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SPEECH

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Introduction

Thank you very much Ron McCallum for that warm welcome.

I would like to begin by acknowledging the traditional owners of the land on which we meet, the Wurundjeri people and pay my respects to their elders past and present.

We are now counting down the days to the introduction of the *Fair Work Bill*. Personally, I am now at the point of counting the 'number of sleeps'. I am very much looking forward to introducing the Government's legislation and to the long-awaited day when what remains of *Work Choices* will be consigned to history.

That day will be the culmination of an extraordinary amount of work by many people and a culmination of extensive consultation and careful consideration.

It will be a highly significant event in the history of workplace relations in this nation.

The reforms that we presented in *Forward with Fairness* at the last election - that were decisively endorsed by the Australian people – provide a clear and comprehensive framework for the future of the workplace relations system.

But in writing the new workplace relations legislation from scratch, there were many questions of detail to be thought through.

From the start of the reform process I have supported a measured and consultative approach to developing the legislation. We established consultation mechanisms that included workplace relations players from the largest corporations, to small businesses and unions, in all sectors of the economy.

As this group would be aware, the Committee on Industrial Legislation – or COIL – is a long standing sub committee of the tripartite National Workplace Relations Consultative Council. The Howard Government gave COIL a few short hours to review the complex and lengthy *Work Choices* Bill, and this was only after the legislation was presented to the Parliament.

In our COIL process, over 50 people met for two weeks in Canberra in October to work through the detail of the draft legislation. As I have already mentioned publicly, the COIL process has been a great success. The legislation I present to the Parliament this month will be all the better for the excellent advice and feedback I have had from this expert group.

The feedback from the COIL process was mostly in the form of helpful technical suggestions, although a number of significant policy issues were debated which required the Government's further consideration.

Some of the more significant issues to be settled relate to the role of the industrial umpire, Fair Work Australia, in the new workplace relations system.

I am aware of the strong level of interest in these matters and so I want to announce here today some of the decisions I have made about the role of Fair Work Australia. But first I want to provide some context.

The Constitutional shift

The break from the conciliation and arbitration power in the Federal workplace relations system started with the Keating Government's forward thinking enterprise bargaining reforms of 1993.

I note that the ACTU was a key proponent of that progressive policy shift as it was in so many of the important economic reforms of the Hawke/Keating Governments and no doubt will be under the Rudd Government also.

Today, reliance on section 51 (xxxv) of the Constitution, the conciliation and arbitration of inter-state disputes, is no longer relevant to our modern economy. Use of this head of power with its arcane and complex processes of ambit logs of claims, dispute findings and all the rest, will be gone from the system for good.

I spent quite a bit of my early career poring over the Commonwealth Law Reports, so I can understand the feelings of nostalgia that many of the lawyers in this room will feel as we bid a final farewell to a hundred years of rather bizarre and uniquely Australian legal doctrine.

But what a relief that the law students of tomorrow will never have to endure the tortured logic of doctrines like:

- The creation of inter-state industrial disputes by serving paper logs of claim. Remember the junior union employees whose job it was to comb through the new Yellow Pages each year and lick the stamps on the thousands of envelopes?
- The ambit doctrine. High Court cases on whether the union secretary *really* mean it when he demanded a million dollars a year and 40 weeks annual leave for his members?
- Inter-state nature of disputes. Remember all those arguments about unions finding 'dancing partners' in other States to join in logs of claims so an award could be made in one State?
- And definitions about what is 'industrial'- doesn't it seem bizarre now that an argument could have been run in the High Court that social workers shouldn't have an award?

It's time to move on.

We need a stable, balanced, truly national workplace relations system that is easy to understand and to apply. So instead of the legal artifice of the conciliation and arbitration of inter-state disputes power, the system will rely principally upon the corporations' power, as well as referrals from the States.

One aspect of the Constitutional underpinnings of the new system relevant to the role of Fair Work Australia is the separation of powers doctrine. The constraints of the Commonwealth Constitution mean judicial functions, dealing with breaches of instruments and the determination of existing rights, will be exercised by the Fair Work Divisions of the Federal Court and the Federal Magistrates Court. The creation of new rights and obligations, the arbitral functions, will rest with the arbitral body, Fair Work Australia.

The Safety Net

Before I talk more about the role of Fair Work Australia in bargaining, it is important to talk about the safety net.

The Fair Work Bill will have as its rock solid foundation a robust, fair, modern safety net of employment entitlements, made up of the National Employment Standards (the NES) and modern awards.

Modern awards and minimum wages will be set and adjusted by Fair Work Australia using open and transparent processes, where unions, employers and all those with an interest can participate.

Awards will be reviewed by Fair Work Australia every four years to ensure they remain relevant to changing community standards. The kind of test cases that gave Australian workers standards we now all take for granted; maternity leave, redundancy pay, occupational superannuation, will continue under our system.

Outside these four-yearly reviews, awards will be able to be varied in limited circumstances, such as work value cases, to remove ambiguity, uncertainty or discriminatory terms.

This new safety net is a key departure from Work Choices, which as we all know allowed basic employment entitlements to be stripped away with no compensation, and allowed awards to 'wither on the vine'.

Fair Work Australia's role in bargaining

The focus of the *Fair Work Bill* will continue to reflect the move away from the automatic arbitration of disputes by the industrial umpire. Instead, the Fair Work Bill will focus on two things:

- Provision of a fair, secure, comprehensive and current safety net of employment conditions for Australian workers; and
- Bargained outcomes at the enterprise level, underpinned by improvements in productivity.

There is now a solid body of evidence about the benefits of enterprise bargaining to both employers and their employees.

Enterprise bargaining has made a significant contribution to the growth in labour productivity in Australia. It has helped employers achieve reforms of work practices, and to deliver more efficiently their products and services. And employees have benefited

too, by being able to share the benefits of that bargaining and to achieve real wage increases and improved working conditions.

But there are of course circumstances when bargaining 'goes off the rails' and when the industrial umpire will need to step in.

Good faith bargaining

A significant new feature of our system will be that bargaining will be fair. Employers and employees will be required to bargain in good faith for an agreed outcome. The good faith bargaining obligations will be set out in the legislation.

Of course most workplaces already bargain in good faith without any intervention. Occasionally, though, this does not happen. In these circumstances, the independent industrial umpire Fair Work Australia will be able to make good faith bargaining orders that can for example, direct parties to meet; to disclose relevant information; to consider proposals and respond to them; and refrain from unfair or capricious conduct.

The legislation will express our policy commitment that good faith bargaining does not require parties to make concessions or to sign up to an agreement that they don't support. Parties will still be able to take a tough stance in negotiations.

Industrial action that is damaging

Fair Work Australia, as the industrial umpire, will be able to 'blow the whistle' and refer a bargaining dispute for the making of a workplace determination where industrial action taken during bargaining has a particularly negative or dangerous impact.

In addition, as announced in our Forward with Fairness policy, a new ground for the making of a workplace determination will be where protracted industrial action causes, or is threatening to cause, significant economic harm to the bargaining participants. Fair Work Australia will have regard to the views of all bargaining participants in making this decision

We have seen a small number of disputes in Australia where industrial action continues for many months; where the employees and the employer suffer greatly and yet the parties are so stubborn and entrenched in their positions that they cannot achieve a breakthrough. In these very unusual circumstances, this intervention is warranted.

The 'significant harm' test for employee industrial action will require Fair Work Australia to be satisfied that economic harm is being suffered by *both* the employer and the employees. Where the employer has locked out its employees, meaning the employees have no income at all, then the significant economic harm need only be caused to the employees to be covered by the agreement.

I stress however that this ground for a workplace determination will have a high threshold, and its use is likely to be very unusual. It is accepted that when the time for re-bargaining comes around every few years, the parties are permitted to put economic pressure on each other to make an agreement.

But in the public interest, there do need to be some limits.

Serious and persistent breaches of good faith bargaining requirements

As I mentioned earlier, *the Fair Work Bill* will expressly state that good faith bargaining does not require bargaining participants to make concessions or to sign up to an agreement where they do not agree to the terms. Good faith bargaining orders will therefore be about process and conduct of negotiations, and won't order parties to make or accept particular offers.

It was put to me in the COIL process that on very rare occasions, there will be industrial parties – either employers or unions – who are prepared to ignore orders and flout the law, if they perceive they will be advantaged in the ultimate bargain made.

It was argued that the availability of penalties for breaching good faith orders alone would not of itself be sufficient in the face of rogue conduct by an employer or union.

I have been persuaded by this argument.

Therefore, for the very unusual case where a party flouts the law, arbitration will be possible in this circumstance. The threshold to trigger arbitration will be high. Fair Work Australia will have to be satisfied that:

- A bargaining representative has breached good faith orders (whether or not any penalty has been imposed); and
- The breaches are sufficiently serious and sustained as to significantly undermine the bargaining; and
- All other reasonable alternatives (including attempting to enforce the good faith order or orders and alternative dispute resolution) for reaching agreement have been exhausted; and
- There is no prospect that the dispute will be resolved within the foreseeable future.

Fair Work Australia will be required to take account of the views of all other bargaining representatives when considering the application.

I am confident that the possibility of, and the making of, good faith bargaining orders will ensure that in 99.9 per cent of cases, everyone does the right thing, and I anticipate that this provision will be seldom used. The kind of rogue conduct this provision is directed at only happens on a handful of occasions each decade.a

As well as its role in setting award rights and minimum rates of pay and its role in supervising bargaining, Fair Work Australia will play an important role in dealing with the kind of day to day disputes that arise not in the bargaining context, but under awards and enterprise agreements.

Disputes under awards, the NES and enterprise agreements

Under the *Fair Work Bill*, Fair Work Australia will be able to exercise a full suite of alternative dispute resolution powers, such as: calling compulsory conferences of the parties; conciliating; mediating; expressing opinions; informing itself about the circumstances of the dispute and making recommendations.

Importantly, one party will be able to request Fair Work Australia to become involved in this way.

Fair Work Australia will also be able to determine a binding outcome concerning the issues in dispute where the parties agree. Any orders made can't be inconsistent with the NES or awards.

Where there is an allegation that an award or NES obligation has not been complied with, then, for the minority of cases that can't be resolved through these Fair Work Australia processes, the Fair Work Divisions of the Court will be able to enforce a party's rights.

The Fair Work Divisions of the Federal Court and Federal Magistrates Court will have new and more effective powers to deal with breaches of modern awards, the NES and enterprise agreements.

- A new small claims jurisdiction will be provided for claims up to \$20,000. The Court will not be bound by the rules of evidence and may act in an informal manner, without regard to legal forms and technicalities.
- This means an employee or employer will be able fill in simple claims forms and represent themselves, or be represented by their industrial association or union.

- The courts will now be able to make ‘any order they consider appropriate’ to remedy a breach, and to issue injunctions to prevent breaches. This is a new feature: previously the Courts were limited to ordering a penalty or back-pay where a party breached an award. This new power will give the Court more flexibility on how to deal with breaches of industrial instruments.

Of course it is a far preferable that parties are able to reach agreement through conciliation. To encourage parties to meaningfully conciliate their disputes, the Courts can take into account whether a party participated in Fair Work Australia conciliation in deciding whether to award costs.

Enterprise agreements in the new system will continue to be required to include a clause for the settling of disputes. The Fair Work Bill will include two improvements.

We saw some examples under *Work Choices* where the dispute clause included in the agreement was effectively ‘an appeal unto Caesar’; that is, the end point of the dispute was a decision of the local HR Manager.

To ensure dispute resolution during the life of agreements is fair and effective:

- Dispute settlement procedures in agreements must involve either FWA or another person or body independent of the parties.
- The procedure must provide for the representation of employees in the process.
- Regulations will provide for a model dispute resolution clause.

Special access to arbitration of intractable bargaining disputes in the low paid stream

Many workers have missed out on the benefits of bargaining. The workers who are reliant on the safety net alone, who lack real bargaining power, are mostly women, young people or newly arrived immigrants, and are often casual or part-time employees.

The policy intent of the Low Paid Stream is assist low paid employees and their employers to enter bargaining for the first time, to get the benefits of bargaining – that is improved wages and conditions underpinned by improved productivity for the business.

In its special Low Paid Stream, Fair Work Australia will have the obligation to facilitate the making of agreements and will play a hands-on role to get the parties bargaining.

Over the past months of developing the detail of the legislation, I have listened carefully to the views of the representatives of low paid workers on how to ensure the success of this scheme. IN particular, I have given careful consideration to the question of what should happen in the event that despite the best endeavours of Fair Work Australia, the bargaining reaches a stale-mate.

I have been persuaded that in order to ensure the special scheme for the low paid delivers effective bargaining, there should be the prospect of arbitration.

Accordingly, the Bill will provide for very limited access to arbitration in the low paid bargaining stream. For Fair Work Australia to arbitrate, strict criteria will need to be satisfied:

- The bargaining representatives have genuinely tried and been unable to reach agreement and there is no reasonable prospect of agreement being reached;
- The employment conditions of the employees are substantially the conditions contained in the relevant award and NES;
- There has not been an enterprise agreement in place (that is, so called 'first contract' arbitration);
- It would be in the interests of promoting future enterprise and assist in identifying improvements in productivity and service delivery; and
- It is in the public interest.

In addition, when arbitrating, Fair Work Australia must consider the need to maintain the competitiveness of the employer.

Before I conclude, there is one further announcement I would like to make today concerning the transition of old workplace relations agreements into the new system.

I asked my Department to seek the views of the Committee on Industrial Legislation on this issue for the purpose of developing the Transitional and Consequential Amendments Bill, to be presented to Parliament early next year.

A proposal flagged to the COIL was that all such agreements would sun-set after five years, with the aim of tidying up the system and encouraging parties to make a new agreement. This was repeated in the media as a so-called "drop-dead date".

I received from the COIL and particularly from AMMA, that this proposal would disturb long-standing and satisfactory arrangements and create an unnecessary requirement to alter those arrangements.

After considering that feedback, I have decided that old Act agreements, such as old 1993 IR Act agreements, AWAs, ITEAs, s170LK and LJ agreements, will continue to apply until such time as a new agreement is made. Of course after the nominal expiry date of such agreements, parties can bargain in the new system.

To balance this, I confirm that the National Employment Standards will come into effect on 1 January 2010 for all employees and will override any inferior conditions. This will ensure that employees on sub-standard AWAs made under Work Choices will receive the full benefit of the NES.

Conclusion

I have carefully considered the views expressed to me by representatives of employers, unions and States and Territories and others over the last months, including in the intensive COIL process.

I have responded to the many thoughtful and intelligent suggestions for improvements to the draft Bill that came from the participants in that process and from others within Government. I take this opportunity to once again thank all those people for their efforts.

I am confident that when this very interested audience sees the Bill, you will agree that we have got the balance in the new system right:

- that it will be fair to employees and to employers;

- that it will promote economic productivity; and

- that it will lead to much needed long-term stability in our workplace relations system.

Thank you.