

Industrial Relations Under The Rudd Labor Government: Establishing A New Safety Net

Braham Dabscheck

Senior Fellow, Faculty of Law, University of Melbourne

On 27 March 2006, the Howard Government's Workplace Relations Amendment (Work Choices) Act 2005 (Cwlth) became operative. It was a complex piece of legislation (see Dabscheck, 2006). Four major features will be highlighted. First, it introduced major changes to the determination of minimum wages and conditions, or what is known as the safety net. Traditionally, minima could not be less than those conditions determined in an award. Awards were normally determined via negotiations between the parties and ratification by an industrial relations tribunal, covering a wide range of employment conditions.

In 1996, the Howard government passed legislation which enabled the negotiation of Australian Workplace Agreements (AWAs). An AWA was an employment instrument which provided for the negotiation of individual employment contracts. AWAs were subject to a 'no disadvantage test' which was linked to an award or collective agreement. *Work Choices* fundamentally changed this. It enabled workers to be employed on AWAs which contained only five conditions; or what was described as the Australian Fair Pay and Conditions Standard (AFPCS). These conditions were basic rates of pay and casual loadings, maximum hours of work and annual, personal and parental leave.

Second, it placed restrictions on the ability of the parties to negotiate collective agreements, with the Minister for Workplace Relations granted power to intervene in such negotiations. Third, *Work Choices* was based on the corporations (Section 51, paragraph xx), rather than the conciliation and arbitration power (Section 51, paragraph xxxv) of the Constitution. The latter involved the Commonwealth government in sharing industrial relations powers with the states; moreover, its power was indirect which forced it to delegate major functions to industrial tribunals. The corporations power grants the Commonwealth direct industrial relations power, and in tandem with Section 109 of the Constitution (which says the Commonwealth prevails over the states where there is a clash of legislation) enables it to override state systems. Fourth, *Work Choices* sought to introduce a national system of industrial relations regulation. The state systems were to be downgraded, if not 'effectively' abolished. *Work Choices* set in train a transition mechanism for workers in state systems to be transferred to the national/Commonwealth system in three years, and for workers, in the

'old' Commonwealth system, not subject to the corporations power (such as small businesses), to move to the state systems, if the states did not refer their 'remaining' powers to the Commonwealth.

Backtracking on AWAS

The AFPCS enabled wages and conditions to fall below the levels previously contained in awards and collective agreements. Given that *Work Choices* provided a mechanism for reductions, it should not be surprising that some employers took advantage of this and cut back wages and other employment conditions. Reports of such and the declining fortunes of the Howard government in the polls resulted in the passage of the *Workplace Relations Amendment (A Stronger Safety Net) Act, 2007* (Cwth). Its major feature was to introduce a fairness test for AWAs for workers, after 7 May 2007, earning a base salary of less than \$75,000 per annum. The fairness test, to be conducted by the Workplace Authority was linked to the exclusion or modification of protected award conditions relevant to the employee (see Dabscheck, 2007).

Since the passage of that legislation two further pieces of evidence have come to light concerning AWAs, prior to the reform of *Work Choices*. First, a study by Sydney University's Workplace Research Centre, released in October 2007, found workers on AWAs, earned, on average, \$106 less per week than workers on collective agreements (van Wanrooy et. al, 2007, p. 45).

Second, on 20 February 2008, Julia Gillard, the Minister for Employment and Workplace Relations in the Rudd Australian Labor Party (ALP) government released data from a sample of over 1,700 AWAs, lodged between April and October 2006, which had been withheld by the Howard government. It revealed that AWAs had dramatically stripped away protected award conditions. Eighty nine per cent had excluded at least one or more conditions, 83 per cent two or more, and 78 per cent three or more, through to 52 per cent six or more and two per cent all eleven such provisions. It also revealed that 70 per cent removed shift loadings, 68 per cent annual leave loadings, 65 per cent penalty rates, 63 per cent incentive/bonus payments, 61 per cent days to be substituted for public holidays, 49 per cent overtime loadings and so on (Gillard, 2008 c)

The Fairness Test

The fairness test was designed to overcome problems associated with AWAs in reducing the wages and conditions of workers with limited bargaining power. Despite this, criticisms have been directed at the Workplace Authority concerning its tardiness in processing such applications (see Scott, 2007). From 7 May to 30 November 2007, more than 222,000 'reform' AWAs were lodged with the Workplace Authority. Of these, slightly less than 73,000, approximately one-third, had

been finalised. Almost 7,000 failed the fairness test (Workplace Authority, 2007). Evidence submitted by the Workplace Authority to a Senate Estimates Committee, in February 2008, of a sample of 3146 'failed' AWAs, revealed that half attempted to cut employee entitlements by \$49 a week, 39 per cent by between \$50 and \$199 a week, 10 per cent by between \$200 and \$499 a week and 1 per cent over \$500 a week (Davis, 2008).

As of November 2007, over 560,000 workers were covered by AWAs, approximately six per cent of the workforce (Workplace Authority, 2007).

The Australian Labor Party's Industrial Relations Programme

During 2007 the ALP, under its new leader Kevin Rudd, issued two documents, under the general title of *Forward with Fairness*, concerning the industrial relations programme it would implement if successful in the forthcoming federal election (ALP 2007 a; 2007 b). These documents said that a Labor government would abolish *Work Choices*. They championed a uniform national system of industrial relations regulation which would be based on all the constitutional powers available to the Commonwealth, to be determined cooperatively with the states.

Collective enterprise bargaining was to be at the heart of Labor's new system. Such collective negotiations could be determined with or without unions. If a majority of workers voted to bargain collectively an employer will be required to enter into 'good faith' negotiations. Industrial action will be 'protected' or lawful following the expiration of an old agreement/negotiation of a new agreement. In the event of an industrial dispute which will harm the national interest there will be provisions for its resolution by a third party.

The documents call for the abolition of AWAs. It is acknowledged, however, that there would be problems if such arrangements were terminated immediately. To overcome this, a transitional mechanism will be introduced for graduated change. The documents propose the use of Individual Transitional Employment Agreements for 'new' employees or for workers previously covered by AWAs, for a period of two years. Existing AWAs will not be abolished. They will cease when their terms expire or if they are converted to Individual Transitional Employment Agreements. The Labor Party also proposed the creation of a new safety net which would be based on ten legislated minima, and an additional ten terms contained in awards (see below). Provision would be made for the negotiation of individual common law agreements which must observe these minima, with an exception for workers earning more than \$100,000 in guaranteed ordinary earnings, per annum, indexed to annual growth in ordinary earnings, beginning on 1 January 2010. The documents also foreshadow that the Australian Industrial Relations Commission (AIRC) will be charged with responsibility for simplifying and modernising awards as part of the process of establishing a new safety net.

Finally the documents called for the creation of a new regulatory body, Fair Work Australia, under which the functions of existing regulatory bodies, such as the AIRC, the Australian Fair Pay Commission, the Workplace Authority, the Workplace Ombudsman and the Australian Building and Construction Commission, will be combined. Judicial and enforcement functions will be the province of the Federal Court.

**The New Safety Net: *The Workplace Relations Amendment
(Transition To Forward With Fairness) Bill 2008 (Cwlth).***

The ALP defeated the Howard Liberal National Parties Coalition in the federal election held on 24 November 2007. Opposition to *Work Choices* has been seen as a, if not the major, factor in the ALP's electoral victory. Following its victory, the ALP on 13 February 2008 introduced legislation to abolish AWAs and create a new safety net. More comprehensive legislation, consistent with its overall industrial relations platform and the abolition of *Work Choices*, will be introduced later in 2008.

The *Workplace Relations Amendment (Transition To Forward With Fairness) Bill 2008* (Cwlth) introduces Individual Transitional Employment Agreements as a vehicle to replace AWAs (Gillard, 2008 a). They will expire on 31 December 2009, to be replaced by National Employment Standards and modernised awards (see below). The Workplace Authority is charged with the responsibility of determining whether or not such agreements satisfy a no disadvantage test. The Bill says that an Individual Transitional Employment Agreement passes this test if 'it does not result, or would result, on balance, in a reduction in the employee's overall terms and conditions of employment under any reference instrument relating to the employee'.

The Bill charges the AIRC with modernising, or making 'modern awards', following a request from the Minister for Employment and Workplace Relations, which must be completed within two years of the request. The Bill also lists various provisions which 'may' be included in 'modern awards'. They are:

1. Minimum wages, classifications and incentive/bonus payments,
2. Types of employment, full time, part time, casual etc,
3. Working arrangements, hours of work, etc
4. Overtime rates,
5. Penalty rates,
6. Annualised wage or salary arrangements,
7. Allowances,
8. Leave loadings,
9. Superannuation, and

10. Consultation, representation and dispute settlement procedures.

The day after the second reading speech of the Bill, Julia Gillard released a draft and discussion paper concerning proposed items which would constitute legislated National Employment Standards (Gillard, 2008 b; Department 2008). They are:

1. Maximum weekly hours of work,
2. Flexible working arrangements,
3. Parental leave,
4. Annual leave,
5. Personal/carer's and compassionate leave,
6. Community service leave,
7. Long service leave,
8. Public holidays,
9. Notification of redundancy termination, and
10. Fair work information statement.

Industrial Relations Under The Corporations Power

Notwithstanding the pending dismantling of *Work Choices*, the major thing it achieved was to clarify that the corporations power could be used by the Commonwealth government to directly legislate on industrial relations matters (Dabscheck 2007). Amongst other things, this enables the Commonwealth to override, if not abolish state systems. The Howard government sought to achieve this by a hostile takeover. The Rudd government has indicated that it wants to work cooperatively with the states. Honey may prove to be more effective than vinegar as a lubricant in massaging change.

In 2007, the New South Wales government commissioned a report to identify principles which could underpin a harmonised national industrial relations system. It recommended that there be an intergovernmental agreement between Commonwealth, state and territory governments for the creation of a Ministerial Council, served by an independent secretariat, to determine national industrial relations laws. New laws would require the consent of a two-thirds majority of the Ministerial Council, including a majority of the states. States would be able to be excluded from specific aspects of national laws (Williams, 2007, pp. 5–7).

The tone of the report is to preserve a 'vital' role for the states and using the charm inherent in 'cooperation' to convince the Commonwealth not to push too hard in utilising the corporations power. The report, for example, maintains that 'Regional governance is considered . . . important . . . because it provides a means of recognising and catering to local and regional variations within

a nation' (Williams, 2007, p. 59).

There are two major problems with this report. First, would not enterprise bargaining, which is promoted by the Rudd government (and incidentally by the previous Howard government), be the best vehicle for 'recognising and catering for local and regional variations' rather than 'differential' legislation at the state level? Second, given the corporations power, there is no need for the Commonwealth to embrace the recommendations of this report and create a new layer of bureaucracy. After being cooperative and having consulted the states under existing arrangements it can enact legislation that it sees as being appropriate. More generally, the future is one in which the powers and role of the states will be more or less quickly diminished, if not distinguished with the exception of arrangements for Crown employees (those associated with State Constitutions).

Conclusion: Australia's System Of Industrial Relations in Transition to Somewhere

Work Choices heralded a new approach to Australian industrial relations. Its impact, however, has been marginal. It operated for less than two years and is in the process of being buried. Its demise occurred in two parts. The first was the introduction of the fairness test to blunt the harmful effects of AWAs in reducing wages and working conditions of workers with limited bargaining power. The second, and more important, was the election of the Rudd Labor government on a platform pledged to its abolition.

In February 2008, the Rudd government introduced legislation to introduce a new safety net. This is to be achieved by abolishing AWAs when they expire and/or utilising a mechanism to transform them into Individual Transitional Employment Agreements, subject to a no disadvantage test to be administered by the Workplace Authority. In addition, the AIRC is charged with creating 'modern awards', which together with ten legislated National Employment Standards will provide a more substantial mooring for such tests. It is to be seen how many employees will seek to avail themselves of the transition mechanism and the speed and facility of the Workplace Authority in processing such tests (see above).

Because *Work Choices* had little time to settle down, and the AWAs with 'lower' conditions it created affected a small percentage of the workforce, which the Rudd government's 2008 Bill seeks to overcome, it is difficult to see how the 2008 legislation will have any major impact on the economy. More important, however, is the legislation to be introduced latter this year concerning the development of a national system of industrial relations based on the principle of collective enterprise bargaining and functions to be performed by Fair Work Australia.

More generally, the rise and fall of *Work Choices* has highlighted the ability of Commonwealth governments to introduce major changes to industrial relations. The corporations power has

provided the Commonwealth with a 'new toy'. As governments and the circumstances that confront them change, they will embark on new bouts of industrial relations reform. This is very comforting. We know that Australia's system of industrial relations is in transition to somewhere.

References

- Australian Labor Party, 2007 a, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, April.
- Australian Labor Party, 2007 b, *Forward with Fairness: Policy Implementation Plan*, August.
- Dabscheck, Braham, 2006, 'Work Choices: Australia's New Industrial Relations Legislation', *The Otemon Journal of Australian Studies*, December, pp. 83–91.
- Dabscheck, Braham, 2007, 'Work Choices: An Update', *The Otemon Journal of Australian Studies*, December, pp. 119–124.
- Davis, Mark, 2008, 'We got it wrong: Nelson,' *The Sydney Morning Herald*, 29 February, p. 2.
- Department of Education, Employment and Workplace Relations, 2008, *Discussion Paper: National Employment Standards Exposure Draft*, Canberra.
- Gillard, Julia, 2008 a, Second Reading Speech, *Workplace Relations Amendment (Transition to Forward With Fairness) Bill 2008* (Cwlth), Hansard, House of Representatives, 13 February, pp. 8–13.
- Gillard Julia, 2008 b, Media Release, Call for public consultation on National Employment Standards, 14 February 2008.
- Gillard, Julia, 2008 c, Media Release, AWA Data the Liberals Claimed Never Existed, 20 February.
- Scott, Steven, 2006, 'Fairness test creates a massive logjam', *The Australian Financial Review*, 6 September, p. 3.
- van Wanrooy, Brigid, Oxenbridge, Sarah, Buchanan, John and Jakubauskas, Michelle, 2007, *Australia@Work*, Workplace Research Centre, University of Sydney, Sydney, September.
- Williams, George, 2007, *Working Together: Inquiry into Options for a New National Industrial Relations System: Final Report*, NSW Government, Sydney.
- Workplace Authority, 2007, Monthly Statistics, November 2007.