Aspects of Workplace Relations under the Rudd Labor Government

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INTRODUCTION

The Government is moving surely and steadily to implement its *Forward with Fairness* agenda. *Forward with Fairness* is two policy documents that were published in the lead up to the November 2007 election. The first was released in April 2007. It is entitled *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*[1] (FIF). The second is entitled *Forward with Fairness: Policy Implementation Plan*[2] (FIFIP).

The Government has been meticulous in adhering to its pre-election promises, as the Deputy Prime Minister made plain to Master Builders in a recent speech:

> *Before last year's election, we made a number of commitments about the workplace relations reforms we would introduce to establish a fair and balanced workplace relations system for all. And we have stuck scrupulously to those commitments – something the MBA has publicly acknowledged.*[3]

This paper shortly outlines some aspects of the changes to the law already made; and then, in detail, discusses proposals for change regarding the building and construction industry, as well as touching upon the proposed new safety net arrangements.

FIRST STEPS

The Rudd Government has already introduced new laws that start a transition to its workplace system,[4] set to be fully in place by January 2010, that add over one hundred pages of dense law to an already complex system.

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[1] Available at http://www.alp.org.au/download/now/forwardwithfairness.pdf. accessed 19 August 2008
[2] Available at http://www.alp.org.au/download/070828_dp_forward_with_fairness___policy_implementation_plan.pdf, accessed 19 August 2008
[3] Deputy Prime Minister Speech to Master Builders Industry Dinner 29 May 2008 available at http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/TheMastersBuildersAustraliaIndustryDinner.htm, accessed 19 August 2008
[4] *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008 (Cth) – proclaimed 27 March 2008

Essentially the initial amending statute brought about two major changes to the workplace relations landscape. It abolished Australian Workplace Agreements (AWAs) and replaced them with new individual agreements known as Individual Transitional Employment Agreements (ITEAs) that will have no currency after 31 December 2009. Secondly, in the context of agreement making it replaced the former fairness test with a new no disadvantage test (NDT).

All new agreements must be assessed against the NDT; the NDT applies to all collective agreements and ITEAs made after 28 March 2008 as well as to variations to existing collective agreements or new agreements made after the same date.[5]

In order to use the new individual agreements an employer must have, as at 1 December 2007, employed at least one person whose employment was covered by:

- an AWA;
- a preserved individual state agreement (being an industrial agreement made under a State law and operating prior to 27 March 2006); or
- a Victorian employment agreement.[6]

ITEAs' terms must be assessed against the NDT using "reference instruments" as comparator documents.[7] These are any of a collective agreement, a pre-reform certified agreement, an old IR agreement as set out in Schedule 7 to the *Workplace Relations Act* 1996, a preserved collective State agreement or a workplace determination or an Award made under Section 170MX of the pre-reform WR Act. That short description gives you an idea of the complexities involved and the continued inter-relationship between

[5] See Division 5A Part 8 of the *Workplace Relations Act 1996*
[6] Section 326 *Workplace Relations Act* 1996
[7] Section 346E *Workplace Relations Act* 11996

the complex terms used in WorkChoices and the initial Labor legislation.

Master Builders is not happy with one major change in the agreement making process brought about by the legislation. Most workplace agreements come into operation 7 days after the date of the issue of a notice by the Workplace Authority that the agreement or variation has passed the NDT. A limited number of agreements which operate from date of lodgement are set out in section 346S *Workplace Relations Act,* 1996. However, the majority of agreement types need approval from the Workplace Authority before they have legal effect. Essentially, ITEAs that are made with existing employees, employee collective agreements and union collective agreements come into operation only when they have passed the NDT and the notice just referred to has been issued.

At the coal face I am told that on average we are waiting at least a month before we get feedback from the Workplace Authority, if all goes swimmingly. Where questions or queries are raised, however, further delay is commonplace. Our members are not happy to wait for extended periods after the deal is done and they certainly do not understand the process from looking at the legislation which is very complex in its expression. They give us negative feedback about the uncertainty associated with the bureaucratic processes which are hampered by the structures of the law.

Indeed, Professor Andrew Stewart in his submission to the Senate Committee inquiring into the legislation[8] said that "many of the new provisions remain unduly complicated and difficult to understand,

[8] Senate Education, Employment and Workplace Relations Committee Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 Submission by Professor Andrew Stewart Law School, University of Adelaide

even for experts."[9] Recently, the law as currently in place has been labelled by another eminent professor as "law for lawyers" with the major changes to the law foreshadowed by *Forward with Fairness* also given that tag:

> *Work Choices (and I fear, Forward with Fairness) represents a body of law that's written for lawyers rather than people at the workplace.*[10]

We are coming to the pointy end of finding out if the professors (the strange collective noun for which is an absence[11]) are correct.

The Government has announced that the substantive legislation that packages and delivers the *Forward with Fairness* policies will be introduced in the Spring sittings of Parliament that commenced on 26 August. [12]

Those sittings finish in early December so the Bill may be some way off in terms of its finality, given that it is likely to go to a Senate Committee inquiry and through prior consultative processes. I will return to some of the aspects of the proposed legislation later in this paper. However, the point should be made that Master Builders would urge a complete re-write of the law in more simple and accessible language rather than the reforms "tacking on" to the current law.

BUILDING AND CONSTRUCTION INDUSTRY IR

There are big changes afoot for the building and construction industry: the Government has made it clear as part of its *Forward with Fairness* plans that the Australian Building and Construction Commission (ABCC) will be abolished as of 31 January 2010. The

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[9] Id at p2
[10] Remarks attributed to Professor George Williams *Commonwealth Yet to Make Hard Decisions on National IR Scheme, says Williams* Workforce 19 August 2008
[11] Although labelled by Wikipaedia as spurious http://en.wikipedia.org/wiki/List_of_collective_nouns_by_collective_term_A-K
[12] See http://www.aph.gov.au/bills/index.htm for the relevant document accessed 20 August 2008

shape and form of the laws and the bureaucratic entity (a specialist division of a new "super body" called Fair Work Australia) that will administer them following the closure of the ABCC is not clear and is subject to an inquiry that is currently underway, the Wilcox Inquiry.[13]

Master Builders will be making a substantial submission to the Wilcox review urging, amongst other things, the retention of the compulsory interview powers that the ABC Commissioner currently possesses, together with the related protections that the *Building and Construction Industry Improvement Act, 2005* (Cth) (BCII Act) sets out.

Section 52 of the BCII Act says the ABC Commissioner may, by written notice, compel a person to produce information or documents or attend before the ABC Commissioner or Deputy ABC Commissioner and answer relevant questions if certain criteria are satisfied. The criteria are that the ABC Commissioner believes on reasonable grounds that the person:

- has information or documents relevant to an investigation into a contravention by a building industry participant;[14] or
- is capable of giving evidence relevant to such an investigation.

No junior officers of the ABCC can exercise these powers: under s.13 BCII Act delegation is only possible from the Commissioner to a Deputy Commissioner.

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[13] Final terms of reference for the inquiry were released on 24 July 2008 see media statement by the Deputy Prime Minister *wilcox terms of reference* available at http://www.alp.org.au/media/0708/msewr240.php accessed 20 August 2008

[14] This term is widely defined in s4 BCII 2005 as follows:

"*Building industry participant means any of the following:*

(a) a building employee;
(b) a building employer;
(c) a building contractor;
(d) a person who enters into a contract with a building contractor under which the building contractor agrees to carry out building work or arrange for building work to be carried out;
(e) a building association;
(f) an officer, delegate or other representative of a building association;
(g) an employee of a building association."

The ABCC in its previous form as the Building Industry Taskforce did not possess such powers. The result was that the majority of complaints went begging:

> *A survey conducted on a number of clients who withdrew their complaint found that 52% had done so for fear of the ramifications they may face should they pursue the matter.*[15]

Importantly, and something that appears to be ignored by a number of media reports,[16] is that there are protections in the BCII Act preventing the information from being used in any other proceedings save for some limited exceptions such as where a person has provided false or misleading information or documents or where a Commonwealth official has been obstructed. Section 54 BCII Act cannot be ignored. Persons who provide information to the ABC Commissioner will have protection against civil or criminal proceedings in relation to the provision of the particular information.

In other words, even though there is a limited intrusion on the common law right to silence, there is a very important statutory protection about being convicted on your own evidence, reinforcing the doctrine known as the privilege against self incrimination.

Commentators have emphasised that it is this protection against self incrimination that is at the nub of human rights not the right to silence:

> *The privilege in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them.*[17]

In the context of the ABCC's powers that basic right is reinforced, not taken away.

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[15] Cth of Australia, Building industry taskforce, *Upholding the Law – Findings of the Building Industry Taskforce,* September 2005 p 11

[16] Epitomised in Margarita Windisch Green Left Online *CFMEU Leader Contests ABCC Charges* http://www.greenleft.org.au/2008/763/39391 accessed 20 August 2008

[17] Queensland Law Reform Commission *The Abrogation of the Privilege Against Self Incrimination Report 59,* December 2004 p2

It is important that these points are made clear publicly in the light of a campaign, commenced in May this year by five unions, designed to pressure the Government to abolish the ABCC early.[18] The campaign is advanced under the notion that it is the "duty" of the Government to repeal all of the Howard Government's industrial relations laws.[19] We find this concept strange; the better view is that the Government should do what it is doing: stick to its promises, and all the indications are that the Government is standing firm.[20].

As recently noted in the media,[21] this union campaign will come to a head when Noel Washington, a union official, will be charged by the public prosecutor not the ABCC, with a failure to provide evidence in accordance with the BCII Act. He may prove to be a powerful martyr to the cause; the court has the right to impose a gaol term for his omission. Whilst there is no ready slogan that comes to mind that has the resonance of *All the way with Clarrie O'Shea,*[22] the galvanic power of a figure who is prepared to go to jail for his beliefs should not be underestimated.

How many of the fundamental components of the current law relating to the building and construction industry will remain in place post January 2010 is not yet known. However in FIFIP, it was made clear that:

> *The principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction*

[18] Outlined at http://www.cfmeu-construction-nsw.com.au/taabolabcc.htm accessed 20 August 2008
[19] AAP NewsWire *Unions Urge IR Ministers to scrap Howard IR Laws Urgently* 22 August 2008
[20] M Franklin and P Maley *PM Firm on Thuggery Watchdog: Unions Use War Chest to Attack ALP* The Australian p1 26 August 2008
[21] Steven Scott *Construction Industry Faces Tight Regime*, Australian Financial Review, 21 August 2008, p1
[22] 1969 slogan for then jailed union martyr Clarrie O'shea see report by Lian Jenvey *Unions: We're Itching for a blue* http://www.sa.org.au/index.php?option=com_content&task=view&id=339&Itemid=106 accessed 28 August 2008

> *industry will continue, as will a specialist inspectorate for the building and construction industry.*[23]

The future role of the National Code of Practice for the Construction Industry and the related Implementation Guidelines[24] (Code and Guidelines) in establishing the current framework that delivers the rule of law to the sector is also an unknown, although it does appear that these instruments will remain in place as part of the institutional structures of the industry until January 2010.

Worrying is the premature public statement by Mr Wilcox that the Code and Guidelines are adversely affecting competition in the building and construction industry.[25] Without the Guidelines, unions could potentially negotiate with a principal contractor that the terms of an independent contractor's engagement contained matters that limited their flexibility and constrained their operations.

The Code and Guidelines operate like any other pre-qualification scheme. As I was quoted as saying in the *Australian Financial Review:* there is not a jot of evidence to suggest that the Code and Guidelines do other than facilitate competition.[26] They enhance the efficiency of labour because they require freedom of association as well as open and transparent workplace relations arrangements.

Indeed, ironically, in the same edition of the newspaper where the comments about the Code and Guidelines by Mr Wilcox appeared, the following is articulated as part of an editorial:

> *"Traditionally, union officials' interests are best served by suppressing competitive differences between firms to maximise membership and fees."*[27]

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[23] Supra note 2 ALP *Forward with Fairness – Policy Implementation plan* August 2007 p 24 http://www.alp.org.au/media/0807/msdloploo280.php accessed 20 August 2008

[24] http://www.workplace.gov.au/workplace/Publications/PolicyReviews/BuildingConstruction/GuidelinesPriorNov2005/AboutheNationalCodeofPracticefortheConstuctionIndustrytheCode.htm

[25] Supra note 20 p12

[26] Steven Scott *Unions Call Labor MPs to Arms* Australian Financial Review, 22 August 2008, p.8

[27] Editorial: *A Co-operative Workplace Needed*, Australian Financial Review, 21 August 2008, p.78

That is certainly the experience in the construction industry where, in the past, wages and conditions have been "regularised" by the rolling out across industry of union pattern EBAs.

Master Builders has urged the Government to retain the notion of prohibited content in the workplace system as a necessary ingredient to the successful structure of the building and construction industry workplace reforms and in the operation of the Code and Guidelines, especially as a means to stop the prior practice just referred to. This proposition, on its face, contradicts the ALP policy in the FWF where it is stated that:

> *Under Labor's system, bargaining participants will be free to reach agreement on whatever matters suit them.*[28]

However, as one of the fundamental principles that underpin workplace reform, the need to regulate the content of building and construction industry agreements is consistent with the promise to retain the principles that deliver the rule of law to the industry.

This issue is vital for the efficiency of the industry and highly relevant in the context of unions urging the ALP to act quickly to scrap the prohibited content rules via regulation as part of the overall campaign to pressure the Government to "go early" on reform.[29]

The pace of reform has been well articulated by the Government and any moves to accelerate change could have unforeseen and negative consequences, including the potential to undermine the stability of a system necessary for it to be "truly national."[30]

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[28] Id p14

[29] Eg WorkForce 15 April 2008 *What Unions Expect in Substantive Bill*: "Fary (ACTU Asst Sec) said the Fed Govt had shown a preparedness to bring forward new arrangements for unfair dismissal and prohibited content ahead of the Jan 2010 kick-off of the rest of its IR system."

[30] *WorkForce 1628* 11 April 2008 " A truly national IR system needs stability we don't have: Stewart" Statement by Deputy Prime Minister AAP NewsWire *Fed: Uniform industrial relations laws essential - Gillard*

Master Builders would urge a different perspective to be brought to bear on the *Forward with Fairness* policy concerning "free agreement" in respect of the building and construction industry; first, it would be a disaster, for example, for productivity if independent contractors were to be limited in number and constraints on their activities were part of the everyday negotiation of collective agreements. That would be a blow to competition and productivity. Secondly, the principle of drawing boundaries around content that affects productivity negatively, in that it restricts efficient work practices, is a principle currently underlying the industry specific reforms.

Accordingly, application of that principle could be argued not to fly in the face of the other components of the policy to be taken forward as it would be specific to the building and construction industry. In other words, the industry specific rules should override the more general promise.

In the alternative we have proposed to Government that in relation to the general law, industrial action taken in support of claims which do not directly relate to the performance of work should be excluded from the protection from suit afforded to protected industrial action. This is the same approach that is presently taken in the law with respect to pattern bargaining claims[31] and a stance which FWFIP reflects as Labor policy. FWFIP states that "Labor will not allow industrial action to be taken in pursuit of pattern bargaining."[32]

Adoption of this Master Builders' proposal would certainly assist in limiting the potential industrial disruption that would come from, say, the ability to strike if a non-working union delegate was not provided

[31] Section 439 *Workplace Relations Act,*1996 (Cth) which is as follows:"Engaging in or organising industrial action is not protected action if: (a) the industrial action is for the purpose of supporting or advancing claims made by a negotiating party to a proposed collective agreement; and (b) the party is engaged in pattern bargaining in relation to the proposed collective agreement."

[32] Supra note 2 ALP *Forward with Fairness – Policy Implementation plan* August 2007 p21

with what were considered to be "adequate" on-site amenities, such as an air-conditioned office, a car and a company supplied computer. In the past, there have been projects which have had a large number of non-working delegates and those projects have suffered from a reduction in productivity as a result.[33] Taking away the right to legitimately strike for items that distress productivity makes sense.

CONSTRUCTING THE NEW SAFETY NET

The Government has also moved quickly to inform the community of its new safety net arrangements that were very broadly outlined in *Forward with Fairness*. Essentially, from 1 January 2010, there will be in place new types of Awards that will operate to underpin relevant contracts of employment. Those Awards will be supplemented by the National Employment Standards,[34] essentially conditions which are an extension of the current Australian Fair Pay and Conditions Standard and which have already been exposed in draft form for public comment and then final form, albeit that the document released will have no effect until enacted as part of the substantive legislation.[35]

The Australian Industrial Relations Commission is currently convening a difficult process known as Award modernisation. It has been charged with creating Awards that will be creatures of statute, rather

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[33] Transcript of Interview of Wal King 24 August 2007 where he commented that since the introduction of the ABCC: "We don't have projects like the ones I've personally been involved with like Spencer Street in Melbourne where there was 24 non working union delegates." Plus see John Masanauskas *Officials rife at work site* Herald Sun 10/10/2006 p 12

[34] http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/NewNationalEmploymentStandardsReleased.htm accessed 21 August 2008. The 10 National Employment Standards are:

1. Maximum weekly hours of work
2. Request for flexible working arrangements
3. Parental leave and related entitlements
4. Annual leave
5. Personal/Carer's leave and compassionate leave
6. Community service leave
7. Long service leave
8. Public holidays
9. Notice of termination and redundancy pay
10. Fair Work Information Statement

[35] On 14 February 2008, the Australian Government released an exposure draft of the proposed National Employment Standards. On 16 June 2008 (see note 34 above) the final detailed form of the NES was released.

than instruments which are the outcome of industrial disputes. The Awards will operate in similar fashion to common rule Awards which traditionally relate to callings or occupations not the identity of the employer's business. In the instance of modernised Awards, common rule coverage will principally derive from the industry of the employer with a limited but yet undefined number of occupational Awards.

Modern Awards will contain minimum wages to be adjusted annually by the new body to be known as Fair Work Australia. How Awards will be "living instruments" (ie they can be varied or amalgamated) will be an issue dealt with in the substantive legislation. The exact manner in which Awards and the NES will interact in the new system will also await the substantive legislation but it is already clear that Awards cannot exclude the NES but can, in a number of instances, tweak the detail. The main point in this area is that we do not want either the NES or Awards to be rigid or stultifying or instruments of constraint.

The task of creating new, industry-based Awards that are required to be made on the basis of not disadvantaging employees and, at the same tme, not increasing costs for employers[36] is something that calls for the wisdom of Solomon. The task is daunting. It is due to be completed by 31 December 2009. That will be difficult to achieve. We agree with this comment:

> *On any view, the award modernisation process will be a formidable undertaking. As will appear presently, there must be considerable doubt as to whether it can realistically be completed within the timeframe, and in a manner consistent with the criteria, set by the Rudd Government.*[37]

[36] See paragraph 2(c) and (d). Request under s576c(i) – Award Modernisation Consolidated version available at http://www.airc.gov.au/awardmod/about.htm accessed on 21 August 2008

[37] Anthony Forsyth et al*, Transition to Forward with Fairness – Labor's Reform Agenda*, Lawbook Co. 2008, p.113

Master Builders is actively assisting the Australian Industrial Relations Commission and the volume of work required should not be underestimated. However, there has already been a focus upon flexibility that does not deliver an appropriate outcome for employers.

On 20 June 2008 the Full Bench published its first decision[38] on Award modernisation. The decision included a model award flexibility clause for inclusion in all modern awards. Whilst the form of the clause is otherwise appropriate, there is a provision in its terms which enables termination of the arrangements negotiated by either the employer or the employee giving 4 weeks notice. Employers constantly send us the message that they want certainty in employment arrangements on projects where they may attract liquidated damages from delays. They do not want to negotiate a flexibility arrangement to find that projected costs that they had anticipated on the basis of agreed arrangements are sought to be changed and renegotiated during the life of the project, let alone one month after they are in place. Hence, it is Master Builders' view that the clause will not be often used in the building and construction industry.

CONCLUSION

The Government has been very clear in its intention to adhere to its *Forward with Fairness* plan. Master Builders believes that it should be commended for sticking to its guns. Master Builders is also hoping for a new workplace relations system that will be simpler and clearer and which will be more accessible to non-lawyers. The structure of the new workplace relations system is a work in progress, with the

[38] ([2008] AIRCFB 550)

canvas half drawn; let’s hope that the paints aren’t spilled and the artist forced to draw a different picture than set out in the plans.