Australian Institute of Employment Rights

Recent changes to industrial relations law: the benefits of experience

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to

Law Institute Victoria – Workplace Relations Conference

RACV Melbourne

Date: 28 November 2008

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The preservation of WorkChoices in Fair Work Australia: a new labyrinth for law and order?

[1] The Law Institute's decision to give me the honour of delivering the keynote address to this Conference may have been inspired by hope. My reputation as an agitator perhaps generated expectations that I might use whatever experience I derived from my longevity as a Presidential Member of the AIRC to ignite discussion of industrial relations law. What I have to say will not inflame the passions of this respectable audience; but perhaps some of you may extract enough from my observations to fuel an expectation that a new labyrinth for law and order is now being shuffled toward Canberra to be born; promising litigational excitement and prosperity for this generation of industrial lawyers.

[2] Oliver Wendell Holmes probably had in mind a different kind of experience from mine when he wrote *that the life of the law has not been logic; it has been experience.* He was referring not to subjective empiricism but rather to the judicial process. Hammond paraphrased it as an *intuitive cognition* around experience. Holmes identified the relevant "experience" with *the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men...*[1] Justice Cardozo put his own gloss on the experience that underlies judicial lawmaking by associating it with *situations in the life of a group, the community of which we are part, forms of conduct that help to stabilise our judgement and make it certain and objective*.[2]

[3] Holmes' maxim was directed to the evolution of the common law. A similar concept of the experience subject to cognitive intuition in judicial rule making should properly be given work to do in evaluating other forms of rule-making whether by the Executive or the legislatures. The formulative process for rule-making of that kind need not be constricted by either logic or experience. The availability of legislative power alone is often seen as reason enough to exercise it. Lack of logic or an abandonment of patterns of regulatory practice may be a vice but it does not invalidate an expression of legislative will founded upon it. Only if an opportunity arises to bring about another exercise of legislative power can a flaw of that kind be exploited as a persuasive device for correction of it.

[4] Statesmanship is attributed to those who display mastery in steering the vessel of State through arduous passages. Edmund Burke's widely quoted definition of it is presumed to have been refined from a kind of experience closely attuned to survival in legislative or executive office. 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. The demand for statesmanlike qualities in finding a balance is well exposed by the contemporary challenges:

> *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"*[3]

[5] No evaluative measure of the quality of Australia's industrial governance could be free from contention. Undaunted, I suggest that an appropriate balance between a disposition to preserve and an ability to improve would have wide acceptance as a fair measure. The parameters for balancing a disposition to preserve and an ability to improve leave ample room for the *felt necessities of the time* and other aspects of experience to be weighed in the evolution of any regulatory regime.

[6] I have applied over some time a broad measure of that kind generally to both the WorkChoices and Forward with Fairness, (FwF), models of industrial governance and social engineering. In this paper, I will contrast the WorkChoices model and the effects of it, with the not yet fully emerged details of the FwF regime, and what I consider to be some remediable deficiencies of it, or of the *Fair Work Bill 2008*, (the Substantive Bill), which was tabled only three days prior to delivery of this paper. I will conclude with an outline of a quality assurance, risk management process now being developed by the Australian Institute of Employment Rights to ensure that participating workplaces are being conducted in conformity with a reasonable balance between employment rights and operational efficiency.

WorkChoices: Strong on political theory, weak on some felt necessities.

[7] 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 shared socio-economic theories ascribed to so-called neo-liberal or neo-conservative values. 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. The turn of the electoral tide against the Bush administration in the United States, and against its cohorts elsewhere, has more or less coincided with the economic vortex of the global financial crisis. In the wake of those events, analysts are showing less deference to the orthodoxies of the political economic theories that written that were among the causative factors for those events. I draw attention in particular to Boucher and Sharpe's recent study of *post-modern conservativism* in Australia.[4] It offers a kind of dissection of an atypical form of conservatism that wore a path toward dismantling institutions that had shaped the nation. Even more extraordinary is the revelation of causes, effects, institutional responsibilities and fallibilities relating to the sub prime investment trigger to the global financial crisis. A remarkable article by Michael Lewis substantiates the dysfunction of Wall Street, financial institutions and rating agencies, the godheads of economic liberalism, in determining allocations of capital since the 1980s.[5]

[8] The arbitral award hybrid system displaced at Federal and State levels by WorkChoices had evolved over more than the 100 years in which the institutions were dominant. The prime function of that system was to moderate an imbalance of power between employer and employee, between capital and labour. It did so through a quadripartite process designed to identify, weigh and adjust outcomes for a mix of private, public and governmental interests. 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 from Federation but recently restructured to accommodate less centralised enterprise bargaining processes.

[9] In 2005, advocates for the Howard Plan pejoratively dismissed the entire edifice of the award system 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. Minister Gillard in a recent address echoed, albeit faintly, some of that impeachment. She emphasised that *today, reliance on s51 (xxxv) of the Constitution , the conciliation and arbitration of inter-state disputes is no longer relevant to our modern economy*. The Minister made much ado about the resultant freedom from the complexities of the jurisprudence associated with that head of legislative power, but added:

> *So, instead of the legal artifice of the conciliation and arbitration of interstate disputes power, the system will rely principally upon the corporations' power, as well as referrals from the States…. The creation of new rights and obligations, the arbitral functions, will rest with the arbitral body Fair Work Australia.*[6]

[10] The use of the corporations power as an alternative basis for enacting a legislative structure of industrial arbitration is now beyond question. I reject an innuendo in some recent utterings by or on behalf of the Rudd Government to the effect that availability of an alternative head of power for industrial arbitration at federal level justifies dismissal or caricature of the evolved arbitral award systems. The fundamentals of the arbitral award conflict resolution and regulatory process, indeed the genesis of the legislative power in s51 (xxxv), stem from societal compromises dating back to the last quarter of the 19th century. Those compromises of public and private interests were reflected in a variety of practices and precedents including State and other legislative instruments, some of which have had a longer operational life than the Australian Federal arbitral award system. The sum of the evolved systems should not be deflated by portraying it to be a mere creature or construct of s51 (xxxv) of the Constitution.

[11] 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 agreements made with individual employees. Collectivist dynamics and tendencies in workplaces were to be discouraged and undermined by measures to exclude union involvement in the process.

[12] 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.***[7] [Emphasis supplied].

[13] WorkChoices got the balance between preservation and change wrong. Not much intuitive cognition is needed to recognise that established conditions and benefits of employment are one of the more stridently felt necessities of the time. Workers did not accept swingeing failure to preserve elements of the past system that contributed to individual incomes. Their displeasure about decreased security in employment and uncertainty of entitlements was not washed away by whatever benefits trickled down. Respect for the social cultural change imposed from the top never grew from the bottom up. Instead, resentment grew until it could be vented electorally, bringing disaster for the political sponsors of WorkChoices.

[14] 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. Many 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.[8] Of course, prudence and the need to retain staff in a tightening labour market discouraged departures from familiar methods and conditions. On the other hand, there were industries in which significant growth in resort to individual agreement-making is manifest and probably irreversible.

Experience and WorkChoices legacies: the hardiness of individual bargaining and agreements.

[15] "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.[9] 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 engaged under that form of relationship.[10] For the foreseeable future, considerable scope will remain for the use of individual contracts to marginalise resort to collective bargaining in many workplaces.

[16] The Rudd Government's action on its promise to scrap AWAs reduced the scope for new entries into individual industrial agreements with statutory force. However, its

legislation in force since 28 March 2008 allows employers the full term of extant AWAs to make suitable workplace arrangements for employees currently on AWAs. The Minister has now foreshadowed that the package of transitional and substantive measures will provide that, in default of such arrangements, AWAs and other forms of extant agreement *will continue to apply until such time as a new agreement is made*.[11] There is no reference to that commitment in the Substantive Bill but it seems provision will be made in the Transitional Bill to be tabled next year. A condition will be imposed on that extended application. The continued use of such agreements to "trump" minimum standards will be curtailed; from 1 January 2010, conditions inferior to those prescribed by the proposed National Employment Standards, (the NES) *will be overridden by it*. However, the Minister's statement of the condition gives no indication that the use of such agreements to trump conditions contained in pre-existing collective agreements or awards will be similarly curtailed. From 1 January 2010, modernised awards will also operate to expand the *new safety net*. At present and perhaps even in future, section 349 of the WR Act operates to ensure that an award has no effect while a workplace agreement is in operation. The counterpart of that provision in the Substantive Bill appears to be Clause 57. It operates to prevent a modern award having operative effect at a time when an enterprise agreement applies to the employee in relation to the employment. By way of exception, Clause 206 prescribes that the base rate of pay under an enterprise agreement must not be less than the modern award rate. It would seem unlikely therefore that the whole of new safety net will be extended to override the grandfathered agreements.

[17] I have little experience of attempting to explore relationships between extant AWAs, other forms of agreement, and the NES or its precedent counterpart. I would claim only somewhat more experience relevant to that task than any backpacker ever likely to have been employed for that or similar purpose. Having the NES, better still all or other bits of the new safety net, prospectively override a time-worn AWA or a cost-cutting non-union collective agreement is an attractive response to the felt necessities of workers affected. The application of a heightened safety net to sometimes amorphously worded conditions entrenched in an old-system agreement is a difficult exercise. So difficult that it leads me to suggest that a new labyrinth for litigational efforts may be under construction through FwF. Probably, employers will be well-advised to keep it simple: ignore the labyrinth around an old-system agreement, just identify the most relevant bits of the new safety net especially the relevant modern award rate and apply them on 1 January 2010. That approach seemed to work well enough for one of Therese Reine's companies a few years ago.

[18] For employees engaged after 28 March 2008, until 31 December 2009, an eligible employer may resort to Individual Transitional Employment Agreements subject to a new *no disadvantage test*. [12] 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.[13] The no disadvantage test operating at present foreshadowed the content of the proposed *Better off Overall Test,* (the BOOT test), to be applied as a condition precedent to approval by the FWA of workplace agreements under the new FwF workplace relations system. Approval of collective workplace agreements under the new system will be dependent upon satisfaction that: *employees are better off overall by entering into the agreement* on the basis of a test for whether *each employee covered by the agreement is better off overall* ***in comparison to the relevant modern award***.[14] Clause 193 of the Substantive Bill confirms that the BOOT test is met if each modern award-covered and prospective award covered employee would be better off overall if the agreement applied to the employee than if the relevant modern award applied.

[19] It is convenient to make reference here also to another new form of individual agreement that will have the force of a modernised award. The Minister earlier this year made an award modernisation request under Part 10A of the *Workplace Relations Act* as amended by the Rudd Government from 28 March 2008. In conformity with that request, an *award flexibility agreements* provision is to be a mandatory component of modernised awards.[15] The Award Modernisation Full Bench has since determined upon the likely content of those provisions. Clause 7 of the Exposure Drafts of the 14 priority modernised awards provides for a form of award flexibility by individual agreements. It allows for an individual agreement 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. As with Section 349 (1) of the WR Act, Clause 57 of the Substantive Bill will ensure that the award and therefore the flexibility agreement will have no effect in relation to an employee while an enterprise 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. It casts a markedly wider net for non-reducible conditions than the *BOOT* that is a condition precedent to the approval of Enterprise Agreements under the Substantive Bill. The BOOT reference for comparison of conditions will be confined to the relevant **modern award** disregarding for that purpose any award flexibility agreement.[16] The Substantive Bill at Clauses 144 and 145 overtakes some of that detail; *flexibility terms* must be included in modern awards. The employer must ensure that any *individual flexibility arrangement* ,made under such a term, must *result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed.* An employer's failure to ensure that requirement is met is a contravention of the modern award. Clause 7 of the Exposure Drafts may need minor revision to meet these changes.

[20] The Substantive Bill makes provision also for another form of individual agreement. Clauses 202-206 will establish a requirement that the Minister foreshadowed: *to be approved under the new system, workplace agreements will be required to contain clauses that provide for individual flexibility arrangements to be made between the employer and individual employees.*[17] A comment by Professor Andrew Stewart, quoted at [28], concerns that policy proposal. The provisions of the Substantive Bill and be related detail in the Explanatory Memorandum make it likely that the mandatory requirement for a *flexibility term* in enterprise agreements will be translated into a provision akin to the award flexibility provision I have just described.[18] Should that transpire, the flexibility term in all collective agreements would open new ground for cultivation of individual bargaining or agreement-making at enterprise level during the life of extant workplace agreements. I do not share the opinion ascribed to Professor Stewart to the effect that the new flexibility arrangements *are unlikely to be used very often.*

[21] Industrial experience provides ample evidence for my contention that it has long been the case that a substantial degree of informal bargaining at individual employee level builds upon minimum award conditions. It is 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. 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.[19] Under the new workplace relations system, individual award and it seems agreement flexibility arrangements will be much more limited, especially because of the need to overbid rather than to merely trump real safety net minimum standard protections. Nonetheless, employers who seek to discourage collective bargaining by either unions or groups of employees will find flexibility agreements and flexibility terms useful for that collateral purpose.

Forward with Fairness: statesmanlike balance or pragmatic minimisation of differences?

[22] The economic turmoil that surrounds us poses again Marquand's great question of the age, how to protect precious filaments of civil society from the pressures of resurgent, sometimes mercurial, capitalism. 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 WorkChoices 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.[20] 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.

[23] 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.[21] 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".*[22]

[24] 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?*[23]

[25] Against the background of those questions 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' legislative package. For the most part, the writing of this paper had been completed before I had access to the detail of the Substantive Bill; it is now and always was unambiguously clear that many of the settings from WorkChoices will be preserved. 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. It beds down with the political expediency served by not rattling too severely the cages of those most advantaged by the WorkChoices settings.

[26] 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 WorkChoices' 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.

[27] 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.*[24]

[28] Professor Andrew Stewart last week did not entirely contradict that analysis. He said FwF lacked a clear philosophical basis, doesn't reflect any core belief in the value of trade unionism and is a *pragmatic* document shaped more by its rejection of Workchoices and the need for Labour to appear electable and "not scare the horses" than any particular vision or philosophy.

> *In the end it seems to me this is a set of policies that is agnostic about trade unions-it is not opposed, but it is not particularly for. It is left up to individual workers to make that choice and the union movement itself to stand or fall on its capacity to recruit and retain members. While collective bargaining is at the heart (of the policies), the new flexibility arrangements to be contained in awards and agreements, although unlikely to be used very often, are important symbolically in requiring every collective agreement to have a clause in it allowing an individual to rewrite some aspect of the agreement.*[25]

[29] FwF certainly fails to replicate WorkChoices in the degree to which it proceeds from or propagates an antithesis to a philosophy built around neo-liberal or neo-conservative values. However, FwF should not be adjudged to be devoid of what Oliver Wendell Holmes would recognise as political theory. As we shall see, "agnostic neutrality" about collectivism permeates the structure of the Fair Work legislation, resulting it seems in erasures of express union representative presence in dispute resolution or representation processes for which it was once an essential ingredient. FwF's policy diffidence about collectivism is in marked contrast to objectives in legislation up to 1996 that *encouraged the organization of representative bodies of employers and employees* in line with ILO principles. The neutrality to which Stewart points will resonate throughout the new system. A policy bias against regulatory intervention is a characteristic incident of the "neutrality" that since 1947 became a hallmark of principles governing the relatively insipid and controversial National Labour Relations Board of the United States.[26] In that context, the neutrality of FwF and the new system it will establish, makes it at best a glass half full as a functional remedy for power imbalances between employer and employees. However, it may be that very quality that

increases the Fair Work system's appeal as a durable compromise solution to the overreach of WorkChoices.

FwF's mild changes: lifting the safety net floor slowly.

[30] 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. My preparatory work for this paper was confined to publicly available details of released through Fact Sheets[27]; and a drip feed of occasional speeches by the Minister. I have made some revisions to cover details since fleshed out in the Substantive Bill.

[31] Enactment of the Substantive Bill is to result in a "*new workplace relations system*" to be fully operational by 1 January 2010. The new system will apply to *national system employers* and *national system employees.* The scheme is laid out in 5 Chapters: Chapter 1 is an introductory establishment of the legislative basis of the scheme outlining its content and indicating linkages between its components. It introduces the scheme of the legislation and provides a guide to the contents that aids understanding. Chapter 2 makes provision for *terms and conditions of employment* built around a safety net of 10 legislated National Employment Standards, (NES), for all employees; modernised awards regulating 10 other conditions including minimum wage rates provisions or orders covering employers and employees below a *high income threshold,*(HIT), to apply at specific industry and occupational levels; that safety net is able to be built upon in particular cases by enterprise agreements emanating from an enterprise-level collective bargaining system; or by "workplace determinations" by the new administering authority, Fair Work Australia, (the FWA), or, in specified circumstances by transfer of some conditions on transmission of a business.

[32] Chapter 3 of the Substantive Bill is devoted to prescription of *rights and responsibilities of employees, employers organisation's etc.* In form, it breaks important new ground by converting some well established regulatory provisions into *workplace rights,* and *protections*; with other prohibitions formulated as duties binding particular persons. In some respects, the legislative structure will go beyond form to substance. In that respect, from the viewpoint of the Australian Institute of Employment Rights, which fosters recognition of explicit workplace rights and duties, I believe the innovation will be welcome. It is in Chapter 3 that unfair dismissal laws are reinvigorated; Clause 382 read with Clause 385 provides a person with protection from unfair dismissal as defined. Chapter 4 covers compliance and

enforcement, civil remedies, jurisdictions of FCA and FMC and like matters. Chapter 5 covers administration and the establishment of the institutional framework including the FWA, as the source of advice and support on all workplace relations issues and enforcement of legal entitlements. Finally, there is a Chapter 6, headed *Miscellaneous.*

[33] 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. The *Substantive Bill* was introduced to Parliament on 25 November 2008. It is to be considered by a full Senate Committee enquiry. A separate *Transitional IR Bill* will be introduced in 2009 to cover the shift to the new system. Key elements of the new system including the bargaining framework, unfair dismissal and associated protections will commence on 1 July 2009, assuming passage of the Substantive Bill.

[34] Processor Andrew Stewart has been advising on the drafting of the Substantive Bill. He has indicated that the best possible result for the Government would be to have the Substantive Bill passed by February or March. Before the substantive legislation was tabled in the House of representatives, he expressed the modest hope that the legislation will *end up being far simpler.*[28] Prudently, Professor Stewart added that he expects the transitional legislation to be *frighteningly complex.* My first impression of the Substantive Bill is that significant simplification and coherence has been achieved. In some respects the optimists progress toward legislative simplicity in this country might be thought to resemble that of the Oracle at Delphi. She, it is said, progressively reduced the volume of her predictions in inverse proportion to the level of the bids for them. Perhaps we should all be buoyed by the fact that the Substantive Bill runs to a mere 575 pages encompassing 800 Clauses; we are told in the Explanatory Memorandum that the current Act is around 1500 pages, but not told that the tally includes transitional provisions! The 1904 Act was comprised of 92 sections fitted within 20 pages; the 1988 Act had expanded to 359 sections plus or minus some single alphabeticals in 298 pages, including transitional stuff.

Preserving the WorkChoices revolution: the machinery of industrial governance

[35] FwF will maintain and consolidate the fundamental shift made by WorkChoices to place the machinery of governance under direct parliamentary and Executive control. The

model adopted establishes a process-rich legislative framework of governance. The AIRC is to be abolished but not until it has completed the task of award modernisation. 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*.[29] 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.

[36] Minister Gillard announced on 30 October 2008 "*all existing full-time AIRC members will be offered roles in Fair Work Australia (FWA) with full preservation of their conditions, including for presidential members, their status as judges*". [30] It seems that the implementation of that commitment will await the passage of the *Transitional Bill;* there is no mention of the AIRC at all in the Substantive Bill. By her decision to preserve the "roles and conditions" of existing members of the AIRC, Minister Gillard took one step that was necessary to reinvigorate the convention that the industrial umpire should be independent of Executive government, impartial and constituted on a tripartite basis by persons of proven expertise. A high value must be attached to maintaining the quality of Australian administrative institutions. This honourable Institute has a responsibility and record of achievement in relation to that objective. In my view, Minister Gillard passes a test of high principle that was failed miserably by Ministers Reith, and Andrews, not consistently met by Ministers Abbot, Cook or Brereton; and fallen away from also by my good friend, Minister Ralph Willis when he chose to not re-appoint Justice Jim Staples to the tribunal in 1988.

[37] A consequence of the preservation in office of AIRC officeholders is that, in some eyes, some bad appointments may be preserved. Some of those appointments may have been a significant factor in the rock solid decision to abolish the AIRC and substitute the FWA. Against that must be balanced the fact that a principle vital to the ongoing independence of the institution of industrial umpire has prevailed. Although, in mouthing that comfort I am left with a taste of the curate's egg. The Substantive Bill broadbands the three tier hierarchical structure of Vice President, Senior Deputy President, and Deputy President into one Deputy President level; it sandblasts from the edifice of the FWA the Presidential Member's equivalence in rank status and conditions with membership of the Federal Court, effectively lowering the status and profile of the institution. Officeholder's tenure, freedom

from prescribed Ministerial direction and protective immunity from suit are consistent with corresponding measures applicable to the AIRC except for provisions relating to membership of the Minimum Wages Panel, which is to accommodate term and part-time appointments.

[38] It will be for the FWA to ensure that the people who make up its resources conduct themselves in a manner consistent with the duties entrusted to them. We should expect, indeed measures should be put in place to monitor and insist, that the duties of exercising discretions and powers are undertaken without prejudice, prejudgments or belief system disrespects for the functions, principles and objectives of the institution to which appointment is made. Regrettably, never again it seems will the independent industrial umpire be required to act *in accordance with* equity good conscience and the substantial merits of the case. Clause 578 of the Substantive Bill makes it sufficient that the FWA *take into account in performing its functions equity, good conscience and the merits of the matter.* Regardless of how duties are expressed, it must be a matter for those who constitute the tribunal itself, as collegiate institution, to ensure that the standard expected of it is met. It will be necessary also for the current Federal Government in particular to abstain from and where necessary repeal other measures that operate to stultify independence and the perception of it.

[39] Another concern about the FwF model of industrial governance is that it continues to reflect the political Executive's obsession with process rather than leaving outcomes to be arrived at by the machinery established. Direct parliamentary determination of National Employment Standards has been carried over from WorkChoices, and reinforced by Ministerial direction of modern award constituents. Commendably that concern must be qualified to take into account the fact that the Substantive Bill contains no provision for Ministerial direction of the FWA in relation to the exercise of the *modern award powers* provided for in Clause 157 to make, vary or review modern awards. The overarching objectives and provisions relating to the exercise of those powers, provided for in Chapter 2, Part 2-3 Division 3, are markedly different and less directory than the corresponding objectives and provisions currently governing the creation of modern awards. As a matter of a first impression, Chapter 5 covering the establishment and functions of the FWA does not contradict its independence in relation to exercise of modern award powers. Welcome as that relaxation of Ministerial influence is, it cannot be other than contingent on Parliament over time leaving the tribunal at arm's length from Ministerial or other forms of direction and control.

[40] The overall effect of the consolidation of WorkChoices by the Substantive Bill is that a worker's constructive right to arbitration by State and Federal tribunals has been effectively abolished. Arrays of decisional discretions in the tribunal are to be hamstrung by statutory or regulatory conditions. By these measures FwF undermines the value the electorate demonstrably attaches to recognising, respecting and maintaining the role of an independent industrial umpire. It is conceivable that FwF may do enough to resuscitate and make viable a continuing role appropriate to the felt necessities of the time and other factors constituting the contemporary experience to which it must respond. No one should give it the benefit of low expectations.

[41] Australian experience, built around values reflected in ILO Conventions, justifies Parliament's role in the minimum standards regime being limited to laying the foundations of industrial governance, leaving the detail and adjustment to an independent tribunal. The vagaries of a competitive populism are characteristic of much contemporary political debate. That force in the political cycles can be relied upon to destabilise, undermine or subordinate the standards established, making them mere symbols in the partisan struggle. In 1999, I presided over the *Junior Rates Inquiry.*[31] The history of Parliamentary involvement and debate about that topic is amply recorded. Hansard illustrates the relatively dismal quality of input and decision-making that can be associated with transactions about industrial issues by parliamentarians. The power of Parliament to legislate is undeniable. The process through which that power is exercised could be structured to ensure that the value the electorate 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 *Strong and Simple Safety Net*: measured against an Australian industrial fairness standard

[42] The content, level, observance in practice and ease of erosion of minimum standards has been in heightened focus and controversy since WorkChoices. The quality and durability of the FwF regime for fair minimum standards is to be assessed within a perspective of the NES, modernised awards, collective and other work agreements and the institutional machinery for adjustment and enforcement of entitlements. Over the past 18 months, the Australian Institute of Employment Rights arrived at a definition of 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.

[43] 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. I have already touched briefly upon most of those changes. By the same measure, FwF has serious deficits. The AIER recently published a magazine, *The Debate: Regulating Work Relationships in Australia* with articles covering in some detail matters that were thought to be potential deficits in the FwF program.[32] In association with that publication it issued a brochure drawing attention to several of the more significant sets of problems and issues, proposing solutions.[33] Those issues or rather, my interpretations and elaborations of them, indicate the grounds for concern.

[44] Overall, the regime falls short of the fair minimum standards and machinery 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.[34] An estimated 15% of employment will not be caught within the federal system.[35] Some elements of the NES standard, most notably requests for flexible working arrangements, appear to be only tenuously enforceable unless a comprehensive reciprocal obligation of good faith is introduced or a dispute resolution process is strengthened. Minimum wages and some conditions in modern awards, will be maintained *by an impartial tribunal independent of government* subject to the reservation I have already expressed about there being no revival of the Minister's request/directions as to modern awards. The content of the NES will not be maintained in that manner; its maintenance will require statutory amendment.

[45] A number of details, not of the same magnitude, warrant comment. The first concerns the coverage, application and "binding" of modern awards. For reasons I have already given in relation to the approval of workplace agreements, the application of modern awards will be

critical to the efficacy of the safety net at workplace bargaining level. The Award Modernisation Full Bench, understandably, reserved its position on the question of which, if any organisations of employees or employers or bodies representative of them will be within the application of each modern award.[36] The status of an organisation "bound" by a modern award is not spelt out in the current Act. The formal role that modern awards are to have in relation to union rights of representation more generally had also been left obscure.

[46] 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.[37] That set of issues, one commentator called it *the elephant in the room*, poses many intriguing questions. Section 576V of the WR Act as now in force, provides that the AIRC **may** express modern awards to bind organisations. Given the character of the constitutional basis of modern awards, it seemed a matter for conjecture whether it was necessary to bind organisations at all. Organisations will be bound in respect of their members covered, as employees. So what? The employees will already be directly bound; what right/duties specific to the organisation arise out of the modern award?

[47] Some of those questions were addressed in part by the Australian Government Submission on 10 October 2008 to the Award Modernisation Full Bench. [38] The submission indicated that under the substantive legislation, *provisions of the WR Act which relate to modern awards "binding" parties will reflect two new key concepts:*

- *that an instrument **covers** an employer and employee or organisation,(that is they fall within the scope of the instrument); and*
- *The instrument **applies** to the employer and employee (that is the instrument actually regulate rights and obligations).*

[48] According to the Submission, under the new system an organisation will have standing to enforce an employee's entitlements under a modern award when the organisation is entitled to represent the industrial interests of an employee covered by a modern award. Right of entry for discussion purposes will be linked to coverage of an employer and employee by a relevant modern award. Entry to investigate a breach of an award will be allowed where the award "*applies*" to the union; it applies where the modern award *covers* the organisation. A precondition to right of entry will be that in addition to being covered by a modern award, the union must be entitled to represent the industrial interests of the relevant employees. Those intentions appear to have been given legislative effect by Clauses 46-48 of the Substantive Bill, read in conjunction with the provisions for entry rights in Chapter 3 Clauses 481-485.

[49] The equivocal relationship between modern awards and the organisations collectively representing employers or employees bound by them appears to be a matter of design not accident. As I understand the policies and emerging draft legislation, modernised awards and the National Employment Standards upon which they are to build, provide reduced visibility and dilution of collective representation. There is provision only for indirect enablement of unions or of the collective voice of employees in industrial representation: for instance, the Explanatory Memorandum at [676] mentions *terms providing for union involvement in dispute settlement procedures* among examples intended to fall within the scope of *permitted matters* for inclusion in enterprise agreements under Clause 172 (1)(b). As yet, the dispute resolution procedures reflected in the proposed standard Clause 10 of the Exposure Draft modern awards do not envisage a union as a direct party to a dispute. A dispute specific appointment of the organisation must be made by the relevant grievant if the organisation is to accompany or represent that party. Section 513 of the WRA, (still extant from WorkChoices), requires that dispute settlement provisions for pre-reform awards efface reference to unions. Perhaps that provision is a factor in the rationale for clause 10 of the Exposure draft modern awards. Why should that degree of effacement of the representative role of organisations now be carried over to the dispute settlement processes of modern awards?

[50] Similarly, as I understand the position, there is to be no direct identification of named unions, or of employer organisations, as "parties" to industrial matters and disputes cognisable by the dispute settlement procedures. The consultative, award flexibility and dispute resolution procedures of the Exposure Draft, Clauses 7, 9 and 10 identify no automatic process for accepting a union as a standing representative of its membership to be covered by the modern award. It would seem from the Australian Government's Submission that the substantive legislation and the coverage and application provisions for modern awards are to allocate standing for those purposes. Under Clause 481 of the Substantive Bill that standing does not appear to be a condition precedent to exercise of the right of entry for enforcement purposes. However, it may be intended that an organisation's right to represent the industrial interests of an employee to whom an industrial instrument applies may not operate unless the organisation itself is within the coverage of the instrument. Otherwise, it would appear that no broad right of representation as the agent for employees is recognized in the Substantive Bill. It is silent about an organisation's right to represent other than in specified circumstances. The formation and other details of organisations are matters exterior to the Substantive Bill: a definition in the Dictionary section of Chapter 1 causes

organisations to spring fully formed from their registration under the Workplace Relations Act 1996.

[51] One specified circumstance exception is the requirement for there to be a union party to a Greenfields enterprise agreement. I have not scrutinised the Bill for all direct or indirect enablements of representative functions. In his presentation to this conference, Tim Donaghey of the Victorian Bar draws attention to an instance of what I would regard as an indirect representative entitlement under the Substantive Bill. Indirectly Clause 387(d) recognises a duty on an employer to not unreasonably refuse to allow a *support person to be present to assist an employee in any discussion of dismissal*.[39] Presumably, a union could hold itself to provide that support service to any member seeking its assistance. However, it should be noted that, even in relation to enforcement of civil penalties, Clause 540 of the Substantive Bill operates to limit union standing generally to situations where it is entitled to represent the industrial interests of *the employee who is affected by the contravention*; the only exceptions concern contravention of an enterprise agreement that applies to the union, contravening a workplace determination that applies to the union, or contravention on the prohibition of organising industrial action before the nominal expiry date of an enterprise agreement.

[52] The Australian Government's Submission also indicates that Fair Work Australia will not be able to make arbitral determinations pursuant to an award dispute settlement clause unless the parties have consented. However, even where there is consent, FWA must not make an arbitral determination that *affects the operation of the NES or a modern award, or is inconsistent with the rights and obligations under the Act or an instrument made under the Act*. The basis of that submission seems to be an acceptance that the FWA either cannot or will not be clothed with a power similar to that available to the AIRC to settle disputes by varying awards to create new rights. The ostensible reason given for that limitation on the FWA is the change in the constitutional head of power for the legislation.

[53] Clauses 738 and 739 of the Substantive Bill appear to be the relevant provisions canvassed by the Submission. However the restriction in Clause 739 (5) is that even where it is arbitrating by consent, the FWA *must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.* Such instruments include modern awards and enterprise agreements. The Submission would appear to exaggerate the scope of the restriction. According to established principles the creation of a new right that affects the

operation of an antecedent instrument would only be inconsistent with it if the new right cannot be obeyed at the same time as the instrument.[40] The switch in the constitutional head of power to the legislation does not necessarily entail an inhibition on legislative capacity to empower the FWA to "arbitrate" to create new rights including rights affecting the operation of the award or the fair work instrument in particular cases. An arbitration pursuant to an enablement under the corporations power, provided it did not purport to determine existing rights, could determine new rights with at least as swingeing a scope as an arbitral determination under the dispute settlement power could. Professor Joellen Riley pointed to corroborative precedent for that view when she spoke at the Harmer's AIER conference last week. In *Visnic v ASIC* [41], the High Court held that an ASIC power to make an order to disqualify a person from holding office in a corporation is exercised for the purpose of maintaining professional standards in the public interest and that because relevant decisions are based on both policy and public interest considerations, the power did not involve an exercise of judicial power. There seems no sound reason to distinguish that reasoning in application to determinations by FWA.

[54] I would accept that a sound rationale might be found for precluding substantial departure from safety net standard and the NES in particular. That rationale becomes more tenuous when applied to consent "arbitration" about the operation of a modern award in particular circumstances; it is almost threadbare when applied to an enterprise agreement's operation. More importantly, if policy is the rationale, it should not be masked as a matter of constitutional necessity. The reasoning disclosed thus far in the Submission, (the Explanatory Memorandum adds nothing), indicates there is something amiss. There appears to be either a mistaken conflation of jurisprudence about judicial determination of existing rights and arbitral creation of new rights, or a deceitful dressing up of a confused political expediency.

[55] In my experience, capacity to settle industrial disputes at workplace level by arbitral determination depended heavily upon the availability of an option to create a new right. Let us assume that under FwF even a new right determined by consent must not affect the operation of the NES or a modern award. What new right devised in relation to the dispute, (justiciable only if it is a *dispute in relation to a matter arising under this award or the NES*, to quote the dispute resolution provision in the Exposure Draft modern awards), would not affect the operation of the NES or the modern award in relation to the disputing employer and employee to whom the right or duty was determined? Will it be the legislative intention that the tribunal in a consent arbitration determination may be denied power to create a new right

affecting the operation of the award even though under clause 7 of the award the employer and an employee could agree directly on a condition having that affect? The independent umpire's important power expressly endorsed by the High Court in what was known as the Private *Arbitration Case*[42] appears to have been thrown away, or at least greatly curtailed.

[56] Finally, in relation to the adequacy of the new safety net, I note the restrictions on the allowable matters for inclusion in modern awards would appear to exclude a number of topics from it. Effectively excluded from the safety net are provisions about reciprocal training arrangements; industry or workplace specific security of employment protection against outsourcing; or, occupational health and safety duties of any kind, including capacity in the tribunal to intervene.

FwF's protection for security of employment measured against the fairness standard.

[57] Australian industrial relations processes for promoting security of employment were not usually as prominent or controversial as they became after 1993 and the inception of the WorkChoices legislation. Insecurity of employment associated with economic downturns from time to time generated considerable controversy. The Termination Change Redundancy cases in the early 1980s and public sector disputes about redundancy from 1978 onwards were the most prominent disputes in the public eye at national level. This perception changed with the introduction after 1993 of the unfair termination of employment jurisdiction in the Industrial Relations Court, with the AIRC responsible for preliminaries and conciliation. That legislation was poorly conceived, unexpected, and because of the division of functions between agencies ostensibly responsible for it, difficult to administer. Employers, often for good reason, became hostile to the impositions on them; thereafter they sustained the rage. WorkChoices watered-down the unfair termination of employment jurisdiction introducing what approximated to a right to fire at will in some circumstances. WorkChoices created incentives to churn staff, especially to substitute lower cost replacements. In some industries those options gave rise to peremptory terminations of employment that fed employee resentment about the insecure and precarious employment that became more prevalent after the 1992 recession. The later labour market tightening, and employer disinclination to shed staff unnecessarily, operated to curb exercises of the right to fire-at-will power.

[58] 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. As Ron

McCallum has pointed out, protection against unfair dismissal is integral to ensuring a reasonable balance of power in the workplace. FwF will move from the low tide mark of the WorkChoices protections. Part 3-2 of Chapter 3 of the Substantive Bill restores protection, albeit with different procedural rules, for employees generally. An exception, rather one of several jurisdictional limitations, will apply to employees of small businesses; and, some classes of employees, most notably HIT employees, will be excluded from the protection altogether. No change from the WorkChoices regime will be made until 1 July 2009.

[59] Another jurisdictional limitation exception is that 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[43]. That paraphrase from the relevant Fact Sheet more or less accords with my understanding of clause 385 (d) read in conjunction with Clause 389 and clause 396 (d), the last of which requires that the FWA must decide whether the dismissal was a case of genuine redundancy before considering the merits of the application. The exclusion of dismissal in cases of genuine redundancy from the definition of unfair dismissal will apply to all employment under the scheme. The sweeping exclusion contradicts long established fairness principles. To my knowledge, for 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. Where individual performance is the criterion, due process protections have been made integral to the employer establishing a valid reason for the dismissal.[44] The expression *genuine redundancy* would be strained unduly if a tribunal attempts to stretch it to allow critical examination of reasons related to the capacity or conduct of the person selected for dismissal that intrude into a primary redundancy decision.

[60] 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. Information about the size of the employer's workforce, timing requirements and procedures generally constitute significant barriers to an employee obtaining redress.

[61] 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.[45] The Full Bench that conducted the 1999 Junior Rates Enquiry also directed attention to the structural flaws in the overall legislative scheme discouraging discrimination in employment. An Appendix to that Report canvassed differences in judicial decisions concerning the wording and application of tests for the reasonableness of indirect discrimination, and about tests for whether a requirement that would otherwise be discriminatory is based on the inherent requirements of a particular job, position or employment.[46] As I understand the policy platform for the new system, it will not address the problems identified. Clause 351 of the Substantive Bill expands upon paragraph 659 (2) (f) of the WR Act only by prohibiting *adverse action,* as defined in sub clause 342 (1), thereby expanding the range of conduct prohibited, an important extension. Perhaps the flaws and frustrations in the existing regime might be more fully explored in submissions to the Senate Enquiry.

Agreement-making and bargaining under FwF: achieving a fair balance.

[62] In my 18 years with the AIRC, the most intractable and difficult dispute arose in circumstances where the employer was adamantly opposed to entering into an agreement with the relevant union although it had a well established coverage in the workplace. In that and two other intractable disputes, the conduct of one or other and sometimes both parties involved significant disregard of what I would consider to be fair bargaining practices. For most of my last six years on the Commission, I had a responsibility for the panel dealing with the metal and manufacturing industries. Others and I found ourselves on what became a relatively sharp learning curve associated with enterprise bargaining Campaign 2000 and several sequels. By the end of that learning curve, I believe that all concerned had come to appreciate the enormous value added by experienced Commissioners engaged as a conciliation resource dedicated to a set of specific disputes. The experience and hands-on knowledge of the Commissioners was a critical element in that success. No less important was that they should have access to a variety of procedural "levers and powers". I refer to powers or actions able to be deployed but almost never used. Such levers can be an important part of the theatre in which negotiations pass through stages to satisfactory completion.

[63] A pre-election commitment to institute an obligation on parties to bargain in good faith is to be implemented according through Part 2-4 and most specifically Clauses 228-233 of the Substantive Bill. That obligation will import a useful set of levers. 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 altogether. 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, not the players or legislators, should control the process for resolving conflicts. The Substantive Bill breaks new ground by grouping the making of enterprise agreements, the bargaining process and the FWA's functions in facilitating bargaining as elements in the terms and conditions of employment system, (Chapter 2 Part 2-4 Divisions1-11). Rights and protections related to industrial action are dealt with separately, (Chapter 3 Part 3-3). The treatment of bargaining continues to be highly prescriptive; none-the–less association of power to make bargaining orders,(Clause 230) with good faith bargaining requirements,(Clause 228), and another innovation, scope orders, (Clause 238), are likely to be significant aids to resolving bargaining disputes.

[64] *Permitted matters* for purposes of bargaining and determining the content of an agreement will extend to *matters pertaining to the relationship between the employer and the employee and the employer and any union to be covered by the agreement.* Deductions from salary for any purpose authorised by an employee and matters about how the agreement will operate will also be permitted matters. In my perspective, the scope of matters allowed by that definition in clause 172 of the Substantive Bill is a welcome expansion on the over prescription of prohibited content that characterised WorkChoices. However I do not approve the retention of the limitation to matters pertaining to the relationship between employer and relevant employees. The limitation can be used to contradict important elements of the right to collectively bargain and the rationale for it. The Minister defended that limitation when she stated 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. The Explanatory Memorandum compounds the distortion within that assertion by identifying the limitation with matters

within *managerial prerogative* and *matters outside the employers control*. That rationalisation wrongly conflates the *matters pertaining* limitation with other constrictions more properly identified with the now discarded "artifice" of finding a genuine industrial dispute under the old system.[47]

[65] 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 manning levels, contracting out of work, 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.

[66] 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. We 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 black-letter activism of the Barwick-Gleeson axis on the High Court ensured that the current judicial reading of those principles promotes restrictive rulings capable of striking down matters not approved by the court's intuitive cognition to be appropriate subjects for collective bargaining.[48] An attempt is made in the Explanatory Memorandum to spell out a legislative intention giving guidance on what is or is not intended to be embraced within the matters pertaining test. That exercise might carry some weight with the FWA; it will be a puny sword or shield when the wording of the legislation is scrutinised under judicial review in relation to a contested matter. 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 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.

[67] Similarly, FwF's proscription of pattern bargaining in Clause 412 of the Substantive Bill is too sweeping and effectively one-sided Subclause 412(1)(c) is an indispensable component in ensuring the prohibition does not operate even-handedly; without that paragraph the prohibition might target employer pattern bargaining techniques! The partial prohibition of multi-employer bargaining is also too constrictive of discretionary bargaining. There are occasions when multiple-employer bargaining is efficacious for all parties. Certainly, a dispensation for the low paid employment is needed and I welcome the indication that access to bargaining-based arbitration will be available to that class of employment subject to meeting a "high threshold". Franchises, related companies, and perhaps even dispersed but organisable entities like clubs may be well served by capacity to strike multi-employer agreements. FwF should enable an application to be made to the FWA to allow for collective bargaining across a specific class of cognate enterprises. The provisions in Clauses 247-252 of the Substantive Bill operate as an exception to the prohibition on multi-employer agreement making; they represent a substantial step in the right direction. They supply a *single interest employer* concept; however the process is one-sided, denies effective union or employee voice but allows for direct Ministerial decision-making.

Freedom to associate for collective bargaining purposes: invisible in FwF's Standards and awards?

[68] 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 has 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.*

[69] Even more pointedly, Professor Keith Ewing drew upon a recent statement by Barack Obama. It brings into relief the reflexive cringe that in Australia characterises political contemporaries of post-modern conservatism when called upon to defend unions as the representatives of collectivist values. Ewing writes:

> Compare the position of Barack Obama who on 2 April 2008 spoke to the AFL-CIO of 'build[ing] an America where labor is on the rise'. In the same speech, he said
>
> *We're ready to play offense for organized labor.* ***It's time we had a President who didn't choke saying the word "union."*** *A President who knows it's the Department of Labor and not the Department of Management. And a President who strengthens our unions by letting them do what they do best - organize our workers. If a majority of workers want a union, they should get a union. It's that simple. Let's stand up to the business lobby that's been getting their friends in Washington to block card check. I've fought to pass the Employee Free Choice Act in the Senate. And I will make it the law of the land when I'm President of the United States of America. (my emphasis)*[49]

[70] A worker's right to representation and to be represented needs to be explicitly declared in the legislation and linked to provisions about unions' 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. Aspects of these questions have now been the subject of debate for some time. I have referred already to the Substantive Bill's linkage of modern award coverage and application to particular union right of entry entitlements.

Administration of the FwF package.

[71] I have referred briefly to administrative problems associated with the implementation in 1993 of a new court and tribunal jurisdiction relating to unfair termination of employment. In my view the essential problem was that the established pattern of coordination within the AIRC could not be deployed. The Commission had responsibility only for conciliation. There was no single agency with coordinative responsibility. Effectively there could not be one given the nature of the responsibilities in the Court and the Commission. It followed that emerging problems may have been picked up by individual members but the normal consultative mechanisms for sorting out problems and if necessary pursuing a co-ordinated response were not available.

[72] A number of growth areas or interfaces are likely to affect the administration of the new system of industrial governance. Effective coordination and resources to carry it out

should be given a high priority. Those responsible for policy need to learn from experience. Federal Court and High Court Registrars are statutory officeholders responsible for the administration of those respective tribunals; they are appointed in close consultation with the respective Chief Justices, are accountable and subject to direction in relation to the administration of matters within the purview of that officeholder. As I understand the proposal about the one stop shop FWA, the Minister will appoint the General Manager. The Substantive Bill provides in Clause 669 that the Minister will consult the President before appointing that officeholder. The kind of relationship between the CEO and the President that is essential to effective and harmonious administration should not be at hazard. Anyone seriously familiar with the history of the AIRC over the past decade or so would be aware that appointments of Registrars have not consistently been directed to or successful in avoiding tension or promoting trust between the Head of Tribunal and those responsible for assisting it. Another test for Minister Gillard's commitment to re-invigorating an independent impartial industrial umpire will be a willingness to entrench a system of appointment of the General Manager that underwrites the authority and responsibility of the President of the FWA.

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

[73] I am a Vice-President of the Australian Institute of Employment Rights. 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.[50] The AIER is currently working on an approach that 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.

[74] One dynamic 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.

[75] The AIER expects to complete this phase of its work before June next year. 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.

[76] I am not in a position to develop in detail the process involved. However it may assist understanding if I elaborate upon the way in which the Charter Right 8: *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.*

[77] 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.*

[78] In more than one sense, those standards might appear to be minimalistic. In the real world, observation of the rights and duties associated with minimum standards often boils down to practical measures. Managers and workers need to be familiar with the relevant standards. Policies will be established to ensure or check that external requirements are being observed and sound internal procedures are being fostered.

[79] 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.[51]

ATTACHMENT A

AUSTRALIAN CHARTER OF EMPLOYMENT RIGHTS

Recognising that:

improved workplace relations requires a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and employers provide for the legitimate expectations of their workers

and drawing upon:

Australian industrial practice, the common law and international treaty obligations binding on Australia, this Charter has been framed as a statement of the reciprocal rights of workers and employers in Australian workplaces.

1 Good Faith Performance

Every worker and every employer has the right to have their agreed terms of employment performed by them in good faith.

They have an obligation to co-operate with each other and ensure a "fair go all round".

2 Work with Dignity

Recognising that labour is not a mere commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being:

- treated with respect
- recognised and valued for the work, managerial or business functions they perform
- provided with opportunities for skill enhancement and career progression
- protected from bullying, harassment and unwarranted surveillance.

3 Freedom From Discrimination and Harassment

Workers and employers have the right to enjoy a workplace that is free of discrimination or harassment based on:

■ race, colour, descent, national, social or ethnic origin
■ sex, gender identity or sexual orientation
■ age
■ physical or mental disability
■ marital status
■ family or carer responsibilities
■ pregnancy, potential pregnancy or breastfeeding
■ religion or religious belief
■ political opinion
■ irrelevant criminal record
■ union membership or participation in union activities or other collective industrial activity
■ membership of an employer organisation or participation in the activities of such a body
■ personal association with someone possessing one or more of these attributes.