

# **The Fair Work Act: Evaluating the Effects of Reforms**

## **Address to the Global Employment Relations Forum**

### **ACTU President Ged Kearney**

**Sydney, 30 March 2011**

Thank you for the invitation to speak at your conference today.

We've been asked today to evaluate the effects of the Fair Work Act. And of course, it is still early days. Key elements of the legislation - such as good faith bargaining – remain to be fully tested in a range of circumstances. And some new provisions - such as the low paid bargaining and pay equity provisions – are being tested for the first time as we speak.

Nonetheless, it is possible to make some broad observations about life under the new Act.

It's no secret that we welcomed the Fair Work laws as a great step forward for fairness and balance in the workplaces of this country.

I'm sure you are all very familiar with the many defects of Work Choices and I won't revisit these today. Suffice to say that it created an imbalance. It slashed the safety net, encouraged unfair individual contracts, undermined collective bargaining, cut unfair dismissal rights, disadvantaged the low-paid and stopped workers from accessing union help.

The Fair Work Act represented a huge step forward in terms of rights for working people.

It is no longer possible to make unfair individual statutory agreements, which strip away basic entitlements without compensation.

Almost all employees now have unfair dismissal protection. And despite increasing coverage, there has not been an explosion of claims, as employers had predicted. As has always been the case, only a tiny proportion of employees who are dismissed challenge their sacking.

The Fair Work Act has helped the low paid. Wage setting functions have been restored to the independent umpire, Fair Work Australia, and the wage setting principles have been evened up to restore balance between the needs of workers and employers. The

result was a strong minimum wage increase of \$26 per week in 2010. And, as you know, we're hoping for an even better result in 2011: \$28 dollars for the lowest paid, and 4.2% for workers at higher classifications.

We now have a decent safety net of minimum standards through the NES and modern awards.

And there are mechanisms introduced in the Fair Work Act which have the potential to deliver real improvements for specific groups of workers. One of these is the low paid bargaining stream. There is currently a test case using these provisions in the aged care sector, led by our affiliate United Voice. We are watching this case closely.

And there is the landmark pay equity case in the social and community services being run by 5 unions with ACTU support, led by the ASU. We are hopeful of a positive outcome in this case that can set a precedent for subsequent opportunities to achieve pay equity improvements for women workers.

### *Bargaining*

The new regime of good faith bargaining is showing real and positive effects.

Major employers who long resisted collective bargaining under Work Choices, such as Telstra and the major banks, have now concluded deals under the new laws.

And the benefits of bargaining are becoming more widespread. According to ABS data, in the first 10 months of the Fair Work Act's operation, agreement coverage went up 9%. This means that almost 4 million workers (or 45% of all employees) are now covered by agreements. Agreement density is up a huge 73% in administrative/ support services, up 55% in food/accommodation and up 34% in mining.

In identifying some of the effects of the new bargaining regime, I think it's also important to emphasise what *hasn't* happened. Despite claims by some employer groups, there has not been a 'wage breakout' under the Fair Work Act. The empirical evidence simply does not support such a claim. Wage increases are barely matching employee cost of living increases and productivity growth is at or above the trend of last decade. Meanwhile, the profit share of national income is back to the near record highs it reached in 2008, and the wages share of income is the lowest since the early 1960s.

And the number of days lost to industrial disputes also remains near record lows.

### *Rights to organise*

Importantly, the Fair Work Act has also given workers more protection to organise, through the 'General Protections' provisions. And now all employees have rights to get help from a union representative in their workplace, during breaks, and to meet with their union in a location that is 'fit' for the purpose. Unfortunately, we've recently had a disappointing decision from FWA regarding the scope for employer interference in this right.<sup>1</sup> We think this shows a tendency to assume, without evidence, that employees are opposed to a union officer being present in a lunch room during meal times and this decision is currently under appeal.

### *Scope for improvement*

But it will not come as a surprise to most in this room that unions think there is still room for improvement.

A key item on our agenda for change is the ABCC. We strongly believe there should be one law for all workers – the Fair Work Act. We want the BCII repealed, the ABCC abolished and its compulsory powers of interrogation removed.

The safety net can be further improved to give greater flexibility for people to balance work and family or caring responsibilities. The right to request flexible working arrangements in the NES is welcome, but it needs to be strengthened by both broadening the scope of the family needs it can cover to include children older than five and ageing parents, and to provide a robust right of appeal when a request is refused. And we'd like to see workers to have a right to return to work part-time after taking parental leave, unless the employer can demonstrate this would be unreasonable.

Unions support good faith bargaining, but are looking for some improvements to make it more fair and efficient.

First, in some cases bargaining at the enterprise level is inappropriate – for example, where some third party controls the wages and working arrangements at the enterprise.

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<sup>1</sup> Somerville Retail Services Pty Ltd v Australasian Meat Industry Employees' Union [2011] FWAFB 120 (10 January 2011).

In these cases, workers should be able to bargain directly with the third party. We want this to occur in these cases, and in other cases where it is in the public interest.

Second, we'd like to see restrictions on the content of agreements removed. These prevents workers from bargaining on a range of issues that are vital to their interests, such as arrangements that enhance job security, consultation rights, access to union help, and the rights of workplace representatives.

Third, if a collective agreement is made and the employer interprets or applies the agreement in a way which is unfair, we want workers to be able to challenge the employer's decision in Fair Work Australia. FWA should be given the power to settle the dispute by making orders about how the agreement should be applied, in future, in the workplace, in a way that is fair for all parties.

Fourth and finally, the ILO has consistently found that our laws do not comply with the fundamental right of workers to associate, because they unduly restrict workers' rights to take industrial action. Unions want Australian law to conform to the ILO's rule that industrial action must not be arbitrarily stopped, except where it endangers people's health or safety.

We also don't think the Fair Work Act goes far enough in terms of protecting workers' rights to representation. Union delegates play a vital role in representing workers' concerns and interests and in preventing or resolving workplace conflict for the benefit of both workers and employers. We want the law to more fully recognise this important role and help delegates perform their role effectively.

The Fair Work Act has also not effectively addressed issues confronting workers who are not called 'employees'. We'd like to see better rights for vulnerable contractors, such as the right to bargain collectively, and the right to have an unfair contract reviewed and varied in a way that is cheap, accessible and informal.

Finally, the Fair Work Act does not adequately address what I believe to be one of the biggest challenges facing workers in Australia today: the rise in casual and other types of insecure, precarious work. Just to give you one statistic – in Australia today, a quarter of all employees are employed on a casual basis. This means over 2 million workers

have no access to paid annual or sick leave, and no job security. Disturbingly, many of these casuals have worked regular hours for the same employer for years.

The ACTU has identified insecure and precarious work as one of the key problems in the modern workplace, and will campaign strongly on this issue in 2011.

### **Conclusion**

In conclusion, there is no doubt that the Fair Work Act has, in its short life, already had tangible and beneficial effects. And I am very positive about the future for Australian working people under the Act. But it is an unfinished canvas, and the Australian union movement will continue to pursue improvements to workers' rights in the areas I have outlined today.

Thank you.