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Remaking Industrial Relations in Australia

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Following the 24 November 2007 Federal election, the Rudd Labor Government began work on its promises to re-shape Australia's industrial relations system. Industrial relations had been a central issue — many thought the central issue — in that electoral campaign. The Howard Liberal-National Coalition Government went to the polls some two years after enactment of its highly controversial *Workplace Relations Amendment (WorkChoices) Act 2005*. Despite the Howard Government's best efforts — via legislative amendment, enormous public spending on pro-WorkChoices advertising and the corralling of employer associations into publicity campaigns in defence of WorkChoices — the clear anti-employee bias of the new industrial relations regime rendered WorkChoices increasingly unpopular. It cost the Coalition the government benches, Howard his electoral seat and the Coalition parties their ability to commit themselves — at least in the short term — to the sorts of employer-focused, individualised industrial relations that they had championed for the previous two decades. The most potent symbol of this trend was the introduction (in 1996) of individual statutory agreements — Australian Workplace Agreements (AWAs) — to override awards and collective agreements. The 2005 WorkChoices amendments further encouraged employers to use AWAs to erode collectively bargained conditions, by allowing the making of AWAs without any 'no-disadvantage' test, and with fewer procedural requirements.

A particularly effective media and community organising campaign by the union movement against WorkChoices had harnessed voter support for Labor's wider policy agenda in support of 'working families'. So unpopular was WorkChoices and so central was its unpopularity to Labor's successful electoral campaign, that the new government appears to have had no option but to engage with industrial relations legislative reform as an important, early part of its legislative agenda. These particular circumstances have opened up a series of questions of fundamental significance for the future of Australia's industrial relations, its institutions, labour market and society. Whatever the Rudd government finally decides (and what the parliament with its 'hung' senate finally allows) is of potentially immense historic importance. This moment comes after nearly two decades of employer association activism that has successfully influenced governments of both persuasions in favour of a national industrial

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relations system far more decentralised and much more focused on the wants of individual employers. During the last 11 years too, unions have faced marginalisation and de-legitimation through policy, law and official discourse. The not unexpected outcomes include an industrial relations reality that is far more individualised, unprotected and insecure for large sections of the workforce. In broad terms, these are some of the experiences and trends that the Australian electorate voted against. So, where will the legislative process go now?

The Rudd Government's first step in dismantling aspects of the WorkChoices framework was the enactment of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Transition Act). The Transition Act delivered on a promise to prohibit the making of new AWAs, however it did not deal with many other contentious matters, including unfair dismissal laws. Through the government's policy statements and other media releases, we know something — but by no means all — of what further changes the new government plans to make. Some aspects of WorkChoices, such as reliance on a legislated safety net of minimum employment conditions, will clearly stay; however, other matters are still open to consultation and debate among newly-formed consultative bodies as well as among traditional employer associations, trade unions and other lobby groups. In that context, it is timely to review the state of industrial relations law and policy in Australia. We stand — if not at a 'fork in the road' — at least at a point of departure from the traditional system of conciliation and arbitration which served as the foundation of Australia's industrial relations system for some nine decades following federation. The WorkChoices regime that the Australian electorate so decisively rejected is likely to have an abiding legacy, if only because it created an opportunity for some grass-roots reconfiguration of industrial relations in Australia.

The theme of this special issue is 'what should an industrial relations system seek to achieve in contemporary Australia, and why?'. We invited a number of contributors to explore this by short, non-technical, reflective essays aimed at encouraging further debate on the issues of most importance. We began planning this issue not long after the November 2007 election and took into consideration the relatively narrow period of time that the new government had indicated for policy review debate. We took it for granted that the High Court's 2007 validation of the Commonwealth's powers in this matter made this area of constitutional debate largely irrelevant. Nevertheless, time has been of the essence and has shaped our approach. Because of our time constraints, and because we wanted to range broadly and include a wide range of themes, interests, backgrounds and perspectives, we placed severe word limits on each of our contributors. In fact, one contributor has playfully protested against this constraint in his piece! We excuse ourselves with him and his co-contributors. Hopefully, our readers will feel the advantages of a greater number and range of perspectives and timely appearance of this issue were worth the constraints.

The issue is divided into three sections. A first section contains four plenary papers, each by an illustrious leader in the field of industrial relations law and policy in Australia: Emeritus Professor Keith Hancock FASS, AO, Emeritus Professor John Niland AO, Professor Ron McCallum AO and Professor Mar-

garet Gardner AO. Each carried out a major review of an industrial relations system under a former government. Professor Hancock chaired a committee that reviewed the federal industrial relations system under the Hawke Labor government. His 1985 report shaped that government's *Industrial Relations Act 1988*. Professor Niland prepared a Green Paper on the New South Wales system for the Greiner Liberal government in 1989 that greatly influenced that government's *Industrial Relations Act 1991* (NSW). This statute operated until after the Coalition lost government in 1995 when the Carr Labor Government asked Professor McCallum to chair its review. His report shaped Labor's *Industrial Relations Act 1996* (NSW). On behalf of the Bracks Labor Government, which came to power in 1999, Professor McCallum also chaired an Industrial Relations Taskforce that reported to that government in September 2000. An upper house hostile to the government's project scuttled the proposed legislation that flowed from that report. For her part, Professor Gardner chaired a committee that reviewed Queensland legislation for the Beattie Labor government in 1998. Her report shaped the *Industrial Relations Act 1999* (Qld).

All four authors were already eminent academics prior to their appointment to conduct those reviews. Each conducted their enquiries and made their recommendations in the light of their intellectual mastery of the field, the terms of reference for their appointments and the unfolding economic, social, policy and political environments in which they were working. Since then, each has had the opportunity to reflect on these processes and their outcomes as well as on subsequent developments. Each is therefore particularly well-placed to bring together vast experience, knowledge and reflection in making proposals for the legislative changes that the Rudd Government is now considering. In inviting their reflections, we encouraged them to contribute their personal and visionary views, prioritising, as each wished, the social and the economic, the political and the ethical. We invited them to refer to their own review experiences as much, or as little, as they thought useful and to make use of other historical evidence to the same effect. Additionally, because we sought highly personalised, essay-style papers that would inspire consideration and discussion among as wide an audience as possible, we suggested that they provide as much referencing as they thought useful, including none at all. Those readers wishing to find references for their statements and arguments have little trouble doing so. We do not further discuss these four plenary papers as they are the subject of discussion by the authors in the second section.

The second section contains seven papers in which their respective authors use the plenary papers as a starting point for their discussion. Each discussion focuses on particular aspects or themes that we felt were of major interest to the legislative review discussion. Many of these have to do with questions of fairness, equity and equality of treatment at work and in the wider labour market — issues that the Howard Government relegated below its claims of employment generation and employer preference. Each paper is the work of an expert commentator with special expertise and interest in that respective area. Once again, we sought a personal approach from each of them that reflected

their own perspective and knowledge and once again we offered the option of informality in style and referencing.

Dr Jill Murray draws on her own personal experience as well as her scholarly research to provide a critical perspective on the fundamentally important question of how minimum labour standards should be determined and enforced under a new system. Her highly engaging paper challenges the assumption that centrally-legislated minima ensure a lower 'centre of gravity' for the setting of labour standards. She argues persuasively that industry-based award determinations, in which arbitrators visited shop floors, factories and hospitals to see working conditions first-hand, allowed a finer calibration of the safety net to the needs and circumstances of particular groups.

Professor Andrew Stewart has written on the abiding significance of the legal boundary drawn between employment and so-called 'independent' contracting arrangement in federal workplace relations laws, supported now also by a federal *Independent Contractors Act 2007*. Stewart identifies the proper mapping of this boundary as a significant challenge for any new system of industrial laws. The present laws allow too much scope for exploitation of 'disguised' employment — the classification of workers who are, in reality, highly economically dependent, low-skilled labourers as independent contractors outside of the protections of minimum employment standards. Stewart's paper is sceptical of the Rudd government's commitment to address this problem, given its apparent concern to maintain the business sector's cooperation in its reform agenda.

We invited Dr Shae McCrystal, who has written extensively on trade unions and collective bargaining, to re-imagine the role for trade unions in a post-WorkChoices regulatory environment. Her thoughtful review of the plenary papers provides an important reminder of the role that the trade union movement has played in the traditional system of conciliation and arbitration, as a general advocate for the interests of workers broadly. The award system institutionalised this role. The move to enterprise bargaining — particularly single-business enterprise bargaining under the *Workplace Relations Act* — limited trade unions to a narrower role, as representatives of their own memberships. Even if the Rudd government introduces United States-style trade union recognition laws, there will be no guaranteed return of the more expansive advocacy role of the trade union movement.

During the latter years of the Howard Government, there was greater public discussion on questions like maternity leave and family-friendly employment. This largely remained at the level of discussion. These are issues that need addressing — and most OECD countries have addressed one or both. Associate Professor Marian Baird, noted particularly for her work on paid maternity leave, has considered the plenary papers through the lens of gender equity at work. She makes a distinctive contribution to the debate by calling upon policy-makers to grasp this opportunity to accommodate greater gender equity in our industrial relations system. This is not just a question of pay equity, but includes a more holistic approach that can encourage a shift towards gender equity in paid employment and outside the workplace.

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Justice Murray Wilcox, former Chief Justice of the Industrial Relations Court of Australia, and subsequently a judge on the Federal Court of Australia, reflects on the contentious question of the scope and operation of unfair dismissal laws in any new workplace relations system. He brings considerable experience of both substantive law and legal procedure before courts and tribunals, in making a case for new laws which minimise costs and formality in the bulk of complaints which generally settle before arriving at arbitration. In those more difficult matters which proceed to litigation, he argues for a commitment to substantive and procedural rules that emphasise fairness between the parties.

Associate Professor John Buchanan, Director of the Workplace Research Centre, provides a perspective from labour market economics His illuminating paper draws into the debate a considerable body of recent research — both Australian and international — on the effects of neo-liberal and 'deregulatory' workplace relations along the lines of Australia's WorkChoices reforms (if 'deregulation' can indeed be an apt term for the extensive law-making required to effect these changes). In articulating the central importance of institutional design in any new system, Buchanan draws from the observations of Justice Michael Kirby (in the *WorkChoices Case*[1]) on the 'profound contribution to progress and fairness in Australian law' made by the tradition of specialised and independent arbitral tribunals. The new government's chief challenge will lie in fashioning new institutions that maintain the 'best of our past traditions' while moving 'forward with fairness'.

We also invited perspectives from employer and employee associations. We are pleased to be able to include an employer perspective contributed by Ron Baragry, legal counsel for the Australian Industry Group, who also has decades of experience in private legal practice in this field. Baragry urges a balanced view of 'fairness', which accommodates the interests of employers as well as employees. We also invited a contribution from a leading union official but, unfortunately, workload and time constraints proved an impediment for its completion in time for publication. In any event, some of our commentators have engaged with their topics primarily from the perspective of employees and organised labour.

A third and final section contains three invited contributions from eminent scholars abroad. Each contributor has a long acquaintance with and continuing interest in Australian as well as their own country's industrial relations. We asked them to reflect on their own country's recent and contemporary experiences with industrial relations law, policy and practice as a way of discussing potential lessons for Australia's own policy debates. The countries we chose — the United Kingdom, the United States of America (USA) and New Zealand — are often (perhaps far too often) chosen as immediate comparators for Australia. In our case, there was good reason. Each has experienced prolonged experiments with the sorts of industrial relations strategies that the Howard Government introduced into the Australian system. Legislative activism by the Thatcher Government in Britain from the early 1980s, and under Jim Bolger in New Zealand in 1991, actively inverted fundamental elements of each nation's industrial relations traditions in the causes of neo-liberalism and anti-unionism. In each, the return of a Labour government (in 1997 and 1999

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respectively) brought decisive opportunities for a change of direction, just as it now has in Australia. We asked our contributors from those countries — Professors Keith Ewing and Gordon Anderson respectively — to critically reflect on the paths chosen as they might inform Australian decision-making.

Professor Ewing, from Kings College London, provides an incisively critical account of industrial relations law under New Labour in Britain, and leaves us with a somewhat bleak perspective on possibilities for genuine reform in the current global political and economic climate. Professor Anderson, from the University of Victoria in Wellington, provides a trans-Tasman perspective. In particular, the New Zealand legislation now enshrines a duty of good faith bargaining — a matter proposed for consideration in the Forward with Fairness reforms. Anderson's reflections on the New Zealand experiment are especially pertinent for Australians.

On the other hand, in the USA, a substantially anti-union regulatory environment has, instead, evolved over a number of decades, from within a legislative framework that had the original purpose of encouraging collective bargaining. While the US labour movement has sought fundamental legislative change in recent years, there has been none to date. Both the Howard Government and the Rudd Government have looked to aspects of the US system for inspiration and example. Some of these aspects are different (or interpreted differently) and some, more controversially, may be the same. We have asked Emeritus Professor George Strauss, from University of California at Berkeley, to explain recent trends in the US system and to reflect on some of concepts, inherent in that system, that the Rudd Government has discussed transplanting. Professor Strauss' paper is always informative and often provocative, pointing out many of the apparent paradoxes between the regulation of US collective and individual labour rights and even within the realms of individual employment law. Interestingly, given how Australian unions long viewed US industrial relations as the end of the long road of Coalition anti-unionism, it is clear from Strauss just how much more anti-union much of WorkChoices was and, in some instances, the Rudd model may turn out to be. Indeed, how often these days do professors of business administration (or anything else) suggest that 'an occasional strike is a good thing; it provides an opportunity for participation'?

As Professor Anderson writes, 'opportunities for comprehensive labour law reform occur rarely, perhaps once in a generation'. Such rare opportunities must be approached intelligently, with careful regard to the lessons of both history and contemporary research, and following open debate with stakeholders. We commend the papers in this volume as thoughtful and insightful contributions to early debate on the reshaping of Australian industrial relations policy, law and practice. In doing this, we thank our contributors for their generosity in writing and proof-editing under the constraints that we imposed, the journal's editors for making this issue available and Jason Antony from the Industrial Relations Research Centre at UNSW for all his good work on producing this issue.

Notes

1. *New South Wales v Commonwealth* (2006) 81 ALJR 34.

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