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ADVANCING AUSTRALIA FAIR: THE AUSTRALIAN FAIR PAY AND CONDITIONS STANDARD

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Beneath our radiant Southern Cross
We'll toil with hearts and hands²

Few could seriously claim that Australians are not toiling with 'hearts and hands'. *Per capita* hours worked by Australians are now amongst the highest in the OECD and there is evidence that work has intensified for most (see Watson *et al*, 2003). There are high levels of temporal, numerical and functional flexibility and corporate profits are booming (ABS, Catalogue 5676.0, 2005). It is, therefore, unsurprising that the Howard Government's *WorkChoices* industrial relations reforms have been greeted with widespread antipathy by all but fractions within the business community (Lewis, 2005). The efforts of the Howard government to prove an impetus for these reforms seems unlikely to accord with the actual working experiences of Australians, many of whom have already traded away conditions and provided employers with considerable flexibility under previous bargaining rounds or individual contracts or through the award simplification process. The \$50m. saturation advertising campaign, designed to sell the reforms to the electorate, has had little impact on public sentiment (Humphries, 2005). Nonetheless, the Coalition's slim majority in the Senate means that *WorkChoices* is likely to proceed into law with few concessions. In

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 - 2 Second verse, Advance Australia Fair

recent years the Senate has proved to be a significant check on the Coalition's more ambitious industrial relations plans, with just 15 out of 56 introduced bills passing into law between 1997 and 2004. The Coalition's remarkable victory in the October 2004 election though has secured a majority in both houses (the first time since 1981, [Singleton, 1996:2]) and the Howard Government now claims a mandate to implement wide ranging reforms to industrial relations not seen since the introduction of decentralised wage determination in 1991.

Among its other reforms, the Howard Government proposes to replace the 'no disadvantage test' with a new standard against which collective agreements and individual contracts are to be measured, known as the Australian Fair Pay and Conditions Standard (AFPCS). This new standard and its likely impact in Australian Industrial Relations is the subject of this article.

We begin our analysis of the AFPCS by placing its introduction in the historical context of the gradual weakening of protective regulation since decentralised bargaining was introduced. Our argument is that the AFPCS is the latest reduction in the steady decline over the last thirteen years of regulation formerly designed to protect wages and conditions from falling. Labor and Coalition governments have both contributed to the dilution of this regulation, although its declining force has been most marked under the Howard government. We contend that, although the steady decline of this regulation has been claimed to stimulate more bargaining by simplifying 'agreement making procedures', it has had adverse implications for procedural and substantive fairness. The AFPCS continues this trend of weakening protective regulation which will only exacerbate existing inequities, especially for the most vulnerable. More particularly, we argue that the impact of the AFPCS must be evaluated in the context of the other introduced reforms, especially the unfair dismissal law exemption.

The following analysis also considers the development of the AFPCS in an international context. Prime Minister Howard has asserted that the passage of the *WorkChoices* reforms will still leave the Australian labour market more regulated than that of the UK and New Zealand. Implicit in this argument is that these are the countries we should be using as benchmarks against which to assess the legislation. So it is important to

look at the evidence on the extent of regulation designed to protect wages and conditions in the decentralised bargaining environments of the United Kingdom and New Zealand

Drawing together these strands of analysis, the paper concludes that, over time, the AFPCS is likely to result in deleterious bargaining outcomes, particularly for those with little bargaining power in the Australian labour market.

The Withering of Fairness in Australian Decentralised Bargaining

The introduction of the Australian Fair Pay and Conditions Standard (AFPCS) is the latest development in the withering away of legislative restrictions on downward wage flexibility in decentralised bargaining which began in 1992. The erosion of the strength of this protective regulation over this thirteen year period has been observed by O'Neill (1997), Naughton (1997), Merlo (2000), Waring and Lewer (2001) and Mitchell *et al.*, (2003).

When the Australian Industrial Relations Commission (AIRC) finally gave way to calls to introduce decentralised bargaining in October 1991, it did so only with the strong proviso that collective agreements would only be approved where they were both consistent with the Commission's wage setting principles and were considered to be in the public interest. As Waring and Lewer (2001) have noted, the public interest test as it was then formulated was a relatively high hurdle for collective agreements to pass. Collective agreements were considered not to be in the public interest if they provided pay and conditions that were inferior to relevant awards or contained provisions that derogated from community standards. The federal Labor government, however, was anxious to stimulate enterprise bargaining and introduced a new 'no disadvantage test' (NDT) in the *Industrial Relations Amendment Act 1992 (Cth)*. This new test allowed the AIRC to certify collective agreements so long as none of the terms and conditions of the proposed agreement proved to be less advantageous than *any* of the conditions contained in the relevant award or law. This legislative shift away from

the public interest test was criticized by the then President of the AIRC, Mr Justice Maddern, who observed that agreements would be registered without reference to public interest considerations (Dabscheck, 1995:75).

In 1993, the test was further weakened by the Keating Government's *Industrial Relations Reform Act 1993 (Cth)*. While the test remained, the way in which it was calculated was altered so that conditions could be traded-off only if employees' wages and conditions as a whole were not reduced. Furthermore, the Keating Government's reforms also clarified that the benchmark for the purpose of applying the NDT would be the relevant award rather than a previous certified agreement. This was a subtle but important point of clarification because it meant that, over time, new agreements which offered lower wages and conditions than in previous agreements could still pass the NDT. Thus the test was considered a global test which considered proposed agreements against the totality of a relevant award. In theory then, wages and conditions under proposed agreements could only fall to levels contained within relevant awards.

When the Coalition won the 1996 March election, its original policy was for all agreements to be certified so long as they met just seven minimum conditions. However, in subsequent negotiations with the Australian Democrats the NDT was retained as part of the compromise which became the *Workplace Relations and Other Legislation Act 1996*. However, as Waring and Lewer (2001) point out, while the NDT was retained, the specific provisions made clear that this was to be a global test.

The Minister for Workplace Relations, Peter Reith, in a speech delivered to the American Chamber of Commerce in May 1997 explained that:

The global (NDT) test means that any award or State legislative condition can be varied. There is no single condition that is not open to variation - every condition is open to variation to tailor it to the needs of the enterprise subject to the statutory minima.

Other elements of the *Workplace Relations Act 1996* also operated indirectly to erode the protection offered by the NDT. The process of award simplification (reducing award provisions to just twenty core

matters) in particular had the effect of reducing the benchmark against which agreements would be measured.

O'Neill (1997) succinctly explained the impact of award simplification on the NDT in the following terms:

It is helpful to ask what will be gained if award simplification proceeds, at least to a point where clauses are removed from awards, or nominated as being unenforceable. The main gain (for employers) will be that the bar for the no disadvantage test (NDT, as applies in the Act to various forms agreements) will be set lower, given that award provisions will be less. This will mean that in future enterprise bargaining rounds, it will be easier for an agreement to meet the NDT, and this is the main force behind employers' push to simplify awards.

Aside from the effects of award simplification, the designation of awards as the minimum 'safety net' meant that growing disparities between awards and agreements further weakened the NDT. This problem emerged in the context of a Federal Court case, *MUA v Burnie Port Corporation Pty Ltd (2000) FCA 1189*, where an applicant for a position with Burnie Port Corporation was offered employment on terms and conditions contained in an AWA which was said to be of less advantage than a pre-existing certified agreement. In this case, Justice Ryan warned:

It may be that in the future, if the designated award that provides the criteria for application of the 'no disadvantage' test is not adjusted to reflect market trends evidenced by certified agreements and AWAs, the utility of the NDT in ensuring minimum standards will gradually diminish.

The effects of the gradual weakening of the NDT have been compounded by the procedural complexities involved in its application. Waring and Lewer (2001) and Mitchell *et al* (2003), for instance, have noted the practical difficulties associating with valuing non-monetary conditions and the subjectivity involved in judging whether, on balance, a proposed agreement is better than or equal to a relevant award. Adding to this complexity is the fact that a number of agreements have not completely

replaced awards and retain links to certain award provisions (see Bray and Waring, 2005).

Considering these difficulties and the deliberate erosion of the strength of the NDT, it seems most unlikely that Prime Minister Howard's 1996 pledge that 'no worker will be worse off' (see Williams, 1997) has been sustained in reality. A recent study by Mitchell *et al* (2003) which closely examined 36 certified agreements and AWAs in comparison to relevant awards, concluded that 'the NDT as it is presently constructed and applied is failing to adequately protect employees in certain defined respects from a deterioration in relation to their terms and conditions of employment'(p.30). In a study of the content of AWAs in the hospitality industry, van Barneveld (2005) found that that the AWAs diluted the terms and conditions of employment, relative to awards, and generated gains to employers largely at the expense of employee entitlements. This demonstrable failure might have been cause for policy makers (concerned that employees not be disadvantaged) to revisit and repair the NDT. Instead, the government is replacing it by an even weaker standard – the AFPCS.

The AFPCS and its Likely Impact

The AFPCS is justified on the grounds that the NDT was unduly complex and that it hindered agreement making (Howard, 2005). The government, as with virtually all its claims of justification, provides no supporting evidence. The pretense of no worker being worse off as a result of the changes seems to have disappeared. These legislative changes will disadvantage many employees. With the removal of the NDT it will be much easier to supplant awards with agreements, and to supplant collective agreements with individual agreements. Through reference to its corporation's powers, the Federal government wishes to supplant the States' based award system with a Federal agreements system and to effectively marginalise the Australian Industrial Relations Commission. As Skulley (2005) commented, 'the framework is heavily skewed towards having workers covered by individual and enterprise agreements rather than the award system...'

The AFPCS is the latest and most drastic weakening of protective regulation in Australian decentralised bargaining. It will incorporate just five minimum conditions of employment into legislation, including parental leave, maximum ordinary hours of work, annual and carer's leave, and wages provisions. These minimum conditions, together with the minimum wage and minimum award wages as adjusted by the Australian Fair Pay Commission, will form the Australian Fair Pay and Conditions Standard. Importantly, this standard will replace the 'no disadvantage test' as the standard which collective agreements and Australian Workplace Agreements are to meet. In other words, agreements will only be registered if they provide wages and conditions of employment the same as or superior to the new standard.

The detail of how the AFPCS will operate is contained in the *WorkChoices* document released by the Federal government in October 2005. Its likely effect can only be gauged by examining its intended operation in the context of the other changes being introduced as part of *WorkChoices*. The new exemption from unfair dismissal law for businesses employing 100 employees or less, along with the privileging of individual contracts over other industrial instruments, are likely to be particularly significant in this context. We judge that they will allow wages and conditions to fall, potentially below award remuneration.

The *WorkChoices* document indicates that the AFPCS will enshrine a maximum ordinary hours of work of 38. However, these hours may be averaged over a twelve month period. While this at first instance seems reasonable, *WorkChoices* goes on to clarify that hours above the maximum will be subject to awards and agreements and that penalty rates associated with hours worked above 38 may be changed, or indeed removed, by express provisions in agreements and contracts. This means that hours of work can easily exceed the 38 figure contained within the AFPCS, subject to a 'reasonable additional hours' provision that reflects the criteria laid down by the AIRC in its test case on reasonable working hours. Moreover, overtime and penalty rates can be removed on any hours, effectively making all hours 'ordinary'. Some collective agreements and AWAs already provide an annualised rate for all hours worked in which penalty rates are rolled into a single wage but these were made in the context of a 'no disadvantage test'. Hence, employees

had to be appropriately compensated to ensure that they were no worse off. New agreements will be subject to the lesser standard – the AFPCS – so that penalty rates can be rolled into a single hourly rate which may be less than what employees might receive under the relevant award.

Under the ‘no disadvantage test’, employees could expect that proposed agreements would be compared with the totality of award pay and conditions. Under the AFPCS, agreements will be measured only against a minimum ordinary pay rate and a few leave provisions. This creates the real possibility that new agreements will be registered even when they push total earnings for employees below award levels. This possibility is best illustrated through a simple example.

Consider the case of a full-time waitress who is employed under the Federal *Hospitality Industry Accommodation, Hotels, Resorts and Gaming Award 1998* (the first award to be simplified under the *Workplace Relations Act*) and who works 38 ordinary hours and four overtime hours a week. Assume that the waitress works four of the ordinary hours on a Friday night between 7pm and 11pm and the same on Saturday night.

Table 1: Comparing the AFPCS with the Hospitality Industry Accommodation, Hotels, Resorts and Gaming Award 1998

	AFPCS	Award
Level 3 Award Ordinary Rate per hour	\$14.33	\$14.33
19.1.1 Weekend Penalty @ 1.25 times the ordinary rate	N/A	\$17.91
19.3.1 Other Penalty (hours worked between 7pm and Midnight Mon to Friday – entitled to extra \$1.47 per hour	N/A	\$15.80
28.3.1 Overtime (Mon to Fri) @ 1.5 times the ordinary rate for first two hours and twice the ordinary rate thereafter	N/A	\$21.495 (first two hours) \$28.66 (rate thereafter)

Under the relevant award (excluding allowances that may be payable for meals and holders of first aid certificates and so on), this waitress would be entitled to 30hrs at \$14.33 per hour plus four hours on Friday evening at \$15.80 per hour plus four hours on Saturday evening at \$17.91 per

hour plus two hours at \$21.495 and two hours at \$28.66 (for the hours of overtime worked). As a weekly rate, the waitress would receive at least receive \$665.05 for this working pattern.

The employer may now choose to replace the award with an AWA with a single weekly rate of \$601.86 (42hrs at the ordinary rate) for the same working pattern. If this is accepted by the waitress, the Office of the Employment Advocate would approve the AWA since it provides wages better than the minimum award rate of \$544.50. In other words, it is perfectly legal to make an agreement which will result in the waitress being worse off by \$63 a week. The disparity may be even greater where a collective agreement is in place since *WorkChoices* provides that AWAs prevail over all other industrial instruments.

Employees might not wish to agree to such a bad bargain, but they might not have a choice. If they are working in a business with 100 employees or less, they will not have access to a remedy for unfair dismissal. This gives their employer a free hand to dismiss employees for any or no particular reason. While there are provisions in the *Workplace Relations Act 1996* which makes coercion in the making of an agreement illegal, employees will have a hard time proving that their employer terminated their employment because of their refusal to accept a bad bargain. This 'employment at will' context clearly creates a new bargaining dynamic in which employees will be reluctant to oppose new agreements that involve degrees of disadvantage for fear of being dismissed. If the waitress holds her position and refuses to accept the AWA, it would not be difficult for an employer to find *post hoc* reasons to terminate her employment at some later date. If the employer does this, there is little the waitress can do, presuming that the café is exempt from unfair dismissal laws. When this happens, the employer can hire another waitress who is willing to accept the AWA.

In circumstances where employment is offered contingent on the acceptance of an AWA, the prospective employee's choices are extremely limited. He/she can accept an AWA that may provide only the minimum award rate or minimum wage (without any penalty rates or bonuses or loadings) or reject employment. This is the 'Billy' example contained in the Government advertising, whereby an unemployed man (Billy) accepts an AWA that provides total wages and conditions less

than the relevant award in order to gain employment. The government has since indicated that unemployed people on benefits (like Billy) must accept available job offers, regardless of the lack of conditions, entitlements or choice over working hours – or lose welfare benefits (Secombe, 2005). The privileging of AWAs over collective agreements and awards will also mean that it will be quite possible for Billy to be working for far less pay than his colleagues performing the same work. Over time, an employer may decide to dismiss workers under collective agreements and re-hire new employees on AWAs providing less pay.

A further reason why employees may accept an agreement that provides total wages and conditions less than the relevant award is due to asymmetric information. Employers have an information advantage over individual employees and are more easily able to model wage costs for various shift and occupational arrangements over extended periods of time. For individual employees, it is a difficult and complex exercise to compare current wages and conditions against those offered in an AWA which may involve subtle degrees of disadvantage.

WorkChoices also makes no account for the award-free sector, where employees are not covered by an award or unsure of whether they are covered by a relevant award. Agreements for these employees will presumably be compared not against minimum award wages but, rather, with the minimum wage contained with the AFPCS.

The AFPCS will also provide for four weeks annual leave, but up to two weeks of this may be cashed out with the agreement of employees. Again, *WorkChoices* paints a portrait of an employee who willingly enters such arrangements but, in doing so, ignores the deleterious effects the unfair dismissal law exemption will have on the bargaining context. Aside from annual leave, the AFPCS provides for ten days of personal leave (sick leave and carer's leave) *per annum* and up to two days of compassionate leave. The final provision in the new standard is 52 weeks unpaid parental leave.

The detail of the *WorkChoices* bill identifies an additional application of the AFPCS. Under the proposed s.103K and s. 103R, an employer may unilaterally terminate an expired certified agreement or AWA after giving requisite notice and transfer its workforce on to the AFPCS. This

would immediately result in a significant reduction in earnings but also significantly shifts bargaining power in favour of employers.

The impact of the AFPCS must be measured by examining the new standard in the context of a bargaining environment where there is no or reduced access to unfair dismissal remedies, where there is a right for employers to unilaterally replace agreements with the AFPCS after the former has expired³ and where AWAs can prevail over collective agreements and awards. In this context wages are likely to fall subject to the condition of labour markets in various industries, the morality of employers and their willingness to incur turnover costs. In industries and workplaces where labour is plentiful and turnover costs negligible, it is likely that wages and conditions will fall below award standards. In effect the safety net is being watered down. Through the process of accretion, standards and conditions will be gradually diminished, more workers will migrate from awards to agreements – from collective to individual arrangements – and along the way the conditions of employment will be eroded. While the safety net minimum wage is to be maintained through the auspices of the Australian Fair Pay Commission, the AFPCS will ensure that many workers will be worse off under the proposed legislation. ACCER (2005) comments that ‘the proposed changes to the no disadvantage test has the potential to erode the benefits that are present in the award system safety net, but which are not included in the government’s proposed safety net...’

The Australian Fair Pay and Conditions Standard in International Context

...let me point out very simply to you that when our legislation goes through and the changes have been implemented, we will still have a labour market more highly regulated than that of the United Kingdom and of New Zealand... (Prime Minister Howard, Address to the Australian Industry Group Annual Dinner, The Great Hall, Parliament House, Canberra, 15 August 2005.

3 S.103R, Workplace Relations Amendment (Work Choices) Bill 2005

In 'selling' its industrial relations reforms, the Howard Government has suggested that the proposals are moderate in the international context. In particular, the Prime Minister has asserted on a number of occasions that the passage of the reforms will still leave the Australian labour market more regulated than those of the United Kingdom and New Zealand. Superficially he is correct, since, as a federal system, Australia has State and Federal industrial relations systems as opposed to the unitarist industrial relations systems of the UK and New Zealand. In Australia the different systems provide choice and diversity with respect to outcomes. After all, the legislation proposes to support choice! The proposed legislative changes will not create a single national industrial relations system, since the use of the Commonwealth's corporation's powers to validate the changes means that only employees of incorporated enterprises will be captured by the Federal system. State government employees and employees of unincorporated enterprises will remain in the State system. Moreover, this will mean that some employees who are currently under Federal agreements and awards will have to transfer to the State system since they are employed by unincorporated enterprises. So much for simplicity and a single system!

Where Australia does depart from the UK and New Zealand experience is that in both these countries there is recognition of collective rights and international labour standards. In both countries there has been an attempt to improve standards and to develop consultative and participatory mechanisms at the workplace. By contrast, in Australia the position is extremely unitarist, with managerial prerogatives being strengthened, and there is no attempt to give recognition to international labour standards.

United Kingdom

The UK has no equivalent to the AIRC in evaluating and setting the terms and conditions of employment codified in collective agreements, and collective agreements are not legally enforceable (though their terms and conditions may flow into the contract of employment). Rather, the role of the Advisory Conciliation and Arbitration Service (ACAS) is largely confined to mediating in disputes, and that of the Central

Arbitration Committee (CAC) confined to matters of union recognition and de-recognition and to information disclosure pertaining to the bargaining process (Lewis *et al* 2003). Both Australia and the UK have similar trade union densities, at 25-30 per cent of the workforce. However, collective bargaining coverage in the UK is low, at approximately only one third of the workforce in 2000, as opposed to over 80 per cent for Australia (OECD, 2004: 145).

Against this, in the absence of national bargaining benchmarks, the UK over the last 10 years has experienced an increasing role for statute law in shaping the employment relationship. It is here that the role of the European Union (EU) has taken precedence over national legislation, with UK governments increasingly transcribing EU directives into national law. Under the former Conservative government this was done begrudgingly – usually as a result of judgements brought down by the European Court of Human Justice, or the House of Lords (Morgan *et al*, 2000: 97). An example here is the 1977 Transfer of Undertakings Directive: protecting employee rights upon a change of ownership and employer, being incorporated into UK law in 1991 and extended to public sector workers in 1993 (Morgan *et al*, 2000).

However, this process accelerated under the Labour government. The Social Chapter of the EU's 1992 Maastricht treaty establishing a single market for goods and services was ratified and enshrined in UK law (the previous Conservative government had refused to endorse the social measures outlined in this treaty). The Social Chapter provided for 12 basic rights for workers: including freedom of association, gender equality, *improvement* of working conditions and *adequate* protection of employment and remuneration (Lewis *et al*, 2003: 197, emphasis added). These measures were put forward by the EU in order to allay worker fears about the adoption of a single market across the EU. Indeed, the EU's championing of international labour standards – now endorsed by the UK - represents an invaluable countermeasure to the increased mobility of capital brought about by the steady dismantling of trade barriers. In addition, a national minimum wage has been introduced for the first time in the UK (Addison and Siebert, 2002), and there has been ratification of EU directives on working time, consultation and information provision in the workplace and an end to multiple contract

renewals for fixed-term employees. Table 2 summarises the key statutory entitlements, and their date of introduction in the UK.

Table 2: Key Statutory Entitlements in the UK, and their Date of Introduction.

Legislation	Key provisions/entitlements
<i>National Minimum Wages Act, 1998</i> <i>Working time regulations, 1998</i> <i>(Implementation of EU Working Time Directive)</i>	<ul style="list-style-type: none"> • Statutory adult minimum wage £3.60 per hour, currently at £5.05 per hour (October 2005) • 48-hour maximum working week (voluntary opt-out available, currently under review to remove opt-out) • 4 weeks paid leave per year
<i>Employment Relations Act, 1999</i>	<ul style="list-style-type: none"> • Statutory union recognition (organisations with more than 20 people, if majority of workforce wish. • No discrimination on the basis of trade union membership • 18 weeks maternity leave minimum • Unfair dismissal qualifying period reduced to 12 months continuous service • All workers (not just union members) entitled to be accompanied by a trade union official for grievance and disciplinary hearings
<i>Employment Act, 2002</i>	<ul style="list-style-type: none"> • Six months paid maternity leave plus six months unpaid maternity leave and 2 weeks paid paternity leave • Adopted EU <i>Fixed-Term Workers Directive</i> (restriction on multiple contract renewals in excess of 4 years) • Compulsory internal grievance and dispute resolution procedures
<i>Employment Relations Act, 2004</i>	<ul style="list-style-type: none"> • Protection against dismissal for official legal industrial action extended from 8 to 12 weeks • Implementation of EU <i>Information and Consultation Directive</i> (for companies with 150+ employees in 2005, 100+ in 2007, 50+ in 2008)

Source: DTI (2005); EIRO (2004); Lewis *et al* (2003); Addison and Siebert (2002).

In addition, in the lead up to the 2005 general election, the UK government and the trade union movement agreed on a set of policies and reforms (EIRO 2004) expected to feature in upcoming legislation, under the so-called 'Warwick Agreement.' This would entail legislation providing for:

- ratification of the proposed EU Directive granting agency workers equal rights to regular employees;
- bank (public) holidays no longer counting towards employees' 4 weeks' statutory annual leave entitlement;
- increasing family-friendly measures in the workplace, including flexible working for parents and carers;
- widening protection under the Transfer of Undertakings Regulations to pensions; and
- more employee representatives on the boards of trustees managing pension funds.

Furthermore, in contrast to the Howard government's proposals, all employees in the UK with a minimum of 12 months' continuous service may claim for unfair dismissal at an employment tribunal. This was reduced from 2 years by the Blair government during 1999. Indeed, the 1999 Act specifically raised the maximum penalty awarded by a tribunal for unfair dismissal from £12,000 to £50,000, and in certain cases up to £68,000 (Addison and Siebert, 2002: 23). This is particularly prescient in the Australian context because the majority of tribunal claims in the UK are filed by employees who have worked in small businesses: 33 per cent of applications were received from those who worked in firms with less than 10 employees. In contrast, only 20 per cent of employment tribunal applications in the late 1990s were from those working in establishments with more than 100 employees (DTI, 2002: 7). In this context, all UK employees who perceive that they are subject to a bad bargain have ready recourse to having their grievances addressed through a formal, fair, process: internally through a grievance resolution procedure and externally through tribunals.

Thus, contrasting with the Australian trend towards exclusion, the UK since 1996 has embarked on *extending* the platform of employment rights, incorporating conditions into the contract of employment. Also in sharp contrast to Australia, where casual and temporary workers are largely excluded from statutory entitlements, the UK's adherence to EU directives on part-time and temporary work grants a minimum range of employment rights, regardless of employment status. Underpinning this tentative shift in industrial relations culture have been notions of 'rights

and responsibilities' and 'partnership' (i.e., cooperative employer/union relationships) in the workplace, as emphasized in the Blair government's 1998 *Fairness at Work* paper. The Government's commitment to extending the statutory framework and supporting consultative and participatory mechanisms with employees in the workplace points to a reversal of the unbridled managerial prerogative that characterised the UK in the 1980s and 1990s. Hence, it is apparent that 'fairness' and 'fairness at work' in the UK is consistent with the Social Chapter's emphasis on basic human rights.

New Zealand

In the first year of office, the New Zealand Labor/Alliance government repealed the *Employment Contracts Act (1991)* and enacted the *Employment Relations Act 2000 (ERA)*. The new law set out a number of key objectives, including:

to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment . . ., by recognising that employment relationships are built on good faith behaviour, by acknowledging and addressing the inherent inequality of bargaining power in the employment relationship, and by promoting collective bargaining.'

The new institutional arrangements demonstrate that the ERA represents a shift back to a more regulated, collectivised but not centralised system. The Act returns the monopoly right to unions to collectively bargain (although individual agreements are still allowable), reinstates unions' rights to organise (for example, by right of entry provisions), requires employers to bargain in good faith and facilitates multi-employer bargaining with worker assent. This mix of strategies generates a renewed legitimacy for collectivism. The legislation enshrines New Zealand's support for ILO convention 87 on freedom of association and convention 98 on the right to organise and bargain collectively (Wilson, 2004). 'Free-riding' is less likely and unions gain a psychological fillip from being rewritten into the employment relationship as making a

positive contribution. This is the principal discontinuity from the former ECA. Walsh and Harbridge (2001:355) conclude:

...the bargaining provisions of the ERA provide a basis for unions to repair some of the damage done to their movement during the last decade. The Act proceeds from the premise that employment relationships involve inherent inequality and that collective organisation by trade unions is the most effective way to redress this inequality.

The ERA is part of an industrial relations reform process that is extending employment regulations, facilitative collective agreement – making and improving basic employee entitlements. The *Health and Safety Bill in Employment Bill (2002)* extended the coverage of OH&S across the workplace. *The Holiday Act (2003)* allowed for the phased extension of annual leave from 3 to 4 weeks. A pay equity taskforce was established in 2003 and paid parental leave of 12 weeks for females was introduced in 2002. As Haworth (2004: 202) comments:

...the ERA sits at the centre of a much larger employment relations project...first, ...it seeks to reform and modernise the employment relations system.... Second, the government is committed to a social democratic approach to employment relations that is consistent with sustainable economic growth...Third, it seeks to promote effective tripartism and bipartism...

As with the UK, New Zealand is extending minimum conditions, conforming to international labour standards and recognising collective rights. Australia is moving in exactly the opposite direction to both countries, despite the Prime Ministers claims.

Conclusion

The use of the words 'fair' and 'Australian' pepper the Howard Government's *WorkChoices* proposals and the accompanying advertising. In early October, 2005 it was revealed that the Government had decided to pulp 60,000 *WorkChoices* leaflets so that the word 'fair'

could be inserted in various additional places (Gray, 2005). The government has chosen to deploy the words 'fair' and 'Australian' to describe both the new minimum wage system and the standard that is to replace 'the no disadvantage test'. Who can be against something that is both 'Australian' and 'fair'? The additional cleverness of deploying the word 'fair' lies in the considerable ambiguity connected to the word. Fairness is a relative concept and normative ideal whose meaning is contestable and can be used to defend a variety of actions and outcomes. According to the Macquarie dictionary, 'fair' can mean just and equitable but it can also mean 'not undesirable but not excellent'. Further, the word itself provides cover for the fact that the removal of the 'no disadvantage test' necessarily creates the very real possibility that disadvantage will result.

In this article we have demonstrated that the introduction of the AFPCS is the latest weakening of regulation formerly designed to ensure that workers are not worse off under certified agreements and individual contracts. While we have pointed to the considerable failings of earlier formulations of the 'no disadvantage test', at least that test attempted to vouchsafe the totality of award remuneration. The AFPCS, in contrast, creates the very real possibility of wages falling below award earnings. The new standard will comprise just four basic conditions and a minimum wage, which means that new individual contracts and certified agreements can eliminate penalty and overtime rates and a range of various allowances that are currently provisioned in awards. The result is likely to be reduced total remuneration. The AFPC is therefore fair only to the extent that allowing employees to be financially disadvantaged is fair.

The imputation of *WorkChoices* is that employees will have a choice as to whether or not they accept a contract. However, in reality, existing employees' choices (especially in small and medium enterprises) will be to accept a contract or run the risk of being arbitrarily dismissed. The creation of an 'employment at will' environment for employees of businesses with 100 employees or less creates a bargaining context that is far less regulated than that of the UK or New Zealand. For job applicants the choice will usually be to accept wages and conditions less than the award or not be employed. If they take the job then they may be

performing the same work as their workmates but receiving inferior pay and conditions – a possibility we consider inconsistent with ‘Australian values’.

Employers’ willingness to take up these opportunities will be constrained by their need to retain quality labour, reduce turnover costs and sustain their own sense of equity. But the introduction of the AFPCS and other reforms encourages and incentivises employers to pursue low-wage employment. More broadly, the removal of unfair dismissal laws signals a new tolerance for ‘unfairness’ while the removal of the ‘no disadvantage test’ suggests a new tolerance for ‘disadvantage’.

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