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INDUSTRIAL RELATIONS: A MINIMUM PROGRAMME FOR THE STATES

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It is hardly necessary to state that Australian unions are facing their most serious threat for over a century. The most anti-union federal government of all time now has a Senate majority, and is intent on a comprehensive deregulation of the labour market, together with systematic de-unionisation of any employer receiving cash from Canberra (universities, TAFE colleges and construction companies are just the beginning). This short note sets out a minimum programme that might be urged on the (Labor) state governments to reduce the impact of the federal government's assault.

What Can be Done?

The federal political scene is bleak. A Labor victory in 2007 is at best a possibility and, short of an electoral landslide, the ALP will not control the Senate until 2011 at the earliest. New Zealand experience with and after the 1991 *Employment Contracts Act* suggests that the damage done to the unions will be permanent, and will not be fully reversible by any pro-union legislation that might follow a change of government. Similarly, union density did not recover in Western Australia after the change of government in 2000 and the repeal of anti-union state legislation (Peetz 2005). These examples are significant, since the

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Howard legislation seems to have been inspired in part by the Western Australian and New Zealand experiences

There is, however, one source of optimism. Uniquely, Labor is currently in power in all six states, and is thus in a position to obstruct, and perhaps to frustrate, the federal plans. A minimum programme that union members might reasonably propose to their state governments would look something like this:

1. Retain the existing state award systems and, in the case of Victoria, restore the system that the Kennett government abolished in 1996.
2. Pass a 'Fair Employment (Safety Net) Act' requiring all contracts of employment in the state to include model terms and conditions derived from those governing the 20 'allowable matters' retained in federal awards under the 1996 *Workplace Relations Act*. These matters are: job classifications; hours of work; rates of pay; piece rates and bonuses; annual leave and leave loadings; long service leave; personal and carers' leave; parental leave; public holidays; allowances; casual and shift loadings; penalty rates; redundancy pay; notice of termination; stand-down provisions; dispute procedures; jury duty; regulation of casual and part-time employment and shift work; superannuation; and pay and conditions of outworkers (Bray *et. al* 2005, p. 294).

The right to union representation, and the consequent right for union officers to enter the workplace at the member's request, should also be included.

These provisions would constitute implied terms in all contracts of employment in the state, whether the employee was part of the award stream, covered by a CA, had signed an AWA or was subject to an 'informal individual arrangement' This contrasts with the Howard proposals, under which the *only* effective safeguard would be for basic rates of pay. The government's claim that four additional conditions of employment would be protected is spurious. The four weeks annual leave entitlement can be reduced to two, with the other two weeks taken away on the pretext of inclusion in a higher hourly rate of pay. The rights to unpaid personal and parental leave are worth very little, and are in any case unenforceable in the absence of effective remedies for unfair dismissal (see below). And the specification of a 38-hour standard

working week is meaningless without provision for either penalty rates or direct control of excessive overtime working.

3. Pass a Minimum Wage Act imposing the hourly rate handed down by the AIRC in its last Living Wage case (\$12.75) as the legally-enforceable minimum wage *and* index-link it to Average Weekly Ordinary Time Earnings, as reported by the ABS. The United States experience of *not* index-linking the federal minimum wage is decisive: without strong and persistent political pressure, the real minimum wage will decline significantly over time.

4. Establish a Fair Employment Court to hear all unfair dismissal cases, cheaply and promptly. Howard claims that 'unlawful dismissal' (for example on grounds of gender, race or union membership) will still be unlawful, and it is probably also the case that workers will retain common law rights against *unfair* dismissal – for example, a parent sacked for refusing an employer's unreasonable overtime demands. But possessing a right is one thing, and being able to enforce it is another thing altogether. The costs and delays involved in access to the federal court system will deter victims of all but the most flagrant cases of unlawful or unfair dismissal from taking action against their employers; court charges and lawyers' bills potentially running into many thousand of dollars will ensure that. Unions may support some members in some cases, especially where the victimisation of workplace delegates is concerned, but anything more than this will be beyond their means. The number of cases will therefore fall dramatically, and the deterrent effect of the law will fade away, greatly increasing the bargaining power of employers – which is, of course, the object of the exercise. Thus there is an urgent need for a cheap, speedy and accessible tribunal system to hear unfair dismissal cases. There will be no difficulty in staffing state tribunals, since large numbers of experienced justices from the AIRC will soon be looking for work!

5. Establish a Fair Employment Office to vet all collective agreements, union and non-union, to ensure that they comply with the Safety Net and Minimum Wage Acts. Then extend the FEO's responsibilities to cover all AWAs, and eventually also to informal individual contracts, through an inspectorate. This is a (slightly expanded) equivalent of the present 'no-disadvantage' tests currently administered at the federal level by the

AIRC and the Employment Advocate, which will effectively disappear under the Howard proposals.

6. Establish a Contracts Compliance Office to ensure that all enterprises that do business with the state government and its agencies comply with the Safety Net and Minimum Wage Acts, and encourage local councils and non-government organisations to do the same.

The Queensland government claims that its Industrial Relations Amendment Act 2005 already achieves most of these goals by specifying 'a set of minimum employment conditions which operate as a fair safety net for employees. These minimum conditions have been extended and improved upon so that they cover Queensland employees who stand to lose employment conditions as a result of the federal Government's policies'. But this claim is unfounded. For one thing, the laws 'do not affect employees whose employment is not covered by an award. More important, except for outworkers they apply 'only if the award or agreement is silent with respect to the relevant employment entitlements. For example, if an agreement provides an all-up hourly rate for casual employees and states that no additional loadings or penalties are to apply, then the agreement will override the loadings and penalties applicable to casual employees as provided in the Act' (Queensland Government 2005). A one-line statement in a Queensland AWA will thus nullify the provisions of the Act. One wonders what the purpose of it was.

Problems to Address

There are two problems with this program, one legal (or more precisely constitutional) and the other political.

There is a substantial history behind the constitutional problem. In 1926 a proposal to amend the constitution 'to give the Commonwealth something close to plenary powers' over both corporations and industrial disputes' was defeated at a referendum, having been opposed by the Lang Labor government in New South Wales and by many conservatives (McMinn 1979, p 172). Intriguingly, this same issue was considered exactly half a century later at the inaugural conference of the fervently anti-union H. R. Nicholls Society, which was attended by one Peter

Costello. 'More complex questions arise', wrote I. F. C. Spry, QC, 'where it is sought by Commonwealth legislation to over-ride State legislation so as to free employers and employees from State regulation. However, the various provisions of the Commonwealth Constitution appear to be broad enough in their aggregate, if not to exclude State regulation altogether, at least to allow it only a small area of operation' (Spry 1986, p. 130). Like the Howard government in 2005, Spry relied primarily on s.51(xx) of the federal constitution, the 'corporations power'. The prominent constitutional lawyer George Williams urges caution, however, since 'Uncertainty about the scope of the corporations power means that it cannot be said with confidence that a law that sought to regulate the full range of industrial matters that can arise between employers and employees can be enacted under the power' (Williams 2005). The states seem ready to buy themselves a ticket in this particular legal lottery. They should work on the assumption that they will win.

Politically, there would presumably be howls of protest from employer organisations, and state governments might cite the danger of losing office as justification for doing nothing to 'upset business confidence'. Against this it can be argued that employer opposition would be muted if the program proved to be widely popular, and that the defence of employment rights might well provide a powerful positive motive for working people to vote Labor, a motive that often seems to be lacking in the mushy, issue-free politics of the 2000s.

This is not a radical proposal. On the contrary, it is profoundly, and deliberately, conservative; it seeks only to retain some of what Australian workers and their unions already enjoy. There is scope for debate about a timetable for expanding these rights – to include (for example) improved and indexed rates of pay for all job classifications above the minimum; more detailed family-friendly employment conditions; paid carers' leave and paid maternity leave, funded by employers; mandatory penalty rates for all overtime working, and an end to unpaid overtime; and a strict maximum 48-hour limit in any week, as required (in principle if not in practice) by European Union legislation. But this should come later, after the impending disaster has been averted.

These proposals might serve as a template for federal legislation by a future Labor (or Labor-Green coalition) government. In the interim, the

increased decentralisation of industrial relations that they imply may be no bad thing. The experience of the 'living wage' movement in the United States is instructive in this regard (Pollin and Luce 1998; Brenner and Luce 2005). The battle for decent wages for the low-paid has been fought at the state and local authority levels, Washington being considered (correctly) as a lost cause. Many state, city and county authorities now pay their employees hourly rates substantially more than the pathetic federal minimum, and require their contractors to do the same. These achievements required considerable grass-roots support, and owed little to the efforts of national leaders. This rendered the campaign less vulnerable to betrayal from above, and also less susceptible to catastrophic electoral defeats (although, by extension, there is also no prospect of dramatic nationwide victories). The 'living wage' has proved an attractive rallying cry in the most unexpected places (the state of Florida is a recent example).

In Australia, too, there are many recent examples of cooperation between unions and community groups, as was evident in the 1998 MUA dispute on the waterfront. Some unions and their members already have close connections with Aboriginal, migrant, environmental disability and women's groups, with anti-poverty campaigners and with some of the churches. These links will need to be strengthened in the very cold climate that will prevail after 2005. The alternative is the survival of collective bargaining, decent wages and fair employment conditions for a small labour aristocracy, and exposure to the full rigours of the free market for everyone else.

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