to single employing undertakings, even though in my opinion some industries lend themselves more appropriately to multi-employer collective bargaining. Second, the Rudd laws will continue Australia's practice of enabling non-union bargaining to operate via collective agreements made by

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employers directly with their employees. This type of agreement-making does not operate in law in any comparable OECD country. In my view, employers are likely to favour non-union collective agreements, more especially where trade union membership in their undertaking is either low or non-existent. In fact, non-union collective agreements are likely to increase in number, more especially once individual workplace agreements have been abolished.

Third, collective bargaining will no longer be voluntary as it has been under the WorkChoices regime where employees were not given a legal choice in the matter. In other words, employers will no longer be able to unilaterally decide whether or not to engage in collective bargaining. Instead, it will be up to employees to determine whether they wish to collectively bargain with their employing undertakings.

Finally, it does appear that the new laws will adopt the current British approach with respect to trade union recognition for the purposes of collective bargaining. In other words, the Rudd laws will give powers to its new agency, titled Fair Work Australia, to determine whether or not an employer must recognise a trade union and bargain with it in good faith. I am of the view that the shape and scope of trade union recognition provisions will be hotly debated in the Parliament, and accordingly it is instructive to briefly examine the British approach.

Under the British laws, which were enacted by the Blair Government, the Central Arbitration Service encourages employers through consultation to voluntarily recognise appropriate trade unions. Where discussions are unsuccessful, the Central Arbitration Service is empowered to order an employer to recognise a trade union in the following circumstances. First, recognition will be ordered where the trade union is able to show that a majority of the employees are members. Second, recognition will also be ordered where the trade union gains a majority of the votes in a representation election where at least 40 per cent of the eligible employees vote (Collins et al 2005: 768–832; McCallum 2007).

The capacity of employees to seek remedies if they have been unfairly dismissed is to be enlarged. No longer will employees whose employers employ one hundred or less employees be debarred from bringing such actions. All employees who are not otherwise excluded[9] will be able to seek redress. The six month qualifying period will remain for all employees whose employers employ 15 or more persons. However, for employees whose employers employ 14 or fewer employees, the qualifying period will be one year. The concept of permitting dismissals for 'operational reasons' is to be abolished, though employers will be able to terminate employees for redundancy. Where a terminated employee seeks a remedy, officials from Fair Work Australia will call a conference, perhaps at the workplace, to resolve the matter. Again, the detail of these new unfair dismissal laws will be vigorously debated both in the media and in Parliament.

The narrow safety net which operated under the WorkChoices regime is to be expanded. There will be ten legislated national standards, together with up to ten minimum conditions of employment to be set out in simplified awards. The

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most interesting new national standard concerns unpaid parental leave. A parent, usually the mother, will be able to request a further twelve months unpaid parental leave, to remain the primary care giver of the child, and the employer will only be able to refuse this unpaid leave on reasonable business grounds. A parent will also be able to request part-time employment until the child reaches school age, and the employer will only be able to refuse this type of employment on reasonable grounds. It is my understanding that this type of provision has been operating in Britain with success. However, in Australia where working women have never received paid maternity leave as a right, and where in my opinion the concept of gender equality is less developed, I suspect that employers will be more reluctant to offer such part-time arrangements. Although paid maternity leave was not mentioned in the *Forward with Fairness* documents, in early 2008 the Rudd Government has requested the Productivity Commission to make yet another inquiry into paid maternity leave (Peating 2008) which is the right of women in all OECD countries except Australia and the United States.

It is appropriate to ask why the Rudd labour law vision seeks only to enact such mild labour law changes, albeit that individual workplace agreements are to be abolished. In my opinion, the Rudd Government wishes to put labour law reforms behind it once and for all, and to develop a modern form of citizenship which places rights, obligations and responsibilities on Australians. It is no accident that one of the titles of Deputy Prime Minister Gillard is Minister for Social Inclusion. In my opinion, this approach is akin to the citizenship concept which underpinned the ten years of Tony Blair's administration in the United Kingdom (McCallum 2005: 30–32; Collins 2003). The hope is to build a competitive and cohesive society where high levels of trust between employees and their employers will establish competitive undertakings which will prosper in our neo-liberal and globalised world.

I surmise that Prime Minister Rudd will be able to obtain the agreement of business for his new labour laws. It is also likely that he and his former trade union colleagues in the Parliament will be able to convince the trade union movement to accept these mild reforms. If the Prime Minister wishes to establish a truly national private sector labour law, he will have to convince the State ALP Governments to cooperate. I doubt that a majority of the States will simply refer their law-making powers over labour relations to the federal Government.[10] The New South Wales Government commissioned Professor George Williams to report on cooperative methods of establishing national laws (Williams 2007), and he has proposed that the States could participate in putting together a national private sector system through establishing a form of cooperative federalism. His suggested arrangements are technical, but in essence they require the establishment of inter-governmental arrangements and either limited referrals of powers by the States, or the enactment of uniform legislation.

If the Rudd Government can achieve its aims, then a stable labour law system will have been created for most Australian employees. Although these new laws will still operate within a neo-liberal paradigm, they will give workers a floor of minimum rights and they will be immune from sweeping ideological alterations when changes of our national Government occur.

Notes

1. Some of this material is taken from, Ron McCallum, 'In Defence of Labour Law', the Sir Richard Kirby Lecture, Melbourne, 1 May 2007, unpublished. I wish to thank Ms. Katherine Fallah and Ms. Michelle Wen for their assistance with this paper. I also wish to thank my wife Professor Mary Crock for her love and empathy during this busy time in our lives. Since this paper was written, the Australian Parliament has enacted the *Workplace Relations Amendment (Transition to Forward With Fairness) Act 2008* which came into force on 28 March 2008. From this date, no more individual workplace agreements may be made.
2. In late 2005, the Australian Parliament enacted the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) which amended the *Workplace Relations Act 1996* (Cth) (hereafter the 'WR Act'). These new laws, which have become colloquially known as 'the WorkChoices laws', came fully into force on 27 March 2006. In mid-2007, the WorkChoices scheme was amended by the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth).
3. *Australian Journal of Labour Law* 2006, CCH 2006, McCallum 2007, Murray 2006, Riley and Peterson 2006, Ross et al 2006, and Sutherland 2007.
4. WR Act, s 448(2).
5. WR Act, s 399.
6. WR Act, s 643(10)–(12).
7. WR Act, ss 643(8)–(9) and 649.
8. *Carter v Village Cinemas Australia Pty Ltd* (2007) 158 IR 137.
9. The standard exclusions which have been in the legislation for many years will remain. For example, casual employees who have been employed for less than 12 months will remain excluded from the unfair dismissal regime.
10. Section 51(xxxvii) of the Australian Constitution, enables State Parliaments to refer any of their legislative powers to the federal Parliament.

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