

Reforming Australian Industrial Relations?

The 21st Foenander Lecture
28 August 2006

Joe Isaac*

My first exposure to industrial relations was as a student at this University in the early 1940s when I did a subject then known as Industrial Organisation. Orwell de Ruyter Foenander gave some half-a-dozen lectures on industrial relations in this subject. These were focused on the role of the Commonwealth Conciliation and Arbitration Court, one of the predecessors of the present Australian Industrial Relations Commission. As an academic subject, industrial relations was in its very early infancy, and Foenander was the most distinguished of the pioneers. He wrote many books and papers on the subject and was appointed first head of the Department of Industrial Relations in 1955. This Department ultimately transmogrified into the present Department of Management and Marketing. My interest and career in industrial relations owe much to his writings and my close association with him. It is, therefore, a very special honour and pleasure for me to be giving this Lecture.

The substance of most previous Foenander Lectures has been in the nature of a review of the contemporary Australian industrial relations system. I propose to do the same on what is perhaps the most momentous change in the system in 100 years. The significance of the question mark in the title of the Lecture is that the word 'reform' used in the promotion of the *WorkChoices* legislation, is a loaded term, suggesting 'improvement'. You will see from what I have to say that this questionable.

Let me begin by posing a number of questions that underlie my paper: What can reasonably be said to be the requirements of an economically efficient and a socially fair industrial relations system? How important is the legislative framework for such a system? To what extent does the *WorkChoices* legislation meet the requirements of such a system?

The requirements

A number of conditions and assumptions of an economically efficient and a socially fair system need to be spelt out first. They are contestable, but for what they are worth, I have drawn them from my years of study and experience; and while you may disagree with them, they would at least identify the basis of any disagreement on the

* Professorial Fellow, Department of Management and Marketing, University of Melbourne.
jei@unimelb.edu.au. Freed from the constraints of footnotes demanded by most journals, I have indulged myself with many long footnotes to shorten the text of my paper.

subject.

1. An economically efficient labour market is one which promotes economic growth through higher employment and productivity. Apart from appropriate economic policy settings – fiscal, monetary and trade - the economic performance of the labour market will be determined mainly by the level and structure of wages, technological advancement, capital accumulation, both physical and human, that is, the skill level of workers as well as the innovative and organisational competence of employers. In such a market, real wages could be expected to rise roughly proportional to productivity, reflecting the historical distribution of productivity gains between wages and profits. However, maximum economic growth should be qualified by the human costs of greater work stress and inadequate leisure and family time. The material benefits of economic growth need to be balanced against the attendant social costs.

2. The labour market is not a perfect market operating impersonally. It is mostly a people-administered market in which judgment, values and various degrees of market power operate, and knowledge is imperfect and mobility can be costly.¹ Furthermore, the labour market is different from other markets in that labour is not a commodity to be bought and sold simply as a ‘factor’ of production. The ‘master and servant’ concept of the 19th Century is no longer acceptable in a civilised society. The human element distinguishes it from other factors and calls for human rights and social considerations. To the employer the wage is a price; to the employee, it is an income on which their livelihood depends and by which they judge their self-worth. Moreover, for the employee, work is also a source of social and personal development.²

3. Whether organised or not, workers are imbued with a sense of fairness on the price of their labour and the ways in which it is used. Relativity in pay and conditions plays an important part in people’s sense of fairness, but it is also backed by economic argument. There are two aspects to this question. One relates ‘fairness among workers, the other to ‘fairness’ in the distribution of productivity between pay and profits.

The first aspect is reflected in the belief that people doing the same work or work with similar requirements and performing similarly, should be paid roughly the same wage. This belief is widely held in a variety of unskilled and highly skilled occupations, and

¹ Paul Samuelson has acknowledged that ‘When an economic theorist comes to write an apologia pro vita sua, he writes certain chapters at great speed and in considerable length, knowing full well the worth of his contributions. The theory of comparative advantage in its application to practical problems of international economics may perhaps be cited as an example. But I fear that when the economic theorist turns to the general problem of wage determination and labor economics, his voice becomes muted and his speech halting. If he is honest with himself, he must confess to a tremendous amount of uncertainty and self-doubt concerning the most basic and elementary parts of the subject. ‘Economic Theory and Wages’ , 1956, in David McCord Wright (ed), *The Impact of the Union*, Kelley and Millman, p. 312

² More than a century ago, Alfred Marshall wrote: ‘For the business by which a person earns his livelihood generally fills his thoughts during by far the greatest part of those hours in which his mind is at its best; during them his character is being formed by the way in which he uses his faculties in his work, by the thoughts and feelings which it suggests, and by his relations to his associates in work, his employers and his employees.’ (*Principles of Economics*, 1890:1-2)

much heart-burning results from its violation.³ There is also economic efficiency justification for such a principle not only for labour but also for other factors of production. Thus, electricity, transport services and other goods are generally priced for all users regardless of capacity to pay except when grounds for special subsidy are called for.

There are, of course, practical problems of judgment in assessing job requirements and especially in establishing 'fair' vertical pay scales. Although undue compression of relativities can be harmful to supply incentives, this can vary from country to country depending on social attitudes on income inequality. Thus, for example, the multi-million dollar pay and equity rewards of some CEOs, mostly in Anglo-Saxon countries, said to be necessary to attract/retain high-flyers, does not seem to be a feature of Japan or of most European countries.⁴ In matters of income distribution, what some regard as envy, others call avarice.

The other aspect of 'fairness' concerns the distribution of productivity gains. Productivity occurs unevenly in different industries mainly because of differences in the incidence of technology. In a highly competitive impersonally operating market, productivity, wherever it occurs, would be passed on in lower prices thus raising the real wages and all other incomes. In the real world, productivity is distributed by a piecemeal administered process through individual bargaining, collective bargaining and arbitration. If these processes allow wages, other than due to greater skills, to rise significantly faster in industries or enterprises enjoying higher productivity, a distortion of established relativities would occur. This is not a sustainable situation either industrially – a sense of 'unfairness' - or economically - a misallocation of labour and a threatened outflow of labour from the industries with lowered relative pay. Forces are set in motion for a correction of the distortion. Thus, for example, take two areas of activity where for technological reasons the capacity for productivity increase is limited – education and parliament – and no pay increase is offered on their productivity record. This would result in a serious distortion in the pay scales of people in these activities. Sooner or later, this would be corrected – before undue strains on the supply of labour to these two areas occur.

³ Those who see performance-related pay as an appropriate basis for fixing pay, might bear in mind the conclusion of one scholar that 'most individual merit or performance-based pay plans [in the United States] share two attributes: they absorb vast amounts of management time and resources, and they make everybody unhappy'. (Pfeffer, J. 1998, 'Six dangerous myths about pay' *Harvard Business Review*, May-June, p.115. Quoted in Stephen Deery and Richard Mitchell, 1999, *Employment Relations: Individualisation and Union Exclusion*, Federation Press, p.9)

⁴ John Shields, Michael O'Donnell & John O'Brien, 2003, A report prepared for the Labor Council of New South Wales. *The Age, Power Salaries*. A Special Report. November 5, 2003. Conyon, M.J. and Schwalbach, J., 2000, 'Executive Compensation: Evidence from the UK and Germany', *Long Range Planning* 33, www.elsevier.com/locate/lrp. Conyon, M.J. and Murphy, K.J., 2000, 'The prince and the pauper? CEO pay in the United States and the United Kingdom', *Economic Journal*, 110, November. Smith, D., 1999, *Management Today*

There is therefore no necessary conflict between economic efficiency and ‘fairness’. I note that the Commonwealth Higher Remuneration Tribunal has recently awarded salary increases to members of the federal Parliament of 6.9%, made up of a CPI increase of 4.4% and a productivity increase of 2.5%, the latter presumably being based on *national* productivity increase rather than on any increase in the productivity of parliamentarians.

I should mention that in recent years the relevance of ‘fairness’ has entered the domain of respectable economics under the name ‘behavioural economics’, recognised by the award of a Nobel Prize in Economics to Daniel Kahneman for introducing the findings of psychology into economics. This new branch of economics challenges the conventional conclusions about income distribution and throws light on the importance, of income relativity in people’s behaviour, on labour mobility and pay increase, and on the relationship between income growth, beyond a certain threshold, and happiness.⁵ Some of these findings question the undue emphasis on economic growth as the prime objective of economic policy for the welfare of the community

Further, there is a growing body of evidence that in many countries good health and longevity are associated with the ‘social gradient’: the extent of inequality as reflected in a number of interrelated factors – the social hierarchy, hierarchy in the workplace, relative incomes, and level of education, skill and occupation.⁶

4. Workers generally have a need for job security and have a sense of proprietorship in their jobs. To be dismissed is a traumatic experience and damaging to self-esteem. To have the right to contest such a decision and to have an independent body judge the fairness of the action, is an important assuaging factor. Bullying and other unfair practices by supervisors are common in employment experience. Legal provision against unfair dismissal and discrimination gives effect to ILO Convention 158 that Australia has ratified.

5. Despite a great deal of common interest, it needs to be recognised that there is often a residual element of conflict between employers and employees – in the sense of opposed interests rather than industrial action. There is nothing pathological about this. Nor is it a manifestation of ‘class’ conflict. An adversarial relationship on certain issues is inherent in industrial relations; because the issues are about determining the conditions of work and the distribution of the proceeds of production; and also on the extent to which the employee is allowed a voice. To close one’s mind to this conflict and to assume a constantly harmonious ‘unitary’ relationship, as is sometimes maintained, is to close the door to its resolution. The task of industrial relations policy and human resource management is to find ways and means to resolve conflicting

⁵ For a fuller discussion see Ian M Macdonald 2005, ‘Policy implications of Behavioural Economics: Introduction’, *Australian Economic Review*, 38,3,

⁶ Marmot, M., 2004, *Status Syndrome. How Your Social Standing Directly Affects Your Health and Life Expectancy*, Bloomsbury; Briggs, C., 2005, *Federal IR Reform: the Shape of Things to Come*, ACIRRT, University of Sydney.

issues and to widen the area of common interest between labour and management.⁷ Because economic, technological and other changes take place almost continuously, the resolution of conflicting issues is also a continuing process.

6. Human rights consideration and the general acceptance as far back as Adam Smith, that the weight of economic power between the individual employee and the employer generally favours the employer, have led to international conventions making *collective* action a legitimate right of workers. These rights are spelled out in International Labour Organisation Conventions (which Australia has ratified) and are enshrined in the United Nations 1948 Universal Declaration of Human Rights. For such a right to be viable two conditions are recognised – the right to continuous organisation of workers in what we refer to as trade unions, and the right to industrial action. Collective bargaining is not meaningful without this right. The existence of these coercive powers generally speeds up the resolution of conflicting issues without being put into action.⁸ Thus, to ban or greatly limit the right to strike does not necessarily widen the area of common interest between workers and their employers. It simply changes the balance of economic power in favour of employers and may even widen the area of conflict.

7. Common law principles based on pre-industrial revolution labour markets, are loaded against workers seeking to remedy the imbalance of economic power by collective action. It is an anachronism in industrial relations. It equates an individual person to a corporation regarded as a legal person. Since the common law is hostile to the exercise of collective action, legislation by parliament is necessary to exclude or limit its operation.⁹ Recognition of trade unions has never been the gift of employers. Legislation is necessary to give effect to workers' rights of 'industrial citizenship', a term used by Ron McCallum in a previous Foenander Lecture. Employees have legitimate rights as stakeholders in the employment process. The activities of unions as representatives of employees go beyond negotiating the terms of employment. An equally important function is ensuring that the terms are properly applied, to represent individual workers in grievances, and to ensure that adequate health and safety protection are in place. In many European countries, they and their employer counterparts are afforded a voice in the determination of economic and social policy as

⁷ I should note in passing that the pejorative reference made by some to the 'industrial relations club' (those favouring the industrial tribunal as the institution underpinning Australian industrial relations) as a kind of self-promoting conspiracy against the public interest, is misconceived. The professional personnel on all sides engaged in resolving industrial conflict are not at daggers drawn but sit together, formally or informally, in conciliation proceedings, to find common ground in a civil manner, and if this fails, to resort to the umpire. They meet at industrial relations conferences and argue about matters on which they have considerable experience. This is a process not of conspiracy against the public interest but quite the opposite.

⁸ While the wording of the ILO Conventions is silent about the right to strike, its supervisory bodies have affirmed this right repeatedly as inherent in collective bargaining, while not disapproving of conditions and procedural elements attaching to such a right in the circumstances of particular member countries. The right to strike is enshrined in the constitution of some countries, for example, France and Portugal. (ILO, 1994, *Freedom of Association and Collective Bargaining*, para 144)

⁹ In Britain, through most of the second millennium, the Master and Servant legislation was used to advance the interest of employers against workers; and we followed suit in the 19th Century.

social partners. It is understandable but not justifiable, that employers resent the intrusion of third parties in their relationship with their employees, whether through collective bargaining or through legislation such as the Factory and Shops Acts or health and safety matters.

8. At the turn of the last century, in the wake of big strikes and the pressure from many employers for ‘freedom of contract’ – the equivalent of the current drive for individual agreements - Australia approached industrial conflict, with direct concern for the public interest, by establishing legally constituted tribunals to deal with industrial disputes by compulsory conciliation and arbitration. The ‘independent umpire’ concept, establishing effectively minimum industrial citizen rights of employees, has, until now, been part of our industrial history for a century.

Let me summarise what I have elaborated as the conditions and assumptions of an economically efficient and a fair system of industrial relations:

1. A system that promotes economic growth through higher employment and productivity.
2. Labour is not a commodity but a *human* resource. Economic considerations should be balanced against social considerations, especially in view of the imperfections of the market.
3. Norms of fairness are a feature of most labour markets and need to be recognised in the interest of long term economic efficiency.
4. There needs to be provision against unfair dismissal and discrimination. (ILO Convention 158)
5. While there is a great deal of common interest between workers and their employers, there are generally differences on the terms of employment that need to be resolved.
6. Generally, individual employees have weaker economic power than do employers. To rectify the unbalanced power, *collective* bargaining with the *right*, within limits, to industrial action, should be available to the parties. (Conventions 87 and 98)
7. Legislation is necessary to provide limits on industrial action and to over-ride the strictures of the common law on unionism and effective collective bargaining.
8. There should be machinery to mediate by compulsory conciliation and arbitration in industrial disputes

Australian conciliation and arbitration

I turn now to discuss very briefly the history of the Australian industrial relations system with particular reference to the federal arbitration tribunal. This is necessary to dispel the simplistic view sometimes asserted that our industrial relations system ‘was designed in the 1900s to solve the problems of the 1890s’.¹⁰

¹⁰ The Australian Chamber of Commerce and Industry, quoted by Minister Kevin Andrews in a speech to the National Press Club, 31/05/2005

Federal tribunals, having the power of compulsory conciliation and arbitration, have been part of the industrial relations processes for a century in dispute settlement, balancing economic and social (fairness) considerations. This marked a radical change from what prevailed in the 19th Century. And until WorkChoices, this has been an enduring feature of our system. However, over its lifetime, the system has undergone frequent changes, some by High Court interpretation, some by legislation but until 1993, on principles and procedures, the changes have come mainly from the tribunal itself within the wide discretionary powers available to it, usually following debate by parties and interveners.¹¹ The system has moved from varying combinations of centralised and decentralised systems to centralised arrangements, such as those based on the indexation principles in the mid-1970s and the Accord in the mid-1980s.

I note in passing the controversy surrounding the economic effects of centralised wage fixing systems. It is now a popular view that centralised wage determination has undesirable economic consequences. However, they were necessary to moderate wage inflationary pressures rampant at the time through free collective bargaining in a substantially protected economy. The available evidence for Australia suggests that the centralised wage fixing episodes, especially under the Accord, have contributed to greater wage moderation, price stability and industrial peace.¹²

A World Bank sponsored international study concluded¹³ that in the 1970s and 80s, countries with highly coordinated collective bargaining tend to be associated with lower and less persistent unemployment, less earning inequality and wage dispersion, and fewer and shorter strikes, compared to countries with uncoordinated bargaining at industry, enterprise and individual level. It also found that countries with high union density and coverage do not contribute to poor employment performance provided there is bargaining coordination. After urging countries to adopt decentralised wage fixing arrangements based on its 1994 model, a more recent OECD study¹⁴ has now concluded, with qualifications as to institutional structures, that highly centralised and coordinated systems (as was our system under the Accord) tend to achieve lower unemployment than do other institutional set-ups.

¹¹ The Commission has over the years made many changes in procedures to speed up hearings. Whereas the pre-1960s national wage cases took many months to be completed, this is no longer so. Written submissions are encouraged and the Commission operates more as a committee of inquiry than an adversarial court.

¹² Gregory, R.G. (1986), 'Wages policy and unemployment in Australia', *Economica*, 53 (210), S53-74. Chapman, B.J. and Gruen, F.H. (1991), 'An analysis of the Australian consensual incomes policy: the prices and incomes Accord', in de Neubourg, C. (ed.) *The Art of Full Employment*, Elsevier Science, Delft, 475-504. Under the Accord, the unions accepted a cut in real wages in exchange for improved welfare provisions.

Dowrick, S. (1991), 'The structure of industrial relations, wages policy and technological change', *Discussion Paper No. 257*, Australian National University Centre for Economic Policy Research, Canberra.

Lye, J.N. and McDonald, I.M. (2004), 'The effectiveness of incomes policies, enterprise bargaining and inflation targeting in Australia', *Australian Economic Papers*, 43, 1, 21-38.

¹³ Aidt, T. and Tzannatos, Z., 2002, *Unions and Collective Bargaining. Economic Effects in a Global Environment*, The World Bank

¹⁴ OECD, 2006:86. *Employment Outlook*

Evaluating recent changes

It is important to consider the changes in the operation of the federal industrial relations system with the deregulation of the financial market and the dismantling of trade protection in the mid-1980s under the Hawke government. This new economic environment produced circumstances calling for faster productivity growth. Conscious of the need for micro as well as macroeconomic objectives, the AIRC responded by instituting a system of centrally managed decentralisation, extracting undertakings from the unions involved in each award and agreement to adhere to the wage fixing principles and to cooperate with employers to improve work practices.¹⁵ The Keating government's 1993 Act gave statutory encouragement to enterprise collective bargaining, setting rules for collective bargaining. The right to strike was protected within limits dictated by the effect of industrial action on the economy, but only on interest matters pursuant to the making of collective agreement. Disputes on rights matters should be resolved through grievance processes, industrial action on such disputes being subject to penal sanctions.

The 1993 Act substantially met the conditions and assumptions of an economically efficient and a socially fair industrial relations system. Australia's entry into global competition and appropriate monetary and fiscal settings provided adequate checks on wage inflationary pressures, but the Act left the door open to a more centralised approach to wage fixation if this was believed by the parties to be necessary. A safety net was available for those not engaged in collective bargaining and provided the basis for a 'No Disadvantage Test'¹⁶ to ensure fairness in the application of flexibility in conditions covered by agreements.

While Keating looked forward to collective bargaining with a reduced arbitral role for the Industrial Relations Commission, further changes, subject to the restraining hand of the Senate, was enacted in 1996 by the Howard Government. This included the restriction of awards to 20 specified 'allowable' items, the deletion of the requirement of 'bargaining in good faith' effectively made collective bargaining voluntary. Industrial action in pursuit of multi-employer agreements or industry bargaining, effectively to standardise agreements among employers in the same industry, was removed.

If flexibility is the name of the federal Government's game, then there are important advantages in allowing diverse bargaining arrangements to develop.¹⁷ In some industries, there is merit in multi-employer bargaining. The bargaining power of the

¹⁵ This exposes the view that the lack of flexibility in work practices under the AIRC. It was inflexible only in regard to approving higher wage increases than was being sought.

¹⁶ The application of this test is not without deficiencies. See Merlo, O., 2000. 'Flexibility and stretching rights: the No Disadvantage Test in Enterprising', *Australian Journal Of Labour Law*, 13. Mitchell, R. *et al* 2005, 'What's going on with the 'No Disadvantage Test'?' Centre for Employment and Labour Relations Law, March 2005.

¹⁷ See Chris Briggs, John Buchanan and Ian Watson, *Wages Policy in an Era of Deepening Wage Inequality*, Occasional Paper 1/2006, Policy Paper 34, The Academy of the Social Sciences in Australia, Canberra 2006.

parties is likely to be more balanced where several employers in substantially the same industry face one or more unions. There are savings in transactions costs, while standardising wage rates is consistent with the outcome of an efficient market in that the less efficient firms are not subsidised by lower wages and allows the more productive firms to earn higher profits. It is also appropriate in certain types of employment – hairdressers, nurses, carers – where employment is scattered with small numbers in each enterprise. There are also advantages in terms of skill formation for certain industries.

However, a more radical change limiting the power of the tribunal has come about from the *WorkChoices* legislation which came into effect in March this year.

WorkChoices

I turn now to the *WorkChoices*. What is the case for it?

The Prime Minister says that the Australian economy has performed very strongly in recent years. Australians have enjoyed higher living standards from a combination of prudent economic management, strong jobs growth, higher real wages, low inflation and interest rates, lower taxes, increased family benefits and improved Government services.

If so, why do we need *WorkChoices*?

Mr Howard's answer is that we 'must press ahead with economic reform if we are to prosper in the 21st century. We do not believe the lemon has been squeezed dry in industrial relations reform.' In this connection it is relevant to note that that the concept underlying this legislation is substantially in line with Mr Howard's '*JobsBack*' Industrial Relations Policy of October 1992. More than 20 years have passed without having to squeeze the lemon dry; yet the economy has prospered. Why should we accept that it is now necessary to squeeze the lemon dry to meet the next 20 years or more?

The Prime Minister further maintains that the measures in Work Choices

represent the next logical step towards a flexible, simple and fair system of workplace relations...Only through this will the full potential for productivity gains in the Australian economy be realised. (26 May 2005.)

As for the legislation being 'simple', anybody looking at the 1300+ pages of the Act and Regulations can hardly believe that it is simple even for experienced labour lawyers. I will deal with the expectation of productivity increases under *WorkChoices* later. As for 'flexibility', I will argue presently that it is potentially more flexible but

the choices are mainly for employers. However, the broad evidence by international standards is that Australia has done well on flexibility criteria.¹⁸

- We have the second highest proportion of part-time workers, a substantial proportion being casual.¹⁹ In addition, the numbers of independent contractors and labour hire workers²⁰, are increasing. However, the downside of this flexibility is that it does not encourage employers to provide opportunities for skill formation, a critical element in productivity. OECD statistics show that we are above the OECD average in the proportion of low-skilled population, and well above those of the US, UK and many European countries.²¹
- our average weekly hours of work are amongst the highest in the OECD²²
- Our age-earnings profile is among the flattest of the OECD, i.e., seniority-based wages are not a feature of our labour market.²³
- On the basis of strictness of employment protection, including difficulty of dismissal, we are below the OECD average and are among the six least restrictive countries.²⁴

The World Economic Forum has published two indices to compare international competitiveness compiled by Jeffrey Sachs and John Macarthur. The Growth Competitive Index for 2005, based on quality of the macroeconomic environment, the state of the country's public institutions, and the level of technological 'readiness', puts Australia in the top 10 countries in the world and above the UK. Although the US is first on this list, countries above Australia, such as Finland, Sweden and Norway, are highly unionised and have more centralised wage fixing systems.

Another index, the Business Competitive Index, based on microeconomic factors which determine current sustainable levels of productivity and competitiveness, puts Australia 15 in the world league, again with the US on top but with a number of highly unionised and more centralised industrial relations systems ahead of us.

¹⁸ The Minister for Employment and Workplace Relations has quoted with approval the BCA's statement: 'despite past reforms aimed at making Australia's workplaces more flexible and responsive to change, overly complex, operationally detailed and prescriptive awards remain at the heart of Australian workplace relations.' (K. Andrew's Speech 27 Feb 2005, 'Where do we want workplace relations to be in five years time?') The BCA's statement is curious in view of the fact that barely 20% of workers, mostly the less skilled, are on awards – 40% are on enterprise agreements and 40% are on common law contracts. The prize for overly prescriptive provisions must surely go to *WorkChoices*.

¹⁹ OECD, 2006:264. *Employment Outlook*

²⁰ According to a recent Victorian Government report, a significant proportion of labour hire workers are in accident-prone activities. (Economic Development Committee, *Inquiry into Labour Hire Employment in Victoria*, June 2005. See also Elsa Underhill, 2002, *Extending knowledge on occupational health & safety and labour hire arrangements: A literature review and analysis of Victorian Worker's Compensation Claims*. A Report Prepared for WorkSafe Victoria).

²¹ OECD, 2002, *Education at a Glance*.

²² OECD, 2006:265. *Employment Outlook*

²³ OECD, 2005:103. *Ageing and Employment Policies: Australia*

²⁴ OECD, 2006:96. *Employment Outlook*

Combining the elements of both measure, we come out 6th in the world. All told, we are well-off in terms of our macro and micro policy and institutional settings.

The various pieces of legislation

Let me now turn to the various pieces of legislation. Many papers have recently been published on *WorkChoices*. These include a submission to Senate Inquiry by 151 academics referring to evidence that deny the case for many aspects of the legislation.²⁵ I shall confine my remarks to the more important ones to highlight the issues.

Although it is convenient to analyse the various parts of the legislation piece by piece, because the different parts are interconnected, its potential impact can only be understood fully if the total package is considered. This is a point that has not been given sufficient weight in public discussion focussed simply on AWAs, which are essentially the instrument by which the various elements are put into effect.

A new body, the Australian Fair Pay Commission, has displaced the AIRC in the determination of the minimum wage.

The UK's *Low Pay Commission*, recently established to fill a void in the determination of the minimum wage, was the inspiration for this body. The Australian Government's argument justifying the new tribunal - that the procedures of the AIRC are adversarial and legalistic - is a red herring. An adversarial element must be expected to exist when interested parties are in disagreement on the terms of employment, as is generally the case between employers and employees, at least in the first instance of negotiations. On major cases, when agreement is not in sight, the AIRC's *procedure* - inquisitorial rather adversarial - has been to act as a Committee of Inquiry on the submissions of the contending parties and to give detailed reasons for its decisions. It allows the parties and interveners to present and debate their arguments and evidence in a public forum. It raises questions and may invite further research to be undertaken on certain contentious issues. The AIRC does not rely on the rules of evidence required in courts of law. It has a balanced range of expertise in legal, economic and industrial relations matters. The proceedings are orderly and transparent. The parties are able to question each other – in technical parlance, there is examination and cross-examination of the material presented. It is this aspect of the proceedings that is usually regarded as legalistic and adversarial. However, while this may have been substantially true half a century ago, a comparison of the proceedings since then with those of the law courts, should make it plain that there is a world of difference between them.

It appears that the AFPC will proceed less formally. Whether there will be a public hearing is not yet clear. It has invited submissions and is going round the country to

²⁵ In connection with the academics' submission, Minister Andrews said that 'a group of academics is no substitute for common sense proposals.' ABC-AM 17/11/05

find out for itself about the state of the economy. It is expected to commission research and to give a reasoned decision. We do not yet know the degree of transparency in its proceedings. While the terms of reference of the AIRC required the determination of an 'effective safety net of fair and enforceable minimum wages', and to have regard to the desirability of 'attaining a high level of employment', the AFPC is required to have regard to the 'capacity of the unemployed and low paid to obtain and remain in employment'. The word 'fair' is strangely absent from the wage-setting parameters of the AFPC, despite its title. The movement in the living standard of the rest of the community, the relativity factor, has been a relevant 'fairness' consideration in the determination of the minimum wage for a very long time.

All that said, it is arguable that the task imposed on the new tribunal as expressed in the requirements in respect of the safety net are not very different from what was set down in the previous legislation. Nor could it be said at this stage with any certainty that the different procedure being followed in collecting and testing evidence, while departing from the traditional procedure, is critical for its outcome. If procedural and safety net requirements were the real issue, the Government could have simply changed the Act accordingly, without going to the expense of setting up an additional tribunal.

It is, therefore, difficult to escape the conclusion that the real reason for displacing the AIRC is that the Government considers that the AIRC has been too generous in its wage determinations and has not taken sufficient account of the unemployed. However, whatever it decides, because of the spurious grounds advanced by the Government on which AFPC has displaced the AIRC, its limited term of appointment and any lack of transparency in its procedure compared to the AIRC, the AFPC may unfortunately carry the burden of a public perception, even if wrongly, of not being fully independent of the Government.

The contention that the minimum wage has been pitched at too high a level at the expense of employment growth, has received support from some economists. One such view is based on the argument that Australia's minimum wage to median wage ratio is among the highest in the OECD.²⁶ However, while this may suggest that the Australian minimum wage is too high, it is far from conclusive. On the OECD's figures of its member countries, there is zero correlation between this ratio and the rate of unemployment. Further, the OECD has recently admitted that 'the empirical evidence concerning a negative impact of minimum wages on employment is mixed, with some studies finding evidence of significant effects particularly for youth.'²⁷ Unlike many other OECD countries, the federal award rates for youths are significantly lower than the adult rate.

²⁶ Wooden, M., 2005. 'Workplace Relations Reform: Where to Now?' *Australian Economic Review*.38,2, 176-81. An analysis by the ABS (Cat. No. 6105.0 July 2006) of the job search experience of unemployed people is a salutary exercise. It shows that there are many factors other than the minimum wage in the rate of unemployment.

²⁷ OECD 2006:86, *Employment Outlook*

The extent to which the minimum wage should be increased at any time without impairing employment growth is a matter of judgment about which experts can differ, particularly when unemployment is falling²⁸ while labour participation rate is rising, profits are high and increasing as a share of Total Factor Income, productivity is rising and wage inflation is in check. The table below shows that since 1996, Real Unit Labour Costs have fallen, while the real minimum wage has lagged behind productivity growth, and Real Average Weekly Ordinary Time Earnings. It has also fallen relative to the real median wage²⁹. All this kind of information was in front of the AIRC when it made its last Safety Net decision in 2005 and in the years before. It has not been a pacesetter but a cautious follower of labour market trends.

Furthermore, there was provision within its principles for any respondent employer to argue economic incapacity to sustain the awarded increase, allowing the AIRC to assess the impact of such increase on employment. It has repeatedly focused on the unemployment issue, much of it revolving around the question of elasticity of demand particularly of unskilled labour. Apart from being confronted by a whole array of elasticity figures, elasticity is calculated on the assumptions that all other things are equal. In the real world, all other things tend to change, making a prediction of the effect of the range of increases in the minimum wage under consideration very much a matter of judgment.³⁰

Percentages			
May 1996-June 2005		1996 - 2005	
Real Minimum Wage (C14)	Real AWOTE Full-time Adults	Labour Hourly Productivity per person annual average	Real Unit Labour Cost Non-farm
*	*	**	**
+12.6	+20	2.0@ 2.5#	minus 7

*May Quarter. Safety Net Review, 7 June 2005 AWOTE = Average Weekly Ordinary Time Earnings

**Years ended June. @Non-farm sector. Treasury Website

#Market sector. ABS Cat. No. 5206.0. Multifactor productivity = 1.3%

²⁸ It has fallen progressively from over 8% in 1996 to just under 5%.

²⁹ AIRC, *Safety Net Review*, 7 June 2005. PR002005

³⁰ An example of the uncertainty of the effect of wage reduction on employment, because of the intervention of other factors, is illustrated by the 'Five Economists' canvassed a few years ago. (Dawkins, Peter (2002) The 'Five Economists' Plan: the original idea and further developments. Technical Report Discussion Paper no.450, CEPR, RSSS, ANU) They argued that a freeze for a period of years in the minimum wage, compensated by a tax credit for low wage earners, would result in the unemployment rate declining to 5%. With the passage of time, the unemployment rate did decline to around 5% without a wage freeze or a tax credit. This is not a criticism of the tax credit concept which, incidentally, has not found favour with the Government and was never put to the AIRC. However, it illustrates the difficulty of prediction in this area of activity.

This is a task that will never please all parties. The AIRC and its predecessors have been convenient political whipping boys on their wage decisions. Perhaps the AFPC will suffer the same fate.

It is possible that if the minimum wage had been held back *substantially*, unemployment of unskilled workers would now be lower.³¹ However, assuming that Asian wage levels are not in contemplation, the effect on employment of the extent of wage restraint advocated by the Government in the 2005 Safety Net case is far from certain.³² What needs to be asked is what factors other than wage rates are behind the unemployment particularly of unskilled workers. The fact that the rate of unemployment among those with less than upper secondary education is twice as high as those with upper and post secondary education (excluding tertiary), suggests that education and training deficiency may be an important factor in unemployment. This is true for Australia as for most other OECD countries.³³ In addition, consideration needs to be given to the effect on the inducement to work arising from narrowing the difference between the minimum wage and unemployment and other welfare benefits.

Moreover, the greater flexibility allowed by the new AWAs – of which more later – through unpaid overtime and loadings, will encourage greater intensification of work and longer hours rather than increased employment.

The new safety net

I mentioned earlier that the No Disadvantage Test, based on relevant awards which effectively constituted the safety net, was introduced by the 1993 Act. The safety net was limited to 20 allowable award items by the 1996 Act. Its purpose was to allow greater flexibility through trading of benefits so long as there was no net disadvantage to the workers concerned. To ensure that accepted minimum standards were not compromised, agreements, collective and AWAs, were tested against relevant awards including the minimum wage. This Test will no longer apply, but a new and more limited minimum standard has been enacted to which all agreements must conform, known as the Australian Fair Pay and Conditions Standard (AFP&C). This will consist of five items - the minimum wage determined by the AFPC, 4 weeks annual leave (half of which may be cashed out), 2 weeks personal (sick) leave, 12 months unpaid maternity leave, and a standard 38-hour week (averaged over 12 months) with reasonable additional hours - effectively, the new safety net of *WorkChoices*. The averaging of weekly hours of work over 12 months provides the opportunity for

³¹ Although the rate of unemployment has been falling to the lowest rate for many years, just under 5%, there is still a margin of underemployment. Most underemployment appears to be of a long-term nature, especially affecting older workers. Although the volume underemployment rate in terms of hours is about 2.2%, a large proportion of those seeking more hours of work are not available for work immediately or at the place or job on offer. ABS, *Australian Labour Market Statistics*, April 2006. Cat.6105, p.23.

³² The AIRC awarded a minimum wage (C14) increase of \$17 (3.6%), while the Government argued for an increase of no more than \$11 (2.4%). If the increases had been limited to the figure advocated by the Government, would unemployment have been significantly lower?

³³ OECD, 2006, *Employment Outlook*, Table C.

employers to avoid paying overtime and other penalty rates by working people below 38 hours in certain weeks and above it at other times.

The new safety net is a downgraded version of its predecessor. Overtime, penalty rates and other allowances, a feature of traditional awards, will no longer apply to the new safety net.³⁴

A reduced role for the AIRC

Apart from being displaced by the AFPC in determining the safety net, the AIRC has been virtually stripped of compulsory award-making and compulsory mediation powers, while certification of agreements has been handed over to the Office of Employment Advocate to rubber stamp. Its tasks are confined mainly to voluntary conciliation and arbitration while parties are encouraged by a Government subsidy to seek private mediation. Mediation is an important function but it means that a party – usually the stronger – unwilling to allow the AIRC to mediate, will prevent a dispute from being settled quickly as well as allow the stronger party to dictate the terms. In areas of weak or absent unionism, employers will be able to impose AWAs as a condition of employment subject to the five minimum items in the AFP&C standard.

Other tasks include the administration of strike ballots and the penal sanctions, and dealing with a greatly reduced scope for unfair dismissal cases

The AIRC has over the years been an important means of determining new standards through ‘test cases’. Thus, equal pay, standard hours of work, maternity leave, superannuation, termination pay and other such matters have resulted from such cases, giving all, weak and strong, the benefit of such determinations. Unless specifically provided by new legislation directly or through the AIRC or the AFPC, benefits of any kind will result piecemeal from enterprise bargaining, the weak missing out.

Individual bargaining through AWAs will be encouraged.

Individual bargaining has taken place over the years and can continue to do so as a common law contract between the employers and individual employees, subject to relevant minimum awards. They have provided scope for greater flexibility in working conditions and enabled workers to be paid above the award-prescribed minimum pay and conditions.

AWAs are a more formalised version of common law contracts. They have existed since 1996, and by the end of March 2006, when *WorkChoices* came into effect, about

³⁴ It is also likely that most casual workers will not even be entitled to the new safety net. Colin Fenwick and Ingrid Landau, 2006. ‘Work Choices in international perspective’. *Australian Journal of Labour Law*, 19, 2.

860,000 or 8% of the labour force had been approved.³⁵ The object of the new legislation is to increase this number, and various provisions in the Act will facilitate this object.³⁶ The new AWAs are, of course, a downgraded version of the old AWAs because the No Disadvantage Test based on the old Safety Net has been replaced by the more limited AFP&C standard. This will allow various established conditions of work – overtime and other penalties – to be taken away from workers in the name of flexibility, facilitated by the new standard *average* 38 hour week. Those employers who may be disinclined to resort to cost cutting in the ways facilitated by the legislation, may be forced by competitive forces to follow suit.

Since the new legislation came into effect, a sample of 250 AWAs shows that, although in a substantial proportion of cases, wages were higher than awards, in all cases, one previously protected condition was removed and in 16%, *all* previously protected award conditions were removed.³⁷

The Government argues that bargaining between individual workers and employers, will produce optimum outcomes for both parties and result in faster productivity growth. No doubt, there are cases for the more skilled and scarce types of labour who may have done well with AWAs. But the evidence does not support this contention for AWAs in general.³⁸ AWA's have generally not been individually differentiated agreements but a fairly standard set of terms for a large number of employees doing the same or similar work in an enterprise and presented to workers on a take-it-or-leave-it basis rather than the result of bargaining. Moreover, the underlying assumption in these cases that individual workers have the same bargaining power as employers defies reality.³⁹

Furthermore, there is no persuasive evidence that individual bargaining through AWAs will in general facilitate faster productivity growth than collective bargaining. David Peetz has looked closely and rigorously at the evidence on this issue and has come to the contrary conclusion.⁴⁰ The New Zealand experience with individual

³⁵ Figure supplied by the Office of the Employment Advocate.

³⁶ See 2nd Reading Speech of the Minister. This is already happening. Between April and June 2006, 5000 employees were covered by the new AWAs in enterprises with less than 20 employees and about 25,000 in larger enterprises. Office of the Employment Advocate. (7/07/06)

³⁷ The extent to which award provisions were removed were – 64% leave loadings; 63% penalty loadings, and 52% shift loadings. Extra pay was received in 78% of the cases. (Peter McIlwain's testimony to the Senate Employment, Workplace and Education Legislation Committee, 29 May 2006)

³⁸ The belief (for example, Minister Andrews, 2004, WA companies reaping rewards of AWAs, Media Release 17104) that those on AWAs have received on average relatively larger pay increases is not substantiated because the earnings figures include managerial and sub-managerial salaries while differential hours of work also make the two sets of figures non-comparable

³⁹ The Government's view is neatly expressed by Mr Peter Reith, then Minister of Workplace Relations when introducing the 1996 Bill: 'The Bill rejects the highly paternalistic presumption that has underpinned the industrial relations system in this country for too long – that employees are not only incapable of protecting their own interest, but even of understanding them, without compulsory involvement of unions and industrial tribunals.' (Second Reading Speech, 23 May 1996)

⁴⁰ David Peetz, 'Hollow shells: the alleged link between individual contracting and productivity growth', in *Journal of Political Economy*, No.56

contracts shows that while in the few years before the 1991 Employment Contracts Act (in many ways similar to *WorkChoices*), productivity in Australia and New Zealand moved at about the same pace, after 1991, Australia moved well ahead of New Zealand.⁴¹

In this connection, it is important to distinguish between cost cutting through a reduction in wages and/or conditions on the one hand, and productivity increase on the other. Both result in lower costs but productivity also leads to a higher hourly output per person enabling lower costs to be realised without cutting wages. The removal of penalty rates and the like, a likely feature of AWAs, cuts costs but does not necessarily increase output per person.

It is widely accepted that the sources of *sustainable* productivity growth are increased physical and human capital (skills) and the application of technology or technical efficiency operating in a competitive market. While there have been occasions where unions have resisted technological displacement of labour, such resistance have not generally been effective or sustainable. In the face of international competition and the threat of unemployment through relocation or outsourcing, there is less likelihood of serious union resistance. The main issues in technological displacement of labour have been sharing the fruits of productivity and appropriate redundancy payments, both legitimate issues.

Historical records show that productivity rises and falls from year to year, unrelated to centralisation and decentralisation of wage fixing systems.⁴² It was on average as high in the days of centralisation as it has been since decentralisation. Contrary to popular belief, there is no clear evidence that even the growth of enterprise bargaining has been responsible for the faster growth of productivity since the 1990s⁴³ while productivity has been falling more recently despite the growth in AWAs. It is more likely that the opening up of the Australian economy has exposed Australia to greater international competition. This has put pressure on employers to improve

⁴¹ David Peetz, *idem*, Fig. 1.

⁴² David Peetz, *idem*, Figs. 2 and 3. See also Keith Hancock, 2005, 'Productivity growth in Australia', *Australian Bulletin of Labour*, 31, 1. In his 2nd Reading Speech, the Minister said that 'It is no coincidence that those industries with the most workplace flexibility also enjoy the highest productivity growth and highest wages.' In the Explanatory Memorandum to the Bill, this point was illustrated by a graph, showing that the more award-reliant industries have lower productivity. This is most misleading. Apart from the difficulty of inferring a *causal* connection between productivity and industries with different degrees of reliance on awards, the graph relates award-reliance to productivity growth on two different time scales – in 2004 for the former and from 1990-2004 for the latter. See Workplace Relations Amendment (Work Choices) Bill 2005, Explanatory Memorandum, The Parliament of the Commonwealth of Australia, House of Representatives, 2004-2005. The absurd conclusion to be drawn from this graph is that award coverage in 2004 had produced positive productivity growth fourteen earlier! See also A Submission to the Inquiry into the *Workplace Relations Amendment (WorkChoices) Bill 2005, Research Evidence about the Effects of the 'Work Choices' Bill*. In its 2005 Safety Net decision, the AIRC showed that that productivity in award-dependent industries rose three times faster than the national average.

⁴³ Loundes, J., Tseng, Y.P. and Wooden, M. 2001, 'Enterprise bargaining and productivity in Australia: What do we know?' *Economic Record*, 79, 245, 245-258. Also John Quiggin, 2006, 'Stories about productivity', *Australian Bulletin of Labour*, 32, 1.

methods of production by resort to more efficient organisation of work and new technology. It has also put pressure on unions for greater moderation in pay claims and a more cooperative attitude to employers – an approach deliberately encouraged by the AIRC in the second half of the 1980s.

As mentioned earlier, since no ‘good faith’ requirement attaches to collective bargaining, and the AIRC cannot intervene by compulsory arbitration and make an award, the weaker sections of the workforce may be forced to accept AWAs as a condition of employment, subject only to the prescribed five basic minima of the AFP&C standard. The greatly reduced scope for unfair dismissal to be discussed presently, will add to the potential for employers to dismiss workers and offer then re-employment on inferior AWA terms.

Reduced scope for unfair dismissal provision

Until *WorkChoices*, the size of a firm or employer was not relevant to the application of the unfair dismissal provision, defined as ‘harsh, unjust and unreasonable’. What constitutes ‘harsh, unjust and unreasonable’ depends on the circumstances of each case but in general it means that dismissal is not genuinely connected with the performance and conduct of the worker in relation to the requirements of the firm. However, casual workers (some 25% of employees) and those with less than 6 months of employment with a firm, were not be protected by this provision.

Now well over 90% of firms and well above 50% of employees will be excluded from the provision. Even a portion of the small minority of large firms may be able to escape this provision if there are ‘genuine operational reasons’, defined as ‘economic, structural or similar reason’, for termination. The anti-discrimination provision will still apply to all firms but that involves expensive legal procedure for the employees concerned, a factor that would discourage many from proceeding to fight the employer.⁴⁴

The Government’s justification for the substantial exclusion of the unfair dismissal right is that the provision discourages employment. However, the evidence for this view is thin, to say the least.⁴⁵ It is understandable that employers would like unrestrained right to hire and fire without being required to justify their action before the AIRC and incurring costs in the process. But, as I have suggested, the other side of the coin is the right of employees to fairness in termination. There are, of course, many cases where the provision has been misused by employees who see it as an opportunity of squeezing a cash settlement out of the employer. The same may be said of some discrimination claims, yet these are still allowed. Furthermore, even if an

⁴⁴ ILO Convention 158 does not distinguish between these two forms of dismissal and covers both forms.

⁴⁵ See, for example, Robbins, W. and Voll, G., 2005, ‘The case for Unfair Dismissal Reform: A review of the Evidence’, *Australian Bulletin of Labour*, 31,3; and De Ruytter, A and Waring, P., 2004, ‘Propogating the Unfair Dismissal Myth: Comparative Employment Protection Law Developments in Australia, Italy, South Korea and the United Kingdom’, *International Employment Relations Review*, 10, 2

employer is willing to include an unfair dismissal procedure in an agreement, the Act forbids it from doing so.

In dealing with the unfair dismissal issue, it is a matter of striking the right balance and providing speedy and less costly proceedings, particularly affecting small employers whose activities may be seriously disrupted by having to engage in such proceedings. There is undoubtedly scope for procedural improvements. The extension under *WorkChoices* from 6 months to 12 months before the provision comes into force, gives the employer ample time to judge the suitability of an employee. For reasons of expediency, small firms, say, with less than 10 employees as applies in some European countries, would seem an expedient compromise on size for exclusion from the provision.

As I have said, the restriction of the unfair dismissal provision should be considered in conjunction with the ability of employers to avoid collective bargaining and to offer AWAs on a more restricted safety net protection. It provides the potential for employers on the expiry of an existing agreement, to dismiss workers and to offer them re-employment on AWAs subject only to the AFP&C standard. This would result in lower standards of pay and/or conditions.

The right to strike is subject to an onerous secret ballot procedure and other restrictions that marginalises collective bargaining

I have said earlier that the *right* to strike is an accepted feature of collective bargaining. Only totalitarian regimes impose undue restrictions on strike action. By its procedural requirements, *WorkChoices* has greatly impeded the exercise of this right.⁴⁶

Strike action is protected from legal sanctions only in connection with the making of a new enterprise agreement (but not multi-employer agreement)⁴⁷ following the expiry of an existing agreement. However, the procedure is longwinded and time-consuming, giving the employer time to prepare for an impending stoppage – all intended to blunt this instrument of collective bargaining. First, application to the AIRC has to be made of intention to strike and the nature of industrial issue. Then approval for such action has to be obtained from the AIRC on evidence that the union has made a genuine effort and continues to make a genuine effort to reach agreement amicably. Given that the employer is not required to bargain in good faith, this is an anomalous requirement. A secret ballot may proceed after the list of those eligible to vote has been checked. The strike may then take place provided it is carried by a majority of a quorum consisting of at least 50% of those entitled to vote. The whole process must be completed within 30 days or the authorisation will lapse; and the union will bear 20% of the cost of the procedure. Protection may be cancelled or suspended by the AIRC or

⁴⁶ The Submission of the Centre of Employment & Labour Relations Law (2005:6.21) says in this connection ‘The highly prescriptive and constricting provisions appear to have no counterpart of other developed liberal democracies.’

⁴⁷ Under *WorkChoices*, approval of multi-employer negotiations have to be obtained from the Office of the Employment Advocate.

the Minister if it is considered that the strike is likely not only ‘to endanger life, personal safety or health’ but also if it is likely to cause ‘significant damage to an important part of the economy’. Furthermore, any third party that is adversely affected by a stoppage, has the right to request that strike protection to be suspended. The suspension or cancellation of the protected right, allows common law injunctions to be invoked immediately – not, as previously, with a grace of 72 hours to provide the parties with an opportunity for a mediation process towards a cessation of the strike.

On the other hand, the employer is afforded the right of protected lockout on three days notice and without a ballot of shareholders.

All this comes when for many years, strikes have been declining. In the last 10 years, the loss from strikes has amounted on average to less than one-tenth of a day or less than an hour per person per year.⁴⁸ Because strikes are generally given an undeserved dramatic quality, the loss from strikes should be placed against other sources of production loss.

- Absenteeism is a large source of productive loss which is caused by a number of factors some of which may be interrelated – illness, industrial accidents, alcohol dependence, family responsibilities, workplace ‘climate’ and employee morale (in which ‘fairness’ plays a part), distance from work and transport difficulties.⁴⁹ Based on the ABS Labour Force Survey of August 1990, the average rate of absenteeism is 2.4%. It has been estimated that this translates to about 5-6 days absence per person per year.⁵⁰ An ABS report shows that in November 2003, some 50,000 employees, or 5% of the workforce, were on sick leave in the two weeks before the survey.⁵¹
- Claims for workplace-related injury and disease amounted \$4b in 2003/04 arising from about 16 claims per 1000 employees.⁵² In NSW alone, some 1.7m person-days were lost through personal incapacity.⁵³ The ABS reports that in 2001, in the four weeks before the interview, 5% of workers over the age of 15, had suffered an injury at work.
- A comparatively small proportion (7.5%) of industrial accidents appears to be alcohol-related.⁵⁴ However, almost 4% of those surveyed reported missing at least one day in the preceding 3 months for alcohol-related reasons; while over 6% reported attending work under the influence of alcohol in the preceding 12 months.

⁴⁸ Even in the building and construction industry, the most strike-prone industry in Australia, the loss from strikes has fallen considerably in the two decades. See L J Perry, 2006, ‘Productivity and industrial disputes. A note on the Cole Royal Commission’, *Economic Papers*, 25, 3.

⁴⁹ Royal Australasian College of Physicians, *Workplace Attendance and Absenteeism* 1999.

⁵⁰ Wooden, M. ‘The cost of time off work in Australia’, Working Paper Series, 1992, No. 115, NILS.

⁵¹ ABS Cat. 6342.0

⁵² Workplace Relations Ministers’ Council, Comparative Performance Monitoring, Seventh Report, 2005.

⁵³ Workcover, New South Wales, 2004/05.

⁵⁴ 2001 National Drug Strategy Household Survey reported in Ken Pidd et al, *Alcohol and Work* June 2006.

Compared to strikes, these losses are not only much greater, they have more lasting social costs.

This not to say that the right to strike should be unrestrained but the restrictions contained in the 1993 Act would seem to be all that is reasonably necessary to deal with strikes. Adequate legal sanctions were in place and the calling for a strike ballot was at the discretion of the AIRC as and when it believed such a ballot was appropriate.

Anti-union features of WorkChoices

Unions have been an important institution in Australian industrial relations. Conciliation and arbitration under the AIRC would have broken down without collective representation. Although there have been episodes in earlier times when unions have used the arbitration system when it suited them and defied orders they did not like, the pressures of an open economy has reduced this tendency The Accord has shown that the trade union movement is capable of a constructive role in promoting macro and micro economic objectives.

It is ironical that one of the stated objects of Work Choices is ‘to give effect to Australia’s international obligations in relation to labour standards’. Since 1996, the ILO’s supervisory bodies have repeatedly asked the Australian Government to amend certain provisions, including AWAs, of the Workplace Relations Act because they violate the ILO’s collective bargaining Conventions. The Government has largely ignored these requests and has further greatly compounded its violations by *WorkChoices*.⁵⁵

Until 1996, one of the stated objectives of the Act was to encourage the development of unions and employers associations. This provision was removed under the Coalition’s 1996 Act, which, by its stress on individualisation, could be described as unfriendly towards unions. This occurred against the background of progressive decline in union density, particularly in the private sector.⁵⁶ *WorkChoices* has gone further and it is difficult to escape the conclusion that it is inherently anti-union as reflected in the following:

- The encouragement given to AWAs, which prevail over awards and other agreements, suggests that union-free settlements are to be preferred. The restriction on the AIRC on making new awards and the prospects of awards

⁵⁵ Forsyth and Landau, *op.cit.* However, I have some difficulty with some of the pronouncements of the ILO’s supervisory bodies on the pre-*WorkChoices* legislation. See G. Biffl and J. Isaac, 2005, ‘Globalisation and Core Labour Standards: compliance problems with ILO Conventions 87 and 98’, *The International Journal of Comparative Labour Law and Industrial Relation*, Autumn 2005, pp.440-44

⁵⁶ This decline may be attributed to several factors that make recruitment difficult and expensive – structural changes in employment from manufacturing to service industries where unionisation has generally been weaker, the large shift to part-time and casual employment, the growth of contractors and labour hire arrangements. Increased insecurity of employment under the prevailing anti-union attitude of many employers as well as the free-rider mentality of many workers may also explain the declining density

withering on the vine, throw the weaker sections of the workforce at the mercy of AWAs with a restricted safety net. Going by the experience of New Zealand, Western Australia and Victoria (during earlier governments), substantial loss in wages resulted from the loss of overtime, penalty rates and other allowances.⁵⁷

- Protected strike action in enterprise bargaining is heavily qualified by procedures designed to weaken industrial action.
- There is no protection for strikes in multi-employer or industry collective bargaining or pattern bargaining⁵⁸. This restriction imposes a heavy administrative burden on unions in having to negotiate and make a separate agreement with each enterprise.
- The Act provides for a most unusual ‘agreement’ known as ‘employer greenfields agreements’, whereby the employer may effectively set the terms of employment unilaterally in new undertakings, which presumably could be a new range of activities of an existing firm. Since the inception of the new Act, some 81 employer greenfields agreements have been registered, twice the number of union greenfields agreement.⁵⁹
- The prohibited items in agreements and awards are effectively directed against union participation.⁶⁰
- Unions play an important part in representing workers in unfair dismissal cases. The reduction in the scope for unfair dismissals will reduce their role correspondingly.
- Traditionally, union officials have been allowed to enter workplaces, usually based on a phone call to the management. This enables the union to check the employer’s records to ensure that the terms of employment are being adhered to, since the Government’s inspectorate have generally been inadequate to deal with this task. It also allows the union to be satisfied that health and safety conditions are being met as well to provide a union presence to encourage recruitment. Under *WorkChoices*, union entry into workplaces are more strictly controlled and limited.⁶¹

Given the absence of reliable evidence on the effect of AWAs on productivity, it is not unreasonable to infer from this list that the essential objective of *WorkChoices* in its quest to promote AWAs, appears to be to weaken and marginalise unions and so

⁵⁷ Chris Briggs, *Federal Industrial Relations Reform- the shape of things to come*, ACIRRT, Nov. 2005.

⁵⁸ Pattern bargaining is narrowly and vaguely defined as occurring when a claims are made in 2 or more collective agreements involving common wages and conditions. (s106B(1)(b))

⁵⁹ Office of the Employment Advocate, *Workplace Agreements Statistics*, 7 July 2006

⁶⁰ The Act is highly prescriptive in many ways even for agreements. For example, agreements must not contain certain prohibited items – any restriction on labour hire, remedies for unfair dismissal, prohibition of AWAs, mandatory union involvement in dispute resolution, trade union training leave, bargaining fees or paid union meetings. These prescriptive items are directed against the union interests. The process of award simplification and rationalisation being carried out will remove, among others, these prohibited items in awards.

⁶¹ The union official must be considered a fit and proper person and does not have a criminal record, has received ‘appropriate training’ about the rights and responsibilities of a permit holder, detailed reasons, backed by a statutory declaration, have to be given to the Registrar for a permit.

further reduce their membership. There have been occasions in the past when certain unions misbehaved in an industrially and socially destructive manner. This has been occasionally true also of business corporations. For both, restraints and sanctions are appropriate when they misbehave. However, it is difficult to justify making the occasional lapses in the behaviour of some unions, the basis for a set of restraints that has the potential to substantially frustrate their capacity to achieve objectives by procedures in keeping with our international obligations. The fall-out in these circumstances is not simply on the unions but especially on those who are disadvantaged by weaker union power and those who are forced into individual bargaining.

The Government has said that the object of *WorkChoices* will not remove the right to join a union or take away the right to strike.⁶² From what I have shown, this is reminiscent of what Henry V is reported to have announced before the battle of Rouen:

Every one knows that I act in everything with kindness and mercy, for I am forcing Rouen into submission only by starvation, not by fire, sword or bloodshed.

A substantially national system of industrial regulation.

Finally, relying on the corporations power of the Constitution, *WorkChoices* has brought about a near-national system covering about 70% to 85% of employees. The Government's argument is that the present dual system is complex and costly. While there is a good case for a national system, this point can be exaggerated.⁶³ Considerable harmonisation of federal and state awards has taken place in recent years. The main, but unstated, reason for the incorporation of the state systems is to prevent state governments and tribunals from frustrating the federal Government's industrial relations objectives. Not to exclude the state tribunals, could well result in a large proportion of federal-covered employees moving into the state systems.

Concluding observations

Trade unions, collective bargaining and collective action have gone hand in hand to rectify the unbalanced bargaining power in favour employers under individual bargaining. In most countries, including Australia, this development has been supported by legislation. In Australia, the balance has also been underpinned by compulsory conciliation and arbitration. Overall, Australia has done well under these arrangements, especially in the last 30 years or so. Although there may be a case for improvements, what has prevailed until *WorkChoices* is not very far removed from the requirements of an economically efficient and socially fair industrial relations system I

⁶² Prime Ministerial Statement, Parliament of Australia, 26 May 2005.

⁶³ The terms by which state awards and agreements will be incorporated into the federal system will be a complex exercise for employers and lawyers..

outlined at the opening of this Lecture. The object and philosophical basis of *WorkChoices* appears to be to unravel even this arrangement and open up the prospects for a return to the master and servant mentality of the 19th Century.

The Government asserts that *WorkChoices* will provide a ‘flexible, simple and fair system of workplace relations’. It is neither simple nor fair. Its legal provisions are complex. The previous award system, allowing flexibility through common law contracts, has had the endorsement of small and medium size businesses in past surveys, presumably on grounds of simplicity and the fairness of its application to all competitors.⁶⁴ The assertion that only through *WorkChoices* will ‘the full potential of productivity gains’ be realised does not rest on any persuasive argument or economic evidence.

I have suggested that to assess its potential impact, the various elements of *WorkChoices* should be seen as a package of inter-related items. This package will change the balance of industrial power greatly in favour of employers by

- reducing union power in various ways,
- reducing the scope for collective bargaining,
- reducing the scope of action by the traditional industrial umpire, and
- reducing the coverage of the unfair dismissal provision.

Combined, these elements of *WorkChoices* will facilitate its object of increasing the incidence of AWAs, the instrument through which these elements will be given effect. This, together with the reduced safety net, will provide the potential for a lower standard of pay and conditions for many more and produce greater pay inequality than would apply under the previous legislative regime. This is especially so if the AFPC lives up to the Government’s expectation of a more conservative policy on the minimum wage. The new regime will provide greater flexibility, but mainly to employers because bargaining power has been tipped in their favour through individualisation. It is unlikely to generate increased productivity. Indeed, it may even reduce the pressure for productivity growth and allow employers instead to rely on cost-cutting. Nor can we count on it to reduce unemployment unless wages, especially of the unskilled, are held back substantially. The number of award-protected workers will decline.

The new system goes against the Australian ethos of a fair society. It has the potential of being socially divisive. It will result in uncertainty and litigation. These consequences will not be evident for a year or two because a large number of agreements were processed before *WorkChoices* came into effect. However, the straws blowing in the wind since the new AWAs came into being give an indication of what could happen on a large scale.

⁶⁴ J E Isaac, 1993, *Small Business and Industrial relations: Some Policy Issues*, The Department of Industrial Relations; Alison Morehead *et al*, 1997, *Changes at Work*, Table 13.17.

I mentioned earlier that in 1992, Mr Howard, then in Opposition, announced *JobsBack*, an industrial relations programme substantially in line with *WorkChoices*. The implementation of this programme was frustrated by the Senate until now. Yet, since 1992, without that programme, economic growth and productivity have proceeded apace, unemployment and inflation have fallen, and industrial disputes have come down to a historical low level. There are no signs on the economic front in the medium term suggesting the case for such a radical change in our industrial relations system.

Why then, do we need these changes now? Perhaps the best answer was given by Mr Howard himself, who allegedly described the legislation as ‘an article of faith’.⁶⁵

⁶⁵ Michelle Grattan, ‘New Senate, New Era’ *The Age*, 25 June 2005.

