SUBMISSION ON REVIEW OF FAIR WORK ACT, February 2012

by Des Moore[1]

Introduction

Fair Work Australia commenced on 1 July 2009 and assumed most of the functions of the Australian Industrial Relations Commission. The operative legislation significantly increased the extent of regulation of relations between employers and employees and also of the capacity of unions to be involved in such relationships. A review of "the operation of the Fair Work legislation, and the extent to which its effects have been consistent with the Objects set out in Section 3 of the Fair Work Act" was announced by Minister Shorten in December 2011.[2]

This submission argues that the regulatory and accompanying quasi-judicial supervisory arrangements are totally unsuited to modern society and are based on a complete misunderstanding of the way that labour markets can and should operate in the interests of the Australian community. As the arrangements do not operate in the interests of most workers and employers, the legislation and its accompanying administration should be totally scrapped. Instead, the interests of employers and employees should be protected through normal legal and administrative processes applying to contractual arrangements. That could include the establishment of an impartial body to provide advice to both employers and employees similar to the UK's Advisory Conciliation and Arbitration Service established in 1975.

Apart from their unsuitability, the existing arrangements have not even worked in ways consistent with the "intentions" of the FWA as stated in the terms of reference. These include establishing "a clear and stable framework of rights and obligations which is simple and straightforward to understand" or promoting "fairness and representation at work", or "effective procedures to resolve grievances and disputes" or "genuine unfair dismissal protection".

The analysis in this submission is based on research by the author over a considerable period of time, including a paper prepared for the Labour Ministers' Council on "The Case for Further Deregulation of the Labour Market" in 1998, articles published in the journal of the Economic Society of Australia (Queensland) in March 2008 and the Australian Bulletin of Labour, and extensive surveys and analyses of regulatory decisions by the AIRC and the Federal Court reflected in papers presented to conferences of the HR Nicholls Society. Further references are available on request.

It is noted that meetings with key stakeholders/roundtable discussions will be held. The author requests such a meeting, which would include other expert participants.

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[1] Des Moore is Director, Institute for Private Enterprise (ipe@ozemail.com.au) and was formerly Deputy Secretary, Commonwealth Treasury. He is also a life member of the Australian Strategic Policy Institute and a member of the HR Nicholls Society board.

[2] See attached Terms of Reference.

The Basic Rationale for Deregulation

The basic rationale behind the new set of regulations and institution(s) is that, because of an imbalance of bargaining power between employers and workers, the greater flexibility in terms and conditions achievable in employment agreements under the WorkChoices arrangements established under the Howard government increased the likelihood that employees would lose conditions to which they were 'entitled' or had negotiated in the past. Indeed much was made of the fact that some statutory individual agreements negotiated under WorkChoices did not include conditions provided under awards previously made by the AIRC. Hence the perceived need, stated to be in the interests of fairness, to ensure that basic conditions would be provided by legislation and/or ensured by an appropriately charged institutional framework.

My contention is that the adoption of a highly regulated approach largely ignores the potential for both economic and social benefits from a freer labour market. The notion that extensive regulation ensures a "fair go" for workers is nonsense: what constitutes fairness cannot be legislated and is in the eye of the beholder. Importantly, it also overlooks the unfairness of much of that regulation, as well as largely neglecting the implications of the structural changes in society over the past twenty or so years.

In adopting the ultra-regulated model two major structural changes in the economy and society have been disregarded.

One of those is the now widespread acceptance that the most appropriate form of economic organisation is a competitive market economy and that, in such an environment, individuals can generally make their own employment decisions without fear of being exploited by employers and without the need for support from union actions. This is reflected in the decline in union membership to less than 15 per cent of private sector employees, with 90 percent of businesses having no employees with union members. Although the union movement continues to present itself as the institution that represents the interests of workers, in reality that is not the case.

Second, governments have over recent years increasingly assumed direct responsibility through an extensive social security and education system for helping those judged unable to obtain employment or otherwise disadvantaged. This system provides a protective bulwark for those at the bottom end of the social spectrum. True, many judges and industrial commissioners have continued to make decisions on the basis that, independently of Parliament or the legislation it passes, the judiciary has a major role in ensuring what they perceive as 'fair' or socially desirable outcomes of employment negotiations.[3] This despite the fact that s.51 (xxxv), which has hitherto

[3] Examples include widely-reported public interviews given in February 1996 during the federal election campaign by Justice Murray Wilcox in which he criticized the Coalition's plans to amend unfair dismissal laws (for further references to Wilcox J, see Forbes, John, *"Just Tidying Up": Two Decades of the Federal Court*, Proceedings of the Tenth Conference of The Samuel Griffith Society, August 1998); a paper to the XX1st Conference of the HR Nicholls Society in May 2000 (see www.hrnicholls.com.au) by leading industrial barrister Stuart Wood analysing judgments by several

been assumed as providing the constitutional basis for regulation, says nothing about safety nets or human rights. This expansive intrusion by the judiciary into the process of settling industrial disputes reflects an entirely inappropriate adoption by many of them of a social justice role that is a matter for Parliament. Legislation regulating workplace relations should leave minimal scope for judicial interventionism.

Let us assume for a moment that social and economic circumstances 110 years ago and for the following 80 odd years could be said to have justified the extensive prescriptions of employment conditions and applications of social justice that applied then. The changes in the last twenty five or so years, producing a market-oriented economy and a social security system, should have long since led to recognition that workers in modern societies have no need for special legal protection against employers, let alone dictation by unelected outsiders of what employment conditions are socially "appropriate".

During the period of the Howard government unemployment was reduced from 8% in 1996-97 to around 4%, and the participation rate increased from 73% to around 76%. OECD international comparisons show the establishment under the Howard government of an employment/working age population ratio considerably higher than countries with similar political systems. There was also a strong increase in average real wages. While these developments reflected a range of influences and policies, it is difficult to deny that the reduced level of labour market regulation helped improve the flexibility of employment arrangements and hence the demand for labour.

The main improvements under the Howard government included the easing of the unfair dismissals regulation, the increased resort to individual agreements encouraged by legislation, the bar on any further exercise of compulsory arbitration, and the limitations placed on industrial disputation. The separate establishment of the ABCC to counter union restrictive practices in the construction industry also markedly improved the functioning of that industry's labour market. Overall, it can justifiably be claimed that these measures contributed to an increased demand for labour being met through increased supplies but without inducing inflationary wage pressures.

After the November 2007 election, and despite stimulatory measures to counter the GFC, there has since the Fair Work Australia regime commenced in July 2009 been no improvement in the participation rate, the initial recovery in employment growth has stopped and the unemployment rate has not returned to its earlier low but has become stuck around 5.3-5.5 percent. The upward trend in the employment/working age population has stopped.[4] As with the improvements under the Howard

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Federal Court judges, including Justice North's in the important case of Australian Paper Ltd v CEPU (1998, 81 IR 15) suggesting tortuous interpretations of Section 127 of the Workplace Relations Act designed to render largely ineffective the legislative provisions directed at preventing unlawful industrial action; and an interview by Justice Munro with Workplace Express on his retirement in 2006 as Deputy President of the Commission implying that the judiciary must keep Parliament and the Government in line because "the number [of ministers] who actually know what goes on has been fairly few, and a lot of advisers know even less." By contrast, according to Justice Munro the Commission had been "getting with the parties and trying to get them to work through problems".

[4] The OECD Employment Outlook for 2011 shows that, between 1994 and 2007, Australia's employment/population ratio increased from 66.0% to 72.9% but has since fallen back slightly to 72.4% in 2010..

government, these developments reflect a range of influences and policies and it is obviously too early to say that they "prove" that the Fair Work regime has not worked as well as the regulatory arrangements operating under the Howard government. Nonetheless there is a clear implication that the Fair Work arrangements have not. Judging by the reactions of business leaders and associations there seems no doubt.

Collective Bargaining, Bargaining in Good Faith and Bargaining Powers Generally.

The Labor Government's policy rationale is that any bargaining between individual workers and employers must be subject to agreements meeting certain legislated conditions *and* that employers must agree to collective bargaining where a majority of employees wants to bargain collectively.[5] That policy also provides that Fair Work Australia is empowered to determine the extent of support for collective bargaining.

However, there is no substantive case for *special* legislation either to encourage or allow collective bargaining or to prevent "exploitation" by employers. Collective bargaining constitutes a quasi monopoly and its adoption can only be justified if it can be shown to be in the public interest. This is hard to establish. Such bargaining adds to the risk that the economy will be subjected to wage increases that do not reflect increased productivity and to adverse effects on employment.

Australia has had several experiences of collective bargaining induced inflationary wage increases, most notably in the mid 1970s, which had adverse effects on employment and the economy. Although Julia Gillard, when Workplace Relations and Employment Minister, gave assurances that wage increases under Labor would be productivity-determined, it is evident this has not occurred. Further, it appears that the basis on which FWA award system operates is unable to ensure that it happens. True, the absence of productivity increases has, until recently, still allowed the corporate profit share of GDP to increase. But this is importantly due to the strong increase in Australia's terms of trade. If the terms of trade fall, as may now be starting to happen, both wages and profit levels would come under downwards pressure unless productivity growth returned.

This submission that special regulatory legislation is not needed to protect employees is not to say that employees are not subject to "exploitation" from time to time, or would be in a deregulated labour market, by individual employers. But where it occurs in a deregulated market it can and should be dealt with either through normal legal processes or through market processes. Employees are protected under the common law and ordinary contract and criminal legislation and, like everyone else, employers are legally obliged to observe contracts including those containing agreed wages and conditions. Nor are the parties to employment negotiations able to avoid the normal criminal law applying to actual or attempted exercises of violence and duress. The legislation requiring no racial, sexual, age or disability discrimination would also continue to apply. It is also relevant that the ordinary common law provides some protections against abuse and contracts will not be upheld if procured

[5] The process of obtaining a majority can be started by the requirement that an employer will be compelled to bargain in good faith where only one employee requests this.

by force, fraud, or undue influence. Contracts deemed to have been entered into in a manner that is "unconscionable" may also not be enforced.

The imbalance of bargaining power justification for special protective legislation also fails to take account of the competitive environment in which employers operate today. Australia now has more than 2,000,000 businesses, of which over 800,000 are employing businesses which operate with a workforce of over 12 million. These businesses compete actively with each other and no valid argument can be mounted that, without prescriptive regulations, employers as a group would force wages down or impose "unfair" conditions on employees as a group.

Further, when working conditions are unacceptable to either party, each side has alternatives that, while not necessarily the first best option for either, prevent businesses as a group from being imposers and workers as a group from being slackers. ABS data on Labour Mobility[6] shows that employees themselves are active competitors in the labour market and have been readily able to change jobs. In the year ended February 2010, for example, about 2.2 million ceased jobs and nearly 60 per cent did so voluntarily.

Small businesses, which comprise around 90 per cent of all businesses and account for about 35 per cent of total employment, are particularly limited in attempting to exercise bargaining power. If they seek to "exploit" workers in some way, they are exposed to serious risk of loss of staff and difficulty in operating a business. Potential competition for labour also exists from the large number of owner-run businesses that are would-be employers and, hence, also judges at the margin of the regulatory arrangements.

Accordingly, the existence of over 2,000,000 actual or potential employers shows the extent of the risk of loss of staff/difficulty in operating a business if exploitation is attempted. Suggestions of potential extensive exploitation in a deregulated market also overlook that businesses need competent staff if they are to operate successfully and that the composition of the business sector changes significantly each year. A typical situation is that, at the end of a year, about one eighth of employing businesses became employers during the year and a not dissimilar proportion ceases to be employers.

It is also often overlooked that competition between employers for labour gives individual employees a degree of bargaining power. Each has the capacity to readily quit jobs if he or she feels badly treated by their particular employer or for any other reason. As noted, this is reflected in the numbers who leave jobs voluntarily during a year.

Individual employees are in fact increasingly able to either bargain for themselves or obtain advice from the many employment and legal agencies, associations, and government inspectorates rather than relying on unions. This is not to suggest that unions have no bargaining role but, rather, that employees now have more choice with regard to advisers and helpers. In such circumstances unions should cease to be given relatively favourable treatment in legislation and industrial tribunals. During the

[6] Labour Mobility, ABS Cat No 6209.0.

period of reduced regulation and union activity under the Howard government, average *hours* of work and industrial disputation fell while real wages increased, which scarcely suggests employees' bargaining powers are weakened in a less regulated labour market.

This is not to deny that moving to a less regulated labour market would cause some employees to experience *reduced* compensation and/or working conditions. But any substantive reductions would need to be assessed against the circumstances in which they were obtained and the subsequent developments in the industry. Although much attention was given in the debate about Work Choices to reductions experienced by some workers employed under AWAs, little or no assessment was made of whether the awards under which those workers were previously employed were justifiable economically or took account of the availability of persons out of a job and prepared to work for conditions different to those required by the award. The reality is that there is no sound economic or other basis for having regulators not involved in a business to determine what conditions should apply, particularly in a labour market that is subject to a variety of changing economic influences and skills of workers. Market forces rather than regulators should be the determiners of wages and conditions and the award "system" should be abandoned.

In fact many awards now being used are probably out of line with market conditions,[7] particularly in industries employing relatively low skilled workers. Past experience also suggests that some awards may reflect the provision of wages and/or conditions made by tribunals in circumstances where claims by unions were based on the actual or threatened use of industrial power that unions were allowed to exercise but should not have been. The outcome of the waterfront dispute illustrated vividly the existence then of extensive unwarranted protection of union power of an unfair nature[8] and a similar situation clearly existed in the construction industry before the ABCC was established.[9]

In this regard it is absurd that unions may be allowed to bargain over "any matter" (ie not necessarily related to employment conditions) and that all bargaining participants are obliged to bargain in the meaningless concept of "good faith". There was no such requirement in the WorkChoices legislation and Labor's policy simply means employers seeking an employment agreement or a change in an existing one have to involve unions if requested. The (then) Minister for Workplace Relations and Employment, Julia Gillard, argued in the election debate that the "obligations are simple" and only required such things as attendance at meetings "at reasonable times", timely "disclosure of relevant information", and "timely responses to proposals". But this absurdly naïve commentary failed to recognize that such requirements are far from simple for the average business.

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[7] While some awards, such as the minimum wage, are set too high, it is evident that some awards are also set below market rates.

[8] Although Patrick did not succeed in replacing its unionised work force, that workforce was reduced by about half as a result of the dispute.

[9] The failure of police forces to enforce the law was also an important element in providing such protection. For an analysis of the failures of the Victorian police force in the waterfront dispute, see *Keeping Things Peaceful or Keeping the Peace: Police at the Pickets* by industrial barrister, Stuart Wood (www.hrnicholls.com.au). There is little doubt that, had the police enforced the law, the attempted breaking of the MUA labour supply monopoly would have succeeded.

In practice, the obligation to meet and to disclose relevant information can involve a lengthy process imposing costs on employers and making it difficult for them to avoid agreeing to some perceived 'reasonable' going rate. Thus, under a regime of mandatory collective bargaining and bargaining in good faith, employers are sometimes effectively forced, under Fair Work Australia procedures, to pay the so-called 'reasonable' going rate or apply the 'reasonable' condition, as the costs of paying the condition would be cheaper in the short run than continuing to bargain in good faith.

Employers are thus sometimes forced to spend un-commercial amounts to protect their bargaining position and this leads others to fall into line, resulting in the gradual adoption of conditions which over time results in loss of productivity. [10]

Labor's interventionist policy on bargaining powers and bargaining in good faith has also provided scope for rogue unions to be allowed to exercise quasi-monopoly powers to the detriment of employers and fellow workers. Although the government has a no-violence/no-threat of violence policy in regard to the activity of unions, and has expelled a couple of abusive union leaders from the party, the establishment of extensive regulatory arrangements, supervised by new appointees to the new Fair Work Australia who are predominantly ex-unionists, has undoubtedly increased union power in practice. The archives of the HR Nicholls Society are replete with examples of the exploitation of *employers* despite regulatory arrangements supposedly designed to provide 'balanced' outcomes.

Overall, the likely beneficial effects of "freer" bargaining arrangements in a less regulated labour market appear not to be understood by the Government, whose Ministers display a woeful understanding of the workings of that market and the relationships of its participants. The idea that protective regulation would preserve employment in the event of a recession fails to recognize that a lack of flexibility works to undermine job security. This was illustrated in the recession in the early 1990s when unemployment increased to around 11%.

If the concern is to help financially workers in dispute with employers, a possible alternative to the industrial tribunal approach would be to establish a body with functions similar to those given to the Advisory Conciliation and Arbitration Service (ACAS) in the UK. That body is widely used in voluntary mediations/conciliations, has established itself as impartial as between employers and employees and provides extensive advisory services to both employers and employees at a low cost.[11]

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[10] An example of what could happen may be found in the behaviour of the AIRC over a considerable period prior to WorkChoices in requiring employers to accept claims for the insertion into agreements of redundancy obligations well in excess of the 13 weeks standard supposedly set in 1983. During this period some employers "agreed" to redundancy obligations of 120-140 weeks and Telstra's acceptance of 84 weeks required it to include about $1 billion for redundancy during T1. Although this was the same amount as it promised for the environment, only the latter received any press coverage.

[11] ACAS was formed in 1975 to take over the industrial relations functions previously carried out from within the Department of Employment at the height of the collectivist approach to labour relations. It has performed four main activities. The most public of its roles is its conciliation involvement in industrial disputes. But it has also helped in organising arbitrations and, as individual rather than collective conciliation has grown, it has played an increasingly important role in individual conciliation. But its most extensive activity by far is its advisory work.

The Institutional Framework

The acceptance of the imbalance of bargaining power argument has inevitably led to the establishment of an inspectorate (the Fair Work Ombudsman) in addition to the Tribunal itself. Particularly given the enhanced role of unions, this has significant implications for the operation of the labour market as it allows union objectives to be pursued and secured through the Ombudsman.

States also continue to have their own regulatory legislation and institutions, which adds to business costs and labour relationship problems. It is apparent, however, that there is growing dissatisfaction amongst the states with the handling by Fair Work of relationships with their own employees. Unless that situation improves it seems likely that some states will move to establish separate regulatory arrangements in regard to their own employees.

The new institutional framework at the federal level means that, although the numerous awards that previously existed were often not fully enforced, businesses now face a much more rigorously enforced set of regulatory arrangements. In short, particularly in the case of small businesses in the service industries, such as hospitality, restaurants, security, cleaning and tourism, what was a de facto relatively deregulated situation in a significant part of the labour market is now disappearing. This is in effect the first time that has happened in Australian industrial relations and, it opens up the possibility of a serious clash between award provisions and market conditions, with the potential for reductions in employment and even the cessation of some small businesses.

Most importantly, however, the continuation of regulatory and quasi-judicial industrial institutions separate from the ordinary courts is a matter of serious concern in circumstances where the new regulations are so broadly expressed as to require and allow interpretation. This exposes employers (and others) to even greater uncertainties and interventionism for social justice reasons than has been experienced hitherto. Media reports of decisions seem to confirm that is the case. This reflects the fact that most of the union-based appointees to Fair Work Australia continue to have similar attitudes to their predecessors. As I have written elsewhere,[12] the historical record of courts, tribunals, commissions and authorities in administering workplace relations laws is a poor one.[13]

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[12] See, in particular, *Judicial Intervention The Old Province for Law and Order,* Samuel Griffith Society 2001 and *Overmighty Judges –100 Years of Holy Grail is Enough,* HR Nicholls Conference 2004 www.hrnicholls.com.au . Also, my article on *"How the Judiciary Continues to Undermine Labour Market Deregulation"* in Australian Bulletin of Labour, Vol. 13 No 1 2005, refers to various decisions, especially those by AIRC commissioners, which suggested increasing interference - or failure to interfere when obviously necessary. Such decisions included failures to protect employers against violent and intimidatory union action, widening the definition of industrial action to allow more arbitration, an extension of circumstances in which unions have the right to strike and to enter business premises, a widening of the safety net beyond its objective, an apparently less favourable treatment of non-union agreements and an increasing attempt to restrict employers' use of non-union labour.

[13] Although industrial legislation actually proscribed both strikes and lockouts until 1930, a high rate of industrial disputation continued after the initial legislation was passed. Moreover, international comparative data from the late 1970s on shows Australia had a higher rate of working days lost than the OECD average. It is arguable that the use of Section 51 xxxv as the basis for legislation and judicial intervention actually encouraged disputation. My report of November 1998 to the Labour Ministers'

The Minimum Wage and Fairness

The Fair Work legislation continued the Howard Government's policy of setting minimum wages but abolished the separate body set to determine that and gave the Tribunal responsibility for determining the wage. This is among the worst features of the regulatory legislation. In fact, Fair Work Australia has an even wider minimum wage role than its predecessor, including an annual updating of minimum wage rates for all awards under a so-called modernised award system.

The reality of the minimum wage system is that it not only misuses the wage system as a vehicle of social welfare policy but applies it unfairly. Households with incomes in the bottom quintile receive only a small proportion of their income from wages (around 10 %). This mainly reflects the fact that they are lesser skilled and find it more difficult to obtain jobs at the minimum wage levels that are set. These households are therefore heavily reliant for income on government pensions and allowances, adding to welfare dependency and requiring higher taxes to foot the bill for higher welfare payments.

By contrast, many of those actually receiving the minimum wage are women or young workers living in households that have high incomes with no need for an income supplement (in fact, more than half of low wage earners are in the top half of household incomes). The fact that minimum rates are determined for those with wages both on the minimum *and* well above it[14] also involves the setting wages for many in high income households as well as raising the question of why anyone already earning *above* the minimum needs wage level protection.

The minimum's high level relative to the median (one of the highest in OECD countries) clearly limits the scope for increasing the employment of those looking for work. The latest ABS survey of Persons Not in the Labour Force showed that, in addition to the unemployed, around 1.3 million Australians wanted work or more of it.[15] But as many are relatively unskilled, their capacity to obtain jobs is importantly dependent on employers being able to offer a wage commensurate with their lower productivity. The setting of a minimum close to 60 per cent of the median wage necessarily prevents a significant proportion of lesser skilled being offered employment.

Without such a minimum, or with a much lower minimum, would the supply of labour be reduced and a higher proportion simply then go on to welfare benefits? Although welfare applicants would undoubtedly increase, their success (or otherwise)

Council on *The Case for Further Deregulation of the Labour Market* contains further analysis of the history of industrial disputation.

[14] Advice from official sources suggests that only relatively small numbers, perhaps in the range of 150,000-200,000 workers, actually receive the minimum wage itself.

[15] Persons Not in the Labour Force, Australia, Sep 2010 (ABS Cat No 6220.0) showed that, in addition to the 600,000 or so then unemployed, there were about 850,000 who said they would like a job but who did not qualify as "officially" unemployed because they were not available to start work within the next four weeks. Also, of the 3.4 million working part time, a substantial proportion would have liked to work more hours. The "official" unemployment rate thus considerably understates the potential for increasing employment. Many recipients of welfare benefits would also become available for work if the eligibility requirements for such benefits were tightened.

would depend on the tightness of eligibility for benefits. If unjustified resort to welfare increased, it would surely be best handled by a tightening of eligibility.

The minimum wage arrangements are those most in need of reform. A minimum wage should cease to be set by government bodies.

Unfair Dismissals and Individual Agreements (AWAs)

In addition to outlawing statutory individual agreements Labor has further extended the regulatory standards required to be observed. Guaranteed minimum conditions are extended to covering (inter alia) no "unreasonable" work hours beyond 38 hours, "flexible" work arrangements for parents with pre-school age children, penalty rates on evenings, week-ends or public holidays, redundancy pay, and long service leave. Such conditions/standards apply to all *individual* employment contracts under common law except for employees "historically award free, such as managerial employees". Labor has also effectively removed the exemption of small businesses from unfair dismissal claims.

These policies of abolishing AWAs, removing exemptions from unfair dismissals and widening the requirements for regulatory standards, represent a major increase in regulation that seriously and unnecessarily inhibit the flexibility of the labour market. There is no need for such separate regulations.

Industrial Disputes

Although the legislation appears to forbid both industrial action during the life of an agreement and action in support of an industry wide agreement (the so-called pattern bargaining), as well as requiring a secret ballot to initiate allowable industrial action, in practice the interpretation of this provision provides increased scope for strike action to be taken by unions. In circumstances where a deregulated labour market allows the ready movement of workers between employers, there is no case for allowing strike action.

Labor's decision to retain the outlawing of secondary boycotts as part of the Trade Practices Act, which allows proceedings to occur in a court, is an important acknowledgement of the need for a competitive labour market. The inclusion of the boycott by the previous Labor Government in the legislation governing workplace relations effectively removed the ban on such boycotts and led to considerable exploitation of employers by unions.

Conclusion

That Australia has had a long history of detailed regulation of employer/employee relations but this does not justify its continuance, let alone its expansion. As Keynes once suggested, when the facts change it is time to change views and policies. There is no doubt that in recent years the facts have changed dramatically, both as regards the increasing recognition of the past failures of that regulatory system and the obvious unsuitability of it to modern competitive economies and societies. In particular, the notion that there is an imbalance of bargaining power between

employers and employees no longer has substance (if it ever did) and the belief that the regulatory system protects those at the bottom of the pile is clearly mistaken.

As noted, it is too early to say definitively that the legislative and institutional changes in regard to regulating workplace relations constitute a serious risk to the efficient functioning of the labour market either in terms of employment and productivity. However, the new arrangements are not only clearly headed in that direction, but they are also an unwarranted infringement of personal freedom. There is no substantive justification for reducing the capacity of employees and employers to themselves determine the major components of employment agreements. The legislation should be scrapped at the earliest possible time.

ATTACHMENT

Review of Fair Work Act – Terms of Reference

"The *Fair Work Act 2009* (Fair Work Act) and the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (together, the Fair Work legislation) gave effect to the Government's commitment to restore fairness to the Australian workplace relations system. In 2008 the Australian Government committed to monitoring the impact of the provisions of the Fair Work legislation through a post-implementation review (the review).

The review is to be an evidence based assessment of the operation of the Fair Work legislation, and the extent to which its effects have been consistent with the Objects set out in Section 3 of the Fair Work Act.

The review will examine and report on:

1. the extent to which the Fair Work legislation is operating as intended including:
   a. the creation of a clear and stable framework of rights and obligations which is simple and straightforward to understand,
   b. the emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and related powers of Fair Work Australia,
   c. the promotion of fairness and representation at work,
   d. effective procedures to resolve grievances and disputes,
   e. genuine unfair dismissal protection,
   f. the creation of a new institutional framework and a single and accessible compliance regime, and
   g. any differential impacts across regions, industries occupations and groups of workers including (but not limited to) women, young workers and people from non-English speaking backgrounds, and
2. areas where the evidence indicates that the operation of the Fair Work legislation could be improved consistent with the objects of the legislation.

The review will not examine those issues to be addressed as part of the review of all modern awards (other than modern enterprise awards and state reference public sector moderns awards) after the first two years as required by Schedule 5, Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. That review is to be undertaken by Fair Work Australia in accordance with the requirements of that legislation and in accordance with Item 6(2) must consider whether the modern awards:

(a) achieve the modern awards objective, and

(b) are operating effectively, without anomalies or technical problems arising from the award modernisation process.

Evidence

The review will draw on a range of sources regarding the operation of the Fair Work legislation. Key evidence gathering activities to be undertaken in the conduct of the review include:

- the release of a background paper on the Fair Work legislation inviting stakeholders to make a submission to the review,
- meetings with key stakeholders/roundtable discussions to outline their experiences with the Fair Work legislation, and
- the commissioning of any additional quantitative and qualitative data that may be required.

Additionally, a wide range of qualitative and quantitative data will be drawn upon to measure the regulatory impact of the legislation, including from:

- the Department of Education, Employment and Workplace Relations' Workplace Agreements Database,
- the Fair Work Ombudsman,
- Fair Work Australia,
- the Australian Bureau of Statistics,
- evidence sources developed by stakeholders, and
- other relevant statistical sources.

The review will culminate in a comprehensive evidence based report which will draw conclusions about whether the legislation is meeting its objectives. The report will also include recommendations for any changes arising out of the review. The Office of Best Practice Regulation will assess the report to ensure that it meets the best practice regulation requirements for a review as outlined in the *Best Practice Regulation Handbook*.

The review is to report to the Minister for Employment and Workplace Relations by 31 May 2012."