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Enduring values or radical change—the shaping of labour law legislation

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Enduring values or radical change the shaping of labour law legislation

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1 Introduction ........................................................................................................................................... 2

2 Core elements of the traditional industrial relations system (1904 – 1989) ................................ 2

3 Did the core elements remain in place after the transition to enterprise bargaining? .............. 4

4 The impact of Work Choices on the core elements of the traditional Australian system ............ 5

5 A return to collectivism – a strengthening of the core elements? .................................................. 8

6 Does anticipated legislation refer to these matters? ................................................................. 9

7 Conclusion ........................................................................................................................................... 9
1 Introduction

This paper contends that there are four core elements that underlie the Australian industrial relations system. This was certainly the case under Australia’s traditional system of conciliation and arbitration, but it remains the case in our present system which we might loosely describe as a bargaining system, supported by principles of “fairness”:

- The presence of an independent statutory tribunal with compulsory powers (in the many different forms it has taken from 1904 until the present day);
- The significance of the public interest in our system, whereby the tribunal has always considered matters affecting the broader community alongside the interests of the parties;
- The recognition and understanding that the system exists to “protect the weak”; and
- An acceptance that trade unions have a privileged (or necessary) role to play in the working of the system.

There is considerable interrelationship between these four elements. For example, the tribunal’s traditional role of fixing minimum standards through the operation of the award system, National Wage decisions and hearing Test Cases was primarily a means of protecting the weak. In all these determinations the tribunal was required to have regard to the public interest, and the economic impact of its decisions. The process was also sustained by the role of unions that existed to ensure a collective voice and an equality of power between the parties before the tribunal.

These four elements and the relationship between them sent out a message that the traditional Australian conciliation and arbitration system stood for “fairness” and “social justice”. More than this perhaps, over time the underlying features of the Australian system were considered to be part of the “national psyche”, and there was a generally accepted principle that employees were entitled to a “fair go all round”.

2 Core elements of the traditional industrial relations system (1904 – 1989)

It is not difficult to identify the significance of the underlying core elements during the 85 year period that the Conciliation and Arbitration Act (C and A Act) was in place (from 1904 until its repeal in 1989). Throughout the period the independent statutory tribunal (whether it existed as a “court” or “commission”4) was invested with authority to resolve “industrial disputes” between employers and unions (who were parties principal to the dispute). Only unions could initiate proceedings on behalf of employees. Their role was linked to the concept of ensuring that employees were heard without fear of reprisal, and that was also associated with the idea of protecting the weak. At the time the original legislation was introduced unions were referred to as “aids” or “agencies” of the Court.6

3 R v Loty and Holloway v Australian Workers’ Union [1971] AR (NSW) 95 (This case arose in an unfair dismissal context).
4 Under the C and A Act the tribunal was established as a “court” (and able to exercise both judicial and arbitral powers). This was found to be unconstitutional in R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254, and from that time the tribunal existed as a Commission, not a court.
5 For discussion, see HV Evatt, “Control of Labour Relations in the Commonwealth of Australia” (1939) 6 The University of Chicago Law Review 529, at 537; and see Burwood Cinema Ltd v Australian Theatrical and Amusement Employees’ Association (1925) 35 CLR 528.
6 House of Representatives, Hansard, 30 July, 1903.
Enduring values or radical change the shaping of labour law legislation

(or necessary) position of unions was also borne out by the fact that they were provided with forms of organisational protection, such as anti-victimisation provisions, and the Court’s power to make an award of preference in favour of union members.

There were public interest aspects in all this as well. The “industrial dispute” that existed for the purposes of the C and A Act was defined within that Act by reference to a list of designated industrial matters but as part of its determination the Court (and later Commission) was required to consider “all questions of what is fair and right in relation to any matter having regard to the interests of the parties immediately concerned and of society as a whole”. This immediately placed the issue of the public interest at the forefront of the tribunal’s consideration of any industrial dispute. It meant that the Australian system referred to the rights of the general community. It wasn’t restricted to the strict legal rights that existed between the parties, but was arguably required to take account of questions of fairness and social justice.

Of course, the “public interest” is a notoriously slippery concept, but by the 1980s it appeared throughout the governing legislation in defining the Commission’s powers. Justice Ludeke spoke of the C and A Act being a “multi-armed miscellany [that reached] into every nook and cranny of industrial relations” in the name of the public interest. It was also considered an unusual aspect of our industrial relations system because other Western countries did not share the obsession. It underlay the tribunal’s award making jurisdiction, and the developing Test Case jurisdiction that began with cases involving standard working hours. The focus upon the public interest suggested that the rights of the community were to be considered alongside the rights of the parties in any dispute, or that the public was a “silent party” in all disputes. There were some important observations that can be drawn from this: community standards were likely to vary from time to time, and the tribunal was required to adapt its procedures and principles to “the changing social and economic environment and the prevailing community values”. In the Merchant Service Guild Case in 1942, Justice Kelly referred to the emphasis upon the public interest as meaning the tribunal’s role was one of interpreting “the social conscience”. Bearing in mind that these comments were being made at a time when the national tribunal was beginning to extend its influence beyond wage case decisions to establishing a range of minimum award standards like hours of work, leave, allowances and rosters through Test Case decisions there is an emphatic connection between questions of the public interest and the related element of “protecting the weak”.

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7 The original provision was s 9, of the C and A Act.
8 Section 40 of the C and A Act (as enacted).
9 The reference to the “interests of the parties and of society as a whole” was an amendment added to the C and A Act in 1910 (Act No 7 of 1910 (s 2)).
12 See eg Amalgamated Engineering Union v J Alerdice & Co Pty Ltd & Others (44 Hour Week Case) (1927) 24 CAR 755; Standard Hours Inquiry 1947 (40 Hour Week Case) (1947) 59 CAR 581.
13 For an early statement of this principle see Higgins J in the Boot Trade Case (The Australian Boot Trade Employee’s Federation v Whybrow (1910) 4 CAR 1.
15 (1942) 48 CAR 566, 567.
16 The Test Case process involved minimum standards being established in a Federal tribunal decision, and then flowing through to other Federal awards. The earliest Federal Test Cases involved question related to hours of work. See for
3 Did the core elements remain in place after the transition to enterprise bargaining?

It was anticipated that the underlying elements of the system would change or be reconfigured in the new enterprise bargaining system that was the predominant feature of the Keating government’s Industrial Relations Reform Act 1993 (the IR Reform Act), and in legislation since that time. This was especially considered to be the case of the role of the tribunal, and the influence played by the “public interest” test. It was assumed that the public interest would become less relevant in an enterprise bargaining environment, where individual parties freely negotiated their own agreements.

Looking back, however, there was no obvious change in our national system. It was the tribunal that approved enterprise agreements, using the benchmark of the “no disadvantage” test which was often described as something in the nature of a public interest requirement that entrenched the significance of the underlying award safety net. That means that at least three of the system's core elements were retained (including “protection of the weak”), and for the most part it was only union parties that were able to negotiate enterprise agreements. The anomalous exception under the IR Reform Act was the creation of enterprise flexibility agreements, which enabled an employer to directly enter an agreement with its employees (without union involvement). Even here, however, the union party was entitled to appear at the approval hearing and the agreement was required to meet the “no disadvantage” requirement.

In its first legislative attempts in the area of enterprise bargaining under the Workplace Relations Act 1996 (the WR Act) the Howard government was restrained from implementing exactly what it may have wanted. The tribunal retained its authority to approve agreements and the “no disadvantage” test (with direct references to the public interest) was fixed in place. The award safety net was pared back, but not enough to suggest that the four underlying elements of the traditional system were no longer necessary features of the system. This legislation also included the general requirement that was included in all Federal legislation since 1988 that the tribunal was to take account of the public interest in all its functions (except in the case of the agreement-making provisions).

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17 Arguably one example of the relationship between the statutory tribunal’s role and the elements of both protecting the weak and the public interest was the process of structural efficiency and award restructuring conducted during the period between 1986 and 1992. In this case attempts were made to strip back awards into minimum rates allied with skill classifications, and supported by a training infrastructure.

18 The legislation commenced operation on 1 March 1994.


21 A precursor to enterprise agreements were the form of certified agreements that appeared in ss. 115 – 117 of the Industrial Relations Act 1989 (this was the legislation that repealed and replaced the C and A Act).

22 See s 170LT(2) and Part VIE of the WR Act.

23 The legislation referred to the existence of 20 allowable award matters, rather than the full content of awards.

24 As mentioned, however, the public interest was a reference point in the “no disadvantage” test requirement, and the test was referred to in certain other contexts including the termination of agreements.
4 The impact of Work Choices on the core elements of the traditional Australian system

Arguably the main challenge to the argument I am putting forward is the Workplace Relations Amendment (Work Choices) Act 2005, which amended the WR Act from 2005 (Work Choices). As introduced the legislation removed the tribunal from the agreement-making process and did away with the “no disadvantage” test. Obviously there was a diminution in aspects of the tribunal’s traditional functions, and certain previous protections granted to disadvantaged employees. The tribunal’s wage-fixing jurisdiction was assumed by the Australian Fair Pay Commission. This may partly have been due to a concern on the part of the Howard government that the tribunal had been overly generous in its wage determinations however, as Stewart notes, the new tribunal “fell into a pattern of granting wage increases that were broadly comparable to the AIRC’s `safety net' rulings of the previous decade.”

While the core elements may have been challenged in this period, there was no attempt to do away with awards, even if they were reduced to what the legislation termed “allowable award matters” (including overtime, penalty rates and leave loading), and these matters could be excluded by agreement. The tribunal was given an ongoing function in the award rationalisation and simplification process, as well as applications for the variation or revocation of awards. In all these tasks the tribunal was required to take account of the public interest, even if the language of the provision was predominantly focussed on economic matters such as the level of employment and inflation, rather than the general needs of the community (unless we regard those things as one and the same).

Most of the tribunal’s dispute resolution powers disappeared (and it no longer played a role reviewing agreements), but on the other hand it retained its authority in cases where a statutory bargaining period was terminated: in circumstances where parties were not “genuinely trying to reach agreement”; or participated in industrial action that endangered the life or personal safety of the population or part of it, or otherwise threatened to cause damage to the Australian economy. In addition, the tribunal was required to manage a new jurisdiction where secret ballots were required for protected industrial action, and to supervise the new union right-of-entry permit system.

Its functions may have been limited but it is important to note Forsyth’s suggestion that members of the broader community remained attached to the AIRC. It had the advantage of a long history and general acceptance among the community. There was also a level of confusion and scepticism amongst the public, who believed the Howard government was merely transferring functions traditionally undertaken by the AIRC to the Office and Employment Advocate and the Australian Fair Pay Commission. There may have been an ideological rearrangement of functions, but not necessarily a removal of the core elements of the Australian industrial relations system.

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27 Part 10, Division 4, Subdivision A and B, Work Choices.
28 Part 10, Division 5, Work Choices.
29 Section 103, Work Choices.
30 Section 430(2), Work Choices.
31 Section 430(3), Work Choices.
32 Part 9, Division 4, Work Choices.
33 Part 15, Work Choices.
The Work Choices system with its emphasis upon individualised relations between employers and employees certainly impaired the ability of unions to carry out many of their traditional functions, and many traditional “union matters” – payroll deduction of union dues and trade union training leave - were excluded from agreements as prohibited content.

Again, however, there was no attempt to question the legal status of trade unions or to abandon the system of trade union registration. Obviously Work Choices was a remarkable reworking of the Australian industrial relations system, but notwithstanding that, the four underlying elements of the system remained in place. The legislation may have been considered unfair and unbalanced, but Andrew Stewart suggests that it was not “revolutionary”, and made no attempt to sweep away existing laws and institutions.

Before its ultimate defeat in 2007 the Howard government sought to blunt criticisms directed at the removal of the “no disadvantage” test by developing what was described as a “fairness” test. This was the requirement that the removal of any protected award conditions in agreements had to be offset by fair compensation. If a protected standard was removed, the Workplace Authority (formerly the Office of the Employment Advocate) was required to make this assessment about “fair compensation”, taking into account both monetary and non-monetary compensation. The test applied to agreements lodged with the Workplace Authority after 7 May 2007. Creighton and Nuttall refer to the fairness test as “a form of no disadvantage” test. This indicates that during its operation there was an awareness that changes were required to address questions about the overall public expectation of fairness in agreement making. Although the new fairness test may have been criticised by many, it appeared to reinforce certain elements of the previous compulsory arbitration model. After less than 18 months operation, the Work Choices legislation was modified to guarantee additional fairness, and what the Minister described as “significant additional protection for vulnerable employees, including young people and workers for a non-English-speaking background”.

The Work Choices legislation also retained some of the traditional areas where the AIRC was required to take account of the public interest. These included the jurisdiction to dismiss matters that...
were not considered necessary in the public interest, reviewing decisions, and allowing a Full Bench appeal against one of its decisions. These observations indicate that questions of the public interest arguably remained one of the core elements the Work Choices model, together with a stated concern for weak (or low paid) during the brief operation of the system.

Most commentators assume that the defeat of the Howard government in 2007 was largely due to the “extreme” nature of the Work Choices provisions, which appeared contrary to the established settlement between political parties about the underlying characteristics of the Australian industrial system. Certainly there were other factors that may explain the Howard government’s defeat in 2007: an “it’s time” factor; the appeal of the new opposition leader; the role of undertakings the Howard government made about interest rates; and the coalition parties’ failure to present a coherent policy on climate change. In spite of this, the matter of industrial relations was crucial, driven largely by the trade union movement. What is relevant for the purpose of this discussion is that the level of change proposed by Work Choices ultimately proved unacceptable to the Australian public.

There may be two distinct ways of considering the Work Choices period. One is to regard it as an aberration considering the evolution of Australia’s industrial system, and its ongoing operation. If so, it is important to note how quickly the legislation was dismantled, and the four core elements of the Australian system cemented back in place. Alternatively, an argument can be made that during the Work Choices period there was no intent to totally eliminate the four core elements of the traditional system, such as the statutory tribunal (with binding powers, albeit in limited circumstances); the system of minimum standard awards and a minimum wage concept that emphasized protection of the low paid; the ongoing significance of the public interest; and a privileged place for unions at the heart of the system (including a system of union registration). These core elements may have been reshaped and meddled with, but they were retained as part of the Work Choices legislation. That is my preferred view. For those who disagree, however, it is important to observe that any changes made had an extremely limited life, and were rapidly overturned.

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44 Section 111(1), Work Choices.
45 Section 114(3), Work Choices.
46 Section 120(2), Work Choices.
47 See wage parameters for the Australian Fair Pay Commission, where there was a reference to “providing a safety net for the low paid” (s 23(c), Work Choices).
49 R McCallum, ibid.
52 Or even during the course of its operation in the case of the fairness test adopted in May 2007 (see above nn 39 – 40).
53 Note, for example, the argument that there is no statistical evidence that Work Choices undermined the protective strength of Australian labour law during its period of operation: see R Mitchell, P Gahan, A Stewart, S Cooney, and S Marshall, “The Evaluation of Labour Law in Australia: Measuring the Change” (2010) 23 Australian Journal of Labour Law 61 at 75.
54 As discussed, in the case of unions there was no consideration given to removing the system of trade union registration, as happened in New Zealand following the enactment of the Employment Contracts Act 1990 (see further, chapter 9).
Enduring values or radical change the shaping of labour law legislation

5 A return to collectivism – a strengthening of the core elements?

After the turbulent events of 2005 – 2007 the Fair Work Act 2009 (FW Act) has been described as a return to collectivism with the tribunal once more invested with the power to approve agreements and manage the bargaining process.  55 As a minimum, agreements must now meet the requirements of the “Better Off Overall Test” which is heavily laced with aspects of the old-fashioned public interest test. 56 Unions now have the capacity to be covered by agreements, 57 rather than being direct parties although most enterprise agreements are negotiated between employers and trade unions. When acting as bargaining representatives during the negotiating process, unions are invested with significant authority to structure the bargaining process, with another attempt to insert good faith bargaining requirements into the bargaining process. Creighton, for one, speaks of there being a “re-collectivisation of Australian labour law”. 58

More important perhaps, the tribunal has been invested with compulsory arbitration powers in the three areas of serious bargaining disputes, 59 circumstances where industrial action causes significant damage to the economy or poses a risk to public health, 60 and under the new Low-Paid Bargaining provisions. 61 In these various circumstances the tribunal has power to make a workplace determination that may subsequently impose an arbitrated agreement upon the parties. At the forefront of the tribunal’s consideration in these matters are questions of the merits of the case, and the public interest. 62 The best known example of these provisions was the Qantas dispute in 2011 when the tribunal first terminated industrial action, 63 and then imposed arbitrated determinations upon the parties (at least with two union parties). 54 Rolled into this is the observation that the Low Paid Bargaining provisions under the FW Act exist specifically to protect the weak (those employees with little opportunity to negotiate an enterprise agreement), 65 and the Equal Remuneration provisions in the legislation 66 have also been used to protect the position of low paid employees (in an action maintained by union parties). 67 Equally, the modern awards objective refers in part to a “fair and relevant minimum safety net of terms and conditions” taking into account the needs of the low paid,


56 See eg, requirements of the Better Off Overall Test (BOOT) in s 186(2)(d), together with the provision that allows for the approval of an agreement that does not meet BOOT where this is not contrary to the public interest (s 189(2)).

57 See Section 183 of the FW Act.

58 See reference to article at note 55, above. There may be some irony about this observation when the figures for trade union membership and density over the same general period show a significant decrease – from approximately 40% to 19% or thereabouts currently (Labour Market Snapshot, August 2014, Jeff Borland, Department of Economics, University of Melbourne).

59 Note powers of the Fair Work Commission to grant a Bargaining-Related Workplace Determination in cases where bargaining representatives have committed serious and sustained contraventions of bargaining orders that have undermined bargaining for the agreement (s 269, FW Act).

60 Section 424, FW Act.


62 See s 275, FW Act.


65 Part 2-3, Division 9, ss. 241 – 246, FW Act.

66 Part 2-7, FW Act.

and the principle of “social inclusion”. The current legislation shows a return to what I have called the four core elements of the Australian system.

6 Does anticipated legislation refer to these matters?

The ongoing significance of these elements is shown in the right of entry provisions that have been proposed in the Abbott government’s Fair Work Amendment Bill 2014. Depending on how you look at this matter, union right of entry has always been regarded as a privilege afforded to trade unions because of the contribution these organisations make to operation of the industrial relation system, which includes assuming their undoubted function of protecting the weak. Since the advent of the WR Act in 1996, this particular issue has taken up an enormous amount of space in our legislation, and now has its own “Part” in Division 9 of the FW Act, comprising some 43 separate sections, which the Abbott government intends to change.

It is noteworthy that the proposed changes appear to endorse the underlying nature of our system. Right of entry recognises the role of trade unions as participants in our system (although unions may complain at the restrictions and limitations placed upon them). The irony of the 2014 Bill is that any fair reading suggests that the provisions invest the tribunal with considerable authority in the event of any right of entry “dispute”. What is proposed is that the Fair Work Commission (FWC) will be called upon to issue invitation certificates to organisations allowing them to enter premises where there is no existing enterprise agreement, and also to determine whether the requirements of occupiers that discussions will take place in a particular room or area (and the route that participants take to reach that location) are reasonable. Here the tribunal is engaged in its traditional role of attempting to bring the parties together, or else arbitrate to determine the matter. It is here that the public interest rears its head. In the event of reaching a decision the tribunal is required to act in a way that is “fair and just”, and promotes harmonious and cooperative workplace relations”, and the President of the FWC is generally also required to ensure that the tribunal fulfils its role in a way that “adequately serves the needs of employers and employees throughout Australia”. In the event that any party is displeased with the tribunal’s decision (as they inevitably will be) the principal test for whether an appeal might be available is whether the matter is in the public interest.

7 Conclusion

Even though they may have occasionally been subject to attack, it is arguable that the underlying elements of Australia’s traditional industrial relations system remain in place. Our system has not changed fundamentally, despite the move to an enterprise bargaining model. It is possible that transplanting laws and institutional forms (such as the adoption of a bargaining system) from one jurisdiction to another may be difficult when it is “embedded in the specific economic, political and social contexts of [its country]”. On the other hand, if the core elements identified throughout this paper are part of our national character, or entrenched within Australia’s political, industrial, and

68 See e.g. ss. 134 (a) and (c), FW Act.
69 Clause 484(2), Fair Work Amendment Bill 2014.
70 Clause 492, Fair Work Amendment Bill 2014.
71 Section 577 (a) and (d), FW Act.
72 Section 581(b), FW Act.
73 Section 604, FW Act.
Enduring values or radical change the shaping of labour law legislation

cultural framework, then it is difficult for Australia’s industrial relations system (however described) to exist without them being cemented in place.

The retention of the four core elements as part of our national industrial relations system is significant because it appears starkly opposed to the view that in a globally competitive marketplace, industrial relations systems inevitably tend to become more alike. This is the argument made by convergence theorists. In contrast, the underlying features of Australia’s home-grown industrial system remain in place. These elements all played a role in guaranteeing justice and fairness for participants under the traditional system. Of itself, this was a matter that was considered to serve the public interest (with the independent statutory tribunal protecting the weak, in part with trade union support). There was always an interrelationship between the elements of the traditional conciliation and arbitration system. This was how the system worked, and it is argued, continues to work in a bargaining context.