Fair Work: A View from the West

Thank you for inviting me to present this paper to the HR Nicholls Society's 30th Conference.

At the 29th Conference last year I presented a paper entitled *"The Fair Work Act and the coming decline in employment in Australia".*

In that paper, I predicted that unemployment would rise in Australia as a consequence of the *Fair Work Act* ('FWA') by reason of higher employment costs (caused by union interference in workplaces and higher minimum wages through the Modern Award process) and the return of unfair dismissal laws (which discourage small businesses from hiring staff out of fear that they cannot be later removed).

To date, the walls have not caved in. Ignoring for the moment that the participation rate has also been falling, thus improving the baseline unemployment figure, at 5.3% in March 2010, the unemployment rate is exceptionally low by global and historical standards. It was at 4.0% in February 2008 and reached as high as 5.8% in mid-2009. Only the most partisan of observers would blame these job losses on anything other than cyclical factors, i.e. the recession.

Industrial disputes have not blown out of control. Last time I looked there were around 50,000 days being lost to disputes in each quarter, which is certainly higher than the record low of about 15,000 days in Q1 2007, but is still substantially lower than the 150,000 days lost per quarter in 2004 prior to the introduction of the Australian Building & Construction Commission ('ABCC'), or the exponentially larger level of strikes that took place in the 1970s and 1980s.

The Deputy Prime Minister, Julia Gillard, would argue that all this is due to the 'balance' that she claims to have restored via the FWA. The truth however is that this whole game has been very well stage-managed by Ms Gillard to delay the inevitable truth.

Despite what you may think, the legislative 'reform' is not yet complete, and as such, we have not yet had the full extent of the hell unleashed. Whilst the FWA commenced on 1 July 2009, many of its provisions did not commence until 1 January 2010. Furthermore, a bill to abolish the ABCC has also been floundering in the Senate as Senators Xenophon and Fielding are currently holding the line, so the Government has not yet been allowed to completely destroy the economy. No doubt that the continued presence of the ABCC has had a significant impact in holding back the mongrel hordes.

The Government has nonetheless done its best to neuter the impact of the Howard Government's building industry reforms. Perhaps the most successful initiative to come from the Cole Royal Commission was the idea that the Government could affect cultural change through its own procurement policy.

From this sprang the idea of the National Code & Guidelines for the Building & Construction Industry. Companies and their subcontractors tendering for Federal Government funded work were prevented from engaging in many of the behaviours that were shibboleths of the industrial dinosaurs in the construction industry. These included many of our old favourites:

- 'One-in, all-in' – Where if overtime, for example, needs to be worked, everyone on site has to get it
- 'Last on, first off' – Where seniority applies to employment, not performance; and

- Ratios – Where unions can require certain numbers of employees on site, e.g. apprentices.

In almost her first act after the commencement of FWA, Ms Gillard used her executive authority to amend the Code & Guidelines to water many of these restrictions down. The Secretary of the AWU, Paul Howes, was reported to have given the thumbs-up to these developments as the most significant change in industrial policy in 15 years. Damning praise for them indeed!

Then it got a whole lot worse on 14 April this year when the Australian Financial Review reported that Ms Gillard would again be amending the Code & Guidelines to force employers to adopt enterprise agreements which provide for compulsory arbitration. This is the same Ms Gillard who promised before the 2007 election that compulsory arbitration was not part of the Rudd agenda.

But perhaps the most important development which we are waiting on is the body of legal authority that interprets the Act. It has not surprised me one iota, but many of the decisions coming from the bench at Fair Work Australia have given very novel interpretations of clauses that most practitioners would have otherwise thought were clear and straightforward.

I do not propose to give a full rundown of all the major decisions handed down by FWA since July last year, as I am sure that some of the more qualified speakers following me will be doing that. However, there are a few which I am highlighting here to demonstrate just how the quality of the judiciary makes a big difference to the way in which the Act is applied.

One such decision currently subject to appeal is *Pacific Brands Ltd t/as Dunlop Foams* [2010] FWA 1401. Section 186(4) of the Act specifically proscribes terms of agreements that provide for union rights of entry to workplaces, or so we thought. Commissioner Ryan, who is a former SDA official, determined in this case that the following clause in an enterprise agreement did not contravene the Act:

> *"An authorised NUW representative is entitled to enter at all reasonable times upon the premises and to interview any employee, but not so as to interfere unreasonably with the Employer's business."*

How anyone can reach a conclusion that such a clause does not give the union a right to enter and hold discussions with employees defies logic.

That such pro-union decisions are coming from the branch is not at all surprising to me. In a outlandish example of 'stacking the bench' Ms Gillard appointed 24 new conciliators to FWA on 23 July 2009 and just prior to Christmas appointed six new FWA Commissioners and twelve dual appointments, almost all of whom are former union officials or career public servants (though some may ask what the difference is!). Contrast that to the practice of the Howard Government in balancing the appointment of commissioners with business backgrounds with those of union backgrounds in the interest of 'balance'. What a load of rot.

The fact that much of the legislation has only been in place for three months tells us that it's too early to give a fully considered judgement on the impact of FWA, but there are already a number of worrying portents of what I am still sure is coming.

There has been minimal coverage of this in the media, but at last count, private sector wages growth was at 4.6% per annum. It's even higher in the public sector of course. Its fair to say that

wages growth isn't back at the double figures level it was in the late 1970s when the wages explosion wreaked so much economic havoc; but when consumer price inflation is running in the 1-2% range and we have just come through a recession, 4.6% wages growth is actually deeply worrying.

The consequences of a continuing wage growth spiral are obvious to all of us, but don't expect any politician or journalist to either understand or have cause for alarm. High wages sound like a good thing to most – except of course if you run a business!

The best example of the industrial unrest which is sure to unfold once the ABCC is abolished resides in the battle last December at the Pluto LNG site in the north-west of WA on the Burrup Peninsula. This dispute, led by Kevin Reynolds and the CFMEU, was publicly portrayed as being all about accommodation facilities.

To understand the background to this dispute, one needs to understand the modern nature of the modern resources industry in WA. Owing to the horrible natural surroundings and heat, few people actually want to live in the vicinity of where they work in the Pilbara, so there are few houses and facilities north of Geraldton and south of Broome.

Owing to this and the 12 hour shift work practices applied on sites, most workers live in Perth and 'fly-in, fly-out' to their workplace. For the weeks that they are on-site, they live in temporary accommodation units, known as 'dongas' which are transportable and look a little like shipping containers. They aren't fantastic, but with a few added amenities such as plumbing, power and air conditioning, they are adequate. Because of the very frequent movement of staff to and from location and the staggered pattern of shifts, Woodside is unable to reallocate staff to the same donga when they next return to site, as it is impossible to get the same set of people on location at the same time.

In scenes reminiscent of complaints about ice cream flavours at Robe River, the CFMEU would have us all believe that miners on remuneration packages of $150,000 went on strike for over a week because they wanted continuity of the same donga whenever they flew in. Yeah, right! The unions derisively described Woodside's donga allocation process as 'motelling'.

Under WorkChoices, this could never have legally happened. All that Woodside would have needed to do under that legislation was obtain an injunction from the Federal Court ordering the employees back to work. If they defied the injunction, then they were in contempt of court.

Instead, under the FWA, Woodside and the State Government could only complain and got nowhere for their efforts, as the orders they were obtaining from FWA were simply being ignored.

Woodside's next trick was to offer free iPods to the 1,500 staff to entice them back to work; but still no luck. Eventually the workers 'voted' to return to work in February, but not until they had caused Woodside to lose something in the order of $3 million for their efforts. Woodside has meanwhile not stopped the practice of motelling. The workers who 'voted' to go on strike have diddled themselves short of wages and Woodside has had its bottom line hurt. No one benefitted from the strike except for Mr Reynolds. And short of the ABCC now pursuing him, he will get away with it.

Everything I have discussed to date relates to industrial relations. But that is by no means the whole story. Ever since it was elected to power, the Rudd Government's overwhelming theme

has been to take over powers from the states. If it isn't IR, its health, water, education… you name it, Mr Rudd wants to run it. Workplace safety legislation is no exception.

I personally don't agree with this seemingly inexorable shift in powers from the states to the Commonwealth. It is neither a good nor desirable thing. But that's another paper for another conference. Some business people and their industry groups however believe otherwise and have been lobbying for it in the area of occupational health and safety (OHS) law for some years now.

Ms Gillard grabbed this opportunity with both arms and announced her intention to develop a 'Model OHS Act' which would be based on the referral of relevant powers by the states to the Commonwealth. Following consultation and a period for comment, the Model Act was released for further public review in late 2009. To be fair, this model is a vast improvement on the current NSW system, although that is a little like arguing that Lenin was a good bloke because he wasn't nearly as murderous as Stalin.

The main issues I take with the model as it currently stands are as follows:

1. It potentially expands the duty of care to employees to parties other than the employer;
2. It potentially expands the duty of care of an employer to the general public;
3. It incorporates and expands upon union right of entry to workplaces;
4. It introduces a reverse onus of proof (i.e. employer guilty until proven innocent);
5. It gives workers a right to cease work on 'safety' grounds; and
6. It significantly increases penalties to employers for safety breaches (up to $3m in fines and five years gaol).

All the States, other than my home state Western Australia, have agreed via COAG to adopt this flawed Model Act. WA has more or less cited the same concerns as the reason for its stance.

That makes for a nice segue into what Ray has asked me to discuss in this paper – namely why WA is 'going it alone'. WA you may also be aware of going it alone on IR too and has refused to refer its remaining powers in this area to the Commonwealth, even though all the other states now have (or are about to).

All Australian business people, both big and small, and in all states and territories are petrified about what Ms Gillard is trying to do right now. What is so unique about WA that sets it apart from the rest of Australia?

Well to be honest, I don't think the answer is very complicated at all. Obviously, the main reason why WA is going it alone is political – Colin Barnett and the Liberals won a surprise victory at the October 2008 state election, and the Liberal agenda is quite different from that of Ms Gillard and all the other state Labor governments around the nation.

Since his election to office, the Treasurer and Minister for Industrial Relations (amongst other things), Troy Buswell has made it very clear that he will not simply drag WA into any old hare-brained scheme that the Commonwealth may dream up. For this, he deserves considerable credit.

But is the Barnett Government really offering much of an alternative to Ms Gillard's proposed national system? I doubt it.

Since coming to office, Mr Buswell has not changed a thing in the State IR system. All the same hacks are sitting on the State Industrial Relations Commission with no work to do. Mr Buswell announced that he would not refer WA's industrial powers to the Commonwealth but instead wants to implement the Fair Work Act and just 'take out the parts that he doesn't like'. So he appointed Blake Dawson lawyer Steven Amendola to conduct a review into the state system, which will presumably recommend exactly this course of action.

Mr Amendola gave his report to Mr Buswell in 2009 but Mr Buswell has not publicly released it as yet. Few are holding their breath in anticipation. With a state election due by the end of 2011, I doubt that we'll see any reform on this front until 2012. No one wants to start a war with the unions right now.

The same goes for the ABCC. The previous Richard Court Government had the good sense to establish their own version of the ABCC, known as the 'Task Force'. It is the view of the Barnett Government that such a vehicle cannot be re-established in WA because of the *Work Choices Case*; but even if it could, there is little work to do in a state system that now only applies to sole traders and partnerships.

That I believe is the crux of the problem. The state IR system is now so limited in scope (I estimate that less than 10% of private sector employees work for employers in the state system) that it seems to be a case of 'who cares?' Any going-it-alone seems to be more for displays of political grandstanding than for any tangible benefit. It's always easier to be principled when there's nothing at stake.

But it's a shame. The Barnett Government has a unique opportunity to become a beacon to the rest of the country and show the benefits of a good industrial relations system. Employers everywhere are begging for it.

I know from my own experience with the National Electrical & Communications Association that our members are running scared about what Ms Gillard has set in train for them. Our membership levels have risen by over 50% in the last two years. Almost all of our new members who I speak with cite the *Fair Work Act* as the reason why they have joined.

Unfair dismissal laws in particular frighten small business employers. The abolition of those alone would fix half of what is wrong with the current system. But as I have outlined already, the political appetite for it at state level seemingly just does not exist.

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Kyle is the Secretary of the National Electrical & Communications Association, Western Australia Chapter. All views expressed in this paper are his own and are not necessarily those of NECA or its members.