HR Nicholls Society Conference

"How Fair is Fair Work Australia"

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Employee and Employer Rights and FWA regulation

By Des Moore

My aim today is to examine the operation of the labour market with particular reference to the likely regulatory effects on both employees and employers. I will consider how readily employees can obtain jobs and how readily employers can offer jobs or abandon them. I will briefly refer to some decisions by the all-mighty Fair Work Australia tribunal.

The HR Nicholls Society is not the only organisation to emphasise the importance of regulatory reform in the labour market. In an address last December, Productivity Commission chairman, Gary Banks,[1] argued that amongst regulatory arrangements "industrial relations is arguably the *most crucial* to get right" (my emphasis). He added that "if we are to secure Australia's productivity potential into the future, the regulation of labour markets cannot remain a no-go area for evidence-based policy making". Banks also expressed concern that, since the early 2000s, there has been a productivity slump[2].

Some business organisations are also seeking changes to the regulatory system, including even the Australian Industry Group. Their CEO recently listed 10 major problems "that need to be addressed", highlighted that "productivity growth has plummeted in the past decade", and claimed that "workplace relations is ... central to improved productivity".[3]

The Australian has also been expressing growing concern in recent months. A recent editorial stated "The unions' demands go far beyond their traditional concerns about their members' wages and conditions ... The campaigns are further evidence that the Gillard government's Fair Work Australia is a misnomer for a centralised, one-sided industrial relations regime that heavily favours trade unions".[4]

The productivity slump since the early 2000s includes the final years of the Howard government during which the hard-fought reductions in regulation secured from the

[1] "Successful reforms: past lessons, future challenges", Keynote address to the Annual Forecasting Conference of the Australian Business Economists, Sydney, 3 December 2010. Early in his address Banks applauded the previous dismantling of centralised wage fixation and the advent of enterprise bargaining,

[2] He noted in particular that market-sector multi-factor productivity fell in 2008-09 by 2.4% and grew only slightly in 2009-10. Banks acknowledged, though, that some of the productivity slump reflected unusually high growth in labour and capital absorbed by the energy and water sectors.

[3] "The Fair Work Act – It's Time for Some Sensible Changes to be Considered", Heather Ridout, Chief Executive, Australian Industry Group, 30 March 2011.One "problem" identified by Ridout is the inability, in practice, to conclude Individual Flexibility Arrangements. She says that AWAs "provided a great deal of flexibility to employers and employees".

[4] "Unions must not dictate hiring", March 23, 2011.

Democrats by Minister Reith in 1996 were further modified[5] in regard to the negotiation of individual agreements, the dismissal of employees and the restrictions on union entry. However, an extensive regulatory system remained[6] and the government's abject failure to handle criticism of the individual agreements arrangements led it to legislate safety net provisions that effectively provided that no agreement should make an employee worse off. Such provisions severely restricted competition and meant that those not employed were unable to offer themselves at reduced conditions than those proscribed under awards.[7]

An even less competitive provision applies to enterprise agreements made under the Fair Work Australia legislation. In three similar cases[8] considered together last December on appeal to the Full Bench the analysis centred around the "better off overall test", or what is described as "BOOT" – a term that could well be applied to the provision itself! A single Commissioner had decided in October that the cashing out of leave provisions in three enterprise agreements had failed the BOOT test and, horror of horrors, threatened to create "a culture of cashing out rather than the taking of paid leave". Although the Full Bench quashed this decision and approved the agreements on the basis of undertakings given to the Commissioner, it undertook an amazingly convoluted deliberation that ended in an offer to undertake further examination if the undertakings were unacceptable to the companies.

Here we have a decision that centred around a totally inappropriate economic test, with no serious consideration of the preferences of the employees or employers and a Commissioner basically concerned with process rather than substance. The Full Bench clearly wanted to act as a kind of manager-in- chief but in the end refrained. The right of employers to manage their workforces was adversely affected and, as the preparedness of employees to cash out was not accepted until Full Bench approval was given, they were arguably treated unfairly.

Note that, while the FWA legislation provides for agreements between an employers and his work force, it is framed in such a way as to make it likely that most enterprise agreements will be negotiated with unions.[9] Enterprise agreements are, in reality, collective agreements and, as such, are arguably a restrictive practice.

Returning to the regulatory changes made by the Coalition, the role of the Industrial Relations Commission was reduced by the establishment of a Fair Pay Commission to determine minimum wages[10] and the creation of the important Australian Building and Construction Commission to handle an industry over which the AIRC seemed incapable of exercising any authority. The success of the ABCC under John Lloyd indicates that properly

[5] The WorkChoices legislation of 2005. In the Senate the Democrats insisted that individual agreements be made subject to restrictive provisions.

[6] The OECD 2006 Economic Survey of Australia welcomed the WorkChoices Act as "moving towards a simpler, national system" but pointed out that "the system is still complex... and businesses have complained about compliance costs".

[7] Although award only employees now constitute only 15 per cent of total employees, the legislation required that those employed under enterprise or collective agreements receive not less than provided in the award

[8] These involved the Armacell, Wilmaridge and Downer companies.

[9] If only one employee is a union member, that union can become the bargaining agent.

[10] The AIRC was also unable to compel the arbitration of disputes although agreements often included provisions for the Commission to be the arbitrator in a dispute.

administered regulations can be effective when the AIRC, or now the FWA, are incapable of taking a tough approach to the use of violence or threats of violence by unions.

Also established by the Coalition were a Workplace Authority to administer the so-called fairness test under Australian Workplace Agreements and a Workplace Ombudsman to monitor observance of the WorkChoices legislation. These new bodies actually extended the area of effective regulation, particularly of small businesses,[11] and they have further intruded into the workforce management of a significant component of the business sector that was operating satisfactorily in a de facto free labour market. The launching of surprise raids on businesses operating in country towns is not unknown.

Despite the extensive regulatory arrangements maintained under Howard, the operation of the labour market improved noticeably, with the unemployment rate falling between 1996-97 and early 2008 from 8.5% to a generational low of 4% and, over the same period, the participation rate rising from 63.5% to about 65.5%.[12] While these improvements reflected the continued favourable economic conditions and economic policies, the generally lower level of regulation started under the Reith legislation undoubtedly played an important part. And the strong increase in demand for labour was met without the inflationary wage pressures that had previously occurred when the labour market tightened.[13]

Before Labor came to office in November 2007 it had issued regulatory statements well in advance, one in April 2007 and the other in August of the same year.[14] But the arrangements implemented in the Fair Work Australia legislation (whose passage, remarkably, the Coalition did not oppose) did not commence until July 2009 and were not fully operational until early in 2010.

However, enough time has now passed to make a preliminary assessment of the FWA arrangements. My view is that they are not only the most regulatory ever[15] but have completely failed to justify the laughable claim that the proposed "new industrial relations system [is] based on driving productivity in our private sector". Contrary to comments by Minister Evans, there has been no recovery from the productivity slump. An examination of interpretations of the legislation by the tribunal also confirms pre-existing concerns that both the beliefs and personnel of the former Industrial Relations Commission would continue to

[11] They were largely able to avoid the regulatory system because the AIRC exercised no effective supervision and unions were thin on the ground.

[12] Although the election was in November 2007, the Coalition could be held "responsible" for levels of employment and unemployment in early 2008 and even later.

[13] Those wage pressures had been wrongly advanced as one of the main reasons for having a centralised wage system, the idea being that the centralised body would keep wages under control. History shows the contrary. The monetary policy reforms under the Coalition, and their application under an improved central bank, played an important role.

[14] I recall the failed attempts by certain individuals to persuade the Howard government to adopt a similar approach in order to promote a deregulatory policy. Letters were sent to Howard in November 2004 and February 2005, the latter signed by Messrs Copeman, Freebairn, Stone, Robson and Moore, the earlier one by many more.

[15] The legislation extends to over 600 pages and contains much detail.

exercise an undue influence on decisions. Their beliefs include that there is an inherent tendency for employers to exploit employees and that an imbalance of bargaining power requires the tribunal to play a role in protecting some version of workers' rights. This was illustrated in an address last year given by Deputy FWA President Jennifer Acton, when she emphasised the importance of the tribunal's role in dealing with "rights- based" disputes, or "disputes over employer and employee rights" as she put it.[16]

The imbalance of bargaining power argument is a completely outdated thesis that relates to past times and does not stand up to examination in modern day society.[17] Australia has more than 800,000 employing businesses operating in an educated society and in a modern economy with in excess of 11 million workers. Around 90 per cent of employing businesses are small and all businesses are actual or potential competitors for labour. In such circumstances no valid argument can be mounted that a regulated labour market is needed to prevent employers forcing wages down or imposing "unfair" conditions on employees as a group.[18] Moreover, in normal economic circumstances most employees are able readily to change jobs and many do so. ABS data on Labour Mobility[19] shows, for example, that about 9% or nearly one million, of those working in February 2010 had changed their employer or business in the previous 12 months and, over the same 12 months, 1.3 million had ceased their job voluntarily.

Most importantly, this capacity for employees to change jobs fairly readily means that employers themselves have limited bargaining power and are susceptible to loss of workers if they do not treat them well. In fact, employers face considerable competition for workers and have limited regulatory protection in practice from loss of workers who are essential to running a business. In reality Australia has a one-sided labour market in which employers are subject to considerable competition for workers but employees are protected from competition through an award system, a tribunal that is obsessed with workers rights, and legislation that does not recognise the vital role that employers play.

True, the tribunal does *formally* recognise employer rights. But if we run through a brief (but incomplete) list of the fairness tests the FWA uses we can see where the most attention is directed. Thus employers face determinations by FWA in regard to the rights of entry by unions[20], the rights of employees to "fair" dismissals and to occupational health and safety,

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[16] "The Fair Work System – Fair Work Australia's Experiences and Insights", 19 April 2010 (Presentation to Ai Group's National PIR Group Conference). Jennifer Acton was appointed a deputy president of the AIRC in 1992 and a senior deputy president in 1999. She is a member for the advisory board of the Melbourne University Centre for Employment and Labour Relations Law. Before joining the commission, Acton was a senior industrial officer with the ACTU.

[17] This was examined at considerable length in my 1998 report to the Labour Ministers Council on *The Case for Further Deregulation of the Labour Market.*

[18] Employees are protected under the common law and ordinary contracts and criminal legislation. There are also many bodies which provide advisory services on employment opportunities. As happens in the UK, and in lieu of tribunals, arrangements could be established to assist employees in disputes with employers.

[19] Labour Mobility, Australia, Feb 2010, Cat No 6209.0

[20] Unions are not mentioned in the legislation but "industrial associations" and "bargaining representatives" are.

the right to engage in good faith bargaining and to take industrial action in certain circumstances, the right of employees to wages and conditions set by FWA under a system of awards that also reflect ten national employment standards.[21] Some will say that these tests are simply applying the legislation passed by Parliament. But while there is much detail in the legislation, there is also much scope for interpretation by tribunal members.

This is vividly illustrated by the FWA full bench decision in a case involving a proposal by the Transport Workers Union for an enterprise agreement with JJ Richards and Sons, which had a garbage collection contract with Canterbury City Council. The union sought to have the company engage in good faith bargaining. This provides that, where a business has union members and majority support for a determination to compel bargaining, a failure to agree to bargain may then lead to the tribunal requiring negotiations. It may also lead to the authorisation of strike action if that receives majority support, although strikes cannot be taken or threatened unless and until there has been a period of good faith bargaining and – here is a classic example of how the FWA is given free rein - the FWA must also be "satisfied that each applicant has been, and is genuinely trying to reach an agreement with the employer of the employees to be balloted".

In the Richards case a *majority* of the tribunal found that the union was "genuinely trying to reach an agreement" even though the union had done no more than send a letter to the company seeking an enterprise agreement. As it had received no claim, the company had refused to bargain with the union and the union had not sought a majority support determination to compel bargaining. The minority Commissioner took the view that bargaining had not commenced or, alternatively, that there were insufficient particulars in the union's letter to decide that it was genuinely trying to reach an agreement.

This important decision in December[22] has now led to follow up action by unions. The same Transport Workers union is threatening to take industrial action against Qantas even though it too had not lodged a claim. Despite this failure the tribunal has given the go-ahead for strike ballots. At a time when Qantas says it is in financial difficulties, the union is attempting to force Qantas to reduce its usage of cheaper casual labour. The FWA cave-in is another example of how it makes decisions that protect unions from competition. Hopefully, the appeal by the Australian Chamber of Commerce and Industry will produce a mood change.

What effect have the regulatory requirements and interpretations had on the labour market itself? General developments in the economy have naturally exerted a major influence, although the Global Financial Crisis did not lead to as large a rise in the unemployment rate as I (and some others, including Treasury) had expected. Even so, from early 2008 the unemployment rate rose by 45% from about 4% to peak at 5.8% about mid 2009, and the underutilisation rate increased from about 10 to 13.5%. Although it shows the extent to which

[21] Covering maximum weekly hours of work, requests for flexible working arrangements, parental leave, annual leave, personal/ careers and compassionate leave, community service leave, public holidays, information in the workplace, notice of termination and redundancy, and long service leave.
[22] The decision is the subject of a further appeal.

available labour are either unemployed or under-employed, this underutilisation rate is often overlooked as an indicator of the functioning of the labour market.[23]

Also completely overlooked is the slowness in the reduction of the underutilised over the 20 or so months since the downturn peak in mid 2009. The unemployment rate itself has fallen to about 5% but that only takes it back to where it was in early 2006. Similarly, although the underutilisation rate[24] has fallen to about 12% that takes it back to only early 2005 levels. Moreover, the number of long term unemployed has actually increased more than 70 per cent since achieving a record low in mid 2008, and the youth unemployment rate remains at levels reached at about the GFC peak. Although lower than the immediate post GFC peak, the youth under-utilisation rate remains surprisingly high at around 25 per cent (it was below 20 per cent in early 2008).

How to explain this marked slowness in the return to pre GFC levels of low unemployment and underutilisation? It can scarcely be explained by the lack of government stimulatory action or by sluggish economic growth: indeed Reserve Bank Governor Steven recently spoke of Australia as experiencing a "boom".[25] Perhaps there has been some relaxation in the administration of access to unemployment benefits. But a serious question remains as to whether there are major deficiencies in the operation of the labour market under the FWA arrangements. Put it this way.

The current position is that Australia has an underutilisation rate that is almost 12% and represents over 1.4 million people. These people are underutilised because they are unable to find either employment or sufficient hours of work. But why can't these workers obtain the employment in circumstances where the demand for labour is said to be strong?

It must be relevant that over half of the underutilised people are relatively unskilled workers in sectors where wages and conditions are predominantly determined by awards made by the FWA.[26] These people therefore face a situation in which there is no labour market as such in which an employer and an employee could legally agree to work under conditions which are below award levels that have been "generous". This is particularly relevant to the minimum wage award, which the FWA increased in July 2010 by $26 and 69 cents per week, and which (surprise, surprise) was only 31 cents less than sought by the ACTU – and less than $2 lower than the ACTU seeks this year.

This minimum wage supposedly looks after "the low paid" but in reality it acts to prevent many unskilled from getting a job. Most recipients of the minimum wage of almost $30,000 per annum are not in the lowest income quintile and are not poor on any proper assessment. And even if they were that should be a matter for the government to handle directly through

[23] The underutilisation rate shows the extent to which available labour is underutilised –either because they are unemployed or are under-employed. The latter are part or full time workers who want to work more hours and are available to do so in the next four weeks but not in the week which tests employment availability for measuring unemployment.

[25] "The Resources Boom", Glenn Stevens, Governor, Reserve Bank, Victoria University Public Conference, 23 Feb 2011. Reserve Bank Bulletin, March 2011.

[26] These sectors are accommodation & food services, retail trade, administrative & support services and health care & social assistance.

the social security system. We now have a ridiculous situation in which those on the dole receive just over $12,000 a year but are unable legally to become employed by agreeing to work for a wage less than the minimum of $29,635. Equally absurd is that the FWA makes minimum decisions in awards up the wage scale for 1.4 million workers, most of whom could well bargain for themselves.

This leads to the question of what policy changes might help add to the supply of labour at a time when increasing shortages are forecast. In an astonishing speech on 1 February,[27] Prime Minister Gillard put forward her solution as follows:

"Friends, we look with particular care and concern on the large number of working-age Australians, *possibly as many as two million,* who stand outside the full-time labour force, above and beyond those registered as unemployed"[28] (My emphasis).

There are important questions left unanswered in this statement. For one thing Gillard's possible two million additions to the labour supply do not come, she said, from reducing the unemployed, which seems an acceptance that the government is unlikely to get the unemployment rate down to levels reached under the Howard government. An important source envisaged by Gillard is some 800,000 from *outside* the labour force, including discouraged workers. But while there *are* about 5.7 million people *not* in the labour force,[29] how many of these are going to be brought into employment without changes to FWA regulations and awards?

Of course, following the review undertaken by "experts" on modernising awards we now have a modern award system that, by reducing the number of awards from about 4,000 to about 120, has supposedly determined some kind of "correct" wage structure on an industry basis. But the award changes were decided by the AIRC, the body[30] least suited to determining wages on an economic basis. The AIRC has consistently given weight to what are described as work value assessments where the tribunal members assess the value of your work with only limited regard to what the market situation is.

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[27] Address to Committee for Economic Development.

[28] Gillard went on to specify that "around 800,000 are in part-time jobs but want to work more. Another 800,000 are outside the labour market, including discouraged job seekers. And there are many thousands of individuals on the Disability Support Pension who may have some capacity to work". While there are likely to be many of the 800,000 or so on the DSP who are not working but have a capacity to work, what changes in eligibility might be made to the DSP to bring about a significant addition to the labour supply? Imagine the ridicule to which the leader of the opposition would have been subjected had he made a similar statement!

[29] The ABS publication on *Persons Not In The Labour Force* (Cat No. 6220.0, March 2010) does include 823, 400 who want to work and are available to start work within four weeks. But over 4 million say they do not want to work.

[30] The AIRC had failed at two previous attempts. The AIRC has consistently given weight to what are described as work value assessments where the tribunal members assess the value of work with only limited regard to what the market situation is.

In the view of a former member of the Fair Pay Commission, Professor Judith Sloan, the process of modernising awards has "proved to be extremely complicated and damaging".[31] She points to the pre-conditions set by Gillard (when Minister) that no employee would be made worse off and the impossible-to-meet associated undertaking that no employer should face additional costs, not to mention the difficulty employers have faced in determining which award applies to them. Given the variability in the economic importance of various sectors, it is almost inevitable that awards determined by a set of bureaucrats will quickly get out of date and require change. In short, for awards to work they will have to be adjusted to market conditions that could have been used in the first place.

The now infamous Terang case highlights the problem with the regulatory approach. That case involved the employment under the "modern" retail award by the Terang Cooperative of school students for two hours a day after school. Bad luck - the award specified a minimum of three hours employment and Vice-President Watson interpreted the legislation as not, in the circumstances, allowing the award to be varied outside the 4 yearly review period. An appeal by the National Retailers Association and Master Grocers was opposed by the relevant union on the strange ground that not having three hours would undermine the safety net applying to all casual employees. The Full Bench dismissed the appeal, apparently on the ground that Vice-President Watson was correct in deciding that the legislation did not allow the award to be varied even though the FWA seems to allow variations to be made "if necessary to achieve the modern awards objective" (Section 157). FWA President Guidice criticised the weakness of the evidence adduced by the employers and complained that "there was no evidence at all in relation to the rest of Australia". He indicated, however, that an application to vary the award in regard student casuals might be considered.

While such an application is apparently being made, this case again illustrates the convoluted nature of the considerations taken into account in award issues, the attention given to a particular interpretation of the legislation suiting the tribunal, and the apparent disregard of the interests of the employer and the student employees. Given the scope for interpreting the legislation to suit circumstances, why couldn't those interests have been dealt with at the start?

A similar situation seems to exist in the case of the unfair dismissal provisions.

These provide that a dismissal is unfair if it is "harsh, unjust or unreasonable". Although the legislation sets out seven criteria for considering whether there is "harshness" etc, in practice this means that members of the tribunal have considerable discretion to decide one way or the other. This was certainly the situation when in January this year Commissioner Gooley decided that an employee of large food manufacturer Goodman Fielder had been unfairly dismissed after urinating into a drain in a loading bay containing packages of food. This decision involved deliberations extending over 14 pages before finding that the dismissal was "disproportionate" as well as harsh etc, that Goodman's was required to reinstate the dismissed employee, and that it should be subject to an order of continuity of the employee's

[31] See her article on "Evaluating the Fair Work Act" in Policy's summer edition, p 20.

service as well as payment of remuneration lost while not employed. The Commissioner took no notice of the view of the manager that he no longer had confidence in the employee.

With unfair dismissal decisions like that just outlined, it is little wonder that since the FWA became law the number of claims has skyrocketed. In her Policy article,[32] Professor Sloan points out that in 2009-10 claims for unfair dismissal reached nearly 12,000, an increase of nearly 50% on the previous year, and three quarters of the cases that were conciliated required a cash payout. Sloan also refers to an FWA decision involving reinstatement despite the employee's violation of occupational health and safety regulations. Sloan generously characterises the FWA decision to which she refers as an "interesting interpretation."

Conclusions

Since the GFC unemployment and underutilisation rates have fallen only to levels reached in the 2005-06 period of the Howard government despite the "boom" conditions being experienced by Australia. Of particular importance are the high underutilisation rates for youths, the increase since the GFC in long term unemployed, and the relatively high underemployment rate amongst lower skilled workers. These developments suggest the increased regulatory arrangements are already having adverse and unfair effects on the capacity of such workers to obtain jobs.

The performance of the FWA tribunal to date also indicates that it has assumed the unfair role of its predecessor as a supposed protector of workers' rights and as a body that gives credence to the perspective conveyed by trade unions. With its liberal interpretation of the legislation, the FWA tribunal has extended the regulatory coverage of the legislation. This has led to an increase in trade union activity despite the fact that union membership has considerably diminished in recent years and is now down to 14 per cent of private sector employees and 20 per cent of total employees. The recent announcements by the new head of the Australian Building and Construction Commission, and the Ombudsman, of inquiries or audits into sham-contracting illustrate further possible reductions in competition in the labour market. Unless corrective action is taken, a further increase is likely over time: government institutions with specific responsibilities tendency to expand their roles.

The outdated regulatory structure not only adds to employers' costs but acts as a deterrent to employment and limits the scope for the improved productivity that was claimed by then Minister Gillard to be the main reason for the FWA. As such, its continuation operates unfairly and against the public interest.

[32] Ibid, p 20-21