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# Submission to Senate Inquiry into the Fair Work Bill

by Des Moore[1] (Jan, 2009)

## Introduction

In the second reading speech introducing this Bill, the Minister for Employment and Workplace Relations asserted it is based on "the enduring principle of fairness while meeting the needs of the modern age. It balances the interests of employers and employees and balances the granting of rights with the imposition of responsibilities".

My submission is that this reveals a total misunderstanding of how relations between employers and employees would operate in minimally regulated arrangements in our modern economy; of how that would be in the best interests of both employers and employees; and of why what is proposed is fundamentally unfair, particularly to unskilled workers. Overall, the legislation if passed would act as a deterrent to employment and would, in the event of a recession (which now seems almost certain), work to undermine job security just as the then highly regulated labour market did in the early 1990s when unemployment increased to around 11%. Nor is there any reason for supposing that the legislation would, as claimed by the Minister, effect any substantive increase in productivity (see attachment).

In these circumstances it is submitted that it would be contrary to the national interest to allow the legislation to be passed. Instead, the Government should hold a public inquiry charged with comparing the likely economic and social advantages and disadvantages involved in implementing arrangements of the kind proposed with those under minimally regulated arrangements.

My rationale for minimally regulated arrangements is outlined most recently in an article I was asked to write for the journal of the Economic Society of Australia (Queensland)[2] and which is referred to the inquiry as part of this submission.[3] I propose in this submission to only briefly set out the reasons for rejecting the legislation.

By way of general comment I note that, contrary to popular perceptions, the Coalition's WorkChoices was not overall the flexible, simple and fair system that the Coalition claimed it to be. Although 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

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[2] Des Moore, "The Case for Minimal Regulation of the Labour Market", Economic Analysis and Policy, Journal of the Economic Society of Australia (Queensland) Inc, Vol 38. No.1, March 2008.

[3] Available on my web www.ipe.net.au

700 pages, distinct federal and state systems remain, and businesses have complained about compliance costs".[4] Although the current Bill runs to slightly fewer pages (575), given in particular the increased interventionist powers proposed for Fair Work Australia, it will be surprising if the next OECD Economic Survey does not reach a conclusion contrary to the Minister's absurd claim that the proposed arrangements are simpler. They will in fact create a complex mixture of bureaucratic and judicial regulations that will add significantly to the uncertainty that businesses will face in making employment decisions.

**Balancing the Interests of Employers and Employees**

The basic rationale behind the proposed new and very extensive set of regulations and institution(s) is that, because of an imbalance of bargaining power between employers and workers, the latter need to be protected by special legislation and an appropriately charged institutional framework against exploitation and/or being forced to accept "unfair" terms and conditions of employment. In this context much has been made of the fact that some statutory individual agreements negotiated under WorkChoices did not include conditions provided under awards previously made by the Australian Industrial Relations Commission.

However, this imbalance of bargaining power justification for special protective legislation has no substance. It fails to take account of the competitive environment in which employers have to operate in modern day economies; of the options available to employees; and of the protection provided to employees under the common law and ordinary contracts and criminal legislation.

The reality of a minimally regulated labour market which the Government has failed to recognize is that Australia now has more than 800,000 businesses competing with each other and operating with a workforce of over 10 million. Moreover, 90 percent of those businesses have workforces that have judged it unnecessary to seek protection by becoming union members. The proposal to allow collective bargaining (which constitutes a quasi monopoly) where a majority of employees wants it is thus clearly not justifiable on the ground it is in the public interest.

In such circumstances no valid argument can be mounted that, without prescriptive regulations and special treatment of unions, 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[5], for example, indicate that large numbers of persons are able to leave their 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 constrained in attempting

[4] OECD Economic Surveys Australia Volume 2006/12 – July 2006, page 17, Paris OECD 2006.
[5] 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.

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 reveals 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.[6]

It is also often overlooked that competition between employers for labour itself gives individual employees 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.[7]

Individual employees have in fact increasingly been 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 nowadays have much greater choice with regard to advisers and helpers. In such circumstances there is now no basis for giving unions the relatively favourable treatment accorded in the proposed legislation. During the period of *reduced* regulation and union activity in recent years, average *hours* of work[8] and industrial disputation fell while real wages increased, which scarcely suggests employees' bargaining powers was weakened in the less regulated 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 (as noted above) much attention has been given to reductions experienced by some (relatively few) workers employed under AWAs[9], little or no assessment was made of the *economic* basis of the awards under which 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. In short, it may well have been the case that the reduced

[6] Australian Industry, ABS Cat No 8155.0, 2004-05; ABS Cat No 8156.0, Table 1.1.
[7] Ibid.
[8] 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.
[9] By contrast, little attention has been paid to the fact that above-award conditions have been provided to many of the workers who accepted AWAs.

conditions under AWAs were fully justified economically and that the award was out of line with market conditions.

The fact that over 4,000 awards were handed down by tribunals, and that these are now acknowledged as requiring modernization, provides prima facie evidence that they were out of line with market conditions. It 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. This is particularly relevant in the highly uncertain circumstances likely to be experienced in the next 3-4 years but, more generally, the Government's proposals completely fail to recognize that Australia has a dynamic not a staid economy.

Past experience also suggests that some awards reflected the provision of wages and/or conditions allowed 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[10] and a similar situation clearly existed in the construction industry before the ABCC was established.[11] The provision in the proposed legislation allowing protected industrial action to occur legitimately leaves open the possibility that a repetition of such events may occur.

Whether modernized or not, there is no basis for, in addition to the unwarranted proposals for legislated National Employment Standards, awards continuing to determine important components of wages and conditions.[12] The basic point is that market forces rather than regulators are better determiners of wages and conditions. It is in any event little short of absurd that the legislation proposes that, between four yearly reviews of awards, Fair Work Australia should be allowed to effect adjustments "in only limited circumstances".

Apart from failing to recognise the protection provided to workers from the competitive environment in which a minimally regulated labour market would operate, the Government has also failed to take account of the role of the social security system. Over recent years governments have increasingly assumed direct responsibility through an extensive social security system for helping those judged unable to obtain employment or otherwise disadvantaged. This now extensive system provides a protective bulwark for those at the bottom end of the social spectrum and provides a striking contrast with circumstances faced by disadvantaged workers in earlier periods.

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

[11] 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.

[12] Including minimum wages, arrangements for when work is performed, overtime and penalty rates, allowance, leave and leave loadings, superannuation and procedures for consultation, dispute resolution and the representation of employees.

In short, the Minister's claim that the legislation would meet "the needs of the modern age" completely overlooks the fact that modern economic and social developments, along with "ordinary" law, already provide protection for workers. In reality, the legislation is a major step back in time to cope with circumstances that no longer exist.

**Fairness or Unfairness?**

The Minister makes much of the claim that the legislation would "ensure" fairness. Leaving aside the point that "fairness'" is in the eye of the beholder, on any reasonable interpretation this contention is also fundamentally flawed.

It also reflects a basic misunderstanding of the respective roles of labour and welfare policies in the modern economy. The basic function of labour policy is or should be to maximise employment opportunities while the object of welfare policy is to provide assistance to those judged by the government to be for one reason or another in need. But the proposed Fair Work Australia legislation would have a major deterring effect on employment, adding to welfare recipients. By contrast, minimally regulated labour market arrangements would reduce the demand for welfare assistance.

An important unfair aspect of the proposals is the requirement that a specialist Minimum Wage Panel within FWA continue with the Coalition's policy of setting minimum wages, with annual updates. With Australia's minimum close to the highest amongst OECD countries relative to the average wage, this is among the worst features of the proposed regulatory legislation. The MWP is required to take into account a set of factors that are contradictory but that will, given the likely appointees to the panel, virtually ensure that the minimum continues at a level that will limit employment opportunities for the lesser skilled.

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 %). This is because they are lesser skilled and find it more difficult to obtain jobs at the minimum wage levels that were 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 who have actually been receiving the minimum wage were 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). As it appears that the proposed legislation envisages a minimum for each award as well as a national minimum, it is relevant that minimum rates have hitherto been determined for those with wages both on the minimum *and* well above it, totalling in all about 1.2 million employees in 2007.[13] Why anyone

[13] 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 suggested there were 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.

already earning *above* the national minimum needed wage level protection is puzzling to say the least.

The minimum's high level relative to the median clearly limits the scope for increasing the employment of those looking for work. ABS Australian Labour Market Statistics for July 2008 show that, in addition to unemployed of around 466,000 (4.7 percent), a further 518,000 were underutilized, giving an "extended" underutilized rate of 9.9 per cent.[14] But as many are relatively unskilled, their capacity to obtain jobs is importantly dependent on employers being able to offer a wage commensurate with their lower productivity. A minimum wage of around $28,000 a year, or close to 60 per cent of the median wage, necessarily prevents a significant proportion of lesser skilled being offered employment.

It is sometimes argued that without such a minimum, or with a much lower minimum, the supply of labour would be reduced and welfare recipients would increase without any significant increase in employment. However, it is difficult to believe that if employers could offer a wage between the minimum of $28,000 pa and the unemployment benefit of around $12,000 pa that would not attract significant additional employees. This "gap" between the minimum wage that is allowed to be paid and the standard unemployment benefit seems absurdly large and contrary to a sound employment policy.

## Conclusion

Overall, the Government is irresponsibly ignoring the likely beneficial effects for both employers and employees of "freer" bargaining arrangements in a less regulated labour market. As noted, by contrast with the claim that the legislation is meeting the needs of the modern age, it is in reality providing for circumstances that no longer exist. 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.

If the concern is to help financially workers in dispute with employers, an alternative to the proposed 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.[15]

[14] Australian Labour Market Statistics, July 2008 (ABS Cat No 6105.0). Those classified as underutilized said they would like a job but did not qualify as "officially" unemployed because they were not ready to start work within four weeks. Also, about one-sixth of the approximately 3 million working part time would have liked to work more hours. The "official" unemployment rate thus considerably understates the potential for increasing employment.

[15] 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.

**ATTACHMENT**

**Productivity Growth and Labour Market Regulation**

The slowing in the growth of labour productivity in recent years partly reflects the growth in jobs through labour market reform, which brought many unskilled or lowly skilled into the labour market, thereby lowering the average per capita level of productivity. Now we face the likelihood of increased unemployment that will involve many of the unskilled and lowly skilled being put out of a job.

This would tend to increase average labour productivity per head and, if it does, the Government may be tempted to use it to justify its claim that the Fair Work Australia legislation will lift productivity growth, whereas the previous laws did not. To date the Government has provided no analysis to justify its claim.

If the Government does attempt to use Fair Work Australia as a reason for explaining any increase in productivity, that could be taken as implying that the new laws have increased productivity by driving (mainly) low and unskilled workers out of a job.

There is also a question as to whether changes in labour composition have affected, and might in the future affect, changes in average productivity. There is a good argument for saying that the changes since 2000 have been mainly due to other developments in particular industries.

In fact, the latest Productivity Commission annual report (2007-08) suggests that the slower productivity growth in the 2000s can be attributed mainly to the slower productivity growth affected by particular, separate factors in the mining and agricultural industries. That may sound strange in the case of mining in particular. But what the PC report suggests is that the higher prices for mining products encouraged investment in mining (which takes time to yield) and also led to production of minerals that have lower yields (= lower productivity despite the rapid growth in income). There was also depletion of oil and gas reserves. And agricultural productivity was adversely affected by drought particularly in 2006-07 - we had labour and capital working away but much lower output.

None of this slower productivity growth can be said to reflect a failure of the Coalition's reduced regulation of the labour market. Indeed it can plausibly be argued that the reduced regulation was of vital importance because it allowed labour to move into the mining industry and earn much higher incomes but without allowing any inflationary flow through of the wage increases as experienced in the past. Arguably, therefore, increased labour market flexibility contributed substantial gains in prosperity even though it was accompanied by a development that has, incidentally, reduced productivity growth.

Going forward, it may be that the mining and agricultural industries will now have a more positive influence on productivity growth. Drought may be less of a problem for agriculture and, with the likely reduction in mining investment, the mining sector may reach a more 'productive' phase of the investment cycle. But if that does happen

any resultant increase in productivity growth in those sectors would have nothing to do with the increase in labour market regulation.