

‘Modern’ Labor and the *Fair Work Act 2009*

Challenging the male breadwinner gender order?

Rhonda Sharp, Ray Broomhill and Jude Elton

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Informing Decisions



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CONTENTS

‘Modern’ Labor and the <i>Fair Work Act 2009</i>	1
Challenging the male breadwinner gender order?	1
Rhonda Sharp, Ray Broomhill and Jude Elton	1
June 2012.....	1
‘Modern’ Labor and the <i>Fair Work Act 2009</i>	3
Challenging the male breadwinner gender order?	3
Key Findings at a glance.....	3
Introduction.....	1
The new Safety Net provisions under the <i>Fair Work Act</i>	3
Workplace reform for the ‘modern’ age	14
The <i>Fair Work Act</i> and gender equality	16
References	21

KEY FINDINGS AT A GLANCE

This report examines key elements of Labor's *Fair Work Act 2009* and its implications, particularly for women workers, and provides an analysis of the Act's potential to bring about a shift in the structure of gender relations, or the 'gender order', away from the existing male-breadwinner/part time female-carer model towards a more equitable dual-breadwinner/dual-carer model.

Undoubtedly gender equity has made some important gains as a result of specific changes incorporated in the Act. The legislation reinstates some important employee rights and entitlements lost under Work Choices, and enshrines new ones that are of particular benefit to women workers. These include the broadening of previously restricted safety net provisions, strengthening of lower paid workers' protection against unpaid dismissal, increased flexibility for meeting household responsibilities and the capacity for sector wide bargaining for pay equity.

While these changes should be acknowledged, our analysis shows that some of these changes are qualified in such a way as to make them potentially difficult to secure positive outcomes in practice. The capacity of workers to collectively obtain new and improved conditions and initiate new standards is restricted by provisions limiting the content of awards; prohibitions on pattern bargaining; major hurdles for multi enterprise bargaining; limitations and penalties re industrial action; and retention of major limitations on the arbitration powers of Fair Work Australia.

Drawing on Pascall's (2008) analysis of New Labour policies in the UK we develop a series of questions that can be applied to the *Fair Work Act* to assess its contribution to a more equal structure of gender relations in Australia. The analysis indicates that, while some provisions relating to care can be shared between men and women, the underlying prerequisites for a dual-breadwinner/dual-carer model have not been addressed. This would require a raft of provisions that promote increased gender equality in the share of care responsibilities, time use, income and power in industrial relations policy along with parallel policies related to child and other care, retirement incomes, training and employment, taxation, and so on. While a single legislative Act will not bring about a change in a society's gender order, its underlying assumptions and provisions can facilitate change or reinforce the status quo. In this regard it can only be concluded that while the Act has provided some important specific improvements in women workers' position, it lacks a substantial vision or strategy to fundamentally challenge existing gender inequalities either in the industrial relations framework or in the broader social gender order. The challenge is for these gains to be taken further in the direction of increasing gender equality while at the same time resisting the threat of a return to a reformulated version of Work Choices.



INTRODUCTION

This report outlines core areas of the *Fair Work Act* (2009) to identify key changes particularly for women workers and analyses the implications of the changes in employment and industrial relations policies for the existing male breadwinner gender order in Australia and gender equality¹. In 1996, the Howard Liberal-National coalition government was elected with an agenda of workplace reform that culminated in the adoption of a radical set of industrial relations policies known as Work Choices. These policies aimed to dramatically transform industrial relations in Australia and had a range of negative consequences for gender equity in the workplace, as well as reinforcing aspects of the still dominant male breadwinner gender order (Elton et al 2007). The defeat of the Howard Coalition government in 2007 saw the emphatic rejection of the Work Choices agenda. The election of Labor in 2007 on a wave of community rejection of Work Choices presented an opportunity to rethink the direction that changes in industrial regulation had taken since 1993 when the Keating Government commenced the shift away from the centralised award system which had, in some ways at least, benefitted women workers. Labor had vowed to overthrow most of the core elements of Work Choices and in particular to restore equity into the industrial relations system in Australia. Once in office, Labor enacted the *Fair Work Act* (2009) to replace the industrial relations framework established by Work Choices.

The Rudd Government was elected in 2007 without a women's policy - the first time that the Australian Labor Party (ALP) had gone to an election without a women's policy since 1977 (Sawer 2010). As a result there was no guiding framework for dealing with women's disadvantage and no strategy for promoting gender equality. Significantly, the ALP's 2007 employment and industrial relations policy document, *Forward with fairness: Labor's plan for fairer and more productive Australian workplaces*, makes no mention of gender equity within its statement of aims (ALP 2007). However, in introducing the *Fair Work Act* Labor stressed that it was designed to 'meet the needs of the modern age' and also to deliver 'a balance between work and family life' (Australian Government 2008:11189). The re-election of Labor in 2010 with Julia Gillard as leader marked a further shift, at least at the rhetorical level, about gender equality as a goal of public policy. For example, the Women's Policy Statement issued by Minister for Women's Affairs Tanya Plibersek for the 2010 election stated:

A Gillard Labor Government will work to deliver greater equality between women and men through practical support and policy reform in consultation with women, families and the broader community (Australian Labor Party 2010: 4)

The challenge for any new system of employment regulation, Marian Baird (2008:71-3) argues, is not to reinstate the early 20th century male wage regime but the creation of 'a new province of women, work and gender relations' that 'cast[s] off the shackles of the male breadwinner model'. She emphasises that 'globalisation is not the only aspect of the industrial relations environment' that must be taken into account in the construction of new arrangements. Women's increased and different participation in the labour market, persistent inequities and 'the barbarous tensions

¹ We are using the term 'gender order' here in the manner used by Raewyn Connell: 'The structure of gender relations in a given society at a given time may be called its gender order; and the structure of gender relations in a given institution may be called its gender regime' (Connell 2012: 1677). See Broomhill and Sharp (2005) for a discussion of the male breadwinner gender order and the role of public policy in Australia.

women face in combining their roles of reproduction and production' constitute an equally pressing domestic problem that demands to be addressed.

In this report we examine key elements of the *Fair Work Act* provisions that impact especially on women workers. Firstly, a new national regulatory institution, Fair Work Australia, was established with responsibility for dispute settling and including a national minimum wage setting panel. Secondly, reforms were made to the industrial relations safety net framework, including revisions to the National Employment Standards established under Work Choices. Thirdly, the *Fair Work Act* introduced a new Modern Award system that provides legal agreements on wages and working conditions for different industries and occupations and may include ten additional minimum employment conditions. Fourthly, the *Fair Work Act* revised the provisions under Work Choices that had reduced workers' rights to challenge unfair dismissals. Fifthly, the *Fair Work Act* made a number of changes in relation to workers' ability to engage in enterprise bargaining. We explore the implications of such changes for the male breadwinner gender order in Australia by discussing a series of questions posed by UK researcher Gillian Pascall in her analysis of the impact of the British Labour government's policies on gender equality and the male breadwinner gender order during the Blair era of New Labour (1997-2007).

The role of the independent umpire: Fair Work Australia

Although the establishment of Fair Work Australia creates a potentially more sympathetic industrial framework for women workers than that which existed under Work Choices, in many ways it consolidates Labor's previous moves away from the centralised system of conciliation and arbitration for both dispute settling and standard setting that existed pre-1980s. Feminist researchers have previously identified the positive role of Australia's centralised system of wage fixation in relation to women's labour market position (Whitehouse 1992; Preston 2007; Smith 2011). In introducing the Fair Work Bill to Parliament, Labor rejected this system, and the understandings of conflicting and unequal interests contained within it, as 'obsolete' (Gillard 2008c:11195).

Fair Work Australia has extensive conciliation powers, but can arbitrate in few situations. Some of these arbitration powers are important for women. As outlined above, Fair Work Australia can make determinations in relation to unfair dismissal. It has powers to rationalise and periodically update awards, with a separate Panel annually adjusting minimum pay rates. Award pay and classification scales can be changed to reflect changes in work value and comparable worth argument. However, its capacity to arbitrate disputes and thereby extend awards has not been reinstated. Fair Work Australia can make dispute determinations in special circumstances only. It may enforce good faith bargaining and make determinations on agreements in order to stop specified forms of industrial action. But it cannot generally impose settlements in deadlocked negotiations or to support workers with little bargaining power, even in the low paid bargaining stream. It may conduct inquiries and recommend adjustments to the National Employment Standards, but has lost standard setting powers to the Parliament.

The only apparent avenues that workers can challenge gender inequities within this system are through constrained enterprise bargaining, award reviews (although this will be limited by legislative provisions on the range of award content), comparable worth argument in relation to pay and classification scales, adverse action provisions (workplace discrimination clauses) and Fair Work Australia inquiries.

Of critical importance is the context in which Fair Work Australia seeks to fulfill its responsibilities (Stewart 2011:554). A radically changed context for gender equity has

emerged since the 1990s with the shift away from arbitration to 'bargaining'. Meg Smith (2011) argues that while the old arbitration system initially played a central role in entrenching the male breadwinner gender order, the introduction of pay equity wage fixing principles and parental leave into the institution for collective wage fixing proved to be positive for partially breaking down the male breadwinner-female carer model of gender relations. New possibilities for gender equity will need to be explored if gender equality is not to be compromised under Fair Work Australia (see below).

The new Safety Net provisions under the *Fair Work Act*

Labor's system of bargaining at the workplace is underpinned by a bargaining floor of employee entitlements that are a significant improvement on those contained in the Howard government's Work Choices. Nor can some be lost as under Work Choices. However, they are not a reinstatement of the full range of matters that were contained in awards and which provided comprehensive entitlements and protections for all workers covered prior to their reduction to twenty matters by Prime Minister Howard in 1996. Successful workplace bargaining is required to obtain a wider range of entitlements which may have previously been in awards, or improved conditions. Workers without the capacity to bargain are forced to rely on the restricted provisions of Labor's safety net. The safety net is made up of firstly, a revised set of National Employment Standards (NES), secondly, a new 'modern' award system and thirdly, new provisions for minimum wages setting.

The new National Employment Standards

The *Fair Work Act's* National Employment Standards (NES) provide ten minimum legal entitlements for all national system employees. These ten entitlements are summarized in Table 1. Modern awards, agreements and individual contracts (for employees over \$100,000) may vary/expand on the National Employment Standards but must be consistent with them and be more, rather than less, favourable to the employee. The National Employment Standards cover: maximum working hours, annual leave, personal leave and parental leave plus a right to request flexible working arrangements, community service leave, long service leave, public holidays, and notice of termination and redundancy pay.

Table 1: National Employment Standards (Safety Net)

1 Maximum working hours	38 hours (for FT workers) plus 'reasonable' additional hours for all employees. In refusing additional hours personal circumstances including family responsibilities must be considered.
2 Annual leave	4 weeks. Extra week for some shift workers.
3 Personal/Carer's and compassionate leave	10 days and 2 days respectively.
4 Parental leave	Each parent is entitled to 12 months unpaid and a right to request a further 12 months unpaid but employer can refuse on 'reasonable business grounds' and there is no right of appeal-employer may consent to a dispute procedure.
5 Right to request flexible working	For parents of under school age children and parents of children under 18 with a disability-

arrangements if employee has min 12 months service	but employers can refuse on 'reasonable business grounds ' and there is no right of appeal- employer may consent to a dispute procedure.
6 Community service leave	For emergency services and jury duty.
7 Long service leave	National long service leave standard.
8 Public holidays	A paid day off on a public holiday except when an employer may reasonably request attendance. In determining reasonableness the employee's personal circumstances including family responsibilities must be taken into account.
9 Termination and redundancy pay	Up to 5 weeks notice and up to 16 weeks. Up to 5 weeks notice and up to 16 weeks.
10 Fair work information statement	All new employees are provided this by their employer setting out rights and responsibilities.

These entitlements, which became operational on January 1, 2010, are established by legislation rather than by arbitrated test cases and awards as in the past. They therefore rely on Parliament to maintain and improve them. Baird argues that a problem with legislated standards 'is their propensity to atrophy' (2008:75). This poses a problem for the many women workers whose limited bargaining power leaves them reliant on the National Employment Standards. The capacity of Fair Work Australia to conduct enquiries and recommend changes to the National Employment Standards is welcome, but it cannot make changes, which will remain subject to uncertain Parliamentary politics. [This has been the case in the history of the USA minimum wage].

The following summary of six of the *Fair Work Act's* key National Employment Standards shows that they contain real improvements but also reveals significant weaknesses that undermine their capacity to protect employees, reduce gender inequities and ultimately to effect change in the structure of gender relations or the male breadwinner gender order:

Firstly, under the *Fair Work Act*, some improvements have been made to the protections available to full-time workers in relation to maximum hours of work. Under Work Choices there was no clear limit to the maximum number of hours an employee could be required to work and no guarantee of a premium rate of pay for overtime work beyond ordinary working hours. Under the *Fair Work Act* maximum working hours remain at 38 hours per week for full-time employees, plus a reasonable number of additional hours. For part-time employees the standard refers to their ordinary hours of work, plus reasonable additional hours. An employee may refuse additional hours. Factors to be taken into account in determining whether additional hours are unreasonable include 'the employee's personal circumstances, including family responsibilities' (Australia 2009: s62(3)(b)). Unlike under Work Choices, total hours in any given week must not be 'unreasonable'.

Brigid van Wanrooy, John Buchanan and Iain Campbell stress several important flaws in this standard that suggest that it will not address the 'extremely long hours' worked by Australian full-time employees. They firstly point to the lack of definition of 'reasonable additional hours'. They argue that this effectively 'removes working hours from a nationally enforceable standard to an individual negotiation between the employer and the employee'. In support of this argument they refer to the experience of the implementation of the 'reasonable hours' clause following the 2001 ACTU initiated Reasonable Hours Test Case. This similarly worded clause has not provided protection against extended working hours (van Wanrooy, Buchanan & Campbell 2008:8).

These researchers propose that reasonable additional hours not exceed a maximum cap of 48 hours per week. They emphasise the importance of Government leadership in combating a long hours culture that has developed in Australia:

International experience shows that working time standards and practices only improve where there are movements across the community based on clearly defined norms embedded in statutes or delegated legislation like awards (van Wanrooy, Buchanan & Campbell 2008:6).

Recent research by the Australian Institute of Family Studies drawing on the Longitudinal Study of Australian Children points to dissatisfaction with existing workplace norms by parents and children. The study found over a fifth of mothers said working hours and arrangements were negative for family time and one third of children said their mothers worked too much. Over 40 per cent of children said their fathers worked too much (Reported by Karvelas & Gosper 2012 in the *Australian* May 15).

Secondly, the *Fair Work Act* provides the employee with the 'right to request' (RTR) flexible working arrangements. This is a positive new provision that gives an employee with at least 12 months' service or a long term casual with a reasonable expectation of ongoing regular and systematic employment, a right to request a change in working arrangements (for example hours, pattern, location) to assist them in caring for pre-school aged children or children under 18 with a disability. However, employers can refuse the request on 'reasonable business grounds' and there is no right of appeal. Neither can a court order be sought requiring the employer to specify the 'reasonable business grounds'. A review of the decision is only possible if the employer specifically consents to it being dealt with by a dispute resolution procedure under an award, enterprise agreement or employment contract. In 2009 an amendment pushed by the Greens and Independent senators was made to the Fair Work Bill enabling dispute resolution but it will require unions to be active in ensuring such provisions and processes are made available (Baird and Williamson 2010:359). The only other avenue of redress may be the lengthier process of a complaint under state equal opportunity law. In 2008 Victoria amended its Equal Opportunity laws to prohibit unreasonable refusal to accommodate a worker's responsibilities as parent or carer.

In their comparative analysis of RTR arrangements proposed by Labor, Sara Charlesworth and Iain Campbell identify important weaknesses in the NES compared to existing Victorian and European models that will limit its take-up and effectiveness. They firstly note that the 12-month qualifying requirement will exclude many women. For example, in 2006 21% of women of child-bearing age (25-44 years) had less than 12 months service with their employer (Charlesworth & Campbell 2008:122). They also argue that the failure to define 'reasonable business grounds', to provide an enforcement mechanism and to provide an avenue of appeal reduces the RTR provision to a guideline, not a standard for employers. They quote the Victorian Government submission regarding the draft National Employment Standards provision on this point:

To be effective, a right must be capable of vindication in a manner appropriate to its nature, otherwise it is not a right at all but a guideline. A safety net of comprehensive, fair and relevant employment conditions is, after all, a public statement of what constitutes socially acceptable minima in a democratic society that respects human dignity. A minimum is nothing if an employer may depart from it when convenient (Charlesworth & Campbell 2008:130).

Thirdly, the *Fair Work Act's* provisions in regard to parental leave contains some improvements, but are also qualified. Each partner is entitled to 12 months unpaid leave, whereas under Work Choices leave was limited to 12 months per couple. Leave must be taken at separate times. Alternatively, one partner may request an extension of leave from one year to two. This can be rejected on 'reasonable business grounds' and the employer's refusal cannot be challenged, except by an agreed dispute resolution process that specifically states that this matter can be determined by it. These provisions also have been extended to apply to same sex couples.

The assured access to two years leave if taken by both partners and less certain access if taken by one, may encourage men to take equal parental leave. The likelihood of this is undermined by the unpaid nature of the leave and household reliance on generally higher/full-time male earnings. However, the (unpaid) parental leave provisions under Labor's employment and industrial relations policy has been supplemented by its historic paid Parental Leave Bill 2010 which established a national government-funded paid parental leave scheme of 18 weeks that commenced 1 January 2011.

Fourthly, the *Fair Work Act* includes a provision in relation to annual leave that is an improvement on Work Choices by mandating that leave accrues continuously according to ordinary hours worked, rather than in 4 weekly blocks. Cashing out of leave has stronger protections, with employees under awards or agreements only permitted to cash out leave if award or agreement allows and each occasion must be agreed in writing. In any case, a balance of 4 weeks untaken leave must always be retained.

Fifthly, personal leave remains at the Australian Fair Pay and Conditions Standard of ten days paid personal/carers leave per year, plus two days paid compassionate leave and two days unpaid carers leave as needed, with the addition of a right for casuals to take two days unpaid compassionate leave. The limit of paid carers leave to ten days in any twelve month period has been removed. Importantly, less notification and justification are also required. These changes are of benefit to many women workers in particular.

Sixthly, in regard to public holidays, the *Fair Work Act* (s114) provides that an employee is entitled to be absent on a public holiday, which is an important right for the care of school-aged children. (The loss of public holidays under Work Choices presented real problems for some parents. See for example, Elton & Pocock 2007:65). An employer may request attendance, but the employee may refuse if the request is not reasonable or the refusal is reasonable. In determining reasonableness the employee's personal circumstances, including family responsibilities, must be taken into account. There is also a new right to be paid for any absence on a public holiday by a full-time employee or casual or part-time employee who would have been rostered on that day.

The new 'Modern Award' system

The *Fair Work Act* ushers in what the legislation describes as the Modern Award system which standardises regulations for agreements on minimum wages, leave, superannuation and so on. The changes introduced under this system do not mark a return to the pre-Work Choices role of awards in providing comprehensive wages and conditions across industries and occupations. In fact, 'the modern award objective' (S134) requires Fair Work Australia to ensure only that awards provide 'a fair and relevant minimum safety net of terms and conditions'. These 'terms and conditions' must take into account:

- (a) relative living standards and the needs of the low paid;
- (b) the need to encourage collective bargaining;
- (c) the need to promote social inclusion through increased workforce participation;
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work;
- (e) the principle of equal remuneration for work of equal or comparable value;
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards;
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy'. (Australia 2009)

Thus, Fair Work Australia must take into account a set of factors that reinforce this limited function and ensure that awards are neither so minimal that they deter workforce participation, nor so supportive that they take the pressure off workers to bargain in the workplace. These factors also show a particular concern that regulation does not burden business or hamper its competitiveness. The one truly innovative aspect in the federal jurisdiction, and one that has potential to improve women's incomes and facilitate a shift away from a male breadwinner gender order is the provision relating to comparable worth which enables unions to contest the historical undervaluing of some jobs. As a result of this change, on 16 May 2011 Fair Work Australia, in an historic decision, ruled that the Australian Services Union and its Equal Pay Case partners had proved that social and community services workers in the not for profit sector are underpaid and that at least part of the reason for that underpayment is gender.

In constructing awards as a restricted safety net, Labor has ignored the reach and influence they continue to have over enterprise bargaining. In their study of the role of awards in the wage-setting environment, Buchanan and Considine (2008) found that they remain 'an integral reference point' for the broader determination of wages and conditions in agreements. They are not just relevant for the 20% or more totally dependent on them. Consequently, a reduction in their content and responsiveness will impact on both award dependent workers and all those who refer to them in agreements. Buchanan and Considine argue that the 'regulatory gap' opened up as awards diminish in influence is 'as likely to be filled by increased scope for managerial prerogative' as it is by formally registered agreements (Buchanan & Considine 2008:56). This has important ramifications for groups with low bargaining power.

Award rationalisation:

Labor aims to significantly reduce the number of awards and eliminate state-based differences in conditions through an award rationalisation process initiated by the Australian Industrial Relations Commission and continued by Fair Work Australia. By 2010 122 Modern Awards had been created, replacing 1560 that existed at the beginning of the review in March 2008 (Connolly et al 2012:126). Any gaps in coverage (excluding managerial or other classes of employees historically award free) are to be filled by the Miscellaneous Award 2010, which is a positive provision for some vulnerable workers.

Award rationalisation is resulting in both favourable and unfavourable outcomes for workers across industries and states. It can be argued that for low paid workers in particular, it should only involve equalising upwards. Employer protests at increased costs in some states arising from rationalisation has led to the then Minister Gillard formally requesting a review of decisions by Fair Work Australia.

Opportunity also exists within the rationalisation process, which includes consideration of pay and classification scales, to redress the undervaluation of women's labour. However, the timeframe imposed by government has discouraged progress here. Researchers reported in 2009 that the modern awards had not shown any evidence of the review of relativities and application of the equal remuneration principle (Junor, Hammond and Taska 2009:6). A study by Julie Connolly, Tricia Rooney and Gillian Whitehouse found that the 2005-2006 equal remuneration gains for Queensland dental assistants and childcare workers are at risk of erosion with the move to nationally based Modern Awards. Across all classifications, losses of 16% were identified for Queensland dental assistants and 8% for Queensland childcare workers at the time of transitioning from the State Award to the Modern Award rate (Connolly et al 2012: 124).

Labor's limited commitment to collective representation through trade unions, albeit an improvement on Work Choices, is further evident in the operation of rationalised 'modern' awards by way of common rule, rather than named (union and employer) respondents. The Full Bench has determined that modern awards will not generally identify particular employee and employer organisations as being covered. Stewart attributes this to the *Fair Work Act* not attaching 'any real significance to award coverage where organisations are concerned'. Only 'representation rights' are conferred with reference to each organisation's eligibility rules (Stewart 2009:22). Trade unions do not appear central to Labor's view of a 'modern' system of employment regulation.

Award content

Under the *Fair Work Act*, employees and their unions are still not free to negotiate and argue for any industrial matter to be included in an award. Award content remains severely restricted to provisions relating to the National Employment Standards, minimum pay and classification scales and 10 additional matters: types of employment; arrangements for when work is performed; overtime and penalty rates; annualised wage and salary arrangements; allowances; leave and leave loadings; superannuation; consultation, representation and dispute processes.

The reinstatement into awards of some matters removed under Work Choices, including the capacity to include detail about their operation and the inability to lose provisions in bargaining, is important for the security of employees' income and capacity to manage work and household responsibilities. For example, the effective management of caring responsibilities requires some certainty and notice about working hours and rosters, which can potentially be secured through detailed provisions concerning working arrangements. These aspects of modern awards are a marked improvement on Work Choices.

However, continuing restrictions on the content and functions of awards maintains the disadvantaged position of workers who have been award reliant and constrains the capacity of organised workers to effect broad change on their own behalf. Women have argued in relation to past award restructuring under Labor that they need more and wider provisions, rather than less, in order to obtain employment regulation that redresses historical discrimination and an entrenched male breadwinner model. Disadvantage is compounded by the long timeframe of 4 years between award reviews. Award variations can only be made within this time period in specified circumstances, namely: adjustments consequent on the annual national minimum wage review, or work value changes (see below), or to remove ambiguity or uncertainty.

Pay and classification scales

Those scales that had been removed from awards to the Fair Pay Commission under Work Choices, are returned under the *Fair Work Act*. However, they cannot be increased except as the result of the flow on of annual minimum wage adjustments and proven changes in work value. Awards have not regained their capacity to provide workers across occupations or industries with wage increases above the minimums. This must occur through workplace bargaining.

At the same time, the inclusion for the first time of a clear work value criteria of comparable worth and the capacity of Fair Work Australia to issue 'equal remuneration orders' presents women with an opportunity to increase their base pay rates. And as stated above, while awards are to be reviewed only every 4 years, there is capacity to address work value within this time frame. Unions are moving quickly to take advantage of this provision and the Australian Services Union comparable worth case for social and community sector workers in 2011 being an outstanding example (see below).

Obligatory flexibility term

Each modern award must contain a provision enabling an employee and his/her employer to agree on an 'individual flexibility arrangement' varying other terms of the award, in order 'to meet the genuine needs of the employee and employer' (s144 (1)). A model flexibility clause for insertion into awards was determined by the AIRC in June 2008. In making its decision, the Commission rejected the ACTU submission that flexibility agreements should only be between an employer and a majority of employees. This clause therefore reintroduces a form of individual bargaining into workplaces, albeit restricted to the operation of terms concerning the time at which work is performed, overtime or penalty rates, allowances, or leave loadings (Stewart 2009:24).

While flexible work arrangements may assist workers to combine work and household responsibilities, it is important to note that an employer can initiate a flexibility arrangement and that all forms of flexibility are not helpful to employees. In recognition of this and the potential for it to be used to undermine award provisions (as occurred with AWAs under Work Choices), certain protections have been built into the term. To be valid a flexibility arrangement must be made without coercion and meet a 'better off overall' test. This test requires that it must not result, 'on balance', in a reduction in entitlements under the award, any applicable workplace agreement or any relevant legislation. The arrangement must be in writing, signed, with a copy to the employee. There is no approval process to verify the test. Disputes in relation to the operation of the term could presumably be dealt with under the obligatory award dispute settling procedure. In making the model clause the Full Bench assumed that its operation in workplaces would be monitored by the Office of the Fair Work Ombudsman (Stewart 2009:24). Fair Work Australia is required under the Act to conduct research into the use of flexibility arrangements.

Public access to this data will be important for an evaluation of the effectiveness or otherwise of the flexibility term for workers with household responsibilities.

The Minimum Wage Panel

The third component of the safety net is the setting and adjustment of minimum wages for national system employees, including rates for juniors, employees in training and employees with a disability. A Minimum Wage Panel will conduct annual wage reviews to set/vary minimum wages in modern awards and to set/vary the minimum wages and casual loadings of award/agreement free employees in a national minimum wage order. The Panel will continue the commissioned research/written submission approach to making its decisions established under Work Choices. The historical method of case presentation and argument, in which unions played a central role and different class interests were recognised, has not been reinstated. The seven-member Panel is made up of the Fair Work Australia President and at least three part-time specialists. As with the previous Australian Fair Pay Commission (AFPC), such specialists don't have to be industrial relations practitioners. The Minister must be satisfied that the person is qualified or has knowledge in one or more of the fields: workplace relations; economics; social policy; and business, industry or commerce. Stewart concludes that the Panel 'is intended to be a successor' to the AFPC (2009:14).

The factors that have to be taken into account by Fair Work Australia to meet the minimum wages objective are set out in Section s284(1):

- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; and
- (d) the principle of equal remuneration for work of equal or comparable value; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability. (Australia 2009)

New unfair dismissal laws

The reinstatement of remedies for unfair dismissal is a welcome aspect of the *Fair Work Act*, especially for women workers employed in vulnerable and precarious jobs. Studies of the impact of the removal of such remedies under the Howard Government suggest that protections against dismissal should also be treated as an essential part of any safety net (even though Labor does not describe it as such). Loss of this minimal aspect of job security under Work Choices undermined women employees' voice and capacity to bargain. The threat of unrestricted dismissal also weakened the ability of employees to access and resist changes to existing rights and entitlements, including those important for accommodating work and household responsibilities, for example regarding the number and pattern of hours (Elton et al 2007).

The new provisions contain strengths and important weaknesses for women workers. Under the *Fair Work Act* an employee at any wage level, covered by an award or agreement, has a right to claim unfair dismissal after a qualifying period. Award free employees can only claim unfair dismissal if they earn less than \$100,000. General exclusions for casual, fixed term, fixed task, seasonal contract and probationary

employees have been removed. The work of casual employees must be regular, systematic and with a reasonable expectation of continuing for them to claim. Qualifying periods are set at 6 months for workers in enterprises with 15 or more employees and 12 months for those where there are less than 15 full time equivalent employees (until 1 January 2011 when it became a headcount of less than 15). This means that women and young workers concentrated in small businesses still have less protection from unfair dismissal. This is in contrast to the Equal Opportunity jurisdiction, where business size does not effect the right to claim unlawful discrimination. Charlesworth and Campbell argue that the lack of job security that these qualifying periods entail will affect employee access to other provisions intended to support work life balance:

Lack of job security makes it a risky business to request a variation to working time arrangements and can work to undercut any sense of entitlement that a right to request has to offer (Charlesworth and Campbell 2008:132).

It is also highly questionable as to whether 12 months is required for an employer to assess the appropriateness of an employee for the job. It is of further concern that the 12-month qualifying period is also that at which some entitlements can be accessed, for example right to request and parental leave. This will give some unscrupulous employers the incentive to sack workers just prior to accrual, in order to avoid their employment obligations. While it can be argued that dismissal in such circumstances would likely involve unlawful discrimination and therefore have alternate remedies of a claim of unlawful termination or of discrimination, such remedies are more formal, daunting and time consuming for workers than unfair dismissal procedures.

The capacity to claim unfair dismissal is also limited by the Small Business Fair Dismissal Code. Under the Code, summary dismissal can occur if the employer has reasonable grounds to believe that the employee is guilty of misconduct, theft, fraud, violence or a serious breach of occupational health and safety requirements. Stewart concludes that dismissal in these circumstances cannot be challenged, even if the accusations turn out to be unfounded (2009:38). In one qualitative study of the impact of Work Choices on low pay workers in South Australia, employers in small business were found to have used false allegations to dismiss or force women out of employment. The major deleterious effects on the health and incomes of these workers were exacerbated by their inability to have their side of the story heard (Elton and Pocock 2007). This exemption does nothing to discourage bad work practices and behaviour in small business.

Collective enterprise bargaining

The momentous shift towards to an emphasis on bargaining and away from arbitration that began in the 1980s has been maintained under Labor's *Fair Work Act* (Stewart 2011:554). Under the *Act*, enterprise agreements are presented as a means to drive productivity rather than reduce inequality or change the gender order. They are constructed primarily as an economic tool, with employee protections built in. The objects of enterprise agreements as set out in the legislation refer only to 'a simple, flexible and fair framework' that delivers 'productivity benefits' (s171(a)). There are no stated aims in relation to improving the income, conditions or equity for workers.

Enterprise bargaining

Employees wishing to obtain wages and conditions above and beyond the minima contained in awards and the National Employment Standards must obtain them through enterprise bargaining. Apart from individual flexibility arrangements,

bargaining cannot be done individually. Importantly for women and other vulnerable workers, Australian Workplace Agreements (AWAs) have been removed. This shift was warmly welcomed by the ACTU:

AWAs were the centre-piece of the Howard Government's Work Choices. They were used to break down collective strength in the workplace, and to drive down wages and conditions. The new laws will allow workers on expired AWAs to access collective bargaining. Other AWAs will also have to comply with the new National Employment Standards. Existing AWAs can be terminated by agreement at any time by mutual agreement, or after the nominal expiry date on application by one party to Fair Work Australia.' (ACTU 2009)

The Act does not refer to union or non-union agreements, which are treated equally. Ron McCallum notes that Australia is unusual in this respect by OECD standards. Non-union agreement-making does not operate in law in any comparable OECD country (2008:26). The emphasis in these provisions is on the voting of employees, with unions acting as bargaining representatives and then applying to be covered by an agreement once it is made. Once again, unions are treated as outsiders and the independent, combined voice of workers is downplayed.

The focus of collective bargaining is on 'single interest employers at the level of the enterprise', including joint ventures and related bodies corporate. It can also include employers with a strong commonality of interest (e.g. franchisees) who have agreed to bargain together and have obtained a 'single interest employer authorisation' from Fair Work Australia.

In the single interest bargaining stream, protected industrial action can be taken, but pattern bargaining is prohibited. There is a legislative requirement for 'good faith' bargaining with support from Fair Work Australia by way of bargaining orders. If an agreement cannot be reached, Fair Work Australia has no power to arbitrate, except in very limited circumstances.

There is limited opportunity for workers to make gains that will redress gender inequities under these arrangements. Enterprise-by-enterprise bargaining with reduced unionisation, little capacity for industrial action and no right to arbitration is an unlikely and inequitable process of achieving social change. Experience of non-union collective agreements in small and medium businesses in the retail and hospitality sectors under Work Choices was that they merely mirrored the statutory minima (Evesson et al 2007:iv). While the statutory minima under the *Fair Work Act* are greater than those under Work Choices, they still constitute minima that are less than pre-1996 awards. There is a real danger under the *Fair Work Act* that women, and young workers in particular, concentrated in sectors such as retail and hospitality, will not improve their employment position, but remain on minima even under enterprise agreements, unless they can access the low paid bargaining stream (see below).

Multi-enterprise agreements

There is some limited provision under the *Fair Work Act* for multi-enterprise agreements where employers cannot establish a single interest or obtain a low paid bargaining authorisation. While this stream of bargaining presents a window of opportunity for workers to try to secure gains across a sector, industry or region, it is a very small window indeed: employers must voluntarily agree to bargain together; there is no capacity for good faith bargaining orders and no right to take protected industrial action. A participating employer may also make a single enterprise agreement at any time, which will override the multi-enterprise agreement.

Low pay bargaining stream

An insertion of a low pay multi-employer bargaining stream into the Act is a promising addition for workers (predominantly women) in low pay/minimum conditions sectors such as childcare, cleaning, community services and security. It is stated in S2.7 of the *Fair Work Act* that Fair Work Australia may make an order it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal and comparable value'. This presents an opportunity for workers to formulate and bargain for improved pay and conditions across industries and sectors. However, it is only necessary because of other restrictions placed on workers' rights to collectively bargain. There are also significant hurdles to bargaining in this stream. Employers must first agree to be included and an authorisation from Fair Work Australia is required. Fair Work Australia must consider a range of criteria and be satisfied that it is in the public interest for an authorisation to be granted. There is no right to protected industrial action. Fair Work Australia may conduct compulsory conciliation, but cannot arbitrate unless all bargaining representatives to the dispute agree or when no employer to be covered has previously been covered by an agreement or workplace determination.

The positive outcome of the Australian Services Union 2010 application to Fair Work Australia for equal remuneration for workers in the female dominated Social and Community Services sector has been encouraging. Significantly, unlike in previous equal pay cases at the national level, discrimination does not need to be proved for gender-based inequalities to be recognised and potentially offset. The Fair Work Australia decision stated:

We consider gender has been important in creating the gap between pay in the SACS industry and pay in comparable state and local government employment. And, in order to give effect to the equal remuneration provisions, the proper approach is to attempt to identify the extent to which gender has inhibited wages growth in the SACS industry and to mould a remedy which addresses that situation (Fair Work Australia Decision Equal Remuneration Case 2012: (2)).

The decision to award pay increases of 18-41 % to the Modern Award rate, phased in over eight years, is regarded as the most important equal pay decision since the 1972 when equal pay of equal value was formally recognised.

Content of agreements

Enterprise agreements can contain a much wider range of content than modern awards and workplace agreements under Work Choices. 'All matters that properly relate to the work performed and the entitlements of employees in the workplace, as well as effective representation' are allowable matters. Such matters may include items supportive of workers with caring responsibilities, for example child care (Gillard 2008b:5), but may not seek to overcome other restrictive aspects of the legislation e.g. lesser rights to claim unfair dismissal in small business. Stewart (2009) concludes that 'corporate social responsibility' provisions regarding, for example, participation in climate change initiatives or dealing only with ethical suppliers would not be permitted (2009:29). He also points out that in placing these restrictions on bargaining, the Rudd Government reneged on a commitment that parties be 'free to reach agreement on whatever matters suit them' (2009:28). An enterprise agreement must have an expiry date, provisions for individual flexibility arrangements, consultation on workplace changes and dispute settling.

The capacity for agreements to regulate more conditions affecting employment, as well as to obtain wage increases over and above minimum wage adjustments by Fair Work Australia, exerts pressure on workers to bargain for a workplace agreement rather than rely on an award. However, workers historically reliant on minimum conditions in awards and with little bargaining power are disadvantaged under this arrangement. Unless they can obtain an agreement under the low pay bargaining

stream, they are condemned to be employed under lesser conditions, with improvements only via a pay equity or work value case, 4 yearly award review catch ups and legislative changes to the safety net.

Approval of enterprise agreements

Agreements must first be accepted by a majority vote of employees in each enterprise to be covered following provision of information, explanation and at least seven days to consider. Failure to secure a majority vote at an enterprise means that it will not be covered. Fair Work Australia must then be satisfied that the agreement passes several criteria, including a 'better off overall' (BOOT) test. This test is much stronger than the Fairness Test under Work Choices and potentially more protective of vulnerable workers. It requires that each award covered employee or class of employees (assuming, unless there is evidence to the contrary, that individuals in it would be better off), be better off overall under the agreement, than they would if the award applied (s193). An agreement that fails the BOOT test may be approved on public interest grounds, but only for two years.

Industrial action

Provisions regarding industrial action are similar to those under Work Choices, although some constraints on action have been removed or loosened. The retained provisions contribute to the difficulties workers will have in making substantive gains to their employment arrangements under the *Fair Work Act*. They reinforce the conclusion that Labor's focus is on productivity gains within static employment relations. There is no vision evident in these provisions for changed power relationships, including those relating to gender equity.

Industrial action is permitted only if 'protected' and in single enterprise bargaining after a previous agreement has expired. Employers can no longer take pre-emptive action, but can respond to action taken by employees. Modified, but still compulsory, pay deductions for industrial action and sanctions against unprotected action remain. Andrew Stewart's assessment is that these 'tough' laws inhibiting industrial action 'flagrantly breach Australia's obligations under international law' (2009: 47).

Workplace reform for the 'modern' age

Labor's revised system of employment regulation was announced by the then Minister of Employment and Workplace Relations Julia Gillard, on the eve of the global financial crisis (GFC) and most of the provisions of the *Fair Work Act* were implemented during these turbulent times. However the impact of the GFC on men's and women's unemployment was muted in Australia as a result of the national government's economic stimulus package which significantly expanded government expenditure and maintained services. Nevertheless the impact of the GFC was profound and certainly changed the environment within which the new employment and industrial relations policy was introduced. The GFC thus impacted on the final form of these reforms and thereby is likely to have an enduring effect on the way that Labor's policy influences existing gender power relations and women's economic empowerment.

Clearly, the changes to Australia's industrial relations regime that were introduced by Labor were the product of a political process that involved negotiation not only with trade unions but also with powerful business interests. Many provisions of the *Fair Work Act* indicate that a primary goal is about keeping employers as free as possible from regulation, while reinstating measures for the minimum 'employee fairness' demanded by unions and the electorate. From his reading of the legislation, Stewart concludes that Labor's revised system is 'an exercise of political pragmatism'

(2009:45) Similarly, in his review of the politics of Australian industrial relations in 2007, Hall described Labor's *Forward with Fairness* policy as 'a calculated political compromise' (2008:371). However, our analysis of the legislation suggests that the weaknesses that it contains are not just an outcome of pragmatism or compromise, but reflect a particular ideological view held by 'modern' Labor that gives primacy to business productivity and competitiveness, while denying class conflicts of interest and mistrusting unions. Importantly, it contains no vision of substantially changed class or gender relations.

In presenting Labor's proposals for a revised system of employment regulation, the then Minister, Julia Gillard stressed that they were not only different from Work Choices, but that they also constituted a break with the past. The Fair Work Bill was designed to meet the 'needs of the modern age' (2008c:11189) with a 'modern workplace relations agenda' (2008a:1). For Labor, 'modern' needs arose from economic change rather than from women's increased participation in the workforce or a goal of gender equity:

The world is a lot different to the one in which Australia devised the original conciliation and arbitration system more than 100 years ago. Economic reform, globalisation, new technologies and rising education have rendered the old ways obsolete (2008c:11195).

Gillard asserted that the design of the new workplace relations system was still informed by 'signature Australian values' of 'a fair go' and decency (Gillard 2008b:1 and 2009:283). While these values have historically been articulated by organised workers in relation to how they want to be treated, the Government's policy definition of fairness equally encompassed workers and business: 'its goal is "fairness" – for employers, employees and unions' (Gillard 2008a:2). For Labor, fairness for workers in the modern age is constrained by, and contingent upon, requirements of the market: 'Legislators in the largest free market economies in the world are now examining how to get the balance right between employee fairness, business flexibility and national economic competitiveness' (Gillard 2008b:3).

Thus, in constructing the legislation, Labor's focus appeared to be on achieving a limited 're-balancing' of the shift of industrial power that had favoured employers under Work Choices. At the time there was very little focus on introducing measures specifically aimed at challenging gender inequities in the industrial relations regime or, more broadly, in reducing gender inequalities in the labour market. Reflecting neo-liberal approaches and language, the Minister's summation of the Bill was that it 'balances the interests of employers and employees and balances the granting of rights with the imposition of responsibilities' (Gillard 2008c:11189). Labor's failure to take up more substantial proposals concerning the interests of working men and women, including in relation to changes in existing labour market gender inequities, made in the many submissions to it by organised workers, community representatives and academics was justified (indirectly) with reference to balance: 'It's not about swinging the pendulum violently back to the other extreme from Work Choices but putting it where it should be – in the centre' (Gillard 2008a:2).

The Minister justified legislative provisions that do not fully protect workers, guarantee access to a particular benefit or factor in inequalities of bargaining power with reference to 'balance'. A system of qualified unfair dismissal protections 'balances the rights of employees ... with the need of employers, including small business to manage their workforce'. Enterprise bargaining arrangements in which employees have limited rights were described as 'without excessive rules and regulations to tilt the balance in favour of one side or the other' (Gillard 2008a:4-5).

Labor's claim that the Act delivers 'a balance between work and family life' (Gillard 2008c:11189) is undermined by its focus on the needs of business and Labor's reluctance to intervene in the employment relationship. This is illustrated further in

the Bill's Explanatory Memorandum where provisions for flexible working arrangements without right of appeal are explained:

The increased access to flexible working arrangements is designed to assist employees to balance their work and personal lives. However, businesses are able to refuse access ... on reasonable business grounds, which will minimise the disruption ... to business (Gillard 2008:v)

Throughout its narrative on the *Fair Work Act*, Labor gives primacy to the needs of the market economy. The Minister (Gillard 2009:283-4) argued that it was '... designed to ensure Australia is competitive and prosperous with decent workplace rights and minimum standards'. The bargaining system that it sought to establish 'focused on driving productivity'. The Explanatory Memorandum described the new 'national workplace relations system' as one that 'is fair to working people, flexible for business and promotes productivity and economic growth' (2008:i). However, Labor consistently has downplayed or rejected historical understandings of conflicts of interest and unequal bargaining power between employees and employers. It argued that ongoing competitiveness in global markets and increased productivity demanded co-operation and harmony: 'All Australians have no choice but to work together to raise productivity and prosperity in the face of difficult challenges' (Gillard 2008a:6). Gillard maintained that workplace relations based on 'cooperation' are 'central to raising productivity'. '(W)e won't achieve change on the scale we need without first building cooperation and trust between all major stakeholders' (2008a:3). Bargaining with minimal external intervention in support of workers is seen as central to this project. Gillard describes, 'a system that has at its heart bargaining in good faith at the enterprise level, as this is essential to maximise workplace cooperation, improve productivity and create national prosperity' (Gillard 2008c:11189).

Ironically, Labor's use of the term 'flexibility' in some ways appears to be less sympathetic to women workers than the Coalition's. at least at the rhetorical level. The Howard Government stressed 'family flexibility' as an important goal of its industrial relations agenda even though this was ultimately used as a justification for removing regulatory protections for workers under Work Choices. Labor is more open about 'flexibility' being built into the framework of the new system largely for the benefit of business. The new 'fair and flexible framework' (ALP 2009) is about 'employee fairness' and 'business flexibility'. 'Balance' will be achieved though by 'a strong safety net for employees' and 'workplace flexibility' (Gillard 2008b:3). Employers are reassured that the safety net of the National Employment Standards and modern awards is such that it will not prevent 'necessary flexibilities' in the workplace (Gillard 2008a:1). Specific provisions for 'flexible working arrangements' to enable workers to better meet household demands have been included in the legislation, but as described further below, they are also able to be initiated by and for the benefit of employers, and employee requests can be denied on 'reasonable business grounds'.

The *Fair Work Act* and gender equality

Historically, the primacy of the male wage and women's relegation principally to the arena of social reproduction led to work arrangements (e.g. shift patterns, hours of work) and employment conditions (e.g. leave) that presumed and reinforced a male breadwinner gender order. Consequently, pay equity of itself will not change it. There are a range of employment arrangements and conditions that must be overhauled for the emergence a more equitable, dual breadwinner model, to be possible.

In the UK, Gillian Pascall (2008) has analysed the impact of the British Labour government's policies on gender equality and the male breadwinner gender order during the Blair era (1997-2007). Pascall poses the question of how far New Labour shifted existing male breadwinner gender inequalities especially through its employment and care policies. She concludes that, under Labour, women's role in the labour market was consolidated and that priority was given to policies to facilitate women's labour market participation and work-family balance – especially through the increased provision of childcare. However, she also concludes that policies to promote gender equality in care, time, income and power were less actively pursued.

In her analysis, Pascall raises a number of questions that can usefully be applied to an analysis of Australian Labor's employment narrative and regulation in relation to the male breadwinner model. The following summary draws upon this approach to focus on key issues underpinning the construction of an industrial relations gender regime: hours of work, leave, income, job security and the capacity of workers to affect general employment standards and arrangements.

1. Is the form of flexibility provided for in the *Fair Work Act* likely to benefit women, through greater capacity to combine care and employment, or employers, through greater capacity to use labour as they wish?

Under the *Fair Work Act*, Labor has included provisions that have the potential to make it easier for women and men to combine paid work and care. The Right To Request (RTT) clause and the flexibility term are sending a message to employers that it is legitimate for employees to request flexible work arrangements to meet household needs. Labor has also reinstated more assured and more easily accessed personal leave arrangements and set public holidays; conditions that are important for the care of sick and school aged children; elder care etc. However, the qualifications and limits to RTT and flexibility provisions undermine any genuine right of access. Some workers are still excluded. Employers may refuse RTT claims and retain some capacity under the flexibility term to rearrange safety net provisions for their benefit. These provisions have not been constructed to favour employers, as occurred with the rhetoric of flexibility under Work Choices. But the extent to which they will benefit women and enable sharing of care is uncertain.

2. Will 'Modern' Labor's policy and legislation enable a shift away from part-time work, casualisation and long hours?

Employees will have greater control over working hours under Labor than under the Coalition. There is a stronger capacity to refuse 'unreasonable' additional hours because of personal circumstances. Modern awards and agreements can include controls on forms of employment and details on working time arrangements, some aspects of which were prohibited under Work Choices (e.g. limitations on casual work). The reinstatement of penalty rates and overtime loadings in the safety net should discourage further extension of unsocial working hours, although it is of concern that they can be traded in flexibility arrangements.

While workers have regained some control over forms of employment and working hours under the *Fair Work Act*, it cannot be argued its provisions will reduce long working hours. In common with New Labour, Modern Labor has rejected regulation to limit the working week – there is no cap on hours, no definition of 'reasonable' additional hours has been inserted and some capacity to average hours remains. The opportunity for organised workers to reduce the working week by pattern bargaining, award cases or test cases, as in the past, has also been lost.

Pascall points to the pressure to work long hours in Scandinavian countries resulting in men taking only a small proportion of available parental leave (2008:225). Modern

Labor's failure to address the comparatively very long hours worked in Australia will likely lead to a similar outcome.

3. Do parental leave provisions aim to change the gender relations in care, bringing fathers into care, as employment policies have aimed to bring mothers into employment?

The extension of unpaid parental leave in the National Employment Standards (NES), including in a way that may encourage men to take the additional year is a positive step to equal sharing of care following birth or adoption. In addition, the provision for the first time in Australia of a broad-based paid parental leave scheme that men and women can share, or either partner can use, is a positive breakthrough for women. However, the qualifying periods for leave, low rate of pay and limited time for paid leave and requirement that it be taken within 12 months will limit access and discourage men from sharing care. Provisions will enable women to retain their connection to the workforce, but are unlikely to have any real effect on the gender order.

4. Will the *Fair Work Act* enable women to increase their relative earnings so that households can realistically share paid work and care?

Equal and sufficient incomes to sustain a family are essential prerequisites for women and men to choose equal employment participation and sharing of care. Consequently, tackling the undervaluation of women's work is an important aspect of any shift from a male to a dual breadwinner model. Labor's inclusion in the *Fair Work Act* of comparable worth in work value criteria and the capacity of Fair Work Australia to issue equal remuneration orders are therefore important improvements for women. Provision for a low pay bargaining stream may also assist women in minimum conditions sectors to at least keep up with wages improvements made in enterprise bargaining elsewhere. It remains to be seen how effective both of these avenues will be in closing the gender pay gap. Other aspects of the legislation such as limitations on industrial action and restrictions on arbitration will make it difficult for women, especially in low pay sectors, to improve their economic position. Evesson et al also note that non-union agreements under Work Choices provided lower returns and poorer conditions for workers in retail and hospitality (2007:vi). Labor has retained non-union agreements under the *Fair Work Act*, albeit with much stronger protections. However, it is questionable as to whether the women concentrated in these sectors will have sufficient capacity under the Act to significantly improve their economic position or attain equal breadwinner status in a family.

5. Will the *Fair Work Act* provide sufficient protection and security for women and men to request and gain access to provisions required for a dual breadwinner model?

Employee protections have been strengthened significantly under the *Fair Work Act*. Basic safety net conditions have been expanded and can no longer be removed as under Work Choices, giving greater security of income, public holidays and hours/patterns of work. Reinstatement of unfair dismissal remedies is crucial for some measure of job security and bargaining power. But these protections are not universal and many employees, particularly women in small businesses, will not be encouraged to assert their rights in other areas. Individual flexibility and non-union bargaining may also be as much a threat as an opportunity.

6. Will the *Fair Work Act* address 'class' differences and so enable women and men at all employment levels to move to a dual breadwinner model? How much is the Act about individual, rather than the collective rights that are important for broad changes in gender constructions?

The focus in the *Fair Work Act* on forcing workers to bargain in the workplace for wages and conditions above a restricted safety net is likely to widen rather than close differences in employment arrangements impacting on the gender order. Prohibitions on pattern bargaining will make it very difficult for employees to work together to obtain improvements across industries that are both consistent in content and timeframe. Those in a weak bargaining position will continue to play catch up through annual minimum wages adjustments and four yearly award reviews. Those able to access the low pay bargaining stream still have lesser bargaining rights than others. Individual bargaining via flexibility clauses remains. This may enhance the opportunities for women and men in unionised workplaces; in positions of higher status and pay; or in organisations with supportive policies (e.g. the public sector) to obtain arrangements conducive to sharing work and care. However, for other employees, individual flexibility bargaining has the potential to undermine rather than improve their workforce position and/or ability to combine work and household responsibilities. The experience of women under Work Choices suggests that employees without remedies for unfair dismissal will remain vulnerable to employer pressures for changes that are not in their interests.

Labor talks of going back to 'Australian values', but Stewart (2009:48) notes the extent to which the *Forward with Fairness* policy framework 'is based on individual rights, rather than collective values'. The *Fair Work Act* brings this policy into effect. Unions as collective organisations of employees are not central to the 'modern' system of workplace regulation established by Labor. Collective rights, such as those relating to industrial action are severely curtailed. Workers are not free to determine what matters they wish to pursue, how or where. Labor has retained non-union bargaining and agreements, with no union oversight. Government controlled standard setting has replaced unionised worker initiation of and industry wide campaigning for wages and conditions improvements and arbitrated test cases. The Act does not aim to encourage collective organisation.

For much of the twentieth century Australian trade unions worked to maintain the male breadwinner model. But as women increased their workforce participation, union membership and industrial activism from the 1960s, trade unions took up wages and conditions matters important to them. Most recent test cases, on leave and working hours, addressed issues central to the gender order. Collective action of this type is less possible under the *Fair Work Act*.

Conclusion

To what extent then can we say that Labor's *Fair Work Act 2009* has contributed to increasing gender equality for women workers and, more broadly, to facilitating the development of a more equitable dual-breadwinner/dual-carer gender order in Australian society? Undoubtedly gender equity has made some important gains as a result of specific changes incorporated in the Act. The legislation reinstates some employee rights and entitlements lost under Work Choices and enshrines new ones that are of particular benefit to women workers. These include the broadening of previously restricted safety net provisions, strengthening of lower paid workers' protection against unpaid dismissal, increased flexibility for meeting household responsibilities and the capacity for sector wide bargaining for pay equity. In particular, the success of the case for equal remuneration for workers in the female dominated Social and Community Services sector has been the result of changes brought about by the Act because, unlike in previous equal pay cases at the national level, discrimination does not need to be proved for gender-based inequalities to be recognised and potentially offset. The extension of unpaid parental leave in the National Employment Standards will benefit families who wish to take an extended period of leave to care following childbirth. In addition, the availability of extended

unpaid leave for men is a positive step that might potentially encourage a more equal sharing of care arrangements in the home. Importantly, this measure has been bolstered by Labor's subsequent legislation to provide for the first time in Australia a period of 18 weeks paid parental leave available to most workers, male and female, as well as a substantial increase in government funding for childcare.

While these changes should be acknowledged, our analysis has shown that some of these changes are qualified in such a way as to make them potentially difficult to secure positive outcomes in practice. The capacity of workers to collectively obtain new and improved conditions and initiate new standards is restricted by provisions limiting the content of awards; prohibitions on pattern bargaining; major hurdles for multi enterprise bargaining; limitations and penalties re industrial action; and retention of major limitations on the arbitration powers of Fair Work Australia (Australia 2009).

Drawing on Pascall's (2008) analysis of New Labour policies in the UK we developed a series of questions that can be applied to the *Fair Work Act* to assess its contribution to a more equal structure of gender relations than the male-breadwinner/female-carer model that has characterized the pattern of social relations between men and women in Australia. The analysis indicates that, while some provisions relating to care can be shared between men and women, the underlying prerequisites for a dual-breadwinner/dual-carer model have not been addressed. This would require a raft of provisions that promote increased gender equality in the share of care responsibilities, time use, income and power in industrial relations policy along with parallel policies related to child and other care, retirement incomes, training and employment, taxation, and so on. While a single legislative Act will not bring about a change in a society's gender order, it's underlying assumptions and provisions can facilitate change or reinforce the status quo. In this regard it can only be concluded that while the Act has provided some specific improvements in women workers' position, it lacks a substantial vision or strategy to fundamentally challenge existing gender inequalities either in the industrial relations framework or in the broader social gender order.

The weaknesses of the *Fair Work Act* can be partially attributed to the difficult economic circumstances in which it was created as a result of the Global Financial Crisis. Similarly, the potential for creating a more progressive industrial legislative framework undoubtedly has been constrained by the extent to which the previous Work Choices regime had shifted the boundaries of the industrial relations playing field in favour of business. However, Labor has been limited by its willingness to adopt, at least to some degree, the neoliberal, deregulated policy approach of its predecessor. In practice, Labor's employment and industrial relations policy has given a higher priority to bargaining arrangements that will placate business interests than those with the capacity to promote equity.

Finally, it needs to be acknowledged that the reforms contained in the *Fair Work Act* that have been achieved for women workers were hard won through a lengthy and fierce struggle against the Work Choices industrial relations framework. The challenge now is for these gains to be taken further in the direction of increasing gender equality while at the same time resisting the threat of a return to a reformulated version of Work Choices.

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