Fair Work for All: Minimum Labour Standards in the Global Era

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Fair Work Commission
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Purposes of the Law governing Work Relations in Australia

- *Fair Work Act 2009* (Cth) – its objects (s3(a)-(b))
  - providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations
  - ensuring that the guaranteed safety net of fair, relevant and enforceable minimum terms and conditions, through the NES, modern awards and minimum wage orders
  - ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions cannot be undermined....
  - assisting employees to balance their work and family responsibilities ...
  - enabling fairness, representation, prevention of discrimination ...
  - achieving productivity and fairness through enterprise level bargaining ...
  - acknowledging special circumstances of small business
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Outline of this Lecture

• Globalisation and the World of Work
  – The role of the International Labour Organization and international labour standards
• Fair Work for All – A Safety Net of Fair and Relevant Minimum Standards in Australia
  – Legislative Standards
    • The National Employment Standards (NES) in the *Fair Work Act 2009* (Cth)
  – Modern Awards
• The Role of the Fair Work Commission (FWC) in achieving the objects of the *Fair Work Act 2009* (Cth)
  – Minimum Wages Reviews & the 4 yearly Review of Modern Awards
• Some Issues and Challenges
  – Precarious work and flexibility – especially casual and part-time work, flexibility, penalty rates ...
Globalisation

• Global – not just international
  – yet defies precise definition
• The information society and the technological revolution
  – a boundary-less or borderless world
  – the pace of technological change – the smart phone, the iPad
  – the pace of change and developments in communication
    • the social networking revolution
• A social revolution
  – the changing forms of the ‘family’ and ‘affective relations’
  – the education revolution
  – the ageing society of developed economies
• Environmental challenges
Global Economic Integration – The Impact of the ‘New Economy’

- The ‘old’ national economies
- The opening up of national economies and the formation of international, regional and global trading markets
  - downward pressure on, or destruction of, national protective tariffs
  - increased global trade in goods and services
  - pressures on work arising from ‘free trading’ blocs
- Increased international flows of capital
- Corporations and their adaptation to the new borderless world
- Opportunities and challenges for developed and developing economies
Global Economic Integration – The Impact of the ‘New Economy’

- Global competition and economic pressures
  - productivity and flexibility; just-in-time production
- From the farm, to the factory, to global service industries – the changing nature of work and commerce
  - the nature and place of work
  - technology and work – including automation
  - the global structure of commerce and business
    - vertical and horizontal re-structuring
    - global supply chains
  - the operation of the market
- Business enterprises- a rich variety
  - the global corporation, small business, franchisors and franchisees, independent contractors and more.....
Globalisation – The ‘New Economy’ and its Social Effects

• An initial political shift to neo-liberalism, and the dominance of a neo-classical approach to economics
  – The capacity of competitive markets to lift all boats in a rising economic tide
  – The ‘de-regulatory’ agenda
• The separation of global economic institutions from social institutions
  – The Singapore Declaration (1996)
• Rising concern regarding the accumulation and concentration of wealth and the structuring of inequalities in distribution of the benefits of globalisation
  – World Summit for Social Development, Copenhagen, 1995
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The ILO in the Global Era

• Common purpose and global collective responsibility for the world of work

• Declaration on Fundamental Principles and Rights at Work 1998
  – Freedom of Association (*ILO C87 and ILO C 98*)
  – Elimination of Discrimination (*ILO C100 and ILO C 111*)
  – Abolition of Child Labour (*ILO C138 and ILO C 182*)
  – Elimination of all Forms of Compulsory Labour (*ILO C29 and ILO C 105*)

• Declaration on Social Justice for a Fair Globalization 2008
  – Scope and principles
    • reaffirming ILO values
    • promoting employment
    • developing and enhancing social protection (social security and labour protection)
    • promoting social dialogue and tripartism
    • respecting fundamental principles and rights
  – Method of implementation - – follow-up action
    • eg developing partnerships with non-state actors
    • promotion of sustainable enterprises
Reaffirming ILO Values in the global era

- *ILO Constitution and Declaration of Philadelphia*
  - labour is not a commodity
  - right of association by all
  - wage adequate for reasonable standard of living in time & country
  - 8 hour day/48 hour week
  - 24 hours of weekly rest usually Sunday
  - abolition of child labour and right to education
  - men and women – equal remuneration for equal work
  - national laws – equitable treatment of all workers therein
  - inspection, including by women, to ensure enforcement
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The ‘New’ ILO Approach – Responding to Globalisation

- The Decent Work Agenda (1999)
  - Recognition of rights
    - The role of international labour standards
  - Full employment and productive work for all
    - access to work – sufficient work
    - Social inclusion
  - Concern for all work – the informal economy, paid work and unpaid care work
    - In a sustainable institutional and economic environment

- Enlarging the world of work
  - social in/exclusion – under employment and unemployment

- The relation between paid and unpaid/care work
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Who is the worker?

• Intersections between global impacts and regulation
• The ‘new worker’
  – part-time work, home-based work, agency work, dependent contractors, domestic workers, workers in the informal economy
  – who is forgotten? how effective is regulation?
• The demise of the ‘standard employment relationship’ (SER)
• The worker in business on their own account – how ‘independent’ is the ‘independent contractor’?
  – the problem of the dependent contractor, franchisee ....
  – the problem of ‘sham’ arrangements
• The growth of precarious employment – the casual, the labour hire worker, the outworker
• Working on the margins – the migrant worker, the domestic worker, the informal economy
  • exploitation – forced labour, unpaid labour

• Work in the home and ‘outsourcing’
  – the private becomes public and the public becomes private
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International labour standards for the Global Era

• The core standards
• The governance/priority standards
  – labour inspection (ILO C81), employment policy (ILO C122),
    labour inspection (agriculture) (ILO C129), tripartite
    consultation (ILO C144)
• The technical standards
  – rules/broad principles, flexibility and accommodation of
    national circumstances, establishment of mechanisms and
    processes – eg wage fixing machinery
• Standards Review Mechanism
  – effective protection to all workers, take into account the needs of
    sustainable enterprises, responsive to modern day needs and
    future challenges, strengthen support for up-to-date standards,
    increase ratifications, improve effective implementation of
    ratified conventions, ensure standards support ILO strategic
    objectives
Global Employment and Social challenges – Emerging Trends and the Role of the ILO

• World economic growth slowing
• Uneven economic recovery – growing in USA; slower in EU and other developed economies; Asia, Latin America and Northern Africa – decelerating, growth below that of previous years; sub Saharan Africa – expansion at 5%
• Growing global jobs gap with significant cross-country differences
• Global unemployment increasing
• Impact on young people, gender gap (GFC loss in male areas – but recovery has also focussed there)
• Opportunities and uncertainties for enterprise and investment
• Widening inequalities
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Global Employment and Social challenges – Emerging Trends and the Role of the ILO

• G20 – Brisbane Action Plan
  – Reducing gap in participation between men and women – would significantly increase growth, reduce poverty and inequality
  – Reduce youth unemployment, ensure young people are in education, training or employment
  – Addressing informality, as well as structural and long term unemployment, by strengthening labour markets and having appropriate social protection systems

• Turkey assumed presidency of G20 at end 2014
  – Inclusiveness, implementation and investment for growth

• UN - Sustainable development – shaping the post-2015 framework
  – Financing for development
  – Decent Work Agenda – Goal 8 Draft Sustainable Development Goals
The Australian Safety Net of Legislative Standards

- The *Fair Work Act 2009* (Cth)
  - 10 National Employment Standards
  - Security of employment
    - bullying at work
    - unfair dismissal
  - Individual rights against adverse action in the workplace

- Anti-discrimination legislation
  - Federal statutes and The Australian Human Rights Commission—*Racial Discrimination Act, Sex Discrimination Act, Disability Discrimination Act, and Age Discrimination Act*
  - State anti-discrimination statutes and regulatory bodies
  - proposals for harmonising legislation now abandoned/shelved – is revival of this proposal good national policy and perhaps inevitable?
  - inter-relationship with *Fair Work Act 2009* (Cth)

- Work, Health and Safety legislation
  - A national approach
  - *Work, Health and Safety Act 2011* (Cth) and
  - Statutes in each of the States
    - eg *Work Health and Safety Act 2012* (SA)

- Child Employment legislation in each of the States (except SA and Tasmania)
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The NES – *Fair Work Act 2009* (Cth), Part 2-2

- Maximum weekly hours
- Requests of flexible working arrangements
- Parental leave and related entitlements
- Annual leave
- Personal/carer’s leave and compassionate leave
- Community service leave
- Long service leave
- Public holidays
- Notice of termination and redundancy pay
- Fair Work Information Statement
The NES – appropriate/adequate for the Global Era?

- Maximum weekly hours
  - can employees be protected adequately alongside the demands of business for flexibility?
- Requests of flexible working arrangements
  - what can a standard achieve without effective enforcement?
- Parental leave and related entitlements
  - why does a breadwinner model of a ‘full-time’ employment requirement structure this leave?
  - why is paid leave not a guaranteed part of our system of workplace rights? (see currently Paid Parental Leave Act 2010(Cth))
- Annual leave
  - why do so many employees (ie casuals) not qualify for a paid break from work?
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The NES – appropriate/adequate for the Global Era?

• Personal/carer’s leave and compassionate leave
  • should conditions personal to the worker be the subject of a separate category of leave?
  • does this standard adequately respond to the full range of needs of workers? Consider, eg, leave in situations of domestic violence

• Community service leave
  • is the capacity for variation by regulation adequate/appropriate here?

• Long service leave
  • is a real national standard needed to replace the complexity?
  • does this antipodean anomaly have any place in the global era?

• Public holidays
  • is the balance of business/employee interests right here?

• Notice of termination and redundancy pay
  • who misses out? are they otherwise adequately compensated?

• Fair Work Information Statement
  • how can it be more effective?
  • do we need better public information campaigns about workplace rights?
Modern Awards – a history of regulatory change

- historically – prevention and settlement of industrial disputes extending beyond a state through conciliation and arbitration
  - test case standards
- 1993- awards as a safety net + enterprise bargaining
  - s150A reviews
  - Award rationalisation and simplification
- Transition to *Fair Work* system
  - Modern awards
  - >1560 industry awards → 122 modern awards (industry & occupation)
  - A limited number of enterprise awards
    - An extraordinary achievement
- The evolution of awards - balancing continuity and change? Traces of the historic regulatory approaches continue to be evident – is this problematic in the global era?
Flexibility in the Safety Net Regulation - Intersection of NES and Modern Awards (and Enterprise Agreements)

- Modern Awards may deal with NES matters where permitted by Part 2-2 or by regulation made under s27
  - Averaging of hours of work – s63
  - Cashing out and taking of annual leave and paid personal/carer’s leave – ss93 & 101
  - Discounting of LSL in some circumstances – s113A
  - Notice of termination by employees – s118
  - Ancillary or incidental terms – s55(4)
    - eg double annual leave at half pay
- Similar agreements with award free employees – ss128-129
- Relationship of Enterprise Agreements and Awards
  - BOOT mediates the relation
Modern Award Content - Terms that may be included (ss139-142)

• Minimum wages
  – skill based classifications and career structures
  – incentive payments, bonuses etc

• Types of employment and facilitation of flexible working arrangements

• Arrangements for when work is performed

• Overtime rates and penalty rates

• Annualised wage and salary arrangements
  – industry responsiveness, and protection of employees

• Allowances

• Leave, leave loadings, and taking of leave

• Superannuation; and

• Procedures for consultation, representation and dispute settlement

• Outworker provisions

• Industry specific redundancy schemes

• Incidental and machinery terms
Modern Award Content - Terms that must be included (ss144-146)

– Flexibility terms – individual flexibility agreements
  • Identify award terms to be varied
  • Genuine agreement
  • BOOT
  • How to terminate
  • In writing and signed
    – Under 18 – parent or guardian
  • Copy to the employee
– Failure to meet requirements – may be terminated on 28 days or less notice
– Terms about dispute resolution
– Ordinary hours of work
– Base and full pay rates for piece workers
– Superannuation including default funds
Evaluating Modern Awards as a Regulatory Instrument for a Global Era

- Has the time come to abandon awards?
  - changed context
- Is standard setting done more appropriately through legislation?
  - advantages - potential clarity and brevity, comprehensive according to their terms & more easily known
  - disadvantages - difficult to access legislative agenda and political skills to negotiate outcomes
  - at Commonwealth level – limited constitutional foundation
    - despite broad constitutional interpretation (NSW v Commonwealth (Work Choices Case) (2006) 229 CLR 1) and the use of the reference of powers from States to Commonwealth (except WA)
    - despite community recognition of the importance of a national system regulating work
Evaluating Modern Awards as a Regulatory Instrument for a Global Era

- Advantages of awards?
  - more nuanced to needs of different industries, occupations or enterprises
  - responsive regulation - the role of the FWC and the processes in place involving stakeholders
  - better regulation – evidence based and cogent; known, regular timetable; & the advantages of independent, expert oversight and assessment

- Does FWC have enough power? Is the 4 year review enough (s156)?
  - limited opportunities for creating, changing & revoking awards in the 4 yearly review – advantages of stability
  - wage variations only for ‘work value reasons’
  - process anticipated over 2.5 years (2014--mid-2016)
  - can the process be conducted in a more effective manner?

- If not awards - what are the alternatives?
**The Modern Awards Objective – *Fair Work Act 2009* (Cth), s134**

- (1) FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
  - (a) relative living standards and the needs of the low paid; and
  - (b) the need to encourage collective bargaining; and
  - (c) the need to promote social inclusion through increased workforce participation; and
  - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
  - (da) the need to provide additional remuneration for:
    - (i) employees working overtime; or
    - (ii) employees working unsocial, irregular or unpredictable hours; or
    - (iii) employees working on weekends or public holidays; or
    - (iv) employees working shifts; and
The Modern Awards Objective – *Fair Work Act 2009* (Cth), s134 (cont.)

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
Minimum Wages – Part 2-6

• Minimum Wages Objective (s284)
  
  (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

  (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and

  (b) promoting social inclusion through increased workforce participation; and

  (c) relative living standards and the needs of the low paid; and

  (d) the principle of equal remuneration for work of equal or comparable value; and

  (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.
Minimum Wages – Part 2-6

- Annual reviews of minimum wage rates
  - FWC – Expert Wages Panel (s617, & 620)
  - 7 members, including President, 3 with specialist expertise (workplace relations, economics, social policy, or business and commerce)
  - Adequate opportunity to make and comment on submissions (s289)
  - Use and publication of commissioned research (s291)
- National Minimum Wage Order – for award free employees
- Equal Remuneration Orders – Part 2-7

- Regularity, reliability of timeframes, changes to payroll on annual basis
Minimum Wages – Some Issues in the Global Era

• A single minimum wage?
  – complexity of the current system
  – ease of communication – stronger potential for compliance
  – information on the ‘back of the bus’

• Importance of wages and classifications – recognitions for work value and skill, developed and modified over many years
  – challenge – how to make them more easily known, accessible and applied

• Pay equity – objective evaluation of skills and work value
  – the role of wages in a system structure around the encouragement of enterprise bargaining
  – the impact of vertical and horizontal sex segregation – the risks are intensified
Minimum Wages – Some Issues in the Global Era

- Award reliance for wages – around 16% of employees
  - low paid sectors (accommodation and food; administrative support and services; retail; rental, hiring and real estate)

- Impact of minimum wages on employment
  - research – both FWC commissioned and presented by parties
  - higher minima than elsewhere? - consideration of trends, and as compared with other OECD countries
  - healthy scepticism about adoption of O/S data and information

- A disincentive to bargain?

- Wages in broader context of social welfare/tax transfers
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Modern Awards – An Effective and Appropriate Safety Net
Assessing the role of the FWC

• ‘Future Directions’
• Promoting fairness and improving access; efficiency and innovation; increasing accountability; and productivity and engaging with industry
• The 4 year review
  – website – published all material including decisions, statements
  – massive scale of the exercise – resources of the FWC and stakeholders
  – transparency and communications
  – building trust
  – enhancing engagement – trade unions, business associations, business, government (NGOs)
  – efforts to engage small business – problems of complexity, efficiency
• Ultimate assessment – the reviewed awards
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Effectiveness of Safety Net - Which workers are protected?
Intersections between global impacts and regulation

• The ‘new worker’
  – part-time work, home-based work, agency work, dependent contractors, domestic workers, workers in the informal economy
  – who is forgotten? how effective is regulation?
• The demise of the ‘standard employment relationship’ (SER)
• The worker in business on their own account – how ‘independent’ is the ‘independent contractor’?
  – the problem of the dependent contractor, franchisee ....
  – the problem of ‘sham’ arrangements
• The growth of precarious employment – the casual, the labour hire worker, the outworker
• Working on the margins – the migrant worker, the domestic worker, the informal economy
  • exploitation – forced labour, unpaid labour

• Work in the home and ‘outsourcing’
  – the private becomes public and the public becomes private
Global Growth of Precarious Work

• Modern Awards and the classification of workers – creating precarity? enhancing flexibility? whose flexibility?
• Typically awards provide for various types of employment – ie employees must fit the definition of ‘full-time’, ‘part-time’, or ‘casual’ employee

• Restaurant Industry Award
  – A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week
12.2 A part-time employee is an employee who:
• (a) works less than full-time hours of 38 per week;
• (b) has reasonably predictable hours of work; and
• (c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

12.3 At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

12.4 Any agreed variation to the hours of work will be recorded in writing.

12.5 An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

12.6 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13—Casual employment.

12.7 All time worked in excess of the hours as agreed under clause 12.3 or varied under clause 12.4 will be overtime and paid for at the rates prescribed in clause 33—Overtime.

12.8 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed in clause 20—Minimum wages, for the work performed.
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Restaurant Industry Award

13.1 A casual employee is an employee engaged as such and must be paid a casual loading of 25%. The casual loading is paid as compensation for annual leave, paid personal/carer’s leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment.

13.2 On each occasion a casual employee is required to attend work they are entitled to a minimum payment for two hours’ work.

13.3 A casual employee must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.
4 yearly Award Review – ‘Casual’ and ‘Part-time’ classifications are ‘a common issue’

• Casual employment
  – casual conversion
  – minimum engagement
  – Circumstances for engagement of casuals
  – Casual loading in addition to penalty rates
  – Other specific issues – from applications

• Part-time employment
  – minimum engagement
  – patterns of work
  – fixation of hours of work, and rosters
  – overtime provisions
  – other specific issues – from applications
Precarious work – Casual workers and Minimum Standards

- Casuals – large numbers in Australia (approx. 25%)
  - women, young people, older workers
  - the long-term casual – an Australian oxymoron
  - long term casual – defined including employment on a ‘regular and systematic basis’ (s12)
  - no paid annual leave (s86); no paid carer’s leave (s95), no notice of termination or redundancy pay (s123(c))

- Reconciling casual work with minimum standards for all
  - loading as buying out of benefits – treating labour as a commodity?
  - casual conversion? – maintains the structure of precarious work just enables individuals to climb the ladder & giving up 25% loading is huge impact on low paid workers - not a solution because individualised
  - deeming ‘permanent’ after a period – 6 months
    - risk of employment <6 months
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Precarious Work and Minimum Standards

• Prospects for abolishing the distinction between casual and other (ongoing full-time or part-time) employment?
  – peculiarly antipodean in its development but deeply embedded

• What is the rationale/fundamental principles behind award provisions?
  – casual loadings? – changing over time and in different contexts
  – classifications? cashing out of benefits? penalty rates? overtime rates? – changing over time and in different contexts?
  – labour is not a commodity

• What protections for workers are required in the face of industry demands for flexibility?
  – cf the European ideas of ‘flexicurity’ – can it work?
  – can reasonable limits/protections be put in place that enable more flexibility?
Precarious Work and Minimum Standards

• Is the ‘part-time’ classification more problematic?
• Leaving it to individual agreements alone does not work
  – enabling the negotiation of more flexible contracts
  – IFAs, flexibility work arrangement requests, return from parental leave
  – FWC’s research (2012) on uptake of flexibility provisions in the legislation
  – Flexibility cannot be code for managerial prerogative
• Identifying and valuing the real advantages of flexibility for both employees and businesses
  • balancing all policy purposes goals
  • the possibilities will likely vary according to sector – award review as the best process for setting in place some parameters eg the capacity for averaging of hours