Forward with Fairness

Has the pendulum stopped swinging?

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Thank you very much for inviting me to your conference today. Before we start I have a couple of housekeeping matters to address.

Firstly I must congratulate the conference organisers in holding this biannual event today, their foresight is astounding, I only wish I had known of their skills before Melbourne Cup day.

The second matter I would like to clarify is a comment made at a conference by ACTU Senior Industrial Officer Cath Bowtell who said that after being holed up in COIL for 10 days she was suffering from the Stockholm syndrome and now felt much closer to me than she ever thought I would. Cath has actually been stalking me at conferences all over the country including this one since COIL, and I suspect that when the complete legislation is released it will become obvious who the hostage was.

Finally as a COIL 'crash test dummy' we got a sneak preview and pizza in return for signing a confidentiality agreement. I would like to stress that my presentation today is based solely on comments made on the public record, although now that we have had the benefit of the Acting Prime Minister's presentation my risk of going to jail will be much lowered.

The industrial landscape has been subject to large pendulum swings with changes of Government since Federation. This process of continual change causes lots of heart ache for the real users of our industrial system, employers and employees. Changes to the structure of the system are not always accompanied by increases in productivity.

From 1 July 2009, and for the third time in less than 20 years we will have a substantially new industrial relations system. Today I want to examine parts of the new system compare them to the previous

Government's approach and finally consider the impact on the pendulum.

The areas I will look at are the Minimum Standards, Awards, Right of Entry, Good Faith Bargaining, Dispute Resolution Processes and Unfair Dismissals.

Minimum Standards

The WorkChoices amendments removed the Commission's minimum wage setting capacity in 2006. The Fair Work Bill will return that role to a Minimum Wages panel within the Fair Work Australia Tribunal. Whilst the Minimum Wages Panel appears to be subset of the Tribunal, we do not know if the minimum wage panel members will perform other Tribunal roles. I suspect it will, if the day to day FWA Tribunal members have the necessary skills in economics and social policy.

Thus the minimum wage setting capacity has been returned to the Commission although based on the criteria specified I suspect that the new processes will not produce a different result than had the function remained with the Australian Fair Pay Commission.

The 2006 WorkChoices reforms also broke new ground with the introduction of minimum standards for all federal system employees regardless of award coverage. The standards contained internal

mechanisms to provide workplace flexibility by use of awards, agreements or common law contracts

The Fair Work Bill builds upon these standards by incorporating additional matters which in the main already form part of the standards framework.

AMMA supports the use of legislated national standards to provide base conditions of employment for all employees. Our concern lies in the capacity for current operational flexibilities to continue where existing laws allow hours to be averaged over a period of up to 52 weeks under current legislated standards.

Under the Fair Work Bill, the default averaging period for award covered employees is one week, subject to the insertion of a provision in a modern award that will allow averaging over more than one week. In the case of award free employees the default rules in the legislated standards will allow averaging over a maximum of six months. This does not provide the flexibility we need to run our current operations. Many payroll and people systems are set on an annualised basis having regard for work arrangements over the year.

The same can be said of access to provisions which allow the cashing out of annual leave – a practical requirement for your oil rig worker, on shore drilling operator or maritime worker that is rostered off for 6 months each year. These employees had the statutory leave requirements cashed out and incorporated into their salary years ago.

Such arrangements will not be possible under modern awards unless specifically provided for. At this point in time the Commission has rejected calls for this type of flexibility.

The Fair Work Bill minimum standards improve base conditions, but reduce existing levels of flexibility.

Awards

WorkChoices snap froze the award system on 26 March 2006. With wage movements coming from the Australian Fair Pay Commission, the only changes to awards were movements in allowances. The Award Rationalisation process did not get off the ground and the goal of a national, flexible, safety net award system eluded the Howard Government.

The current Award Modernisation process, time consuming as it is for all participants, will be a welcome improvement if it provides for flexible outcomes.

AMMA's experience in creating a modern Mining Industry Award to replace a myriad of State regulation has been a positive one, with the real prospect of achieving a concise, flexible, simple modern award.

The award modernisation process will expand the coverage of the award system. The modern award system will cover the majority of

Australian workers except for historically award free employees and high income employees who have guaranteed earnings exceeding the high income threshold. Industries which may have been award free in one state will be covered if a modern award is made for that industry or occupation. After the modern catch all award is made we expect that only managerial and supervisory employees will escape the net. This has implications for right of entry.

Right of Entry

The Fair Work Bill will result in modern awards 'covering' employers and their employees if the work performed falls within the awards scope. Awards will continue to cover an employer and its employees even if an enterprise agreement is made (although the award will not apply).

A union's right of entry for discussion purposes will be linked to modern award coverage.

Presently unions can only enter workplaces for discussion purposes if there is an award or collective agreement that the Union is a party to. The impact of having modern awards 'cover' workplaces even if another agreement applies will open the door to greater union access and represents a massive expansion of union right of entry. The position of unions as default bargaining agents and their ability to become party to agreements will increase access to workplaces.

The ACTU has received a significant return on their $30M investment.

Good Faith Bargaining

Good faith bargaining represents new ground in the Australian Industrial relations system.

At present a party who wishes to take protected industrial action must be genuinely seeking to reach agreement. Genuinely seeking to reach agreement means that the party must demonstrate a preparedness to take into account the circumstances of the other party, agree to face to face meetings at reasonable times, consider and respond to proposal and not act in a capricious manner. These requirements are presently directed at unions not employers.

Under the Fair Work Bill bargaining participants will be required to attend and participate in meetings, disclose relevant non-confidential information, genuinely consider proposal and provide a response. Employers will not be required to make concessions or reach agreement. Compulsory arbitration will not be generally available.

There appears to be a dichotomy between the obligation to genuinely consider and respond to proposals whilst not being required to make concessions. Examples of action which could be characterized as bad faith, include employees not being prepared to consider new work methods to improve productivity. This raises some questions.

If an employer refused to consider proposed changes because they did not want to reach agreements would they be acting in bad faith and subject to order by Fair Work Australia which would be enforceable in the Federal Courts?

Will an employer who repeatedly contends that they do not want to reach an agreement be fined by the Court for a breach of the Act, or worse still be compelled to consider a proposal when they don't want to reach agreement?

Good Faith bargaining in this form is more than a procedural requirement. We can expect the Tribunal to be more actively involved in agreement negotiations, whilst the Government has set a high bar before the Tribunal can arbitrate it remains to be seen how this works out in practice.

Agreement Making

The Howard 1996 reforms built on the collective agreement options introduced by the Keating Government and added access to individual statutory agreements. WorkChoices gave AWA's primacy over collective agreements, introduced Greenfield employer agreements, and changed the award based no-disadvantage test in a manner which regrettably resulted in sub-optimal agreements in some industries.

Under the Fair Work Bill the only type of statutory agreement will be a collective one. Collective agreements will be able to be made with a single enterprise, a group of related businesses or a discrete undertaking, site or project. Greenfield agreements will be restricted to agreements with a union.

AMMA accepts that statutory individual contracts will not be a feature of the new system. The Government proposes the individual flexibility agreements in awards and collective agreements together with the exclusion of high income earners from awards, will be a substitute for AWAs. At this point in time, the exposure draft of the modern mining industry award is quite flexible and together with individual flexibility agreements may indeed be a workable substitute for AWAs subject to the NES flexibility concerns I raised earlier. It should be noted that this mechanism will not protect employers from industrial action in pursuit of bargaining or impede disruptive union recruitment campaigns.

The Fair Work Bill reduces formal agreement making options but may be flexible enough to provide a workable replacement for statutory individual agreements.

Dispute Resolution Processes

WorkChoices encouraged dispute resolution at the workplace level. The Commission's dispute resolution powers were merely persuasive

as a result of provisions which removed any power for the Commission to compel a party to do anything, arbitrate, determine any rights or obligation, or make an award or order, even if the parties agreed.

The Fair Work Bill approach to the Tribunal's powers (out side of Good Faith Bargaining and Protected Disputes) is consistent with the WorkChoices approach, save and except that the Commission will have a power to arbitrate if the parties agree.

Unfair Dismissals

WorkChoices introduced a 100 employee threshold under which employees did not have access to a remedy if they were unfairly dismissed. To this day I have not found an employer organization who will admit they lobbied for this provision.

WorkChoices also codified a range of exemptions including the exclusion of persons dismissed for operational reasons and introduced the concept of a qualifying period.

The Fair Work Bill removes reduces the existing threshold, reduces the qualifying period for big business and reduces the small business threshold. Small Business will be offered an option of a stress free termination provided that the fair dismissal code is followed.

In an effort to resolve unfair dismissal applications quickly and reduce costs, Fair Work Australia will have a streamlined process and make determinations quickly and in the absence of lawyers, with a focus on reinstatement where fault is found.

Save for greater access, the fair dismissal code and the anti-lawyer provisions I suspect the new system will operate in a very much the same way as the existing one.

Conclusion

The Howard Governments 1996 reforms built upon the Keating reforms and continued the devolution of the determination of working arrangements to the workplace and individual level and incrementally moved the pendulum in the right direction. The WorkChoices reforms lacked wide ranging support which was exacerbated by the lack of consultation in the policy implementation process. The most contentious areas of WorkChoices tainted the positive aspects - like the processing of agreements on the papers, encouraging parties to take responsibility to resolve their own disputes, and rapid responses to unlawful industrial action.

It is true, that the contrast between the consultation process undertaken by the previous Government in respect of WorkChoices and the introduction of the Fair Work Bill is like chalk and cheese. As of the COIL and other processes I am confident that the new industrial system will be more bug free than WorkChoices.

The process is aided by the Acting Prime Minister's knowledge of industrial relations which enables her to engage with stakeholders and her drafting team with an understanding that few other Workplace Relations Ministers could hope to achieve.

In addition Acting Prime Minister Julia Gillard is alive to the need to ensure that the Forward with Fairness policy is implemented without collateral damage of the type experienced under WorkChoices,

By way of example in April this year, after being confronted with claims that the ALP's proposed reforms would adversely affect the capacity to operate mining FIFO rosters, Julia Gillard was quick to assure the mining industry that existing roster patterns and arrangements would continue to be available. This level of understanding and commitment gives the mining industry much comfort in the face of impending change.

The Government has committed to getting the balance right and achieving both fairness and flexibility. Whilst we are yet to review the detail of the Fair Work Bill, the outline provided today indicates that the Government has genuinely considered the views of industrial participants.

AMMA is pleased that the Government has stepped back from proposals to terminate all existing agreements, this was a dirty bomb and we are glad that it has been defused.

We are also pleased that the ability for the Tribunal's capacity to impose outcomes in disputes will continue to be limited. To do other wise would represent a return to compulsory arbitration.

Of course you could not expect the mining industry to embrace all the content of the Bill.

We loved our AWAs and time will tell if the access to individual flexibility agreements under modern awards or agreements, and agreements for high income earners will be a workable substitute.

We are concerned that the Government has walked away from its pre-election commitment to maintain Right of Entry laws, and has made it easier for militant unions to disrupt workplaces, particularly where non-union arrangements have long been in place.

By basing rights of entry on union coverage rules the spectre of union turf wars raises its head. Some years ago there was a million dollar court case over the interaction between the AWU and CFMEU rules, and the last thing we need is for that battle to be replayed at the grass roots level interrupting mining operations.

AMMA will review the detail of the Bill over the coming weeks in order to work out where the pendulum is currently positioned.

Whilst it is too early to state definitively my initial impression is that the swing of the pendulum has reduced and that will be step towards a stable industrial system that is more likely to withstand the changes in Government in years to come.