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The Future of Industrial Relations in Australia

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From 1985 to Now

The institutions of industrial relations have proved to be more malleable than I expected in the mid-eighties, and the 'system' has, for better or for worse, been transformed.

Underlying forces conducive to change have been the economy's exposure to external competition, related changes in the structure of industry and employment, the pervasive free market ideology and a sustained decline in union density. More fortuitous factors, such as the antipathy of an ACTU Secretary to members of the Australian Industrial Relations Commission, a Prime Minister's entrenched hostility to the 'system'[1], the Coalition's unexpected capture of a Senate majority in 2004 and the High Court's validation of WorkChoices,[2] have also contributed to the present state of play.

Two decades ago, there was a strong consciousness of recent industrial and economic history, when 'stagflation' was the foremost problem of economic policy. The Australian Conciliation and Arbitration Commission was criticised for granting 'excessive' increases when, in truth, it was merely recognising the limits of its own capacity. An unambiguous advance since the 1980s has been the reduction, if not elimination, of union-induced cost inflation. The principal causes of this change seem to be:

- more intense product-market competition, which stiffened employer resistance and reduced the capacity of unions to press demands without risk to their members' employment;
- the widely understood determination of the Reserve Bank to limit inflation, which dampened inflationary expectations and altered the norms of employer, employee and union behaviour; and
- the reduction of union power, which has mitigated the requirement for the Reserve Bank to resort to restrictive monetary policy.

These changes have lessened the role for wage policy as an instrument of economic management.

A common perception is that industrial regulation has been successfully directed to the encouragement of greater productivity. It has been argued, for example, that enterprise bargaining, encouraged by the Keating Government's

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legislation, caused the productivity 'surge' that characterised the late 1990s. Others have suggested that individual agreements — AWAs and their State counterparts — allowed employers to deploy their work forces more productively. Such claims are inherently difficult to test. The productivity surge was short-lived — from about 1994–95 to about 1998–99; and the effects of industrial relations factors cannot be separated empirically from those of the microeconomic reforms introduced in the 1990s (an issue discussed in Hancock et al 2007). Nevertheless, we may accept that, whereas in the 1960s and 1970s productivity was treated as a *determinant* of wage policy, since the mid-1980s there has been a greater emphasis on the reverse impact of industrial relations policies on productivity.

Nostalgia is unhelpful. The industrial world has changed in ways that entail a different context from that of the 1980s; and the agenda has been reshaped.

Employer Power

Industrial relations systems rebalance in two ways the relative power of employers and employees. First, they enable some workers to enjoy terms of employment superior to those available in an unregulated market. Secondly, they qualify the employer's workplace power. The employment contract is essentially one of command and obedience in return for payment; and the employee is a subordinate. The contract is imprecise and incomplete, and the potential uncertainties are resolved by the employer's power to command (see Kaufman 2007: 5–33).

Fundamental to the employer's workplace power is the capacity to dismiss. Conversely, the employee's lack of property in his or her job is a crucial weakness. Hence the risk of dismissal is both a weapon of control and a source of insecurity. In the 1980s and 1990s, limited protections against dismissal came with award and statutory provisions about redundancy and unfair and unlawful termination.

WorkChoices and (to a lesser degree) earlier legislation of the Howard Government shifted the balance of industrial power in favour of employers by (1) restricting union power, (2) limiting the role of arbitral tribunals, (3) elevating individual agreements to a status above that of collective agreements and awards and (4) reducing employees' protections against dismissal. The questions now confronting policy makers are whether and how these enhancements of employer power should be reversed.

Criteria for Reform

Industrial relations reforms should:

- provide an effective safety net of wages and conditions for the protection of workers who neither possess market power nor benefit from collective bargaining;
- avoid reinstituting an inflationary bias to the movement of labour costs. Reliance on other arms of economic policy to counter such bias has adverse effects on employment, investment and innovation;

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- enhance the dignity of workers in their relations with employers and increase their job security;
- avoid damage to productivity and, if possible, assist in raising it;
- allow employers scope to offer wage and conditions superior to those of the safety net so as to attract and motivate workers;
- protect the community against the disruption of supplies of goods and services associated with industrial disputation; and
- minimise the conflicts between the above goals.

It will not be possible here to translate all of these goals into specific policy proposals.

Unions and Collective Bargaining

Freedom of association and the right of employees to be represented by unions in collective negotiation with employers are widely supported. They are also enshrined in international covenants to which Australia is party. Problems arise, however, when attention shifts to the means by which unions enforce their demands. Strikes and other forms of 'industrial action' clash with several of the goals outlined above, not only because of the disruption due directly to them but also because of possible indirect effects, including a reversion to stagflation.

Strikes and lockouts were characterised by Higgins as a rude and barbarous method of resolving disputes. Higgins's antipathy to direct action was unrealistic, and strikes were to be an enduring feature of Australian industrial relations. But, over the past quarter-century, they have diminished almost to the level of insignificance. Foremost among the reasons is the reduced unionisation of the workforce; and the same factors as have reduced union density, including changes in the industrial and occupational structure of employment, have also curbed the propensity to strike. A secondary cause has been the enactment of a legal framework within which direct action is confined to the negotiation of new agreements and even then is circumscribed by various conditions (including the avoidance of pattern bargaining and the balloting of workers).

Should the 'package' of industrial relations reforms have, as an objective, a revival of union power? The Labor Government's proposals do not seem to envisage this, though they do include a requirement for employers to negotiate in good faith with unions where a majority of the affected workers desires union representation. For three reasons, I am inclined to agree with the thrust of the Government's proposals:

1. It may well be unrealistic to expect the unions to 'turn around' the secular decline in their penetration of the work force. I do not mean that union density could not rise by a few percentage points, but I doubt that it will remotely approach the historic situation when most employees were unionists.
2. The impact of collective bargaining on the relative rewards of different groups of workers is capricious, and those likely to benefit most from un-

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ion strength are not necessarily the most deserving. Collective bargaining might, for example, favour high-paid professional and paraprofessional employees.

3. A return to stagflation would be a serious loss to the society. I do not say that stronger and more active unions would *necessarily* cause this, but it is a risk that cannot be disregarded.

Unions will and should remain available to those workers who wish to use them, and employers should be required to deal with them if most of their employees wish them to do so. They should also have the role of representing members who seek their help — for example, in unfair dismissal proceedings. We should, however, be devising institutional arrangements that recognise the reduced commitment of workers to unions.

Today's Requirements

These arrangements would reflect three objectives: the creation, maintenance and gradual improvement of a 'safety net' that provides rewards and conditions that do not lag far behind those set in 'the market'; enhancement of the employee's dignity in the workplace; and protection of the public against the remaining risks of industrial disruption.

The maintenance and improvement of the *safety net* is a continuing task, ill-suited to political intervention. I favour the delegation of this role to an authority guided by broad objectives defined in the law. The whole range of safety net provisions — wages, hours of work, leave, penalty rates, casual loadings, redundancy payments, etc. — should be within the authority's jurisdiction. There is little merit in separating the prescription of wages from that of other terms of employment. As the productivity of the economy advances, decisions will need to be made as to how the benefits are allocated to workers reliant on the safety net: higher wages, shorter hours, more leave and so on. This should be a co-ordinated process.

The AIRC and its predecessors, taking account of the applications made to them, were able both to raise standards over time and to introduce new standards reflecting evolving industrial and social priorities. WorkChoices stripped the AIRC of this role. The Australian Fair Pay and Conditions Standard prescribes some of the terms of employment, leaving minimum wages to the Australian Fair Pay Commission (AFPC). The Labor Government proposes a set of legislated National Employment Standards (NES). These do not include minimum wages, which from 2010 onward will be set by the new authority, Fair Work Australia (FWA). 'Modern awards' will supplement the NES with provisions specific to the industries or occupations for which the awards are made. Apart from wages, the NES will be more important than the awards. FWA, however, will be able to recommend, on its own motion, changes to the NES. It remains to be seen how this provision will be implemented. If the convention were to develop that changes to the NES were initiated by FWA, and that governments acted on FWA's recommendations, my fears about the politicisation of the process would be somewhat alleviated.

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The goal of affording greater *dignity in the workplace* — of recognising industrial 'citizenship' — lies partially beyond policy prescription, requiring attitudinal change. A fundamental basis for industrial citizenship, however, is a degree of job security. Opposition to job protections is typically founded on a claim that they reduce employment. The quantitative evidence about this is inconclusive, but I accept in general that measures which attach burdens to employment — minimum wages, restriction of working hours, occupational health and safety laws and, possibly, job protection — may deter hiring. These burdens are imposed because the gains are thought to outweigh the losses.

Because job protection cannot be absolute, it is necessary to establish criteria and procedures for termination. The requirements for redundancy and the compensation for it should be regarded as part of the safety net (and are within the NES). Dismissal for other reasons, especially misconduct or poor performance, requires impartial investigation of allegations and counter-allegations.

It may be true that the earlier mechanism for dealing with unfair dismissals was too cumbersome and that some employers paid 'go away' money simply to avoid the 'hassle'. Labor's policy is to reduce cost and inconvenience by modifying qualifying periods and adjusting procedures — for example, by excluding legal representation and by the tribunal's going to the workplace rather than requiring the parties to attend before it. I favour also the appointment of an ombudsman. An aggrieved employee would first contact the ombudsman's office, usually by phone, to outline his or her complaint. The ombudsman, after investigating the complaint, would either (1) advise the complainant that it lacked merit or (2) recommend to the employer action to remedy it. These services would be free. Either side could pursue the matter in the tribunal, but a party which sought unsuccessfully to overturn the ombudsman's finding would be liable for costs.

The pre-eminent weight traditionally given to *dispute resolution* no longer accords with the realities of industrial relations. Crippling strikes are now a rarity. We now have a compromise between allowing a general right to strike, on the one hand, and prohibition of industrial action, on the other: unions may instigate industrial action in support of claims for collective agreements, but not otherwise. Where the industrial action is likely to damage the community, it may be prevented or curtailed. This is, in my view, a realistic compromise. Disputes about the operation of agreements during their currency and about matters on which they are silent are inevitable, and grievance procedures should be mandatory.

Agreements and Departures from the Safety Net

Both union and non-union collective agreements should be allowed, the former taking priority if (and only if) most of the employees signify their preference for them. These agreements would be registered with the Workplace Authority. The onus would be on the parties to an agreement to notify the Authority of any aspect of it that falls below a safety net standard.[3] If a deficiency is notified, the parties should satisfy the Authority that there is adequate compensation. This

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is a more convenient procedure than requiring the Authority to scrutinise all agreements.

I do not envisage statutory individual agreements.[4] Unless there is a collective agreement, however, an employer should be free to apply to the Workplace Authority for permission to depart from the safety net in a specified way. The application would state the compensation to be provided, and the Authority would grant the application if the compensation were judged to be adequate. Permission would be for a defined period and would lapse if there were a subsequent collective agreement.

Failure to notify the Workplace Authority of a term of employment below the safety net standard would render the deviation void and expose the employer to liability for underpayment.

Fair Work Australia

The Government proposes to create a new authority — Fair Work Australia (FWA). I make no comment on the name. FWA will replace the AIRC. I cannot see the need to replace one authority with another, but this is not a major issue. (I would hope that, as a matter of propriety, existing members of the AIRC will be transferred to FWA. The Staples precedent should not be followed.)

FWA should have three divisions:

- a safety net (or award) division, responsible for the 'modern awards' and for FWA's responsibilities in relation to the NES;
- a division for the oversight of unions, employers' associations and bargaining; and
- an unfair dismissals division.

There could perhaps also be a judicial division with responsibilities of enforcement and ensuring that the administrative and regulatory divisions of the tribunal act within their powers.

Unlike the AIRC, the Fair Pay Commission has been proactive, initiating reviews of its own motion and undertaking and commissioning research. This is a welcome change (made easier by reliance on the corporations power) and should be followed by FWA. Interested parties, including (but not confined to) unions, employers' associations and governments, would be able to make representations to FWA about both its agenda and its prospective decisions. From time to time, FWA would announce its intention to review existing safety net provisions (most frequently, wages). Its research papers would be available for comment. Interested parties would be free to tender submissions and research results; and there might be formal sittings at which oral commentaries on the written material would be heard.

The Commonwealth and the States

Without State co-operation, neither the federal Parliament nor any authority created by it could control employment by the States in their own public services or in unincorporated enterprises. (There are 'grey' areas, such as local government and charities.) The most important division is between private

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businesses that are incorporated and those that are not. George Williams has estimated that the scope of federal coverage is now 70–75 per cent of the employed labour force — fewer than the 85 per cent suggested by the previous federal government (Williams 2007: 20).

Williams has proposed a scheme for the creation of a 'national law', based on agreement between the Commonwealth and the States. The States would give effect to the agreement by either (1) a 'text referral', whereby the State would refer to the Commonwealth the power to make a law in terms of the text[5] or (2) passage of mirror legislation applying the terms of the agreement within the State. A State could opt out of the national law in certain respects. Williams also proposes a continuing mechanism for joint decision-making about the national law (Williams 2007: 89–94).

His proposals would confer on the States a significant role in the enactment and amendment of national legislation. The obvious benefits are to ensure that all workers are afforded the protections of the agreed scheme and to avert divergent standards having little rational basis (i.e., whether or not businesses are incorporated). The requirement that changes to the national law be the product of joint decisions would lend stability to the scheme at the possible cost of inhibiting responsiveness to emerging problems in the institutional structure.

In her second reading speech on the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill*, delivered on 13 February 2008, the Minister for Employment and Workplace Relations said that the States and Territories had 'wholeheartedly endorsed the key principles outlined in the Government's *Forward to Fairness* policy'. She did not say, however, whether they or the Commonwealth would enter into any agreement to achieve consistency between laws.

In my opinion, the corporations power is a defective basis of industrial law because of the arbitrariness of the distinction between incorporated and unincorporated businesses. I therefore support exploration of the possibility of Commonwealth-State agreement, as recommended by Williams. If it cannot be achieved, however, there will remain other possibilities of harmonisation of the policies and practices of the Commonwealth and State authorities. For example, State authorities may accord much weight to the NES and to safety net decisions of FWA.[6] Moreover, there is now a long history of consultation between tribunals, and there is no reason why this cannot continue.

Conclusion

It is not possible, within the space available, to deal in detail with the Rudd Government's industrial relations proposals. I have not commented, for example, on the specific content of the ten NESs. Overall, however, I would give good marks — just short of a High Distinction — to the measures so far introduced or foreshadowed. They are a well-constructed response to the changed situation caused by underlying economic and industrial forces and by the legislation of the past 15 years. My principal regret is the risk of politicisation of the process of determining the safety net. Governments come and go, and it will be a pity if minimum standards become a subject of political contest (as they

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have in some European countries and, in respect of the minimum wage, in the United States). But perhaps the High Court's decision in *WorkChoices* has made this inevitable.

Notes

1. The stress on John Howard's personal attitude should perhaps be qualified by recognising that it may have owed much to advice tendered by the Treasury in the 1970s and early 1980s. The Treasury's view may also have had a significant influence on Paul Keating. Treasury made no secret of its hostility to the conciliation and arbitration tribunals.
2. *New South Wales v Commonwealth* (2006) 81 ALJR 34 (*WorkChoices case*).
3. If the Labor Government's present proposals are implemented, the safety net will comprise the NES plus the relevant 'modern award'.
4. Common law agreements are acceptable because they do not displace statutory instruments.
5. The States would also refer a limited power to amend the law.
6. Such co-operation would be more likely to occur if all aspects of the NES were set by FWA, rather than by legislation.

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