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# The Case for Minimal Regulation of the Labour Market

by Des Moore[1] (11 Feb, 2008)

Introduction

At the time of writing the newly elected Labor government is about to commence the implementation of a policy establishing what will likely be the most extensive legislative regulation of relations between employers and employees ever applied by the federal government. My emphasis here is of course on *legislated* regulation: prior to the rather tentative moves towards legislated *deregulation* from the late-1980s[2], Australian labour markets were subjected to extensive federal regulation through the judicial and quasi-judicial systems in addition to the post-federation legislative regulation. In effect Labor is now putting much of the judicial-type regulation, plus some more, into black letter law and is reversing the moves started under its predecessor towards a less regulated labour market. Thus, although Labor claims the basis of its current approach is for enterprise agreements to be the basis of employer/employee relations, in reality the conclusion of such agreements will be subject to extensive legislated regulation as to wages and conditions, to judicial and administrative interpretation of such regulation and to an increased role for unions in bargaining.

Based on its two *Forward With Fairness* policy statements, one in April 2007 and the other in August 2007, Labor's legislation is to be implemented over a period and will not come into full effect until January 2010. The initial step will be to stop the negotiation of new statutory individual contracts directly between employers and employees[3] and require all individual employment contracts under common law[4] and enterprise agreements to conform to ten minimum employment standards. At some stage legislation will also provide for a possible further ten minimum standards that

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[2]The 1995 Australian Workplace Industrial Relations Survey by the Department of Workplace Relations and Small Business (published in 1997) concluded that, by the time the Workplace Relations Act 1996 came into effect in December 1996, around 65% of employees under federal jurisdiction and about 35% under state jurisdiction were being paid under enterprise agreements and that individual contracts had also become 'an established part of the wages determination system', involving about 10% of employees. However, the reductions in regulation reflected in these agreements appear to have been relatively small up to that time.

[3] Except for the about 1 per cent of employees earning over $100,000 a year. An existing Australian Workplace Agreement (AWA) will be able to continue up to 31 December 2012 and, if an expiry occurred prior to 1January 2010, a new form of temporary individual contract would be permitted until then.

[4]Except for employees 'historically award free, such as managerial employees'.

may be compulsorily arbitrated under industry awards intended to set annual wage levels.

Although it is unclear what role Labor will give to the Australian Industrial Relations Commission prior to the establishment in 2010 of a new institution named Fair Work Australia, the AIRC will be charged with modernising the many awards it created[5] (and failed previously to modernise) and, in the period prior to 2010, it is possible that Labor will return the Commission to operating the existing award system and dealing with new claims under those awards. In addition, Labor will 'inherit' from the Coalition government several regulatory institutions, including the Fair Pay Commission determining a minimum wage, the Australian Building and Construction Commission, a Workplace Authority (established to administer the fairness test under Australian Workplace Agreements) and a Workplace Ombudsman (established to monitor observance of the WorkChoices legislation and to investigate or prosecute contraventions). These bodies will apparently continue to operate, presumably as regulatory authorities under the new legislation, until Fair Work Australia is established. In short, it is no exaggeration to say that one way or another Labor will acquire a substantial industrial regulatory force to apply existing or any new regulatory legislation.

It is relevant to note that, contrary to popular perceptions, the Coalition's WorkChoices and other legislation operated under an extensive framework of regulation, a good deal of which (such as the outlawing of pattern bargaining) will continue in some form. This framework was partly designed, however, to allow more flexible arrangements between employers and employees ie the Coalition sought to use regulation as an instrument to support certain more flexible arrangement, such as those relating to the negotiation of individual agreements, the dismissal of employees and the increased restrictions on union entry. Even so, WorkChoices was not overall the flexible, simple and fair system that the Coalition claimed it to be. While the OECD 2006 Economic Survey on Australia, for example, welcomed the WorkChoices Act as moving "towards a simpler, national system", it pointed out "the system is still complex: federal legislation runs to nearly 700 pages, distinct federal and state systems remain, and businesses have complained about compliance costs".[6] Subsequent to that survey the passage by the Coalition of the stronger safety net legislation for all individual and collective agreements further added to the complexity.

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

[5]There are still more than 4,000 awards that have application.
[6] OECD Economic Surveys Australia Volume 2006/12 – July 2006, page 17, Paris OECD 2006.

The Basic Rationale for Deregulation

Given the acceptance by both major political parties of the need for extensive regulation of employer-employee relations, there is now little prospect in the foreseeable future of moving to a deregulated labour market in which, subject mainly to observing normal legislated or common law contractual requirements, the terms of employment agreements are basically settled between employers and employees. Nonetheless, this paper argues that this rather than the highly regulated approach should be adopted.

My contention is that Labor's adoption of the highly regulated approach largely ignores the potential for both economic and social benefits from a freer labour market. The notion that extensive regulation ensures a "fair go" for the workers actually overlooks the unfairness of much of that regulation, as well as largely neglecting the implications of the structural changes in society over the past twenty or so years.

In adopting the regulated model Labor has effectively disregarded two major structural changes in the economy and society.

One of those is the now widespread acceptance that the most appropriate form of economic organisation is a competitive market economy and that, in such an environment, individuals can generally make their own employment decisions without fear of being exploited by employers and without the need for support from union actions. This is reflected in the decline in union membership to 15 per cent of private sector employees, with 90 percent of businesses having no employees with union members,[7] and notwithstanding the continued relatively favourable treatment given to unions in legislation and by industrial tribunals, the marked drop in industrial disputation. Although the union movement continues to be widely regarded as the institution that represents the interests of workers, in reality that is not the case.

Second, governments have over recent years increasingly assumed direct responsibility through an extensive social security system for helping those judged unable to obtain employment or otherwise disadvantaged. This system provides a protective bulwark for those at the bottom end of the social spectrum. Notwithstanding this, many judges and industrial commissioners continue to make decisions on the basis that, independently of Parliament or the legislation it passes, the judiciary has a major role in ensuring what they perceive as 'fair' or socially desirable outcomes of employment negotiations.[8] This despite the fact that s.51 (xxxv), which

[7] The proportion of the workforce that is union members would probably fall further in a less regulated environment.

[8] Examples include widely-reported public interviews given in February 1996 during the federal election campaign by Justice Murray Wilcox in which he criticized the Coalition's plans to amend unfair dismissal laws (for further references to Wilcox J, see Forbes, John, *"Just Tidying Up": Two Decades of the Federal Court*, Proceedings of the Tenth Conference of The Samuel Griffith Society, August 1998); a paper to the XX1st Conference of the HR Nicholls Society in May 2000 (see www.hrnicholls.com.au) by leading industrial barrister Stuart Wood analysing judgments by several Federal Court judges, including Justice North's in the important case of Australian Paper Ltd v CEPU (1998, 81 IR 15) suggesting tortuous interpretations of Section 127 of the Workplace Relations Act designed to render largely ineffective the legislative provisions directed at preventing unlawful industrial action; and an interview by Justice Munro with Workplace Express on his retirement in 2006

has hitherto been assumed as providing the constitutional basis for regulation, says nothing about safety nets or human rights. The expansive intrusion by the judiciary into the process of settling industrial disputes reflects the adoption by many of them of a social justice role. Mr Justice Kirby, who has been a leading advocate of that role by the judiciary, has even claimed that where there is no law on a subject judges should prescribe it[9].

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

The reduction in unemployment from 8% in 1996-97 to around 4.5% now, and the increase in the participation rate over the same period from 63.6% to around 65%, certainly suggest that reductions in labour market regulation do improve the flexibility of employment arrangements and hence the demand for labour. In similar vein international comparisons show that, from having a considerably lower employment/working age population ratio than countries with similar political systems, Australia has moved closer to or even level with the ratio in those countries.[10] The main improvements included the easing of the unfair dismissals regulation, the increased resort to individual agreements encouraged by legislation, the bar on any further exercise of compulsory arbitration, and the limitations placed on industrial disputation. The separate establishment of the ABCC to counter union restrictive practices in the construction industry has also markedly improved the functioning of that industry's labour market. Overall, it can justifiably be claimed that these measures have allowed increased demand for labour to be met through increased supplies without inducing inflationary wage pressures.

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

Both major political parties and many in industrial academia, however, support the need for extensive legislation to protect workers on the basis of a perception that employers have much the strongest bargaining power. In his Second Reading Speech introducing the stronger safety net bill, (then) Minister Joe Hockey asserted, for example, that its rationale included "employers cannot coerce existing employees into

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as Deputy President of the Commission implying that the judiciary must keep Parliament and the Government in line because "the number [of ministers] who actually know what goes on has been fairly few, and a lot of advisers know even less." By contrast, according to Justice Munro the Commission had been "getting with the parties and trying to get them to work through problems".

[9] A report in the Herald Sun of 26 November 2003, "Kirby Calls for Judicial Activism", included the following quotation from a lecture by Justice Kirby in England on law-making by judges: "If there is no apparent law on a subject, the judge is duty bound to create it, based on past precedents. Citizens need to know and face these realities. So do the bullies who cry judicial activism".

[10] The OECD Employment Outlook for 2007 shows that, between 1994 and 2006, Australia's employment/population ratio increased from 66.0% to 72.2%, the UK's from 68.7% to 72.5%, New Zealand's from 68.0% to 75.2% while the US's stayed at 72.0%.

modifying or removing protected award conditions". In turn, Labor's policy rationale is that any bargaining between individual workers and employers must be subject to any agreement meeting certain legislated conditions *and* that employers must agree to collective bargaining where a majority of employees wants to bargain collectively.[11] That policy also provides that Fair Work Australia will be empowered to determine the extent of support for collective bargaining.

However, there is no substantive case for *special* legislation either to encourage or allow collective bargaining or to prevent exploitation by employers. Collective bargaining constitutes a quasi monopoly and its adoption can only be justified if it can be shown to be in the public interest. This is hard to establish given that it adds to the risk that both individual businesses and the economy will be exposed to possible wage increases that do not reflect increased productivity but do reduce employment. Australia has had several experiences of collective bargaining induced inflationary wage increases, most notably in the mid 1970s, which had adverse effects on employment and the economy. Although Workplace Relations and Employment Minister Julia Gillard has given assurances that wage increases under Labor will be productivity-determined, and that pattern bargaining will continue to be outlawed, this will be difficult to achieve if collective bargaining is allowed to expand, particularly when unemployment is low.

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

The imbalance of bargaining power justification for special protective legislation also fails to take account of the competitive environment in which employers operate today. Australia now has more than 800,000 businesses competing with each other and operating with a workforce of over 10 million. In such circumstances no valid argument can be mounted that, without prescriptive regulations, employers as a group would force wages down or impose "unfair" conditions on employees as a group. When working conditions are unacceptable to either party, each side has alternatives that, while not necessarily the first best option for either, prevent businesses as a group from being imposers and workers as a group from being slackers. ABS data on Labour Mobility[12], for example, indicate that large numbers of persons leave their

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

[12] Labour Mobility, ABS Cat No 6209.0, Feb 2006 (Reissue). The data relating to the year ended February 2006 shows about 1.35 million leaving jobs voluntarily and about 640,000 leaving involuntarily.

jobs voluntarily, with around 20 per cent doing so mainly because they assess their working conditions as unsatisfactory.

Small businesses, which comprise around 90 per cent of all businesses and account for about 35 per cent of total employment, are particularly limited in attempting to exercise bargaining power. If they seek to "exploit" workers in some way, they are exposed to serious risk of loss of staff and difficulty in operating a business. Potential competition for labour also exists from the *additional* 1,550,000 owner-run businesses that are would-be employers and, hence, also judges at the margin of the regulatory arrangements.

Accordingly, the existence of about 2,500,000 employers or potential employers shows the extent of the risk of loss of staff/difficulty in operating a business if exploitation is attempted. Suggestions of potential extensive exploitation in a deregulated market also overlook that businesses need competent staff if they are to operate successfully and that the composition of the business sector changes significantly each year. In 2005-06, of the total of 808,000 businesses that employed work forces at the end of the year, about 102,000 became employing businesses during the year and 80,000 ceased to be employers. Of the employing businesses about 720,000 were "small" businesses ie employing fewer than 20 people.[13]

It is also often overlooked that competition between employers for labour gives individual employees a degree of bargaining power. Each has the capacity to readily quit jobs if he or she feels badly treated by their particular employer or for any other reason. Of the nearly 2 million of employees who left their jobs in 2005-06, over two thirds did so voluntarily and only about 11 per cent were retrenched.[14]

Individual employees are in fact increasingly either bargaining for themselves or obtaining advice from the many employment and legal agencies, associations, and government inspectorates rather than relying on unions. This is not to suggest that unions have no bargaining role but, rather, that employees now have more choice with regard to advisers and helpers. In such circumstances unions should cease to be given relatively favourable treatment in legislation and industrial tribunals. During the period of reduced regulation and union activity in recent years, average *hours* of work[15] and industrial disputation fell while real wages increased, which scarcely suggests employees' bargaining powers would weaken in a deregulated labour market.

This is not to deny that moving to a less regulated labour market would cause some employees to experience *reduced* compensation and/or working conditions. But any substantive reductions would need to be assessed against the circumstances in which they were obtained and the subsequent consequences. Although much attention was recently given to reductions experienced by some workers employed under AWAs, little or no assessment was made of the *economic* basis of the awards under which

[13] Australian Industry, ABS Cat No 8155.0, 2004-05; ABS Cat No 8156.0, Table 1.1.
[14] Ibid.
[15] As reported in the AFR ("Families first, workers say", AFR 27 June 2007), research by the Melbourne Institute suggests the reduction in average working hours since the peak in 1994 - when enterprise bargaining was introduced - may partly reflect a reaction to the growth in real wages. To the extent this is a trade-off by *employees*, it indicates a degree of relative bargaining strength.

those workers were previously employed, let alone the availability of persons out of a job and prepared to work for conditions different to those required by the award. The fact that over 4,000 awards exist itself raises a serious question about the capacity of regulators to determine what conditions should apply in a labour market that is subject to a variety of changing economic influences. Market forces rather than regulators are better determiners of wages and conditions in such circumstances.

Indeed, many awards now being used are probably out of line with market conditions, particularly in industries employing relatively low skilled workers. Past experience also suggests that some awards may reflect the provision of wages and/or conditions made by tribunals in circumstances where claims by unions were based on the actual or threatened use of industrial power that unions were allowed to exercise but should not have been. The outcome of the waterfront dispute illustrated vividly the existence then of extensive unwarranted protection of union power of an unfair nature[16] and a similar situation clearly existed in the construction industry before the ABCC was established.[17]

In this regard it is worrying that Labor's support for collective bargaining, leading to its policy of abolishing AWAs, includes the policy statements that unions will be allowed to bargain over "any matter" (ie not necessarily related to employment conditions) and that "all bargaining participants will be obliged to bargain in good faith". There was no such requirement in the WorkChoices legislation and Labor's policy effectively means employers seeking an employment agreement or a change in an existing one would have to involve unions if requested. The (now) Minister for Workplace Relations and Employment, Julia Gillard, argued in the election debate that the "obligations are simple" and only require such things as attendance at meetings "at reasonable times", timely "disclosure of relevant information", and "timely responses to proposals". But these and other requirements are far from simple in the overall scheme of things.

In practice, the obligation to meet and to disclose relevant information could involve a lengthy process imposing costs on employers and making it difficult for them to avoid agreeing to some perceived 'reasonable' going rate, particularly if the relevant division of Fair Work Australia adopted an interventionist approach involving a continued ordering of meetings and information disclosure. Thus, under a regime of mandatory collective bargaining and bargaining in good faith, employers could effectively be forced through Fair Work Australia to pay the 'reasonable' going rate or apply the 'reasonable' condition, as the costs of paying the condition would be cheaper in the short run than continuing to bargain in good faith. Recalcitrant employers would be forced to spend un-commercial amounts to protect their bargaining position and this would lead others to fall into line, resulting in the gradual adoption of conditions which would over time result in loss of productivity. [18]

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

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

[18] An example of what could happen may be found in the behaviour of the AIRC over a considerable period prior to WorkChoices in requiring employers to accept claims for the insertion into agreements

Labor's interventionist policy on bargaining powers and bargaining in good faith also risks a return to the situation in which even under the supposed regulatory system rogue unions have been allowed to exercise quasi-monopoly powers to the detriment of employers and fellow workers. Although (now) Prime Minister Kevin Rudd claimed in the election debate that Labor has a no-violence/no-threat of violence policy in regard to the activity of unions, and expelled a couple of abusive union leaders from the party, Labor's intended establishment of extensive regulatory arrangements supervised by new appointees to the new Fair Work Australia would risk an increase in such union power in practice. The archives of the HR Nicholls Society are replete with examples of the exploitation of employers despite regulatory arrangements supposedly designed to provide 'balanced' outcomes.

Overall, inadequate regard is being paid by Labor to the likely beneficial effects of "freer" bargaining arrangements in a less regulated labour market. Moreover, the idea that protective regulation would preserve employment in the event of a recession fails to recognize that a lack of flexibility works to undermine job security. This was illustrated in the recession in the early 1990s when unemployment increased to around 11%. If the concern is to help financially workers in dispute with employers, a possible alternative to the industrial tribunal approach would be to establish a body with functions similar to those given to the Advisory Conciliation and Arbitration Service (ACAS) in the UK. That body is widely used in voluntary mediations/conciliations, has established itself as impartial as between employers and employees and provides extensive advisory services to both employers and employees at a low cost.[19]

**The Institutional Framework**

The acceptance of the imbalance of bargaining power argument has inevitably led both major parties to accept that special authorities or tribunals are needed to administer the associated supposedly protective legislation. As already noted, Labor 'inherits' a number of federal regulatory institutions that will continue to operate in some form until their roles are taken over by Fair Work Australia. As FWA will have an "independent" judicial division, there will continue to be a minimum of two federal institutions responsible for industrial regulation as well as the court system proper.

It is not clear at the time of writing whether the states are likely to continue to have their own regulatory legislation and institutions Although Labor has stated that its

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of redundancy obligations well in excess of the 13 weeks standard supposedly set in 1983. During this period some employers "agreed" to redundancy obligations of 120-140 weeks and Telstra's acceptance of 84 weeks required it to include about $1 billion for redundancy during T1. Although this was the same amount as it promised for the environment, only the latter received any press coverage. While the Commission ceased under the Coalition to have the power to compulsorily arbitrate the settlement of disputes and hence require the insertion of provisions into agreements, it may still have an influence where both employers and unions have agreed to nominate it as the arbiter in disputes.

[19] ACAS was formed in 1974 to take over the industrial relations functions previously carried out from within the Department of Employment at the height of the collectivist approach to labour relations. It has performed four main activities. The most public of its roles is its conciliation involvement in industrial disputes. But it has also helped in organising arbitrations and, as individual rather than collective conciliation has grown, it has played an increasingly important role in individual conciliation. But its most extensive activity by far is its advisory work.

object is to have a uniform national system, the use of the corporations power as the constitutional basis for its legislation would leave it open to the states to keep their own institutions (and legislation) to regulate the unincorporated sector. This seems unlikely to be practical, but if Labor negotiated with the states the exclusion of the public sector from the FWA (which it has stated it is prepared to consider), they would doubtless continue with their own institutions.

The new institutional framework at the federal level has potentially adverse implications for the operation of the labour market. For one thing, although numerous awards exist they have often not been fully enforced and the unions (the primary enforcers) have tended to use any award breach they found more as a bargaining weapon in negotiating workplace agreements or in regard to other 'deals', such as the establishment of a closed shop. In short, particularly in the case of small businesses in the service industries, such as hospitality, restaurants, security, cleaning and tourism, there has been only a limited application of awards and a de facto deregulated labour market operated. Now, however, the new well-funded bodies will try to *ensure* awards and other regulations are enforced. That would be the first time this has happened in Australian industrial relations and, if much stricter enforcement of awards does occur, there would be a clash between award provisions and market conditions, with the potential for reductions in employment and even the cessation of some small businesses.

Most importantly, however, the continuation of regulatory and judicial industrial institutions separate from the ordinary courts, but applying additional regulations, will continue to expose employers (and others) to the uncertainties and interventionism for social justice reasons that has been experienced hitherto. As I have written elsewhere,[20] the historical record of courts, tribunals, commissions and authorities in administering workplace relations laws is a poor one, even in attempting to achieve the original principal objective of having federal regulatory legislation involving the prevention and settlement of industrial disputes.[21] This gives rise to a major concern as to whether the appointees to Fair Work Australia will continue to have similar attitudes to their predecessors or, indeed, largely involve the same personnel. Labor has already announced the existing President of the AIRC, Justice Giudice, will head the institution.

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

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

**The Minimum Wage and Fairness**

Labor is continuing with the Coalition's policy of setting minimum wages. This is among the worst features of the regulatory legislation, with the kind of 'guidelines' given by the Coalition to the Fair Pay Commission virtually ensuring that Australia's minimum will continue close to the highest amongst OECD countries relative to the average wage. The requirement that the Commission "have regard to" providing a safety net for the low paid also makes it difficult for that body to reach a decision that would increase wages less than inflation, even though the Commission has to balance this provision against the requirements to (inter alia) have regard to "the capacity for the unemployed and low paid to obtain and remain in employment; and employment and competitiveness across the economy".

When Fair Work Australia commences operation it will apparently have an even wider minimum wage role, including an annual updating of minimum wage rates for all awards under an award system that is envisaged as being more extensive than at present. Given that the FWA would have a well-funded enforcement arm, the difficulty of obtaining employment for those outside the job market would likely increase.

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

By contrast, many of those actually receiving the minimum wage are women or young workers living in households that have high incomes with no need for an income supplement (in fact, more than half of low wage earners are in the top half of household incomes). The fact that minimum rates are determined for those with wages both on the minimum *and* well above it, totalling in all about 1.2 million employees,[22] also involves setting wages for many in high income households as well as raising the question of why anyone already earning *above* the minimum needs wage level protection. With over 100,000 separately regulated minimum wage 'points', the whole minimum wage system (sic) is little short of farcical.

The minimum's high level relative to the median clearly limits the scope for increasing the employment of those looking for work. The latest ABS survey of Persons Not in the Labour Force showed that around 1.7 million Australians wanted work or more of it.[23] But as many are relatively unskilled, their capacity to obtain jobs

[22] Although about 850,000 were estimated to receive the $10.26 per week increase in the minimum wage announced on 5 July 2007, advice from official sources suggests there are only around 150,000 workers on the minimum wage of $27,144 pa itself. Yet, astonishingly, the minimum wage increase applied to all receiving less than $36,400 pa. Even more astonishing, an increase of $5.30 per week was "granted" for another 350,000 earning *above* $36,400.

[23] Persons Not in the Labour Force, Australia, Sep 2006 (ABS Cat No 6220.0) showed that, in addition to the 500,000 or so then unemployed (4.8%), there were nearly 700,000 (equivalent to 6.4% of the labour force) who said they would like a job but who did not qualify as "officially" unemployed because they were not ready to start work within four weeks. Also, of the 2.9 million working part

is importantly dependent on employers being able to offer a wage commensurate with their lower productivity. A minimum of around $27,000 a year (not including on-costs), or close to 60 per cent of the median wage, necessarily prevents a significant proportion of lesser skilled being offered employment.

Without such a minimum, or with a much lower minimum, would the supply of labour be reduced and a higher proportion simply then go on to welfare benefits? Although welfare applicants would undoubtedly increase, their success (or otherwise) would depend on the tightness of eligibility for benefits. If unjustified resort to welfare increased, it would surely be best handled by a tightening of eligibility, which the previous government started to apply. Given adequate tightening, if employers could offer a wage between the minimum of $27,000 pa and the unemployment benefit of around $12,000 pa that would surely attract additional employees.

The minimum wage arrangements are those most in need of reform.

**Unfair Dismissals and Individual Agreements (AWAs)**

It has tended to be overlooked that the Coalition's WorkChoices legislation allowing both individual and collective agreements by *direct* negotiations between employers and employees required *all* such agreements to comply with mandatory legislated minimum standards covering, inter alia, leave (including personal/carers, parental and maternity leave) and hours of work (in fact, those standards applied universally to all employment contracts in Australia, and were unable to be varied or altered even by agreement). Also, the introduction of the fair compensation test effectively returned to the no-disadvantage test under the Workplace Relations Act's requirement that individual agreements contain no overall reduction in award conditions.

Notwithstanding the extensiveness of this regulation, in addition to outlawing statutory individual agreements Labor proposes to further extend the standards required to be observed. Guaranteed minimum conditions are to be extended to ten covering (inter alia) no "unreasonable" work hours beyond 38 hours, "flexible" work arrangements for parents with pre-school age children, penalty rates on evenings, week-ends or public holidays, redundancy pay, and long service leave. In addition, Labor's "modern, simple industry awards" would allow up to a further ten minimum employment standards to be compulsorily arbitrated, depending on industry conditions. As with the Coalition, such conditions/standards will apply to all *individual* employment contracts under common law (except for employees "historically award free, such as managerial employees"). Although it proposes to extend the qualifying periods for claims to be made, Labor will also effectively remove the exemption of small businesses from unfair dismissal claims.

Labor's policies of abolishing AWAs, removing exemptions from unfair dismissals and widening the requirements for regulatory standards, represent a major increase in regulation that will seriously and unnecessarily inhibit the flexibility of the labour market.

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time, close to 500,000 would have liked to work more hours. The "official" unemployment rate thus considerably understates the potential for increasing employment. Many recipients of welfare benefits would also become available for work if the eligibility requirements for such benefits were tightened.

**Industrial Disputes**

Labor will, like the Coalition, legislate to forbid both industrial action during the life of an agreement and action in support of an industry wide agreement (the so-called pattern bargaining), as well as requiring a secret ballot to initiate allowable industrial action. How this will work out in practice depends importantly on the detail of the legislation and the discretion given to Fair Work Australia or, before it is established, the AIRC.

As the Coalition found, if costly settlement delays to employers are to be avoided there is a strong case for Labor to limit the capacity of institutions such as the AIRC to exercise discretion in processing industrial action and termination of agreement cases.[24] Similarly, if a return to compulsory arbitration is to be avoided (as Labor has promised and is most important) whichever institution is handling industrial disputes will need to be restricted in its interventionist powers and a resolution found to the apparent conflict with Labor's policy statement indicating that the FWA "will have the power to end industrial action and determine a settlement". That statement (as with some other elements in Labor's policy) seems to establish a de facto form of compulsory arbitration.

Related to this are in what circumstances Labor proposes to allow union bargaining demands over "any matter". That has the potential to pave the way for strikes over any subject matter contemplated by union officials without even a connection being required to wages and conditions of employment.

Labor's agreement to retaining the outlawing of secondary boycotts as part of the Trade Practices Act, which allows proceedings to occur in a court instead of undergoing a slow arbitration process in the AIRC, is an important improvement. The inclusion of the boycott by the previous Labor Government in the legislation governing workplace relations effectively removed the ban on such boycotts and led to considerable exploitation of employers by unions.

**Conclusion**

That Australia has had a long history of detailed regulation of employer/employee relations does not justify its continuance, let alone its expansion. As Keynes once suggested, when the facts change it is time to change views and policies. There is no doubt that in recent years the facts have changed dramatically, both as regards the increasing recognition of the past failures of that regulatory system and the obvious unsuitability of it to modern competitive economies and societies. In particular, the notion that there is an imbalance of bargaining power between employers and employees no longer has substance (if it ever did) and the belief that the regulatory system protects those at the bottom of the pile is clearly mistaken.

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[24] While under the Coalition's Workplace Relations Act 1996 unions were not able to take industrial action in respect of employees on AWAs, the AIRC remained the body primarily responsible for handling industrial disputes. Following earlier failed amendment attempts, in 2006 the Coalition succeeded in effecting amendments designed to remove the discretion previously available to the Commission in processing industrial action and termination of agreement cases..

At the time of writing, however, the legislative and institutional changes proposed by the new Labor government in regard to regulating workplace relations constitute a serious risk to the efficient functioning of the labour market both in terms of employment and productivity, as well as an unwarranted infringement of personal freedom. It will further reduce the capacity of employees and employers to themselves determine the major components of employment agreements. The effects on employment are likely to be adverse, particularly (but not only) when the economy slows.