

Current Workplace Relations Environment: Positives and Negatives

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“Statesmanship”: the preservation of WorkChoices in Fair Work Australia?

[1] I retired from the AIRC in mid-2004. Reviewing the workplace relations environment in perspective, I was struck by a parallel with Edmund Burke’s widely quoted definition of statesmanship. The essence of the Burkean tradition was summarised in a recent piece by David Marquand. It demands a combination of a “disposition to preserve” with an “ability to improve” plus a balance between them. Marquand paraphrased the balancing task before contrasting contemporary demands for statesmanlike qualities:

Headlong change, based on a priori theorising, could lead to disaster, but so could rigid adherence to the legacy of the past...

One of the great questions of the age is how to protect the precious filaments of civil society from the pressures of resurgent capitalism, hyper-individualism, resentful populism, family breakdown and state encroachment..... The feverish social engineering beloved of old Thatcherite and New Labour policy wonks is part of the problem, ... lasting social and cultural changes have to grow from the bottom instead of being imposed from the top”¹

[2] An appropriate balance between a disposition to preserve and an ability to improve seems to me to be a fair measure against which to test the quality of Australia’s industrial governance. In what I have to say, I will apply that measure generally to both the WorkChoices and Forward with Fairness, (FwF), models of industrial governance and social engineering. In doing so, the experience of the registered clubs industry will be related to that context, including some settings in the new industrial relations system that particularly affect it; some deficiencies in the proposed system in its protection of employment rights will then be touched upon; I will conclude with an outline of a quality assurance, risk management process now being developed to ensure that participating work places are being conducted in conformity with a reasonable balance between employment rights and operational efficiency.

The WorkChoices regime and perceptions of statesmanlike balance.

[3] The WorkChoices regime was a delayed implementation of the 1992 Howard *Fightback* model, a local version of Margaret Thatcher’s policies. The policy frameworks were driven by the common socio-economic theories of neo-liberal or neo-conservatism. Built around principles of unfettered free markets, individualist before collectivist values, self-interest and the maximisation of profits, the policies based upon them give priority to enhancing productivity to allow benefits to *trickle down* especially through added employment.

[4] WorkChoices renounced any intention to preserve elements of the 100 year old arbitral award hybrid system it displaced at Federal and State levels. The durability and resilience of that system was no accident. It was a by-product of a complex institutional alloy. Relevant constitutional powers were interwoven with State and Federal checks and balances, compromises and dependencies between industry, union and governmental interests; all more or less veiled behind the public face of the so-called independent umpire, the industrial tribunals. The system had been developed since Federation but recently restructured to accommodate less centralised enterprise bargaining processes. In 2005, the entire edifice was pejoratively dismissed for being a labyrinth of *too many rules and regulations*, being *adversarial* in character and inconsistent with the flexibility appropriate to a modern market economy.

[5] Far from preserving the protectionist collectivist values and processes integral to the arbitral system, WorkChoices sought to obliterate them. The achievement of that overall objective required a fundamental and revolutionary step although it was misrepresented as “evolutionary”. The machinery of industrial governance was placed under direct government control. To ease the impact, transitional measures, many of them still on foot, operated to dilute and obscure pre-WorkChoices awards and industrial instruments as sources of employment benefits. Other measures operated to substitute and encourage wherever practicable agreements made with individual employees without union involvement minimising collectivist dynamics and tendencies in workplaces.

[6] McCallum has supplied a concise summary of the intended impact of Workchoices:

By elevating individual agreement-making over collective bargaining, the Work Choices laws sought to set at naught the imbalance of power between employers and their employees. Instead, the laws enshrined individual agreement-making and even increased the bargaining advantage of employers by denying employees remedies for unfair dismissals.... Even where employees were permitted to bring unfair dismissal proceedings, employers were given the power to mask their terminations in the garb of operational reasons so as to defeat otherwise meritorious claims. Collective bargaining was permitted... provided that it is voluntary and strictly confined to single enterprises. By allowing individual workplace agreements to trump collective agreements, it was hoped that collective bargaining would gradually diminish as an individualised workforce took centre stage in Australia.ⁱⁱ

[7] WorkChoices got the balance between preservation and change wrong. The failure to preserve treasured elements of the past system was not accepted by workers. Their displeasure about decreased security in employment and uncertainty of entitlements was not washed away by whatever benefits trickled down; resentment grew until it could be vented electorally, bringing disaster for the political sponsors of WorkChoices.

[8] From the other side of employment relationships, employers welcomed increased powers to use labour more flexibly, to cut costs and especially to be freed of restrictions when firing employees or downsizing. But many also were reluctant to use the new powers. According to an Australian Human Resource Institute (AHRI) survey in 2007, a large majority of employers covered in the sample found no need to take advantage of the increased powers made available to them by WorkChoices.ⁱⁱⁱ Of course, prudence and the need to retain staff in a tightening labour market, favoured delay in departing from familiar methods and conditions.

[9] The experience of registered clubs and particularly those within the membership of Clubs New South Wales is confirmed in those findings. A study of that experience can be drawn upon for an insight into the pros and cons underlying the more conservative managerial approaches. To this audience and more generally, aspects of that experience indicate patterns and arrangements that are likely to be factors influencing the future environment. I will bring that experience into perspective before turning to the emerging industrial relations system.

Labour market flexibility and individual bargaining in the clubs industry.

[10] Registered clubs employ over 90,000 employees in nearly 5000 establishments throughout Australia. The club's industry has been defined to include associations that are licensed and provide to their members a wide range of services that include gambling, sporting social and entertainment functions. Generally, it seems accepted, and I will assume, that registered clubs are trading corporations for purposes of now bringing them within the scope of the federal industrial regulatory system. In NSW, Section 10 of the *Registered Clubs Act 1976* requires that to be registered, a club shall be a company within the meaning of the *Corporations Act 2001* or a co-operative under the *Co-operatives Act 1992*, or a corporation under another Act. A club holding a licence under the NSW *Liquor Act 2007* is a registered club for the purposes of the Act.

[11] Clubs are very diverse in type, size and employment numbers. Unless there has been a remarkable change in the overall pattern of employment in New South Wales over the last decade, which seems doubtful, 60% of clubs employ fewer than 20 employees, and about 6% employ 100 or more employees. Current figures for the club industry generally at national level indicate that casual employees accounted for 48.5% of employment, 33% were permanent full-time and 18.5% permanent part-time. A high degree of multi-skilling and multi-tasking is a characteristic of the clubs industry workforce. The New South Wales *Clubs (State) Award*, (the NAPSA), provides for a seven level classification structure across a range of indicative duties, including cooking and catering, stores control, waiting and dining

services, secretarial, accounting and supervision, event planning, responsibility and accountability for gaming machines, caretaking, security, health and service program delivery and related trade and technical skills.

[12] The impact of regulatory changes on wage determination and associated variables involved in the movement from a centralised to a decentralised system in registered clubs was the subject of two studies conducted by Dr. Jeremy Buultjens between 1996 and 2003. He surveyed a sample of about 450 clubs from some 1900 contacted in New South Wales and Queensland over that period. The material from New South Wales dated from 1996; the analysis comparing the two studies was published in 2004 before WorkChoices was on the horizon.^{iv} However, decentralisation, deregulation and the encouragement and enablement of various forms of enterprise and individual bargaining had been a feature of the New South Wales industrial relations system since 1990.^v I preferred at [9] to the later AHRI study human resource managers in Victoria concerning the use of options created by WorkChoices. It corroborates the hesitance of many managers about taking advantage of some of the opportunities presented to them.

[13] Buultjens conclusions about his findings point to what I believe to be a relatively constant disposition displayed by sections of Australian middle management:

*Decentralisation was supposed to provide significant benefits to Australian industry through allowing employers and employees to bargain at the workplace over wages and other employment issues..... This study has shown that despite the rhetoric of proponents of decentralisation there appear to be limited benefits for registered clubs, an important sector of the hospitality industry. Despite having the ability to negotiate for more collective and individual agreements, most clubs have remained within the centralised system, although there has been a relatively small increase in formal bargaining since 1997. Despite the lack of formal bargaining there is a high level of informal bargaining taking place. **Most of this bargaining uses the relevant award as a basis of the negotiations. This finding supports the research data that suggests a centralised system allows employers and employees to negotiate wages and conditions to suit an individual enterprise's needs and capacities.** Despite the high level of flexibility existing within the centralised system, club managers perceive that they are relatively restricted by awards. **In addition, despite the low levels of unionisation and trade union activity, especially in Queensland, club managers also feel relatively restricted by trade unions. The perceptions of club managers probably explain why governments, trade unions and other relevant stakeholders have supported the decentralisation of the industrial relations system.** However, given the findings from this study it may be appropriate to question the benefits of such a system.^{vi} (my emphasis).*

[14] Those observations must be kept in perspective with the expansion in managerial options associated with WorkChoices. Upon commencement of that scheme in March 2006 registered clubs in New South Wales would have been exposed to the federal system for the

first time. Dr. Buultjen's survey returns and interviews establish that registered club managers unequivocally valued work-time flexibility, functional flexibility and numerical flexibility options for managing their workforces. Certainly, Boards of Directors, sometimes through incompetence, inhibited managerial discretion about the exercise of powers available to improve flexibility. The expanded managerial options made available through WorkChoices were not within the scope of Buultjen's study. I am told that between 2005 and 2007, the incidence of AWAs under WorkChoices increased in the clubs industry; by last year, AWAs were estimated to have covered around 25% of employment by registered clubs in New South Wales. That circumstance points to a corresponding increase in managerial resort to the options created by WorkChoices. However, in the absence of detailed knowledge of the content of AWAs compared with formal and informal agreements in use prior to 2005, it would be unsafe to conclude that more than a gradual departure from the practices described in Buultjen's studies occurred.

[15] Anyone well versed in the transactional level of human resource management will not be surprised that employers would even now find an uneasy comfort in using the relevant award as a basis of negotiations. An industry wide classification and reward system may restrict employer discretion but it also restricts competitors. It affords a stable platform from which the normal aspirations of employees can be met. Moreover, an examination of the *Clubs (State) Award*, (the NAPSA), shows that formal agreement-making with individuals may have fostered a relatively high degree of "informal agreement-making". In that respect, Clause 11 of the NAPSA might properly be considered to be an important and relatively unique provision. Its substance has been broadly summarised:

Clause 11 of the award provides for a voluntary exemption agreement whereby the club and the employee may agree to provide the employee a wage of not less than 33% above the total rate for the work being performed from time to time in return that the following clauses of the award shall not apply: hours, overtime, Saturday and Sunday rates, rostered days off and public holidays. The clause provides for the parties to enter into a written voluntary exemption agreement by following the procedure set out in the clause.^{vii}

[16] In effect, subject to paying a premium of 33% above either the award rate for the individual employee's classification or, at a minimum, above the Level 4 rate, (\$644.30), the provision allows for negotiation around work-time flexibility requirements. The effect can be illustrated by using the facts of the case from which I extracted the summary of Clause 11. Taking the then Award hourly rate for a Level 5 club employee, the 33% Clause 11 total rate may be contrasted with the total produced by applying the award hourly rate to 38 hours

worked plus an RDO and penalties including Saturday and Sunday rates; on my recalculation of figures supplied, the result would produce a 15% margin of the Clause 11 exemption agreement rate over the award rate entitlement, or over \$90. That margin would have been sufficient to compensate also for approximately 4 ½ hours overtime at time and a half rates or about 3 ½ hours at double-time.

[17] I understand the voluntary exemption agreement provision was introduced sometime after 1996. However, it may have had a precedent of some kind in Clause 37 of the 1993 version of the award and even of the 1990 version to which I do not have access.^{viii} It appears to have been fairly widely used in the past and apparently is again being used relatively frequently. For a time, the take-up of AWAs reduced the incidence of voluntary exemption agreements; AWAs were more readily available and less likely to attract union participation. Those individual agreement precedents and the degree of resort to them demonstrates a characteristic of the registered clubs industry. A substantial degree of informal bargaining at individual employee level builds upon minimum award conditions. The voluntary exemption agreement provision has a close parallel, albeit less directory, in the *award flexibility agreements* provision that is to be a mandatory component of modernised awards.^{ix} Overall, the experience of registered clubs in New South Wales makes it likely that resort to forms of individual agreements and contracts building upon award conditions will continue to be at a significant and growing level. The incentive to maximise work-time flexibility without incurring significant added cost burdens will sustain efforts to find ways to use the most suitable available formal or informal agreements.

[18] Agreement-making with individual employees in clubs is by no means a peculiarity of the industry. “Individualisation” of binding employment conditions in the Australian labour market and workforce is a continuing employment market setting. All employment depends upon the existence of a common law contract. Such contracts are often the primary or sole source of conditions of employment for about 30% of the workforce. By end 2007 only about 5% of the workforce, 400,000 or so, were subscribed to AWAs.^x There is apparently bipartisan support at federal level for statutory segregation of “independent contractors” from industrial regulatory regimes, using the Corporations head of legislative power. About 1.9m people are said to be engaged under that form of relationship.^{xi} For the foreseeable future considerable scope will remain for the use of individual contracts to marginalise resort to collective bargaining in many workplaces.

[19] The Rudd Government’s action to scrap AWAs reduced the scope for new entries into individual industrial agreements with statutory force. However the legislation allows

employers the full term of extant AWAs to make suitable workplace arrangements for employees currently on AWAs. For new employees, until 2009 an eligible employer may resort to Individual Transitional Employment Agreements subject to a new *no disadvantage test*.^{xii} An ITEA passes the no-disadvantage test if the Workplace Authority Director is satisfied that the ITEA does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employee whose employment is subject to the agreement under any reference instrument relating to the employee. A reference instrument includes an assortment of relevant awards or agreements that would have bound the employment but for the operation of AWAs.^{xiii} It would seem likely that the no disadvantage test operating at present foreshadows the likely content of the proposed *Better off Overall Test* to be applied as a condition precedent to approval by the FWA of workplace agreements under the new FwF workplace relations system. Minister Gillard explains that test in terms that indicate approval of enterprise agreements under the new system will be dependent upon satisfaction that: *employees are better off overall by entering into the agreement*. The Better Off Overall Test will be applied *to ensure that each employee covered by the agreement is better off overall in comparison to the relevant modern award*.^{xiv}

[20] The abolition of AWAs and the strengthening of approval criteria to preclude industrial instruments undercutting minimum standard conditions will arrest the use of statutory individual agreements. Much of their appeal stemmed from the ability to deploy them to defeat protected award conditions and to preclude or discourage collective bargaining.^{xv} Under the new workplace relations system, although award flexibility agreements will be much more limited, employers who seek to discourage collective bargaining by other unions or groups of employees may find them useful for that purpose.

[21] There would appear to be a low incidence of collective agreement-making in the clubs industry. Of some 583 certified agreements classified within the AIRC's Hospitality and Accommodation industry, only 20 or so are readily identifiable as made by registered clubs. Buultjens' studies reported results consistent with the low level of formal enterprise bargaining:

At the time of the survey in NSW, no club had a registered enterprise or individual agreement, however approximately 28 per cent of club managers stated that they had an informal enterprise agreement in place. In Queensland, despite seven years of increased decentralisation, the level of informal bargaining was lower than in NSW clubs and the level of formalised enterprise and individual bargaining had increased only marginally. The level of enterprise bargaining in clubs was 17 per cent, and of these, only 7 per cent indicated that enterprise agreements had been formalised..... The

data indicates that formalised bargaining had increased only marginally over the seven years between 1996 and 2003.^{xvi}

[22] In his major work on the 1996 data for NSW clubs, Buultjens mentions that the RCA policy at the time was to discourage enterprise bargaining but adds several other possible reasons for the low incidence of it:

There may be substantial costs associated with negotiating formal agreements resulting in few additional benefits. The evidence suggests that there is already a high level of bargaining taking place at the workplace and that this is resulting in satisfactory outcomes for the sector. Another reason for the dearth of formal bargaining in the sector is the lack of management knowledge about the process. Many managers are unclear as to the differences between enterprise bargaining and individual bargaining.... A number commented that they did not fully understand what was required to undertake formal enterprise bargaining. Other managers suggested that their Board of Directors were either unable to understand the process or were against the introduction of formal enterprise bargaining into their club.^{xvii}

[23] The need for the Australian labour market to be sensitive to the demands for a competitive economy may now be taken as a “setting” for policy development. Effectively, this setting represents an almost insurmountable barrier to any policy that seeks to restore an industrial relations system that tilts the balance toward more rigid or uniformly applicable labour market outcomes. The independent contributions of Professor Ron McCallum and Joe Isaac when Work Choices was being assailed prior to the last election were compelling; each stressed that a socially fair industrial relations system needed also to be economically efficient.^{xviii} Of course, that view which I share, does not contradict the desirability of the industrial relations system operating to further an optimally fair balance between employer and employees.

[24] Against that background, for the clubs industry the relative success of voluntary exemption agreements might provide one hint as to the possible whereabouts of the statesmanlike balance between preservation and a capacity to improve. The formula contained a “rolled –up” no disadvantage test, albeit costly perhaps but simply and quickly applied. It remains to be seen whether and how well, the voluntary exemption agreement model can be accommodated within the modernised award currently being worked out for this industry.

[25] Conversely, several factors are building toward a significant growth in attempts to foster greater use of collective agreement-making in the clubs industry. Among others that could be cited are the level of employment in clubs, the low incidence of collective agreement-making up till now, the consolidation of the clubs industry within the federal

system and the relative disappearance of unions from visibility in the safety net provisions of the new workplace relations system. If unions are to survive, they will need to struggle to become visible through vigorously pursuing whatever options remain open for fostering their representative role and large workplaces. All those factors are likely to build union impetus toward collectively bargaining; there may also be advantages to club management in sponsoring forms of collective agreements.

Forward with Fairness and perceptions of statesmanlike balance.

[26] The test for balance between a disposition to preserve and an ability to improve can be applied with equal rigour to the FwF agenda. Much the same requirement to balance preservation and improvement. confronts the Rudd government. Unequivocally, it has chosen to preserve many of the settings from WorkChoices. For more reasons than one WorkChoices, although shorn of AWAs, is still largely intact and will remain so until most of the original transitional arrangements have expired. The reasons for failing to “tear up WorkChoices” are open to conjecture. When the policy was being framed, political expediency alone was sufficient reason for being long on rhetoric and short on substance that might frighten employers; now, despite the size of the Rudd government’s majority, its existence and survival depends upon a swag of marginal seats held but narrowly; and there is also the Senate. Even more important is a policy conviction along New Labour/Blairite lines that beds down with the political expediency served by not rattling too severely the cage of those most advantaged by the WorkChoices settings.

[27] Emeritus Professor Ron McCallum in a recent address about the “Rudd Labour Law Vision” contrasted three visions of industrial law and governance. He showed the traditional purpose of labour law to be to ensure fairness for labour by measures, (unions and arbitral tribunals among them), lessening the imbalance of power between employees and employers. He compared the Work Choices’ vision: individual arrangements between employers and employees delivering increases in productivity, hence AWAs; employees giving their loyalties to enterprises free from interference by trade unions or industrial tribunals, hence the limitations on unfair dismissal laws and union involvement in workplaces.

[28] Contrasting the Rudd Labor vision of labour law he stated:

It is more difficult to discern Prime Minister Kevin Rudd’s labour law vision. True it is that the transitional Act of last March has prevented the making of new AWAs; has re-introduced a “no disadvantage” test for collective bargaining; has commenced an award modernisation process, and has introduced a broader safety net of national employment standards. We have also been put on notice that the Industrial Relations Commission which has faithfully served the interests of working people is to be

abolished and replaced by a body called Fair Work Australia. However, much of the Work Choices edifice still remains. No alterations will be made to the anti-strike laws, to the right of entry restrictions, to the outlawing of pattern bargaining, and for the present no changes to the unfair dismissal restrictions.

It does appear to me that Prime Minister Rudd wishes to settle the labour law question, once and for all by gaining business acceptance for his rather mild changes, and through co-opting the trade unions and the former officials now in the Parliament to seek no further watering down of the Work Choices laws. If labour law can be “put to bed” in this manner, the Government can press ahead with social democratic reforms embodying social inclusion, and education revolution, high trust workplaces as did Tony Blair in Great Britain.^{xix}

FwF’s mild changes: preservations, timetables and ethical abandon of spilling officeholders.

[29] It can fairly be said that FwF seems more disposed to preserve the WorkChoices model than to revive labour law as the socially essential instrument by which to improve the balance of power between employers and employees. Details of the proposed legislation to implement the package are now being released through Fact Sheets.^{xx} It is already manifest that Rudd Labor will maintain the fundamental shift made by WorkChoices to place the machinery of governance under direct parliamentary and executive control. The AIRC is to be abolished but not until it has completed the task of award modernisation.

[30] That task is being undertaken under a ministerial request within the prescriptive framework set out in Part 10A of the amended *Workplace Relations Act 1996*, (the WRA). O’Brien makes the valid point that the *Minister’s request mutates into Ministerial “directions” that preclude the Commission from being at liberty to exercise general discretions of a kind normally associated with dispute settlement, where such discretion would be inconsistent with or contrary to the directions.*^{xxi} Award modernisation is a demanding task. It requires the AIRC to balance conflicting interests and relative power positions associated with employment across Australian industry generally. Yet the holders of the high public offices to whom the task has been entrusted are manifestly denied the security of tenure associated with holding those offices. The AIRC is constituted of officeholders whose continuance in office of any kind has been deliberately left in a vacuum.

[31] That juxtaposition amounts to a serious and politically unconscionable disregard of the importance of maintaining the appearance of independence of industrial institutions. Minister Gillard seems to consider it proper to generate public direct formal and informal direct and indirect representations about the merits of matters entrusted to the tribunal.^{xxii} The most recent instance seeks to counter the provisional extension of redundancy entitlements to employers with less than 15 employees. No-one could object to the government having a

view about provisional decisions by the Award Modernisation Full Bench; nor, presumably could there be objection to a revised request/direction being publicly issued. It is objectionable to keep in occupational limbo the office bearers responsible for dealing independently with the merits of the governmental view with which they are being belaboured. In my view, such conduct is administratively unethical and should not be allowed pass without criticism and censure.

[32] If completed, the FwF agenda is to result in a “*new workplace relations system*” to be fully operational by 1 January 2010. The new system will be built on a safety net of 10 legislated National Employment Standards, (NES), for all employees; a modernised award system applicable to employers and employees at specific industry and occupational levels; an enterprise-level collective bargaining system; unfair dismissal laws; and a new institution, Fair Work Australia, (FWA), to be the source of advice and support on all workplace relations issues and enforcement of legal entitlements. The NES were provided to the AIRC on 16 June to assist with award modernisation. Exposure drafts of modern awards for priority areas were published on 12 September 2008; each draft includes the model individual flexibility agreement clause issued by the Award Modernisation Full Bench on 20 June 2008. A process established to receive feedback on draft legislation should be completed by 17 October 2008; a *Substantive Bill* will be introduced to Parliament by the end of this year to be considered by a full Senate Committee enquiry. Key elements of the new system including the bargaining framework, unfair dismissal and associated protections will commence on 1 July 2009, following passage of the Substantive Bill.

[33] These *mild changes* are yet to be tested against the statesmanlike balance test I have canvassed. Probably the only effective test will be objective assessments of endurance and relative success. In that respect, probably the electorate has a casting vote. In the meantime for the purposes of today’s discussion, it is productive to explore selected details of the operation of the industrial governance system as it is in force or likely to develop. I will touch upon some suggestions about problems and solutions that might have strengthen FwF’s achievement a fair balance in employment. I will conclude by providing an outline of an approach that might be explored by responsible employers, their employees and unions as an available option. It would involve an accreditation process built around standards and principles intended to ensure that workplaces develop along lines consistent with optimal productivity and a fair balance of rights and obligations across the employment relationship.

Modernised Awards and the Clubs industry

[34] It is readily apparent that the minimum classification rates in the Clubs NSW NAPSA are comparable with those established for the six level classifications proposed in the proposed modernised toward, the Exposure Draft *Hospitality Industry (General) Award 2010*, (the Exposure Draft). As a matter of broad impression, the NAPSA classifications cover a perhaps marginally wider range of skills across a relatively more diverse industry structure than those implied in the Exposure Draft Classification Definitions. For the NAPSA classifications, there is a relatively explicit linkage with hospitality industry training competencies under guidelines issued through Tourism Training Australia. Unlike the Exposure Draft award, the NAPSA makes reference to prescribed standards of training.^{xxiii} But training is not included in the matters allowed by Section 576J of the WRA to be covered in modernised awards; the Exposure Draft imports reference to training qualifications through a definition of *appropriate training* but creates no rights or duties in respect of access to it.

[35] One issue of concern to Clubs NSW that may illustrate aspects of the emerging system is whether there should be a separate modernised award for the club industry generally. A case has been put for a *single national clubs industry award*. The AIRC has ruled that the licence clubs industry is part of the hospitality industry but recently deferred consideration of a question it had posed at the outset of the award modernisation exercise:

At the level of the safety net, it may be difficult to justify the creation of four separate modern awards as the peculiar circumstances of each part of the industry could be dealt with satisfactorily by minor modifications to some of the terms of one industry award.

We have drafted a single award for the hospitality industry, although we have deferred consideration of whether licensed and registered clubs.... should be included within the scope of that award. We have reached the provisional view of the nature of work in the hospitality industry and the terms and conditions of employment in federal awards and NAPSAs do not provide any insurmountable obstacle to the making of a single modern award, being a safety net, in the hospitality industry....

*We have decided to defer consideration of award coverage of the licensed and registered clubs sector. **It may be that the sector could be included in the proposed hospitality industry modern award, with or without some special conditions and/or appropriate transitional provisions.** The different types of clubs within the sector in different activities undertaken by them raise issues of potential overlap of events staged by clubs and grounds management and maintenance.^{xxiv} (My emphasis)*

[36] The grounds relied upon to contend for a single clubs industry award are predominantly concerned with the size, diversity and uniqueness of the industry and with differences between the patterns and categories of employment in it compared with other sectors of the hospitality industry. Considerations of coverage and identification between significant players for particular modernised awards are important from the viewpoint of the industrial players and interests concerned. Such considerations are likely to be less persuasive

to an AIRC Full Bench directed to have regard to the desirability of reducing the number of awards operating in the workplace relations system.^{xxv} I would suggest that the strongest elements in making good a case might be derived from factors demonstrating that *peculiar circumstances of the clubs part of the industry* have been dealt with by terms in NAPSAs. Presumably, to be relevant, any such terms would need to be within *matters allowed to be included in modernised awards under Section 576J* of the Act, but which are not able to be dealt with by *minor modifications of the terms* of the Exposure Draft.

[37] On my own initiative I compared in a cursory manner the NAPSA with the Exposure Draft. My impression is that *peculiar circumstances* might need to be worked up from the distinctive provisions of:

- the classification structure and related definitions;
- Clause 11, *Voluntary Exemption Agreements*, subject to the provisions being able to get past the AIRC's rationale for the standard Award Flexibility Clause proposed for Clause 7 of the Exposure Draft;
- Clauses 40 and 41 dealing with *Prescribed Training* but that topic seems not to be a matter that is allowable in a modernised award;
- Clause 44 dealing with general conditions in the nature of what used to be called *Amenities of work* such as a staff dressing room, but again that is not manifestly a matter that may be dealt with in a modernised award;
- Clause 45 B, dealing with *secure employment* and the imposition of occupational health and safety procedures and risk management controls on labour-hire or contract businesses employing staff performing work or services normally performed by employees; but even if this provision could be found to pertain to the relevant employment relationship, occupational health and safety is not a matter that can be the subject of terms in a modernised award;
- Clauses 50 and 51 relating to Termination of Employment and severance pay on redundancy: both matters that may be the subject of terms in a modernised award albeit the clauses in the NAPSA reflect a higher standard than that set as a safety net in the Exposure Draft;
- Clauses 27, 28 and 45A dealing with what might broadly be described as *rights associated with industrial representation of employees by unions*, specifically authorised stop work meetings, right of entry to union officials and deduction of union membership fees: so far as I can discern, none of these subject matters are within the scope of terms permitted in a modernised award pursuant to Section 576J of the Act

and some continue to be prohibited from inclusion in “post-reform awards” by reason of extant provisions from the WorkChoices chapter of the WRA.

[38] Two conclusions might be drawn from the very cursory analysis I have just made. Lest I should be accused of offering entirely unsolicited advice, I shall pass over the first possible conclusion. To those who may be concerned, I offer a suggestion. Do what you can to support the case for separate single modernised award by refining as many *allowable peculiar circumstances* as can be mustered from every relevant NAPSA or related industrial statutory provision across the full breadth of the registered clubs industry. In that exercise, provisions, if any, which may have originated from arbitrated rulings of State tribunals, and which are worth salvaging, could be persuasive of the need for separate treatment.

[39] Passing right along to the second possible conclusion, my analysis brings into relief a list of things that some connected with the Clubs NSW NAPSA might regard as holes and omissions in the safety net of minimum conditions being erected. Modernised awards and the National Employment Standards upon which they are to build provide:

- as yet, no clear articulation of which, if any organisations of employees or employers or bodies representative of them will be within the application of the Award. The Award Modernisation Full Bench has reserved its position on this question.^{xxvi} The status that legislation will give to a party bound by a modern award is still unknown as is the formal role awards will have in relation to the union rights of representation more generally. The issues about application of modern awards to particular organisations and/or parties may be pregnant with significance for the future of all representative bodies.^{xxvii} That set of issues, one commentator called it *the elephant in the room*, poses many intriguing questions. Section 576V, allows modern awards to bind organisations. Given the character of the constitutional basis of modern awards, it is open to conjecture why it was necessary to bind organisations at all.
- no safety net about reciprocal training requirements;
- no industry or workplace specific security of employment protection against outsourcing;
- no occupational health and safety duties of any kind or capacity to intervene by the industrial tribunal;
- reduced visibility and dilution of collective representation by allowing only indirect enablement of unions or of the collective voice of employees in industrial representation. Even the dispute resolution procedures reflected in the proposed standard clause of the Exposure Draft do not envisage a union as a direct party to a

dispute. A dispute specific appointment of the organisation must be made if it is to accompany or represent a party. Section 513 of the WRA, (still extant from WorkChoices), requires that dispute settlement provisions for pre-reform awards efface reference to unions; it is debatable whether that degree of effacement of the representative role of organisations should now be carried over to the dispute settlement processes of modern awards.

- no direct identification of named unions, or of employer organisations, as “parties” to industrial matters and disputes. The consultative award flexibility and dispute resolution procedures of the Exposure Draft identify no automatic process for accepting a union as a standing representative of its membership to be covered by the modern award.

[40] Clause 7 of the Exposure Draft provides for a form of award flexibility by individual agreements to vary the application of the award concerning arrangements when work is performed, overtime and penalty rates, allowances and leave loading. An award flexibility agreement will operate as part of the award; if Section 349 (1) continues in force, the award and therefore the flexibility agreement will have no effect in relation to an employee while a workplace agreement operates in relation to the employee. The provision in Clause 7 of the Exposure Draft is relatively prescriptive; it requires that the agreement be confined to variation of the terms listed and not disadvantage the individual employee *by resulting on balance in a reduction of the overall terms and conditions of employment of the individual employee under the award and any applicable agreement made under the Act... or under any relevant laws.* The resultant *no reduction in overall terms* test is similar in principle to the *no disadvantage test* for ITEAs; but it is markedly less comprehensive than the foreshadowed *Better Off Overall* test that will be a condition precedent to the approval of Workplace Agreements: in the latter test, the reference for comparison of conditions will be confined to modern awards and the NES. It may be worth emphasising that the modernised award flexibility provision is notably less explicit than the relatively simple but perhaps expensive formula of the current NAPSA that sets a 33 per cent premium above **the award classification rate** for a work-time flexibility voluntary exemption agreement.

Measuring FwF against industrial fairness standards.

[41] The character of the industrial relations system that will replace WorkChoices should not be lost to sight behind issues that are of topical interest in the clubs industry. These days of my turmoil raise with an added force the great question of how to protect precious filaments of civil society from the pressures of resurgent but never more dominant capitalism. One can look for answers to that question in the Rudd Government's legislative package no less than one did with WorkChoices. The historic importance of the legislative answers now being developed to *questions of fundamental significance of the future of Australia's industrial relations, its institutions, labour market and society* are of historic importance.^{xxviii} We face what Margaret Gardener has called a "Higgins" moment in Australian industrial relations:

"when we can negotiate an outcome that draws on our history but can respond flexibly to the future; when we can lay down the bases of a system that should serve for many decades".^{xxix}

[42] The context of the opportunity has been concisely expressed by Riley and Sheldon:

This moment comes after nearly two decades of employer association activism that has successfully influenced governments of both persuasions in favour of a national industrial relations system far more decentralised and much more focused on the wants of individual employers. During the last 11 years too, unions have faced marginalisation and de-legitimation through policy, law and official discourse. The not unexpected outcomes include an industrial relations reality that is far more individualised, unprotected and insecure for large sections of the workforce. In broad terms, these are some of the experiences and trends that the Australian electorate voted against. So, where will the legislative process go now?^{xxx}

[43] Those lines of questioning have stimulated thought over and the past several years about the element of a fair economically efficient industrial relations system. Influenced by that work and after extensive consultation the Australian Institute of Employment Rights defined at the essential elements of fairness at work. The resultant Australian Charter of Employment Rights drew upon Australian industrial practice, the common law and international treaty obligations binding on Australia to frame a statement of the reciprocal rights of workers and employers in Australian workplaces. The AIER aims to promote the recognition and implementation of the rights of employees and employers in a cooperative industrial relations framework. It has a tripartite structure based on that of the International Labour Organisation, representative of unions, employers academics lawyers and the general public. A copy of the Charter is an attachment to this paper.

[44] Among the intended purposes of the Charter and work associated with it was the provision of an objective template or measure against which to test the fairness and adequacy

of employment rights and duties at both workplace and national level. By reference to that measure FwF is a welcome improvement on WorkChoices in many respects. Most of those changes were touched upon in the passage quoted from McCallum at [28]. By the same measure, FwF has serious deficits. The AIER has issued a brochure drawing attention to several of the more significant sets of problems and issues, proposing solutions.^{xxx1}

[45] Those issues or rather, my interpretations and elaborations of them, will be sufficient to explain the grounds for concern about .

FwF’s Strong and Simple Safety Net is too rigidly strung between populist poles and has big holes in it.

[46] The quality and durability of the regime for fair minimum standards must be viewed in perspective with the NES, modernised awards, collective and other work agreements and the institutional machinery adjustment and enforcement of entitlements. Overall, it falls short of the fair minimum standards and machinery of essential to ensure fairness across the labour market. Not every worker will be entitled under the NES, because “employees” covered will not include workers engaged under disguised employment arrangements^{xxxii}; some employment will not be caught within the federal system; some elements of the NES standard appear to be only tenuously enforceable unless a comprehensive reciprocal obligation of good faith is introduced or a dispute resolution process is strengthened. Minimum standards, other than it seems wages and conditions in modernised towards, will not be maintained *by an impartial tribunal independent of government.*

[47] The regime of minimum standards, at its heart, is Parliament’s decree. The NES and the associated modern awards will be subject to the fluctuations of the political cycle. Instead, Parliament’s role in the minimum standards regime should be to lay the foundations and then to leave the detail and adjustment to an independent tribunal. Otherwise, the vagaries of the competitive populism that is characteristic of so much contemporary political debate will destabilise, undermine or subordinate the standards established, making them mere factors in the partisan struggle. In 1999, I presided over the *Junior Rates Inquiry*.^{xxxiii} The history of Parliamentary involvement and debate about that topic is illustrates an instance of a dismal quality of input and decision-making about industrial issues by parliamentarians. Of course, the power of Parliament to legislate it is undeniable; but the process through which that power is exercised could be structured to ensure that the value the electorate to demonstrably attaches to maintenance of the role of an independent industrial umpire is recognized and respected. That could be done in a manner that would inhibit, or at least

expose to sanction, the legislative conduct of those who would devalue the worth and function of that uniquely Australian institution.

FwF's protection for security of employment is delayed, tenuously available and falls short of the fairness standard.

[48] Protection of every worker against unfair, capricious or arbitrary dismissal without valid reason relevant to the worker's performance or the operational requirements of the enterprise and *affecting that worker* is demanded of Australia by ILO Conventions. FwF will not move from the low tide mark of the WorkChoices protections until 1 July 2009. The *new fair dismissal system* will ensure that employees who have been dismissed because of a business downturn, or because their position is no longer needed, cannot bring a claim for unfair dismissal, provided the redundancy is genuine^{xxxiv}. If, as seems to be the intention, that statement of policy is to be applied to all employment under the scheme, it will contradict long established fairness principles. It are almost four decades, tribunals have required that the selection of individual workers for redundancy be made where practicable by reference to declared criteria applied objectively; and, where individual performance is the criteria, have associated due process protections with the establishment of a valid reason for dismissal.^{xxxv} The proposed *Fair Dismissal Code for small businesses*, (those with fewer than 15 employees), deems a dismissal of an employee with at least 12 months service to be fair if the employer follows the proposed Fair Dismissal Code. On information available to this point it would appear that protection of employees would fall well short of meeting the concrete requirements of the ILO standard. On what is disclosed of the new process it seems likely that often it will not be practical for an employee to effectively pursue a claim. Belinda Smith has shown that judicial interpretations now operate to *fatally frustrate* existing protections against unlawful termination of employment or discrimination in employment for prohibited reasons.^{xxxvi} The new system will not address the problems identified.

FwF's prescriptive regulation will circumscribe agreement-making and bargaining to a degree inconsistent with maintaining a fair balance.

[49] The commitment in the FwF policy Fact Sheets to maintaining a pre-election commitment to institute an obligation on parties to bargain in good faith is welcome. Less welcome is the requirement that whenever an employer refuses to bargain, employees or their representatives must first ask Fair Work Australia to determine if there is majority employee support for negotiating an enterprise agreement. A worker's right to bargain collectively is contradicted if the bargaining process is to be surrounded with controversy. Technical

requirements have in the past been used to divide workforces, to frustrate bargaining processes, or to avoid them. Disagreements over exercise of the right to bargain collectively, whether about bargaining unit, the use of unions or elected spokespersons, or about authority to bargain, should be reserved to the industrial tribunal to sort out without detailed legislative prescription. Complex and inflexible procedural requirements should not be part of the legislative scheme: the industrial umpire, rather than the players or legislators should control the process for resolving conflicts.

[50] The limitation of the content of bargainable matters and agreements to *matters pertaining to the relationship between the employer and the employee and the employer and any union to be covered by the agreement*, is unnecessary. Enactment of the limitation will contradict important elements of the right to collectively bargain and the rationale for it. The Minister defends that limitation by stating that the expression, *matters pertaining to the employment relationship* has been used for 100 years and brings with it established legal principles. That contention reflects a flabbergasting failure to give weight to the litigational nuisance and obtuse judicial caprice associated with that expression and its counterparts.

[51] True, the *matters pertaining test* has a history. It was a concept integral to the constitutional limits of industrial disputes about industrial matters under the head of constitutional power enabling the arbitration system. It became a sort of foundational brick wall. At various times the expression served to block jurisdiction being exercised about superannuation entitlements, reinstatement in employment, post employment rights, and matters such as apprenticeship. The reinstatement of it as a limit to bargaining content is tantamount to building a new brick wall against which to batter the heads of any employer or collective force enterprising enough to come up a novel negotiable term for the contractual relationship. Given the constitutional basis of the new workplace relations system in the corporations power, and its character, the right to bargain and agree is not constitutionally circumscribed. The parties should be left with freedom to choose to agree upon any matter that might lawfully be agreed upon in a commercial contract for work or services with the corporation. Only the most rigorously tested and necessary restrictions on that freedom of choice can be justified.

[52] I was among the advisers who endorsed the retention of the counterpart to the matters pertaining test in the legislative scheme implementing the Hancock Report. I and others involved kowtowed to a legal official's suggestion that it would be best to retain language

with which the system had become familiar. We were also encouraged to believe that retention of the expression would not restrict arbitral discretion because the High Court could be trusted to adhere to the liberal construction favoured by some of its then members. The advocacy of the current generation of employer interests should not induce a similar acquiescence to equally bad advice about the wisdom of retaining principles, the restrictive content of which owes much to the black-letter activism of the Barwick-Gleeson axis on the High Court.

[53] Similarly, FwF's proscription of pattern bargaining and its partial prohibition of multi-employer bargaining are too sweeping and effectively one-sided. There are occasions when multiple-employer bargaining is efficacious for all parties. Certainly, a dispensation for the low paid employment is needed. Franchises, related companies, and perhaps even dispersed but organisable entities like the clubs, may be well served by capacity to strike multi-employer agreements; an opportunity to apply for collective bargaining across a specific class of cognate enterprises should be allowed.

[54] A sufficient containment of illegitimate subject matter intruding into bargaining and agreement-making could be achieved by empowering the independent tribunal, on application, to strike out or and restrain action in relation to any subject matter determined to be contrary to public policy or the public interest having regard to the objects of the Act.

Freedom to associate for collective bargaining purposes should be less invisible in FwF's Standards and awards.

[55] Freedom to associate for collective bargaining purposes is a fundamental right elemental to the new system. Properly, the new system also contains some institutional arrangements that *recognize the reduced commitment of workers to unions*. The need to devise such arrangements does not justify maintaining measures and pressures against collective representation associated with the legislative scheme of Work Choices and its predecessor. As Gardener as cogently argued:

if unions can and should represent their members, then there must be arrangements that allow them to gain access to potential new members and to their existing members in order to understand their aspirations and grievances. Unnecessary restrictions in these areas are a practical repudiation of freedom of association.

The right of entry and related provision should be changed to link a worker's right to representation and to be represented to provisions about the union right of entry to workplaces. The legislation and related modern awards should require that facilities, including reasonable access to workplaces and an ability to post and distribute notices or

electronic messages from the union are available to ensure that unions can carry out their duties promptly and effectively.

Using the AIER charter employment rights as a tool for diagnosing the health of Australian workplaces.

[56] As Lisa Heap has pointed out, an intended purpose of the AIER's charter of employment rights is to assist businesses and employees to align stated employment values and management practice.^{xxxvii} The AIER is currently working on approach which will identify standards appropriate to particular rights. That is the first step toward a process that will assist workplaces to diagnose problems that are impacting on performance and set standards against which to train managers. The process would give employees and the unions a framework within which to articulate what is important to them in the employment relationship and what is missing in their own workplaces. The AIER would intend to promote use of its process as a means whereby employers could demonstrate the objective attainment of a good employer status as well as minimising of risk or liability for falling below externally binding standards.

[57] One of the dynamics driving the AIER's work is the desirability of developing awareness of a risk management component relating to rights covered in the Charter. A chapter of the work in progress spells out the reasons why that is so. Managing the risks arising from an unsafe workplace from discrimination or harassment is part and parcel of the work of most employers. Employment rights allocate responsibility to either or both the employer and worker. An obligation to act in a fair and balanced way with regard to the other's well-being is integral to the right duty relationships established. Failing to provide a workplace where workers and employers interact in a climate of mutual respect, or where the participation of workers is discouraged, means that a business risks poor morale, low innovation and an inability to manage change. A business that understands the need to develop a proactive risk management of all rights covered by the Charter is more likely to succeed through a more committed workforce and a more profitable and productive workplace. Businesses face a tough challenge if they wish to succeed. There is increasing pressure upon employers to be *employers of choice*: employers who have a good reputation for managing, training and building their workers.

[58] The AIER expects to complete this phase of its work before June next year. My mention it in the context of this address is premeditated. It represents an opportunity for both management and employees within select areas of the clubs industry to establish an

ongoing basis a mechanism that will promote a fair and productive workplace relationship. The Institute envisages that eventually it will produce a publication on the topic. A phased process of accreditation of workplaces and enterprises that comply with the rights and standards to a level commensurate with their capacity and resources will then be rolled out.

[59] I am not in a position nor am I at liberty to develop in detail the process involved. However it may assist understanding if I elaborate upon the way in which the Charter right : *Fair Minimum Standards* is elaborated upon. That right is expressed as follows:

Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provides for a minimum wage and just conditions of work, including safe and family-friendly working hours.

[60] The AIER process would identify with that right three *Standards*. Each of the Standards might be elaborated upon for use as a component in diagnosing satisfactory observation of the right in a particular workplace. The Standards currently being contemplated would be to the effect:

- *There is a clear business commitment to complying with fair minimum standards imposed externally to the workplace.*
- *The employer, in consultation with workers, is willing and committed to providing fair minimum standards that build upon the legislative minimum and which are tailored to the needs of the workplace.*
- *The business respects the need of workers to live a fulfilling life and to obtain a fair balance between work and the rest of their lives. This requires that the business develop policies on parental leave, working hours and workloads and other conditions within the workplace.*

[61] In more than one sense, those standards might appear to be minimalistic. However in the real world observation of the rights and duties associated with minimum standards often boils down to practical measures being taken to acquaint managers and workers with the relevant standards and to establish policies to check that external requirements are being observed and sound internal procedures are being fostered.

[62] The process we contemplate will develop standards relating to the reciprocal rights and duties connected with each of the rights identified in the Charter. Specifically those are: Good Faith Performance, Work with Dignity, Freedom from Harassment and Discrimination, a Safe and Healthy Workplace, Workplace Democracy, Union membership and Representation, Protection from Unfair Dismissal, Fair Minimum Standards, Fairness and Balance in Industrial Bargaining, Effective Dispute Resolution.

[63] No one would be more conscious than many of you are that the best workplaces owe little to, and often could not care less about, the detail of the formal regulation system. An industry characterised by a relatively healthy over award payments system, sensitive to the need to retain good staff and to keep them positive about the objectives of their enterprise, will be engaging in its own risk management strategy. It is just such an industry that might be attracted to demonstrating that it can readily establish and maintain to an adequate degree within its own workplaces, the values and rights that are propounded in the Charter of employment rights.

ⁱⁱ David Marquand: *Cameron is no secret Thatcherite*: Guardian weekly 5 September 2008 at 21

ⁱⁱ Professor Ron McCallum: *Australian capital labour Law and the Rudd Vision: Some Observations* (16 May 2008) Paper to the Industrial Relations Association of NSW Conference.

ⁱⁱⁱ Australian Human Resources Institute; *Work Choices; Its Impact within Australian Workplaces*. Survey Findings (23 August 2007): surveying 676 human resource managers throughout Victoria.

^{iv} Jeremy Buultjens: *A comparison of wage determination in New South Wales and Queensland (Australian) Clubs*: (2004); available from author, School of Tourism and Hospitality Management, Southern Cross University. And see also a same author, *Industrial Relations Processes in Registered Clubs of NSW* (2000); a thesis submitted to Griffith University, for Ph.D.; available on Web.

^v Buultjens: at 6-7

^{vi} Buultjens at 19.

^{vii} *Gen Wei Bao v Western Suburbs Leagues Club Ltd* (6 April 2001) Chief Industrial Magistrate: [2001] NSWCMC 58 at 2

^{viii} I am fairly reliably informed that after the 1987 State Wage Case decision, the Wage Fixing Principles made it pretty easy for award parties in NSW to make consent awards, introducing all sorts of flexibilities which had not previously existed. Although begun by the AIRC's structural efficiency principle, such agreements in NSW came to be more accessible than was the case under federal awards.,

The 1993 version of the Clubs Employees Award, [(278) NSW Industrial Gazette 182], had a Section B *Alternative arrangements by Mutual Consent* provision in Clause 6 Standard Hours. That allowed clubs to adopt different patterns of working hours, subject to notifying the union and employer organisations, which then had an opportunity to object and for a dispute to go to the Commission. Clause 38 Form of Consent dealt with the mechanics of how such agreements were to be made - it had to be in writing. It seems these provision may have come into the award in 1990, (see para(xxiv)).

^{ix} Clause 7 Exposure Draft *Hospitality Industry (General) Award 2010*

^x The ALP Policy Implementation Plan adopts the 5% estimate based on ABS statistics.

^{xi} Kevin Andrews; Media Release 3 May 2006: *New Protections in Independent Contractors Bill*

^{xii} Joint Statement of Kevin Rudd MP and Julia Gillard MP *Forward with Fairness –Policy Implementation Plan 28 August 2007*: and *Workplace Relations Act 1996-2008* as amended.k

^{xiii} Sections 346D to 346J of *Workplace Relations Act 1996-2008*

- ^{xiv} *Fact Sheet 8: Approval and content of enterprise agreements.* Available from <http://www.workplace.gov.au/workplace/Publications/PolicyReviews/ForwardwithFairness>
- ^{xv} David Peetz: *Brave New Work Choices: What is the Story so Far?* Paper Presented to *Diverging Employment Relations in Australia and New Zealand?* 24th conference of the Association of Industrial Relations Academics of Australia and New Zealand, Auckland, NZ, 9 February 2007. Based on data current up to 8 February 2007.
- ^{xvi} Buultjens : (2004)
- ^{xvii} Buultjens: (2000) at 136.
- ^{xviii} Joe Isaac; *Reforming Australian industrial relations?* Foenander Memorial Lecture: The Journal of Industrial Relations (JIR), 49, 3, June 2007; at 410. Professor Ron McCallum: “*Australian Labour Law after the Work Choices Avalanche: Developing an Employment Law for our Children*” JIR Vol 49 at 436
- ^{xix} McCallum: op.cit.
- ^{xx} *Fact Sheets: The new workplace relations system:* available from <http://www.workplace.gov.au/workplace/Publications/PolicyReviews/ForwardwithFairness/>
- ^{xxi} A O’Brien: :”*From Modernisation to Mergers: Award Modernisation and its implications for industrial coverage (eligibility) of industrial organisations*”. Available from andyobee@optusnet.com.au
- ^{xxii} Workplace Express: *Gillard to make submission to AIRC on draft redundancy clause:* 12 September 2008
- ^{xxiii} *Clubs (State) Award, Clause 40 and following*
- ^{xxiv} *Award Modernisation:* (2008) AIRCFB 550 at [31-34], 20 June 2008; *Award Modernisation Statement:* (2008) AIRCFB 717, 12 September 2008 at [46]
- ^{xxv} Section 576B (2)(b) WRA
- ^{xxvi} [2008] AIRC FB 717 at [6-11].
- ^{xxvii} Workplace Express: *Award modernisation to trigger coverage crisis for employer groups:* (9 September 2008) referring to article by Andy O’Brien
- ^{xxviii} Joellen Riley Peter Sheldon Collins: *Remaking Industrial Relations in Australia* (May 2008): Volume 18 The Economic and Labour Relations Review (ELRR 18) 1-6
- ^{xxix} Gardner M. *Beyond WorkChoices: Negotiating a Moment;* ELRR 18 at 33
- ^{xxx} Op Cit. ELRR 18 at 2
- ^{xxxi} AIER: *Industrial Fairness—the essentials:* available from www.aierights.com.au
- ^{xxxii} Andrew Stewart: *WorkChoices and Independent Contractors: The Revolution That Never Happened:* 18 ELRR at 53
- ^{xxxiii} *Report of the Full Bench Inquiring under Section 120B of the Workplace Relations Act 1996* Munro J; Duncan DP; Raffaelli C: (4 June 1999) Print R5300
- ^{xxxiv} *Fact Sheet 9: A simple, fair dismissal system for small business.*
- ^{xxxv} A discussion of the relationship between termination for redundancy and a valid reason dismissal can be found in *Smith v Moore Paragon:* Ross VP, Lacey SDP and Simmonds C (March 2002) PR 915674 at [83-90]
- ^{xxxvi} Smith B: *From Wardley to Purvis: How far has Australian Anti-Discrimination Law Come in 30 Years?* 21 AJLL 3 (April 2008) at 3-29
- ^{xxxvii} Heap L: *The Australian Charter of Employment Rights: Setting the Standard for New Legislation and Good Practice.* (March 2008). Journal of Industrial Relations Vol.50 at 349