



Fair Work Act Review 2012

John Lloyd
Director
Work Reform and Productivity Unit

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Reform of the Australian Workplace Relations System

1. The scope to reform the workplace relations system is relatively unencumbered compared to previous decades. Legal and constitutional impediments have receded. The High Court in its 2006 decision upholding the legality of Work Choices confirmed that the Commonwealth was able to use the Constitution's corporations power to regulate workplace relations. This offers more direct and sweeping powers than were available by reliance on the conciliation and arbitration power.
2. A list of reforms is presented. The key tests to support the reforms were that each proposal would facilitate:
 - a. workplace flexibility;
 - b. job creation and security; and
 - c. investment in Australian ventures and jobs.
3. The obvious objectives of a workplace relations system are to provide:
 - a. real incomes growth;
 - b. jobs growth;
 - c. improved productivity;
 - d. fair pay and conditions;
 - e. easy access to jobs;
 - f. encouragement to try innovative work practices;
 - g. a safety net for more vulnerable workers; and
 - h. a credible system to resolve entrenched disputes.
4. Unions have a legitimate role in workplace relations. However, they have been given a privileged and powerful position under the fair work system. It is estimated by the Australian Industry Group that the *Fair Work Act 2009* (FW Act) contains 100 new union rights. This expansion is unjustified when their representation in the workplace has declined so dramatically.
5. It follows that some of the proposed reforms curb the excesses of union power.
6. The deficiencies of the fair work system are numerous. The main deficiencies are outlined in **Attachment A**.
7. Many of the features of the fair work system are reminiscent of decades past. A credible workplace relations system must be suited to contemporary conditions. The reforms proposed in this paper are suited to these conditions. The features of a modern workplace are outlined in **Attachment B**.

Agreements

8. Choice of agreement type should be reintroduced. The system should allow employers, employees and unions to choose an agreement type best suited to their circumstances. The agreement types on offer would be:
 - a. union collective;
 - b. non-union collective;
 - c. individual;
 - d. union greenfield; and
 - e. non-union greenfield.
9. Collective and greenfield agreements could be a multi-employer agreements in limited circumstances, for example to cover employers of a common franchise.
10. All agreements would have to satisfy a no disadvantage test against the National Employment Standards. An individual agreement would be subject to an additional no disadvantage test against a collective agreement that applied in the workplace to employees in the same category.
11. The approval of agreements has become an elaborate bureaucratic process. Approval should be the responsibility of the regulator, the Fair Work Ombudsman (FWO) and not the tribunal, Fair Work Australia (FWA). The accessibility of FWO and quick turnaround would be fundamental requirements of the system.

Individual Flexibility Arrangements

12. Individual flexibility arrangements (IFAs) were supposed to offer access to individually tailored workplace arrangements. It is clear that they have failed; take up is minimal.
13. The procedures to enter an IFA are complex and cumbersome. The model IFA clause for awards is highly restrictive in its scope. Unions demand strict limits on the scope of IFA clauses in enterprise agreements. It is common for the clauses to restrict IFA content and to require consultation with the union or other employees. The ease of exiting an IFA engenders reluctance on both sides.
14. Ideally, IFAs should be replaced by individual agreements. In the event they are retained, substantial amendment is required if they are to attract any genuine interest. Enterprise agreements should confirm access to an IFA absent the insertion of any restrictions on content or procedure. An IFA is an agreement between the employer and employee. Interference or oversight by a union or other employees is unwarranted.

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15. Similarly, the model clause used in many awards should be less restrictive. A no disadvantage test against the award and National Employment Standards should continue to apply.
 16. The termination arrangements should be extended beyond the present 28 days' notice period. Termination with 6 months' notice should apply.
 17. An IFA lapses with the approval of a new enterprise agreement that covers the employee. An IFA should continue, notwithstanding the making of a new agreement, subject to the IFA continuing to meet the better off overall test.
 18. The maximum term of an IFA should equate with the maximum term of an enterprise agreement, four years. Therefore, an IFA would apply for a period of up to four years that is agreed between the employer and the employee.

Bargaining and Agreement Making

19. Bargaining and agreement making are now more complex and the unions have an enhanced role. Employers are reluctant to pursue innovative agreements with employees. Instead they tolerate what the system and unions dictate and adjust their business activities to suit. It is not surprising productivity has stagnated.
20. The wide definition of "permitted matters" for negotiation should be reduced. A menu of prohibited matters should be established. Unions are pursuing broad negotiating agendas that extend to controlling the running of the business in areas that are traditionally the responsibility of management. This frequently results in protracted negotiations and disputes. Prohibited content would include:
 - a. restrictions on the engagement and use of contractors, casual and labour hire workers;
 - b. encouraging or discouraging union membership;
 - c. restrictions on the ability of a person to become a party to a particular type of agreement;
 - d. right of entry; and
 - e. discriminatory terms.
21. Australia is becoming accustomed to the emergence of protracted bargaining and lengthy industrial disputes. We have seen this in the airline, car manufacturing, mining, public and food production sectors to name a few examples. The trend is partly due to the unions having confidence to extend their claims beyond the traditional pay, conditions and entitlements improvements. Unions are now adopting bargaining agendas that pursue rights over the business strategy and operations of the employer. The reintroduction of prohibited content will alleviate some of these pressures.

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22. The fair work bargaining system is also at fault. FWA could be empowered to create an initial period of protected action and to approve the type of action to be taken. An extension of the period of protected action would require FWA approval.
 23. In a number of disputes the unions are frequently employing the tactic of withdrawing notified protected action at the last moment. This means the employer's business is disrupted while union members suffer no loss of pay. Penalties should be imposed on the use of this tactic where the withdrawal is not linked to a settlement of the dispute. The late withdrawal of notified industrial action would result in the deduction of pay for the employees involved. The deduction amount would equal pay for the period of the notified action.
 24. Genuine choice of agreement type combined with improved bargaining rules should promote productivity improvement. It is incongruous that union leaders boast about enterprise agreements delivering massive pay increases absent any commitment to productivity improvement. The most glaring recent examples are the General Motors Holden agreement and the Victorian building industry pattern agreement. Parties entering such agreements invite a reckoning that will involve business contraction and job losses.
 25. The best outcomes for a business and its employees are achieved when both sides have the capacity to entertain improvements that add value to the business and improve earnings and job security. Inevitably, new work practices and improved efficiency are involved. Many businesses and their employees in Australia understand they operate in a competitive environment and that the future is not guaranteed. Genuine choice of agreement type and fairer bargaining are urgent reform needs.

Independent Contracting

26. The gradual incursion of tribunal and union interference in the use of contractors and labour hire workers is damaging workplace flexibility and efficiency. Many Australians prefer the freedom and opportunity independent contracting offers them. Unions oppose independent contracting because it limits their influence in the workplace.
27. The regulation of independent contracting and labour hire should be removed from the workplace relations system and transferred to commercial law. This form of work is common across many sectors of Australian industry. People who choose to be contractors know the risks and do not need the dead hand of union control to protect them. A transfer of regulation to commercial law will reassure them that appropriate opportunities and regulation will apply to their endeavours.
28. The unsuitability of workplace relations regulation would be reinforced by having interference with contracting decisions identified as prohibited content that could not be included in industrial agreements.

Regulation of Unions and Employer Associations

29. Events during 2011 highlighted a lax system of union accountability and regulation. This deficiency is particularly apparent in the management of finances. Unions collect and spend \$ millions of members fees. They own property, employ large staffs, support political parties, campaign on a variety of public interest issues and engage actively in the media.
30. The High Court's 2006 decision strongly affirmed the Parliament's right to use the corporations power to regulate the activities of trade unions and employer associations.
31. Unions are registered and regulated pursuant to the *Fair Work (Registered Organisations) Act 2009*. Corporations are regulated by ASIC. The corporations' law system is rigorous and highly effective. Unions and employer associations should be regulated by ASIC with the same level of accountability as applies to corporations. The ASIC coverage would apply to registration, financial management, conduct of officers, rules of the organisation and elections. Disputes would be heard by the federal courts.

Right of Entry

32. Union officials should have a right of entry to conduct legitimate business at a time and in a manner that does not interfere with the operation of a workplace. The fair work system has significantly expanded the rights of entry. The ALP policy in 2007 was to retain the right of entry provisions that applied under the *Workplace Relations Act 1996*. This policy was not honoured.
33. The right to enter to hold discussions with employees should only apply if the official's union has members at the workplace. The fair work system permits entry for discussions if a workplace contains employees eligible to be a member of the official's union.
34. The tests for granting a permit should be applied with rigour. Similarly, notice of entry requirements should be strictly enforced. Officials whose conduct contravenes the law would become ineligible for a permit. Repeat offences would lead to penalties against a union and possibly withdrawal of entry rights from all its officials.
35. The right of an employee to decline to meet with a union official who has gained entry should be clearly spelt out and protected. Employers should be required to ensure this right is not infringed.
36. Agreements should not be able to include provisions on right of entry. Right of entry terms should be specified in the legislation and nowhere else.

Transfer of Business

37. In our dynamic economy business structures change frequently. Takeovers, mergers and outsourcing are common. Regulations that allow these transactions to occur easily are important to a modern economy. The fair work system provisions act as a potential disincentive to transfer business and have adverse consequences for job security. They operate against the interests of both employers and employees.
38. In a takeover or merger employees in the vacating business are more likely to be terminated. If employees of the vacating business are retained then multiple agreements apply to the employees of the acquiring business. This results in disharmony and administrative complexity. Also, out-dated terms and conditions are preserved often to detriment of employees.
39. The “character of business” test should be reinstated. The test requires two employers to have the same character before transfer of business implications arise. Reasonably settled law had evolved around this test. The current “similarity of work” approach should be removed.

General Protections

40. ALP Governments display a natural inclination to add to the regulation of how Australians lead their lives and go about their business. This inclination is nowhere more apparent than in workplace relations.
41. The fair work system introduced a particularly pernicious concept of “general protections.” The general protections are an amalgam of the former, freedom of association, coercion, and unlawful termination of employment provisions with some additions. In particular, the concepts of workplace rights and adverse action that breaches a workplace right have been introduced. If an adverse action is alleged the reverse onus of proof applies to legal proceedings.
42. Protections against abuse of freedom of association, coercion and unlawful termination have existed in previous legislation. They have operated satisfactorily. The new general protections, combined with expansive legal rulings, have the capacity to constrain and damage employer – employee relationships. Already we are seeing the use of general protections displacing traditional unfair dismissal remedies.
43. The general protections are potentially the most damaging aspect of the fair work system. They reflect the zealous regulation associated with European labour laws. Increased litigation about employment decisions and jurisprudence establishing a range of detailed workplace rights will be the result.

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44. The general protections chapter of the legislation should be removed and protections reflecting those in the *Workplace Relations Act 1996* reintroduced.
45. If this was to take time then immediate changes could be made. For example:
- a. a workplace right not to include a discretionary benefit offered by an employer;
 - b. the standard legal principle of the applicant proving that a contravention has occurred to apply. The reverse onus of proof removed;
 - c. claims relating to termination of employment to be lodged within 3 weeks of the termination; and
 - d. the sole or dominant reason to be taken into account in determining the reason for a particular action. Decisions are emerging where very contorted logic is being applied in ascertaining the reasons for taking action.

Superannuation

46. Superannuation legislation gives an employee the right to choose the superannuation fund in which they want their money invested. Awards are required to include a clause specifying “default” superannuation funds. Default funds come into play if an employee declines to make a fund choice. Typically the award clause will list up to five funds. The funds listed are with few exceptions industry superannuation funds. The Productivity Commission is conducting an inquiry into the selection and assessment of default funds in awards.
47. The investigation is overdue and supported by the IPA. The process is riddled with potential conflicts of interest, appears to be anti-competitive and resembles a closed shop.
48. The treatment of superannuation in enterprise agreements raises equally grave concerns. Most agreements deny employees choice of superannuation fund. Some agreements such as a Woolworths agreement state “choice of fund is not available.” The template CFMEU agreement in the building industry provides “no employee shall commence employment unless he/she is a registered worker in the C+BUS scheme.”
49. Most employers and unions are reaching comfortable agreements that mandate payment of employees’ superannuation into one or two nominated industry funds. This occurs despite most private sector workplaces having few, if any, employees who are union members. The employers are denying their employees’ the right to choose; a right that the superannuation legislation supports.
50. Agreements should not be allowed to include terms that deny choice. However, they should be permitted to nominate preferred funds while allowing an employee to choose an alternative that complies with the superannuation regulations. The National Bank Enterprise Agreement 2011 provides a model clause offering employees choice of fund.

Demarcation Disputes

51. Demarcation disputes are disputes between unions involving a contest as to which organisation has the right to represent workers. Employers are expressing concern that demarcation disputes are increasing under the fair work system. Such disputes are damaging and difficult. An employer generally can do little to resolve them, yet their business can suffer significant dislocation. Industrial action in support of a demarcation dispute is unlawful.
52. The rights of entry for union officials to workplaces for the purpose of discussions with workers have been relaxed. Modern awards apply to employees in an industry or occupation and do not have union respondents and do nothing to partition union representation. These faults have engendered an atmosphere where in a number of industries contested rights are pursued with vigour with little regard for legislative constraints.
53. The right of entry for discussion purposes should be returned to having members covered by an industrial instrument that applies to the workers at the workplace.
54. Industrial action in support of a demarcation dispute is unlawful. The core responsibilities of the FWO should include the investigation and prosecution of unlawful conduct associated with demarcation disputes.

Building and Construction Industry

55. The building and construction industry plays a vital role in our economy and community. The unions and some contractors have a history of showing contempt for the law and decent standards of conduct.
56. The IPA is hesitant to support potent intervention in an industry's workplace affairs. However, the workplace relations of the building and construction industry demands strong action. The *Building and Construction Industry Improvement Act 2005* should not be disturbed. The ABCC should concentrate on its core business of enforcing workplace relations laws on building sites. The National Code of Practice and associated guidelines should be designed and administered in a fashion that provides a compelling inducement for contractors to comply.

Appointments to Fair Work Australia

57. The credibility of FWA is to some extent compromised by the controversies that surround the appointment of members. The careers of new appointees are scrutinised and tallies of backgrounds regularly counted. ALP governments appoint predominately union officials and union-friendly lawyers. Coalition governments appoint predominately employer related personnel.
58. A new system adapted from procedures associated with appointments to similar bodies overseas could be used. Nominations to fill the FWA vacancies of Deputy President and Commissioner would be made on a rotating basis by the ALP and the Coalition, irrespective of who was in power. The appointment of President would be made by the government after consulting the Opposition, the ACCI and the ACTU.

Compliance Advice

59. The fair work system has intensified earlier trends by establishing a complex, prescriptive and legalistic regime. Legal obligations in employing people can be difficult to understand. Even large employers such as Spotless, Toys R Us and Hungry Jacks have fallen foul of the legislation.
60. The advice of the regulator, the FWO, is therefore important in assisting employers, especially small employers, understand their obligations. Small employers lack the financial resources to obtain considered legal advice.
61. However, employers are unable to rely on the advice of the FWO in any legal proceedings alleging that they have not satisfied their employer obligations. This is wrong. A government that chooses to impose a complex system on the community has an obligation to provide accessible and expert advice about obligations.
62. An employer who accurately describes their circumstances is entitled to receive written advice about their obligations. Such written advice should be allowed as a defence in any subsequent legal proceedings.

Public Sector

63. The public sector has a natural inclination to resist workplace relations reform. All public sectors are susceptible to the one size fits all approach. Central agencies for budget and personnel management are powerful. Policies and guidelines are produced with bewildering regularity and scope. Unions play on these characteristics and support with relish centralised policies and bargaining.

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64. Inflexible agreements, one size fits all criteria, elaborate protections against termination or discipline, and mediocrity promoted in preference to reward and incentive are features of most of the systems. The result is a reluctance to seriously address work practice changes, efficiency and productivity. Staffing levels have risen and there is evidence too many workers are engaged on mind numbing form filling and processing.
 65. Governments appear to endorse the centralised philosophy advanced by unions and their own bureaucrats. Worse they appear to accept that public sector workers are a unique species that require protections not available to employees in the private sector.
 66. Government budgets are coming under increasing pressure. The call for services and infrastructure is not abating while revenue is not keeping pace. Reforms to improve efficiency and productivity are necessary. A key reform to achieve this is to allow individual agencies to bargain and reach agreements with minimal interference from central agencies. The tests for the approval of multi-agency agreements in the public sector should be strengthened to discourage their use.

Conclusion

67. The reforms that the IPA proposes take account of the modern workplace features. It is fundamental that the country needs a workplace relations system suited to the present and the future.
68. So much of our workplace relations culture remains tied to the past. A culture characterised by “one size fits all”, that change involves threats rather than opportunities, and that performance incentive, reward for effort and merit are exploitative still flourishes amongst unions, languid employers and stultifying tribunals.
69. The harm caused by the fair work system is that it limits our growth opportunities. It plays too hard to union dogma. Investment in our future and securing jobs is put at risk. The strength of our mining sector disguises the harm being caused in other industries. This impact is becoming apparent to many involved in workplace decisions.
70. The challenge is to introduce change so that the system is suited to the economy and labour market of 2012 and beyond. A failure to introduce fundamental change means the applause of unions will ring hollow as investment and jobs are lost in a modern Australia.

The Fair Work System – A Failure on Many Fronts

71. The *Fair Work Act 2009* (FW Act) was heralded as a rebalancing of Australia's workplace relations.
72. The Government claimed it would promote productivity and provide fair laws that businesses would find flexible.
73. The fair work system has failed to live up to its promise. Productivity is stagnant, employer – employee engagement is in retreat, and outcomes that enhance flexibility are rare. Unions have acquired a privileged position and their leaders display a return to militancy. Industrial unrest has increased.
74. Fundamentally, the fair work system is unsuited to modern workplaces. It seeks to regulate workplaces in the style of the 1970s. It represents a threat to future growth in jobs and investment.
75. This paper highlights the key deficiencies of the fair work system. Some are readily apparent. Others are more disguised and only recognised as time brings more of the system's provisions into play.

Individual Flexibility Arrangements

76. Individual flexibility arrangements (IFAs) introduced a new element into workplace agreement making. They were intended to give employers a capacity to develop innovative employment arrangements with individual employees. The IFA initiative was used to allay the concerns of many employers and employees about individual statutory agreements, Australian Workplace Agreements, being removed from the system.
77. IFAs have proved to be a glaring failure. The take up of IFAs is very limited.
78. Detailed and onerous conditions apply to their use. They cannot be offered as a term of engagement. An IFA can be terminated with a maximum of 28 days' notice. An IFA lapses with the making of a new collective enterprise agreement or modern award.

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79. The fair work reforms were presented as a return to collectivism. The unions embraced this approach as it affords them considerable privileges. Individual arrangements undermine their influence and as such are strongly opposed. A key position adopted by most unions in bargaining for collective enterprise agreements is that the clause allowing access to IFAs must be highly restrictive. Some clauses go as far as giving the union or employees a veto right over any IFA that an employer and employee may wish to enter.
80. In contrast the FW Act allows an IFA to cover and therefore vary any term in a collective agreement.

A Multi Layered and Complex System

81. Australia's workplace relations system has evolved into a distinctly complex model.
82. Our system now incorporates four intricate layers:
- national employment standards;
 - enterprise agreements;
 - awards; and
 - minimum wage orders.
83. In addition there is interaction and overlap between the layers.
84. Awards, curiously called modern awards, represent a re-enlivening of highly prescriptive industry and occupational regulation. They are a uniquely Australian feature of the workplace relations system. In most OECD economies the design of workplace relations reflects agreements or contracts supplemented by legislated national standards.
85. The implications of the complexity for small business are dire. Over 700,000 small businesses employ 4.7 million Australians. The previous gains in small employer – employee relationships are now jeopardised. The added complexity of the system, its emphasis on collectivism and more aggressive compliance systems forces many small businesses to fall back onto the award. This means workplace innovation has diminished and for many employees remuneration and conditions entitlements are below potential.
86. Large employers also complain of the complexity of the system and the difficulty of winning a commitment from unions to work practice change and productivity improvements.

Greenfields Agreements Only Available With a Union

87. Greenfields agreements apply to new ventures where employees have not been engaged. They feature in many areas of the economy, particularly in construction and mining.
88. The FW Act prescribes that an employer must negotiate a greenfields agreement with a union. This is a departure from other agreements which are negotiated with employees.

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89. Earlier legislation provided an employer the capacity to establish proposed terms and conditions for employees to commence work. Union involvement was not mandated, although union agreements could be negotiated once the enterprise commenced operations.
 90. The time involved in negotiating an agreement with a union during the sensitive start-up phase of a venture can jeopardise the project. Investors are often reluctant to commit while union negotiations are continuing. Unions also exhibit a tendency to exploit the vulnerability of an employer at this stage of an enterprise and demand excessive pay and conditions standards.

The Tribunal Has an Enhanced Role

91. Workplace relations that endure are those developed between an employer and employees. Unions, employer associations, industrial tribunals and regulators can influence workplace outcomes. A workplace where these outside bodies have a continuing influence will have a limited future. As Nobel Prize winner Paul Samuelson observed “unions determine how industries in decline are accelerated towards their extinction.”
92. A workplace relations system works best where the role of the tribunal is held in reserve or is seen as a light touch. The focus of the tribunal should be on assisting the parties to resolve any difficulties that arise in the negotiation or implementation of agreements.
93. The fair work system is said to encourage collective bargaining. Instead, it expands the role of the tribunal to be an active influence in the affairs of many workplaces. Fair Work Australia (FWA) vets and approves agreements. It can review bargaining practices and issue binding orders on how bargaining is to be conducted. It can arbitrate on the pay and conditions to apply to groups of so called low paid employees. It can suspend or terminate bargaining and impose an arbitrated outcome on the disputants. It oversees the finances and the conduct of unions and employer associations.
94. This amounts to an active role with high transaction costs for those caught in the system. In addition, parties dissatisfied with the role or rulings of the tribunal have recourse to the Federal Court.
95. The trend that had emerged from the early 1990s of reducing tribunal and court interference in Australian workplace relations has been reversed with a vengeance. Inflexible regulation will inevitably destroy job opportunities and compromise the capacity of Australian firms to compete and grow.

Bargaining Rules Transform Agreement Making into an Adversarial Encounter

96. The FW Act introduced into Australia an American concept of good faith bargaining. Australia now has a highly adversarial system of agreement making. It represents a compelling example of a big government, big union and big business model imposed on all workplaces. It has all the hallmarks of becoming a very damaging innovation.
97. The shortcomings of the system are manifest. The more obvious are identified below:
- a. the range of matters that can bargained has been expanded. Unions frequently press claims to usurp management prerogatives that previously could not be bargained. The bargaining agenda now includes more about rights with less focus on entitlements;
 - b. unions have a guaranteed seat at the bargaining table if they have the right to cover any employees of the employer. They may not have any paid up members in the workplace and the workers may not want them involved;
 - c. the bargaining procedures are numerous and complex. Small employers are choosing not to engage in the process;
 - d. unions are more inclined to pursue protracted negotiations. Union leaders are more confident that industrial bans and strikes will wear down employers;
 - e. employers have less capacity to engage with employees not committed to a union or to taking industrial action;
 - f. an employer's response to damaging bans has to meet a proportionate test. Employer access to the "no work as directed no pay" response is essentially unavailable. Lockouts and shutdowns are more common. Innocent employees unnecessarily suffer;
 - g. work practice change and productivity improvements are proving almost impossible to win through bargaining. Where they have been won it is invariably not immediate change but an undertaking to introduce future improvement;
 - h. union leaders have responded to their more dominant role by becoming militant. An employer with the tenacity to reject a union's claims is likely to encounter fierce and often public repudiation their position. This is typically followed with threats of industrial action and a campaign to undermine the public standing of an employer;
 - i. unions have been afforded the capacity to take industrial action first and bargain later; and
 - j. industrial disputation and disruption are increasing. The economic cost of the disputation is growing and Australia's reputation as a place to invest is being damaged.

Right of Entry

98. The FW Act was introduced on the pretext that right of entry (RoE) rules would not be altered. This is not the case. Changes have been made and a more relaxed RoE system applies.

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99. The right to enter a workplace to hold discussions with employees is linked to a union's eligibility to cover employees. Previously it was based on the union being covered by an agreement or award applying at the worksite.
 100. RoE clauses are now permitted in enterprise agreements. It is not uncommon for agreements to confer additional entry rights on unions. Clauses in construction agreements allow officials to enter without a valid permit, without notice and at times other than meal breaks.
 101. This results in the RoE system breaking down. Mining projects in Western Australia report hundreds of entry requests over a few months.
 102. The legislation presents a system based on tightly approved permits, clear notice of entry requirements, on site conduct that does not disturb operations, protection of the rights of employees who do not want to meet a union official and sanctions for abuse of the system. In reality the system is infringed almost daily. In many industries unions adopt the practice of entering without asserting the right upon which the entry is justified.

The Content of Enterprise Agreements

103. A distinctive feature of the fair work system is its embrace of collective agreement making. The support for collectivism is detrimental. It denies individual initiative and curbs innovation and engagement at the workplace level. It rests on the premise that most workers are incapable of deciding what is good for them. A one size fits all mediocrity is favoured over incentive and reward for performance.
104. At the same time the range of issues that can be introduced into bargaining is considerably expanded. The unions are using this to extend their inclination to constrain innovation into areas traditionally the preserve of those running a business. The system of determining what can and cannot be included in agreements is complex and confusing. Similarly, the repercussions for including the wrong material in an agreement is not readily understood by many involved in bargaining.
105. An enterprise agreement is about permitted matters. Permitted matters are:
 - a. terms pertaining to the relationship between an employer and employees covered by the agreement;
 - b. terms pertaining to the relationship between an employer and unions covered by the agreement;
 - c. deductions of wages authorised by the employee; and
 - d. how the agreement operates.

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106. An enterprise agreement must contain the following:
- a. a nominal expiry date;
 - b. a dispute settlement procedure;
 - c. a flexibility term that allows IFAs; and
 - d. a consultation term.
107. An enterprise agreement cannot contain unlawful terms. In addition, an enterprise agreement must not contain a term that excludes a National Employment Standard entitlement, modifies a National Employment Standard entitlement to an employee's detriment, or is a designated outworker term. FWA cannot approve an enterprise agreement that contains any such terms.
108. An unlawful term is a term that is:
- a. a discriminatory term;
 - b. an objectionable term – a term requiring or permitting a contravention of the general protections provisions of the Fair Work Act or the payment of a bargaining services fee. The general protections provisions are an amalgam of the former freedom of association, coercion and unlawful termination of employment provisions, but with more added in. The provisions are broader in both application and the type of conduct which is prohibited than what existed under the Workplace Relations Act 1996. In particular a concept of 'workplace rights' which is defined very broadly is introduced;
 - c. confers an entitlement or remedy in relation to an unfair dismissal that occurs before the end of the minimum employment period;
 - d. modifies access to, or the application of, unfair dismissal provisions in a detrimental way;
 - e. is inconsistent with industrial action provisions;
 - f. provides an entitlement to right of entry for a purpose covered by the RoE provisions in the FW Act that is different to the entitlement under the FW Act; and
 - g. allows right of entry under state OHS laws different to RoE provisions of the FW Act.
109. In summary, at approval stage, FWA must be satisfied that an enterprise agreement does not contain unlawful terms, designated outworker terms or terms which exclude or detrimentally modify NES entitlements before it can approve the enterprise agreement. However, FWA is not required to consider whether an enterprise agreement contains non-permitted terms at approval stage. Therefore an enterprise agreement which contains non-permitted terms can be approved. Those terms will be of no effect – and it will therefore be up to the employer to know what terms are permitted and what are not permitted. The underlying purpose of the very confusing scheme is to ensure that an enterprise agreement that has been approved but which is later found to contain a term that is of no effect is not rendered invalid and can continue to operate.

Independent Contracting and Labour Hire

110. Independent contracting and labour hire are forms of employment chosen by many Australians. It affords them flexibility in the type of endeavour they pursue and how they go about it. They have a capacity to balance work and family pressures more on their own terms. They enjoy independence and the chance to run their own business. They believe that by using their skills, initiative and knowledge that can earn a good living.
111. Unions do not embrace personal initiative and separation from the traditional employment relationship. The power and influence of unions is undermined. Most unions are hostile to independent contracting and labour hire. The ACTU is orchestrating a campaign around the notion of insecure employment as a pretence for limiting access to these forms of endeavour.
112. The fair work system enables unions to demand enterprise agreements that severely limit the use of independent contracting. For example agreements often contain the following limiting terms:
 - a. employers to consult unions and employees 14 days before engaging contractors;
 - b. the union to be informed of
 - the name of the contractor/labour hire firm;
 - the type of work to be given to contractors to be identified;
 - the number of contractors to be engaged;
 - the duration of the engagement;
 - c. contractors to be paid wages no less favourable than ongoing employees;
 - d. no ongoing employee can be made redundant while contractors are engaged.

The Oversight and Regulation of Unions

113. The conduct and affairs of unions and employer associations are regulated by the *Fair Work (Registered Organisations) Act 2009*. The Act codifies obligations regarding registration, amalgamation, rules of the organisation, membership, elections, records and accounts and conduct of officers.
114. Events that have come to light during the past year raise questions about how effective this regulation has been. Most unions are large organisations. They collect \$ millions in membership fees. They are generally designed as federal bodies with branch structures, are active in the media, lobby political parties, have influence over the ALP, are engaged in community interest campaigns and employ large staff.
115. Returns are often not lodged on time. The latest FWA Annual Report suggests new rules have added to these problems. Disputes about the conduct of elections and control of unions occur with some regularity.
116. A regulatory scheme that is not robust nor effectively administered involves the risk of fostering an “above the law” attitude amongst officials.

Transfer of Business

117. In a dynamic economy business structures change frequently. Take overs, mergers and outsourcing are common. Regulations that allow these transactions to occur easily are important.
118. The fair work system provisions act as a potential disincentive to transfer business and have adverse consequences for job security. They operate against the interests of both employers and employees.
119. A new “similarity of work” concept has been introduced. This has disturbed previous concepts and accepted jurisprudence. The rules specifically apply to the outsourcing and insourcing of work, even if assets do not transfer.
120. The rules focus on transferring employees and only apply if there is a transferring employee. An employer can avoid the obligations by not employing any employees from the transferring business. In a takeover or merger employees in the transferring business are more likely to be terminated. If employees of the vacating business are retained then multiple agreements will apply in the new business. This results in disharmony and administrative complexity. Also, out-dated terms and conditions are preserved often to detriment of employees.

The Workplace of 2012

121. The Fair Work Act 2009 is often characterised as introducing laws that are reminiscent of the 1970s.
122. At the time when Australia's workplace relations institutions were forged, agriculture and manufacturing were highly influential in framing workplace attitudes and expectations. The workplace relations culture of this period prevailed through to the 1970s.
123. It might be attractive for some in the ALP and the union movement to hark back to past glory days of the 1970s. Days when we had a command economy, centralised wage determination, strong union membership, a managed currency, protection of and rent seeking by key industries and a wide spread 9-5 workplace culture.
124. Those 1970s features however bear little resemblance to the Australian workplace and economy of 2012.

No Job Guarantees

125. The most striking change is that we exist in a highly competitive world. Nothing can be taken for granted. No job has a guaranteed future. Business and commerce is changing rapidly as technology impacts on all aspects of life and work. New products and services emerge quickly. The international market place is being transformed as emerging economies mature and old economies stagnate. Australian firms are employing and locating more jobs overseas.
126. The predominant occupational categories in the workforce are white collar jobs in the services sector. Many of these jobs are readily transferred between locations. Others are impacted by technology. Agriculture and manufacturing jobs as a proportion of the workforce have been in decline for decades.

Union Membership

127. The membership of unions has declined. Union members represent less than 14 per cent of the private sector workforce. This is consistent with the experience of most OECD countries. It is an anachronism then that the Australian workplace relations system affords unions such a central and privileged role.

Family and Work

128. It is now a feature of many Australian families that both adults work and pursue careers as well as raising a family. They have a different attitude to work and value flexibility to balance work and family demands. Not everyone regards weekend and evening work as an imposition. Some will find work at these times suit their lifestyle.
129. In December 2010 an ABS survey of attitudes towards workforce participation and flexibility in Victoria was released. It estimated that 42 per cent of workers from two parent families with children had requested changes to their work arrangements that involved more flexible hours or the ability to work from home. A further 28 per cent of this cohort had sought to work fewer hours or to take leave.

Career Pathways

130. The career is now seen as a more adaptable pathway. Long service with a single employer has become the exception. Young people in particular expect to work with a variety of different employers throughout their career.
131. The workforce places higher importance on education and skills. Workers with a higher education qualification jumped from 47 per cent to 57 per cent between 2001 and 2011. Education and training will be continuous. Time out for study, family or personal reasons will be accepted as normal.

Independence

132. People value their independence and control over their own destiny. Many relish the challenge and freedom of running their own business. Independent contracting, labour hire and outsourcing are entrenched features of our economy. Both the individuals and business benefit from the flexibility offered by these modes of work.

Part-time and Casuals

133. Part-time and casual work are also playing a greater role in the Australian workforce. This reflects a number of influences including the competitive pressures on business, the impact of greater workplace regulation and the mobility of younger workers. The participation of women in the workforce has also increased markedly since the 1970s.

Individual Rights

134. Individuals are more aware of their workplace rights and the capacity for them and their employer to devise mutually beneficial arrangements for work and reward. The old “one size fits all” approach to managing a workplace no longer applies. People in many aspects of life value the freedom to make their own life and financial choices. It is incongruous for them to then come to the workplace and be dictated to by a constraining collective workplace culture. Reward for effort and performance incentives are valued by many workers.

Older Workers

135. The population and the workforce are ageing. Workers aged 55 years and over comprised 16 per cent of the labour force in 2010 compared to 10 per cent in 1980. The labour force participation rate for women 55 years and over rose from 11 per cent in 1980 to 27 per cent in 2010.

136. Early retirement was an ambition in earlier decades, but is now not as valued. People are encouraged to remain in active employment longer. Technology affords many older workers the opportunity to adopt work patterns that suit their lifestyle. Australian workers now recognise the importance of superannuation and wealth creation. It is accepted that a vibrant and competitive private sector is vital to the future provision of wealth and prosperity in Australia.

Technology

137. Rapid technological change has transformed the workplace and workplace relations. The traditional lines of authority, the methods of communicating in the workplace and the access to knowledge have been adapted to suit modern technology. Many businesses use the internet and social media to interact with customers and staff. A firm that relies on out-dated technology and systems will find it difficult to retain staff.

Conclusion

138. These are some of the key features of the modern workplace.

139. The reforms that the IPA proposes take account of the modern workplace features. It is fundamental that the country needs a workplace relations system suited to the present and the future.

140. So much of our workplace relations culture remains tied to the past. A culture characterised by “one size fits all”, that change involves threats rather than opportunities, and that performance incentive, reward for effort and merit are exploitative still flourishes amongst unions, languid employers and stultifying tribunals.

141. The harm caused by the fair work system is that it limits our growth opportunities. It plays too hard to union dogma. Investment in our future and securing jobs is put at risk. The strength of our mining sector disguises the harm being caused in other industries. This impact is becoming apparent to many involved in workplace decisions.

The challenge is to introduce change so that the system is suited to the economy and labour market of 2012 and beyond. A failure to introduce fundamental change means the applause of unions will ring hollow as investment and jobs are lost in modern Australia.