Speech to Northern Territory IR Society
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Industrial Reforms – A view of the brave new world

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This Federal Government is proposing the most fundamental re-writing of Australia's industrial laws in over 100 years. This re-write is an attempt to shape a workplace culture that is both unfair and inequitable. The most vulnerable workers in Australia will be the ones most severely affected by these changes, although they will affect all Australian workers.

The first part of the Government's reforms is to erode the safety net set by awards, which establish a fair minimum set of conditions and wages.

The Government will first abolish the role of the Australian Industrial Relations Commission (AIRC) in setting and adjusting minium wages. The euphemistically named Fair Pay Commission (FPC) will take on this role. We know, even before the FPC is set up that they will reduce wages. The AIRC has traditionally adjusted minimum award rates annually. The last adjustment was effective from June this year. The FPC will not meet until at least October in 2006 putting at least a four month delay into adjusting rates – resulting in real hardship to those 1.6 million workers directly effected by these award adjustments for a pay rise.

The Government claim that the current system of adjusting pay is too adversarial yet fails to outline how the FPC will undertake the task. If Interested parties are able to make submissions on what they think the level of adjustment should be and the FPC determines a final amount then how is this any less adversarial than the current system where interested parties

make submissions of what they think the increase should be and the AIRC determines a final amount? The removal of this so called 'adversarial' approach means the FPC will make decisions without hearing from interested parties – and how fair will that make their decision.

There is no doubt that the role of the FPC is to deliver lower minimum wages than the current system. We know this because, over the last 9 years of NWC if the government preferred increases had been accepted minimum wages would be $50 a week less than the current $467.60 a week. (If ACCI's submissions had been accepted the minimum wage would be $95 per week less).

And Employment and Workplace Relations Minister Andrews has said he thinks the national minimum wage is about $70 a week to high. The cat was finally let out of the bag recently when Ian McFarlane, Industry Minister said Australia should cut its labour costs to meet those of New Zealand. The difference in minimum wages for the same work in the same companies in Australia and New Zealand can be in the order of 30-45%, with New Zealand rates lower.

The Government justifies such changes by perpetuating their discredited argument about jobs growth.

The argument is examined every year by the AIRC in its safety net review. This year, as in other years, the commission considered this argument and concluded that it was "not persuaded that there is any necessary association between award coverage, safety net adjustments and employment growth."[1]

In fact, employment growth in the two highest award reliant industries has outstripped the all-industry average, with health and community services growing by 28% since 1996 and accommodation, cafes and restaurants by 30% since 1996. The all industry average since 1996 is 15.5%.

[1] Safety Net Review – Wages, AIRC, PR002005, June 2005

Despite the fact that the AIRC consistently rejects the government evidence, the government continues to claim that Australia's minimum wages system has suppressed jobs growth.

How it can do so while also claiming record job creation and record unemployment is mind-boggling.

The real losers out of this brave new world of setting minimum wages will be low paid, low skilled workers. As awards become irrelevant – as the value of wages are eroded over time these workers will be forced into an agreement making system that will also see further erosion of the safety net.

The proposed changes to the Agreement making system is the second way the government's reforms will erode the safety net.

In today's world you know if you can't negotiate an agreement with your employer your award of 20 allowable matters provides a fair safety net. And that if you do negotiate an agreement – whether collectively or individually – it must provide you with pay conditions that are, overall, no worse than those you have under your award. That is, the no disadvantage test (NDT) ensures that you don't end up worse off by negotiating an agreement at the enterprise level.

These agreements – at least the collective ones – are put through an open scrutiny by the AIRC to ensure they do meet the NDT. Parties with an interest in the agreement (it is not a free for all) can make submissions if they believe the agreement does disadvantage them. This public scrutiny provides is a reason for confidence in the system.

Individual agreements are checked to see if they meet the NDT through a private process by the Office of the Employment Advocate (OEA). Under the Gov'ts proposal the OEA will be responsible for approving all agreements. Yet the OEA's processes are seriously flawed.

In a recent case in South Australia[2] the SA IR Court considered an (unfiled) AWA, which paid a worker 25 per cent less that the award and cashed out all holidays. The OEA is reported as defending the AWA on grounds it was not formally approved by his office. Yet this defence by the OEA ignores the fact that the Court found 50 other employees of the business were employed on similar AWAs that had gone through the OEA.

In the case of the Meirbin Mushroom Farm, the OEA refused to approve AWAs following Federal Court action by the AWU that resulted in the reinstatement of four women who were sacked from the farm when they refused to sign the AWAs, fearing they would result in a cut in pay. The OEA's refusal notice said it rejected the AWAs because workers did not genuinely consent to the individual contracts not because they cut pay. An analysis of the AWAs in this case showed that they would cut take home pay by 25 per cent.

A study of AWAs[3] by researchers from Melbourne University of found evidence of agreements approved by the OEA which gave the employer unilateral power to reduce the non-performance related component of wages during the life of the agreement. And agreements that expressly excluded the operation of the award but contained no pay clause at all – how such agreements could pass the no disadvantage test is astounding – but they did and were approved by the OEA.

The OEA is not open to public scrutiny in the way the AIRC is. Yet this organisation is to be given responsibility for all agreements in the brave new world.

The proposed new system of 'certifying' agreements also removes the no disadvantage test. Agreements, which previously were tested against the

[2] *Yurong Holdings Pty Ltd v Renalla Yurong Holdings Pty Ltd v Renalla*
[3] Mitchell & Fetter, (200?), *The individualisation of employment relationships and the adoption of high performance work practices* Melbourne University

award, will now only be required to meet 4 statutory minima and the minimum award wage. These conditions are 4 week's annual leave (though apparently up to two week's of the leave can be cashed out, personal/carer's leave (although the minister has not been prepared to commit to any particular standard), parental leave and 38 ordinary hours of work.

Agreements will be able to lawfully abolish penalty rates, overtime pay, shift loadings, allowances, redundancy pay, the extra week of annual leave where it exists in a number of awards, casual loading, work & family provisions and so on, without any compensation of any kind. An examination of federal awards show most contain all of these provisions and every award contains at least three of them.

It won't be as easy as negotiating an agreement on some specific issues and relying on the award to apply as well. Workers will have to choose between the award and an agreement – they won't be able to have both.

The losers in this system will be those with little or no bargaining power – casual workers with no job security, low skilled workers, workers with minimal literacy and numeracy skills.

On top of this erosion of what is in agreements, individual agreements – AWAs – will be preferred to collective agreements.

Hurdles will be put in the way of collective bargaining. In an effort to fragment unions and collective bargaining the new industrial relations laws will intrude to an unprecedented level into the voluntary negotiations between parties. But more of these later.

The new laws will enable employers to choose the form of agreement making in the workplace. While the Government talk of greater choice for employers and employees in setting wages and conditions of employment, don't be fooled by the words.

Collective agreements are to be subordinated to individual contracts, and collective bargaining will not only be made far more difficult for employees and unions, it will be lawful to discriminate against employees who wish to collectively bargain.

In fact collective agreements will never be closed. Employers party to lawfully made collective agreements will be free at any time to offer individual contracts to any employee which will negate the operation of the collective agreements in relation to that employee.

Unions will be bound by collective agreements for their term, and be subject to severe sanctions if they act outside their commitments, including if they act to protect the integrity of the collective agreement against the offering of individual contracts by the employer.

But employers will be free to opt out of collective agreements with individual employees at any time.

Just imagine the effect of this if it were applied to commercial contracts, if one side could freely disregard its obligations at any time whilst the other faces crippling penalties if it responds and seeks to protect the integrity of the contact?

The laws will enable employers to offer AWAs as a condition of employment. The Government says this is choice - the employee has a choice not to accept the job. This is not choice over regulation of employment conditions!

So too, employers will be able to refuse to negotiate a collective agreement even where that is the determined preference of the workers. This power of employers to ignore the preferences of employees will be further enhanced under the new laws.

These laws are not about choice for employees, they are about handing control to employers.

The ACTU's view is that workers must have a genuine right to bargain collectively. This right must be accompanied by an obligation on an employer to negotiate with unions who represent employees in the particular industry or occupation. Bargaining should occur in good faith and resulting agreements must apply to all employees for the life of the agreement.

The second part of the Government's reforms are directed at restricting access by workers to unions and restriction on the rights of workers to collectively bargain.

As I mentioned earlier under the new laws collective or union bargaining will face more and substantial hurdles, many of which will offend Australia's obligations under international standards to which it is a party. These restrictions will include the right of workers to access advice and representation (through restricting access to the workplace) and restrictions on choice of the level at which bargaining will occur.

The proposals as well are fixated on the issue of industrial action.

The proposals include a prohibition on pattern bargaining (by unions but not employers) secret ballots before industrial action, increased penalties for taking unprotected action, extension of the period notifying the taking of industrial action and further restrictions on union right of entry.

We know this because the Minister has indicated that the contents of the BCII Bill 2003 form a model for 'reform' for the rest of Australian workplaces.

Each of these is designed to limit the role of unions in bargaining or to restrict the capacity of workers to bargain vigorously.

The choice that employees make about *their* preferred form of bargaining will carry no weight. Just as the workers at Boeing, the Meirbin Mushroom pickers and so on chose a collective agreement as their choice for bargaining and it

was able to be ignored by the employer then so the choice of the employee in the future will be able to be ignored to the point where it really is only about the employer's choice in bargaining that counts. This means a further restriction on the rights of workers to be represented by their union in their preferred form of bargaining – a further diminution of the rights of the workers and the unions.

The third part of the Government's proposed changes to industrial laws is to make it easier for employers to sack workers.

The Government proposes to change the unfair dismissal laws so that employers of fewer than 100 employees will be exempt from unfair dismissal laws.

Over 4 million workers employed in 99% of corporations will no longer be protected from being dismissed unfairly.

The Government through Andrew Robb most recently claimed that the unfair dismissal laws have cost an estimated 80,000 jobs being created. There is no reliable evidence that Australia's unfair dismissal laws has cost jobs or that their removal will create any more jobs than would otherwise be the case.

This assertion, of the link between strict employment protection laws, and job creation, has been tested by the OECD, and no unambiguous link has been proven.

And lets be clear. Australia's unfair dismissal laws are not an 'experiment' of the Keating Government. The unfair dismissal laws are how Australia meets its international obligations under ILO Conventions to which it is a party. They put us in step with every other OECD countries, not out of step.

The removal of these unfair dismissal laws is not balanced by unlawful dismissal laws. The laws against unlawful termination are not the other side

of the unfair dismissal laws coin. Employees who are dismissed do not have the choice of taking unfair or unlawful dismissal action.

The removal of unfair dismissal laws means that employers will be able to dismiss employees for any reason with the only restriction that it cannot be for a reason that is unlawful.

But what really happens today in the workplace is that a worker is not told she has been dismissed because she took time to care for a sick child – she is told she is dismissed for poor performance. An employee is not told he is dismissed because he refused to sign an AWA – he is dismissed because they are cutting back on shifts!

Under today's laws these workers can have their claims that they were unfairly dismissed dealt with in the AIRC – they have a mechanism for getting their case heard. Given that no unlawful reason is ever given for the dismissal under the new laws they will have no recourse.

And let's be clear about this. Workers get dismissed for unfair reasons regularly. They get dismissed for questioning their pay or entitlements, they get dismissed for refusing to extend their hours, they get dismissed because the manager wants to employ his or her niece or just because the manager is having a bad day.

All of this, under the Government's changes to the law will be fair.

But even if the dismissal is unlawful where does a worker, unemployed, find the $20-30,000 plus that it takes to run an unlawful dismissal case in the Federal Court?

Conclusion

So, what we have is first a government that wants to strip away the safety net, then they want workers to sign an individual agreement in the process of

which they make it harder for the collective bargaining and then they want to make it easier to sack workers.

These changes proposed by the Government are unprecedented.

The effect on workers, and in particular the most vulnerable workers, will be severe.

Wages and conditions of employment will be cut – and there are a raft of changes I have not even touched on such as further award stripping – the capacity to access unions and bargain collectively will be restricted and the employers will be able to sack workers with no recourse.

This proposed new system is unfair and unbalanced.

A system based upon an unfair imbalance of power in the workplace is not sustainable. And this Government will not last forever.

An effective and sustainable democracy requires checks and balances.

Democracy also involves respect for working people, not treating them as pawns in a big picture economic game, but giving them a real say in their own working lives.

The Government is proposing to give the business community all of the aces in its' new industrial relations system. How about a fair deal, a genuine democratic choice for workers?

What the Government proposes is:

- Constitutionally questionable;
- Not supported by the States;
- Not supported unanimously by state branches of the liberal party;
- Not supported unanimously by state based employer organisations.

The changes are not sustainable and they are not fair.