



COMPULSORY COLLECTIVE BARGAINING - A DANGEROUS ROLLBACK IF ALP ADOPTS ACTU POLICY

Since the announcement last year of the Howard Government's workplace reforms (WorkChoices) and the high profile but largely misleading union campaign that followed, it has been clear that industrial relations will be a major battle ground in the lead up to the 2007 Federal Election. Policy announcements to be adopted by the ACTU Congress in October 2006 would represent a dangerous roll back of 13 years of workplace reform if they were in turn accepted by the ALP. Australia should not return to the days when a one size fits all industrial relations system based on industry wide awards and union claims held back economic development and living standards.

In September 2006 the Leader of the Federal Opposition, Hon Kim Beazley MP, held a Saturday morning press conference to announce the "centrepiece" of the ALP industrial relations policy – a new collective bargaining system underpinned by new powers for unions and industrial tribunals to force bargaining for above-award wages and conditions in unionized and non unionized workplaces.

Four days later, ACTU Secretary Greg Combet released 'the new trade union vision' for collective bargaining in conjunction with the release of a report by an overseas delegation of Australian union officials. That Blueprint is the central policy before the October 2006 ACTU Congress.

The high profile and complementary nature of these national announcements was an effort by the labour movement to lift the profile of the industrial relations debate. By week's end though, the lack of detail and the inconsistency in positions left the public and industry in confusion about the alternative to WorkChoices.

That uncertainty is unlikely to be resolved by the October 2006 ACTU Congress and can be expected to remain until the ALP debates its industrial relations platform at the April 2007 ALP National Conference. Enough detail though has been presented, particularly in the 158 page union blueprint, for an initial analysis of what this means for employers, employees and the economy.

ALP ANNOUNCEMENT

Mr Beazley announced that:

- collective bargaining would be the "centrepiece" of Labor's industrial relations policy;
- collective bargaining would be presided over by a "fair" and "powerful" independent umpire;
- the right to a collective agreement would be decided by a "majority of workers";
- the independent umpire would be able to force collective bargaining if it "ascertained whether or not the majority of workers want it";
- the independent umpire would "preside over" the "determination of the outcome of that agreement"; and
- Australian Workplace Agreements (AWAs), or individual statutory agreements, would not be permitted.

The message to employers from Mr. Beazley was (quote) that "if workers want a collective agreement, they will be able to get it."

ACTU 'VISION'

The ACTU 'vision' recommends:

- a strong safety net of pay and conditions;
- collective bargaining rights for wages and conditions "over and above the safety-net";
- replacing the current system of 'union' and 'non-union' agreements with a single stream of collective

- agreements;
- workers, unions and employers should be free to agree to bargain at whatever level they decide;
 - an obligation to bargain in good faith;
 - a right of workers to have a collective agreement at their workplace if they want one;
 - last resort arbitration of bargaining outcomes by the Australian Industrial Relations Commission;
 - the right to union membership and representation; and
 - the abolition of Australian Workplace Agreements.

COLLECTIVE BARGAINING ALREADY EXISTS

Collective bargaining means negotiating wages and conditions above minimum standards with unions or with employees as a group, rather than by direct negotiation with existing or new employees.

The public could be mistaken for thinking that the ACTU/ALP announcements would introduce, or reintroduce, collective bargaining into the industrial relations system. This is not so. Collective bargaining has been part of the industrial relations system since 1993, and is retained by WorkChoices.

What the ACTU and ALP have foreshadowed is a new and different system of collective bargaining rights – one that has not previously operated in Australia. The ACTU and ALP models would introduce significant elements of compulsion to collectively bargain, into the conduct and outcome of bargaining.

WHAT EMPLOYERS SUPPORT

Collective enterprise bargaining is not opposed by employers where three principles apply:

- 1) It is freely entered into;
- 2) It reflects the real interests of the parties; and
- 3) It is not the exclusive form of employer/employee engagement over wages and working conditions.

Collective bargaining earns respect when it in turn respects the rights and interests of individuals.

Under WorkChoices and the laws that preceded it, many employers have collective agreements voluntarily entered

into with groups of non-union employees, or with unions. Those agreements continue to this day. In an industrial relations system based on minimum standards and choice and freedom to negotiate above those standards, voluntary collective bargaining (and for that matter union membership and representation) has a beneficial and proper role.

COMPULSORY COLLECTIVE BARGAINING IS PROPOSED

The direction set out by both Mr. Beazley and the ACTU, whilst they may differ on some detailed issues (this itself not being clear), breach each of these three principles. It would appear that:

- collective bargaining can be compelled;
- collective bargaining outcomes can be determined by third parties; and
- collective bargaining overrides every other form of employer/employee engagement.

In a statement on 17 October, the ALP suggested that orders could be made requiring an employer to bargain, either collectively (if a majority of employees want a collective or union agreement) or in each employee contract of employment (if no majority exists). Either way, employers face bargaining compulsion.

This fundamentally distorts the notion of bargaining over wages and conditions in excess of minimum standards. It forces collective bargaining upon employers and employers that do not want it and makes it the only bargaining “option” outside of employment contracts available in Australian workplaces.

CONTROLLING HOW EMPLOYERS BARGAIN

The ACTU and ALP announcements would not only compel collective bargaining, but also compel the way that employers and employees conduct themselves during bargaining.

An employer would be compelled to negotiate in ‘good faith’. This means an employer would not simply be able to say ‘no’ to union demands. This obligation has previously meant employers must hold meetings (with unions), disclose business details (to unions) and provide reasons (to unions) for saying ‘yes’ or ‘no’ to their claims.

If unions knock on an employer’s door, demand a union agreement and half of the employees back them, the employer will be forced to negotiate the union demands

under threat of arbitration. According to the ACTU report, you wouldn't even need a majority of employees for that to occur - a point that remains uncertain following subsequent public statements.

EQUIVALENT INDIVIDUAL BARGAINING WOULD BE PROHIBITED

To assess the impact of these approaches, they need to be read in conjunction with a series of previously made announcements by Mr. Beazley, such as the June 2006 announcement to not only "tear up" WorkChoices but to also abolish AWAs and any form of statutory individual bargaining.

The compulsion to collectively bargain is compounded by the fact that, having a collective agreement forced on them, an employer is also prohibited from reaching an agreement with an employee on terms that differ from the collective agreement (even an employee who disagrees with the collective bargain).

In other words, the collective agreement is all-powerful and exclusive. Only if the collective agreement allows it, can there be an individual arrangement. In this way a union can control the extent of individual negotiation.

Mr. Beazley has said that employers and employees can reach individual common law agreements. This is not a flexible option to set aside restrictive work practices or unacceptable conditions in awards or collective agreements. Common law agreements are simply employment contracts. They are only able to operate if they do not differ from or are inconsistent with the terms of an award or a collective agreement, including a union agreement. Such an option has been part of employment law for over a century and it is disingenuous to present it as a new alternative to AWAs.

INTERFERENCE WITH BASIC RIGHTS

Aside from fundamentally distorting collective bargaining and usurping individual employee rights, these proposals also represent an unacceptable interference with basic freedoms of employers. They would:

- force an employer to collectively bargain (denying an employer the basic right to exercise their free will to say 'no, I don't want a collective agreement in this business'). This would occur if a majority (or perhaps even a minority) of employees want a collective agreement, with the employer compelled to submit to orders of an industrial tribunal that collective bargaining take place;

- compel the employer to apply the agreement to all employees, even to those that did not want a collective agreement;
- distort the bargaining process so that it does not reflect the real interests of the parties. Bargaining under compulsion, under forced disclosure of information and under threat of arbitration denies an employer the right to only reach agreements that they consider to be in their interests;
- present an agreement as an agreement freely entered into by an employer, when it may not be (i.e. an industrial tribunal deciding what will be in an agreement means that it is not the employer's agreement at all – it is the arbitrated view of a third party);
- deny the right to employ people based on minimum legal standards. Forcing a collective agreement on an employer denies the right to simply employ people according to the legal minimum, because a collective agreement compels an employer to provide higher wages and conditions than the legal minima; and
- deny the right of an employee who does not want a collective agreement to be free to negotiate wages and conditions that differ from the collective agreement directly with their employer.

Collective bargaining by compulsion and the denial of choice is not really bargaining. It is an unfair and extreme approach to industrial relations.

REGULATION ON TOP OF AWARDS

The collective bargaining approach of the ACTU and that being considered by the ALP are in addition to the industrial award system and its compulsory obligations on employers.

Introducing compulsion into a system where extensive minimum standards already apply in legislation and collectively apply in industrial awards is not only unprecedented, but extremely dangerous for jobs and economic activity.

It will impose a level of regulation, compulsion and over-award labour costs on the private sector that has not previously existed in Australian law. It will render Australia just about the most regulated labour market in the world, importing the most regulatory aspects from a myriad of differing systems. Other countries with collective bargaining rights do not have an award system as an extra and pervasive layer of regulation.

NEW TRIBUNAL POWERS

The policy direction foreshadowed by the labour movement goes beyond new union rights, to include new rights of industrial tribunals to compel bargaining and to regulate the method and process of bargaining and its outcome.

Mr. Beazley has said that the 'new independent umpire' overseeing this compulsion would be made "powerful". So powerful that it can force people to apply an 'agreement' that contains things that are arbitrated and which they do not agree to!

Governments and industrial tribunals are third parties not involved in the employment relationship. Their role should be restricted to safety net matters – i.e. minimum standards. Given that enterprise bargaining involves wages and conditions above minimum standards they should not have a role in over-award bargaining.

Decisions of the Australian Industrial Relations Commission after the introduction of enterprise bargaining in the early 1990s (such as the Asahi Case) confirmed the right of an employer to say 'no' to over-award bargaining demands and to not have them arbitrated by an industrial tribunal. This new approach turns sensible decisions like that on their head.

FORCING EMPLOYERS TO PAY MORE

The new power of an industrial tribunal to determine the outcome of a disputed (forced) negotiation is the most regressive aspect of the policy announcements.

Australia's industrial relations system, as regulated as it has been, has always been about imposing minimum wages and conditions on private sector employers, not more than that.

Given that collective bargaining is on top of minimum obligations in legislation or in awards (and the ALP has already foreshadowed more extensive minimum regulation in each of these areas), this means that employers and small business could be ordered to pay more than minimum wages and conditions.

In this situation, it would be unlawful simply to employ people on the minimum standards according to law, as extensive as they may become.

For example, even though the minimum legislated or award rate of pay for a shop assistant might be \$550 per week, the employer could be forced by arbitration of a collective agreement to meet a union demand to pay their

shop assistants (existing and new), say, \$650 per week, as a minimum. Because this would become a new legal minimum for that employer, it could not be reduced for the life of the 'agreement', not even in hard times.

This would clearly increase labour costs, damage the economy and cost jobs.

IGNORING MODERN REALITIES

Giving increased power to unions and industrial tribunals to compel bargaining above minimum standards ignores modern labour market realities.

Only one in ten workplaces have union members. Less than one in five private sector employees are union members. Over one million non-union agreements have been made between employers and employees over the past ten years and more than half a million of those still exist.

In these circumstances it is wrong for unions and industrial tribunals to become the 'centrepiece' of an industrial relations system, let alone a bargaining system in non-union workplaces.

IMPLICATIONS FOR STRIKES

Making collective bargaining compulsory has another negative spin-off - it would increase the right to strike in Australia and be very likely to increase the incidence of actual strikes and the economic costs of strikes. This is because whenever collective bargaining occurs, a legal strike can be held.

This would be retrograde at a time when Australia has record low dispute levels, and has shrugged off the old image of being a trading partner that could not reliably guarantee supply.

Every collective bargaining process allows a right to strike until an agreement is reached, concessions made or demands withdrawn.

A system where collective bargaining can be compelled means that the right to strike can be extended to workplaces where there would not otherwise be collective bargaining or the possibility of strike action.

Further, the ACTU announcement contemplates that collective bargaining could be compelled at 'any level'. This means that collective bargaining demands would not have to be enterprise-based (against one employer), but could be a pattern claim at the one time by a union against all employers in an industry.

Allowing pattern bargaining means that the right to strike would be able to be applied against all employers in an industry – resulting in industry-wide close downs for which there could be no sanction against the union for the economic damage caused. This was not intended by the enterprise bargaining system or the concept of the right to strike enacted by the Keating Government in 1993, and the ALP in 2006/07 should jettison that idea.

In addition, both the ACTU and the ALP have indicated that they will expand the range of issues that can be demanded by a union for inclusion in a collective agreement. That means that a collective bargaining dispute could be created by a union over matters that do not concern wages and employment conditions of employees, but may instead concern union rights, or union demands that employers conduct their business in a certain way, or union demands that employers support a political or social cause that unions advocate. Extending the subject matter of collective bargaining in this way means that unions could precipitate a strike in support of these demands for concessions outside of the employment relationship.

This analysis suggests that the right to strike would be open to considerable misuse.

The right to strike is not, and should not be, an unlimited right. Each strike interferes with other basic rights such as the right of people and businesses to go about their daily business without incurring the economic or social cost of being the victims of strikes.

IMPLICATIONS FOR PRODUCTIVITY

Voluntary collective bargaining and voluntary individual bargaining, if they sensibly address employee needs and business needs (such as the elimination of restrictive work practices and performance pay) can help lift productivity. This was the experience of Australia when enterprise bargaining was introduced in 1993 and individual bargaining in 1996.

However compulsory collective bargaining is likely to have a completely different and potentially reverse effect on productivity and competitiveness.

The ACTU Blueprint, and the policy being considered by the ALP, advocate a framework that transfers industrial power over bargaining to unions and industrial relations tribunals and away from employers and employees. Past experience suggests that this inhibits flexibility, makes it difficult to remove restrictive work practices and raises labour costs.

Bargaining under compulsion and under the threat of

arbitration distorts the equilibrium of bargaining. A coercive environment means concessions are more likely to be extracted from employers that do not result in mutual trade offs (i.e. instead of wage increases in return for elimination of restrictive work practices or higher productivity, only wage increases occur).

Pattern bargaining is even more regressive. It takes negotiation away from the particular needs and circumstances of a single business and into the realm of industry-wide conditions. This reduces the potential for meaningful changes to work practices that could drive competitiveness and productivity in an enterprise, putting jobs at risk and denying individual flexibility for either the employer or employees.

In addition, an expansion of the right to strike is a drain on productivity. Allowing unions to close down a whole industry at the one time (for example the car industry) by exercising a right to strike on a pattern basis is the high water mark of damaging productivity and competitiveness and compromising the jobs of Australian workers in a globally competitive world.

ROLLING BACK MORE THAN WORKCHOICES

The policy direction outlined by the ACTU would, if implemented by an ALP government, dramatically wind back the labour market reforms of the past thirteen years, not just the past six months of WorkChoices.

The economic and social consequences of doing that are far reaching. It is high risk. The last time unions and powerful industrial tribunals were the centrepiece of industrial relations, real wages fell and almost one million Australians lost their jobs because the labour market was not flexible enough to cope with an economic downturn.

Industry and small business expect policies that are balanced, that are forward looking, and at the very least reflect the reform approach of Labor when it was last in government and enterprise bargaining first introduced.

Mr. Beazley and his shadow ministers have been at pains to assure the business community that Labor would want to protect the competitiveness and productivity of industry. This is welcome. Doing so is essential to growing jobs and keeping jobs in this country.

This sentiment cannot however be divorced from what the ALP is looking at for the industrial relations system. Industrial relations policy is a major driver of productivity and competitiveness together with other labour market policies (such as skills and training) and prudent economic management.

A regressive industrial relations policy compromises other labour market and economic policies that the Opposition may present.

THE WAY FORWARD

Fresh thinking is needed by the ALP on industrial relations in the lead up to the 2007 Federal Election. Early indications after the 2004 election loss were that a more progressive industrial relations policy would be developed. Those hopes have been severely set back by the collective bargaining announcements, the plan to abolish AWAs, the proposal to reintroduce unfair dismissal laws on small business and the intention to abolish workplace reforms in the building industry.

The 2007 election is some time off. It is not too late for these regressive directions to be reversed. The starting point is to not adopt the Blueprint to be sanctioned by the October 2006 ACTU Congress. Development of the federal ALP industrial relations policy is a work in progress and the detail does matter.

ACCI and employer bodies are seeking further information from the Federal Opposition on these announcements and will continue to discuss policy matters with the ALP to seek to ameliorate adverse effects on employers. The door for dialogue is still open and industry has a responsibility to bring its concerns to the fore.

However, if the centrepiece of the ALP industrial relations policy is compulsory collective bargaining of the character foreshadowed in September 2006, it will be a serious move in the wrong direction, will put economic prosperity and living standards at risk and will be opposed by business.

Whilst WorkChoices has its shortcomings, it is structural reform in the right direction, consistent in important ways with the reform direction of Labor (in 1993) and the Coalition (in 1996). It is contributing to remarkable jobs growth (over 200,000 new jobs, mostly full-time, since March), historically low disputes and the continuation of high living standards.

Indeed, what is remarkable about this is that the recent jobs growth is happening on top of the jobs growth from thirteen years of economic expansion. These are not 'catch-up jobs' after a recession. They are new jobs, real jobs and extra jobs. Likewise, the drop in industrial disputes is on the back of what were already historically low dispute levels.

After a generation of effort, Australia now has an

unemployment rate with a '4' in front of it – unthinkable a few years ago. Having achieved this, we should do everything to keep it that way. The last thing we should do is tear up the workplace laws that help make it possible.

The ALP has an opportunity to build on workplace reform in a balanced way, not tear it up. Dialogue with industry will be crucial. So far the signs of progressive policy making are not good and the consequences of not doing so would be damaging to the national interest.