The Fair Work Act and the coming decline in employment in Australia

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Thank you for inviting me to present this paper to the HR Nicholls Society's 29th Conference.

Prior to the 2007 Federal election, the then Opposition Leader, Kevin Rudd, deliberately released an IR policy which some mockingly called 'Work Choices lite'. True or not, this policy was a deliberate departure from some of the more extremism of earlier ALP policy statements on IR. The strategy was to satisfy the business community that a Rudd Government would not cause a substantial departure from the dreaded Work Choices laws, but would merely seek to remove the elements of the legislation which it perceived were the most odious. Remember, Mr Rudd even used to describe himself as an 'economic conservative'.

To some extent, this strategy worked. So-called business leaders, such as Sir Rod Eddington and Heather Ridout from the Australian Industry Group (AiG), subsequently came out in support of the policy on the grounds that it wasn't really all that bad. Mr Rudd even got attacked by some of the more militant unions. Dean Mighell of the ETU Southern States Branch did, and still continues to, claim that the Rudd laws are little better than Work Choices. Mr Mighell was expelled from the ALP, mostly as a result of his controversial views, and consequently began donating union funds to the Greens! Just last week Mr Mighell circulated a newsletter to his members warning that he was referring the Rudd Government to the ILO because of the Fair Work Act.

But those of us who know better knew that the devil always existed in the legislation – policy counts for nothing. And it was no surprise to me that we got what we eventually got in the Fair Work Act.

I should say that AiG is a strange group. They are the old MTIA, essentially just a sectoral employer group for large manufacturing interests, who at some stage changed their name to make themselves sound like a nationally representative body of all Australian employers. Nothing could be further from the truth. Yet the media lap up every word of this organisation, primarily because they are the one employer group who can always be relied upon to say the wrong thing. And that of course suits the left wing media agenda. AiG is to employer groups what Malcolm Fraser is to Liberal Prime Ministers!

The focus of this paper is to discuss the impacts of Fair Work Act on Australia. As the Secretary of an employer association, and one that operates a Group Training Organisation that employs 750 apprentices, I am well placed to assess the impact this legislation will have upon both employers and employees alike.

My friend Simon Billing has already given us an excellent overall summary of the legislation. The focus of this paper is more to do with the union related aspects of the legislation, in particular how these laws will encourage the full scale return of unions to Australian workplaces.

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Given all the discussion about the 'Global Financial Crisis' and the possibility that we are entering into a Depression, then the modern parallels to the 1930s are stark. The Fair Work Act is quite possibly the modern day version of the infamous Smoot-Hawley Tariff Act. It is exactly the wrong legislation at exactly the wrong time.

In 1929 when Smoot-Hawley was first proposed to the Congress, through to the trough of the Depression in 1933, global trade collapsed by 80%. It spiralled quickly downwards as though it were water in an unplugged basin. The folly of Smoot-Hawley is so recognised today by all that even Al Gore used a photo of Senator Reed Smoot and Rep. Willis Hawley to deride Ross Perot during a Presidential election debate in 1992. I wonder if we also one day see a photo of Julia Gillard and Senator Fielding being used by future politicians to highlight the great folly of the members of the Australian Parliament in 2009?!

Anyhow, I will start with the rules in relation to enterprise bargaining, and this includes a discussion on industrial action, as the two are closely intertwined.

I believe that the most critical aspect of the Fair Work Act (after the unfortunate return of the unfair dismissal laws) is the new bargaining rules. Quite simply, the new ability for the parties to negotiate on anything is a recipe for complete mayhem and disaster.

If anything, the only two worthwhile achievements of Work Choices were the abolition of unfair dismissals (for those with less than 101 employees) and the introduction of "prohibited content". PC was a list of items proscribed by Regulation, which could not be included in an agreement. These were essentially any clauses that the unions usually went to war over, e.g. trade union training leave, bargaining agent fees, shop steward preference clauses and more generally, any matter not pertaining to the employment relationship.

Clause 172 of the Fair Work Act retains the 'matters pertaining' distinction, although it has extended the definition to include any matter pertaining to the relationship between the union and the employer. This is an important distinction, because it basically makes ALL bargaining items a matter which pertains. Section 194 states that an agreement term is only outlawed if it is discriminatory or breaches another section of the Act. So essentially, there is nothing of substance which cannot be included in an agreement.

Now this is important, because industrial action flows from the potential content of agreements. If a matter was prohibited content under Work Choices, then a union could not seek to take protected industrial action in support of it. The fact that virtually all content will now be negotiable means that all such items can subsequently become a *raison d'etre* for industrial action.

This is not Work Choices Lite. This isn't even the '93 Brereton Act lite. This is a return to the bad old days of the 80's and before. Imagine it now… If a union can seek protected action over virtually any issue, then what is to stop them from striking over the flavours of ice cream in the canteen in a mine somewhere in the Pilbara? Or the CFMEU striking because they wish to prevent Rio Tinto from extracting coal because it may be sold to the Chinese for use in steel production to make tanks on the off chance they may use the tanks to crush Tibetan uprisings?

There is no doubt that this power will eventually be used for extremely malicious purposes. Unions run rafts of businesses. These laws will therefore be used to force other employers to trade exclusively with such union owned businesses.

I have no doubt the Fair Work Act will not save union membership. Indeed nothing will. That horse has bolted. And union membership will only decline further still. But these laws will to further what I like to call the 'buckets of money' strategy pursued by many unions. This is where the union requires employers to make payments into training and redundancy funds, but where the money rarely gets used for the purpose it is ostensibly intended but instead goes towards funding junkets for union officials – much like Mr Mighell's recent trip to London, funded entirely by one such redundancy fund, on which he was accused by some of using the same funds to hire a transsexual prostitute.

With membership falling further still, these buckets of money will help to keep the unions afloat and will increase the insidiousness of their influence. In France, private sector unions are believed to only account for 5% of the workforce; yet you wouldn't believe it, given their huge level of influence.

And don't ever believe for even two seconds that the Fair Work Act is geared towards promoting collective bargaining. I don't believe there is any evidence to support that proposition.

The Award Modernisation process is wrapped up in much of this. It will include a new 'catch all' award for those not traditionally covered by awards, and will increase minimum wages in some awards by upwards of 25%. Note also that the Fair Work Act has adopted the current NSW bargaining system - the compulsory union involvement in agreement making. Under the new Act, unions are the default bargaining agent for all employees (unless the employees opt out) and any non-union agreement made can be entered into at any later date by a relevant union upon its own initiative. 'Good faith bargaining' also stands a good chance that it will be interpreted very broadly by the tribunals and courts to import an almost universal requirement for an employer to give the union whatever it wants, perhaps even extremely sensitive commercial info.

In such circumstances, which business, regardless of size, is going to want to even consider making a registered enterprise agreement?

The NSW experience is that no one used this system because it was completely unusable, except of course if you are the NSW public service. In my opinion, the primary purpose of the Act is therefore to keep everyone in the Award system. Fair Work Australia will then begin to treat awards as market wage instruments, as opposed to the minimum wage instruments which they current are. This is a clear return to the pre-Brereton setup.

I guarantee that we will look back on this Act in 10 years, if it is still operational, and we will reminisce about the good old days of agreement making. My prediction is that it will completely dry up within the space of a few years.

I believe the truth is that the primacy of awards under the Gillard system suits exactly what the unions want. Enterprises covered by awards and not by agreements are exposed to industrial action. This means a permanent state of industrial warfare.

It also seems clear to me that the Fair Work Act has been deliberately designed to finally give effect to Hawke vision of the 'one big union'. 100 years of carefully created demarcation boundaries have been thrown out the door by the new right of entry rules. Under Work Choices, for a union to have right of entry to a workplace, the union had to be a party to the applicable industrial instrument AND be eligible to

represent such employees. The Award Modernisation process has removed union (and employer association) respondency to awards. This means that all unions are effectively now parties to any award. To gain right of entry to a workplace, they only need to be able to represent at least one employee at that workplace.

Consider a construction site for a moment. There are concreters, bricklayers, metal form workers, electricians, plumbers, fridgies, tilers, glaziers, engineers (and more) all in the one workplace. Consequently all the relevant unions can compete with each other on the same site for members. It will be the battle of the CFMEU v AWU v CEPU v AMWU v APESMA v...

Industrial action will occur because of union turf wars and often will have nothing to do with employer or employee matters. It will be a race to the bottom to see who is the most militant in order to attract the members. Eventually one union will win out, but it could take decades of blood letting to arrive at this point. Add to this the new ability for unions to access company records on any employee, and who would want to be an Australian employer?

Worse still, Rudd has promised to abolish the Australian Building & Construction Commission by 2010. Justice Wilcox is conducting a review right now into what should become of the promised 'specialist division' of FWA. A toothless tiger is certain to be the outcome. Lawlessness will return en masse to construction sites in Australia. Nothing has been said as yet about the future of the National Code, but this would presumably be expected to accompany the ABCC's long march to the graveyard.

So what was it again that gave Ms Ridout so much hope about the Fair Work Act, and caused Mr Mighell such heart ache?

Funnily enough, Mr Mighell's main complaints seem to centre on the retention of secret ballots and the prohibition on pattern bargaining. Ironically, both of these changes in Work Choices were perhaps the two least successful aspects of the old legislation. I know of no pattern bargain that was ever stopped as a result of the laws (indeed I can provide many examples to the contrary) and the unions succeeded in having over 95% of their requested industrial action approved by secret ballot. The introduction of secret ballots didn't really achieve anything.

So if these are the sole reasons why some say that FWA is 'Work Choice lite', then they couldn't be more wrong. Arguments like this are the intellectual equivalent of people claiming that Barack Obama is no different from George Bush because he retained Bob Gates as Defence Secretary. It's totally laughable really.

Therefore, there is sadly so much to despair about the Fair Work Act. As I earlier stated, this is the modern equivalent of Smoot-Hawley. Just last night John Stone mentioned that once monetary and fiscal policy options have been exhausted, a government only has the ability to stimulate the economy by the use of wages policy. Yet we are horribly seeing things go in a counter cyclical direction. Right as the economy is seriously contracting, the reforms of the Rudd Government are perversely causing the price of labour to rise sharply.

Just as the Smoot-Hawley Act caused world trade to disappear down the gurgler, the Fair Work Act will similarly lead to the death of employment in Australia. Off-shoring will rapidly increase in pace, long term unemployed will become permanent welfare recipients and the Australian economy will suffer for many decades. Small business simply will take a risk on employing anyone.

So what can we do about it? Sadly I think we are wasting our time if we are hoping for the Federal Opposition to save the day. The majority of the present team don't have the intellectual capacity for it, and the political pundits are telling them to stay right away from IR for at least a generation.

What about state governments? Political hues aside, the most insidious outcome of the Work Choices Case was the transferral of power over IR for constitutional corporations away from the States to the Commonwealth. So the states now only have IR powers directly with respect to non-constitutional corps, e.g. sole traders and partnerships – so basically not much.

There are some things a State government can do though, but not much. The sole Liberal IR Minister in Australia, Troy Buswell, recently announced that he was keen to start his own state version of the Building Taskforce. One also existed in WA prior to the election of the Gallop Government in 2001. Whilst there is the obvious corporations power restriction now, one presumes that the criminal law could be used appropriately to regulate behaviour on building sites and/or the State Government's procurement policy… much like the National Code is currently used by the Federal Government. All worth considering and worthwhile, but ultimately will be a drop in the ocean compared to the overall damage that will be wreaked by the Fair Work Act.