'Choice vs Fairness': The Australian Industrial Relations Battleground

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In 2010 we face another federal election and we wait to see the nature of the contest for the voters' support. In the last election the Australian industrial relations system, and particularly the legislation that shapes it, was a major site for political contest. The titles of Australia's two most recent pieces of legislation sketch the ideological battle lines. The legislation that was the focus of the 2007 federal election campaign was the *Workplace Relations Amendment Act* of 2005, known as *Work Choices*. The legislation that replaced it in 2009 is the *Fair Work Act*.

And in the titles of those two pieces of legislation we see starkly reflected the ideological battleground that lauds choice or fairness as the symbolic heart of contending industrial relations systems. It is not clear at present whether the same battle lines will be drawn in the forthcoming federal election – although some elements of the previous WorkChoices legislation, primarily individual agreements and unfair dismissals have been flagged for reintroduction.

Before the introduction of the *Fair Work Act* I suggested that Australia faced a 'Higgins' moment. By this I meant that Australia, following the repudiation of *Work Choices* by the electorate, could and should design a new industrial relations system for this new century. Ideally this new system would attract bipartisan support to stop the cycle of each change of government bringing major changes to industrial relations legislation.

As this audience knows, Higgins described the arbitration system, which was the core of federal Australian industrial relations for much of the twentieth century, as a "new province for law and order". This new province, the arbitral model, had bipartisan support for much of its life. But since the 1990s the major Australian political parties have been at odds over the future shape of our industrial relations system.

[1] With thanks to Gavin Moodie for research on the legislative differences.

Today I want to talk about the nature of that battleground and its implications for Australia's future industrial relations regime. I will consider the 'logic' of the contending positions, trying to separate the rhetorical claims from the fundamental changes they contain for industrial relations. In doing so I draw on two recent papers I have written, one about what would be needed post *Work Choices* and another reflecting on the history of Queensland industrial relations over the last 150 years.

I will not spend time parsing the clauses of the current Act nor debating the projected effects of current changes such as the modernisation of awards. For those who spend their lives directly embroiled in the negotiations and conflicts of industrial relations, the nuance of a change to a clause in legislation or award, or the timing or scope of an agreement is quickly evident and such changes closely monitored. For most others much of what industrial relations experts care about is arcane, mildly confusing and sometimes vaguely threatening in its portents. Rather than the detail, I want to focus on the nature of the industrial relations system that is produced if the primary intent is choice or fairness.

The logic of the industrial relations system

The ideological battleground between choice and fairness was presented to the Australian people as being about how it would affect them. The benefit to people of choice and flexibility in employment arrangements versus the benefits of fairness and justice was how the contest was presented. Whether choice or fairness is delivered is, however, dependent on the shape of the system.

This is an important debate and one that should be informed by clear understanding of the relationship between the industrial relations system and the outcomes it produces. For at the heart of the history of any society is the opportunities that are available for its people, the way they may be treated, and their ability to have a say about their opportunities and their treatment.

Work is one of the major places in which we all find those opportunities and experience the way society and economy treat us. Industrial relations mediate those experiences in the workplace. As a collection of industrial relations experts, this Society should be a place for informed non-partisan debate about the desirable shape of the Australian industrial relations system.

The rhetorical appeal to choice as the underlying logic for an Australian industrial relations system sits firmly on the freedom of individuals to make decisions about their preferences and of flexibility to respond to the market. Used as a slogan it is often vague about whether it is the individual as worker or employer that has choice in the industrial relations system. Its benefits rely fundamentally on the ability of a party or individual to influence and change their workplace circumstances and therefore to exercise their choice or give expression to their preferences.

The appeal to fairness relies on notions of what is a just outcome or process for the individual in their group or societal context. Again as a slogan it can be and is used flexibly in terms of whether the process is a just process or the outcome is just, and it is applied to the rights of the individual to fair treatment, as well as whether the overall outcome is fair and just.

What I would argue distinguishes the recent debate of choice versus fairness from the nineteenth century contest of ideas about industrial relations is that today's ideas are rhetorically presented in terms of their outcomes or benefits for the individual. This represents a profound shift in the supporting logic of our industrial relations system.

Looking back and looking forward

Think back to the conflicts and debates of the nineteenth century that contributed to the creation of Australia's arbitral model and we see that it was the employers as a group and their interests versus the interests of the workers as a group that was at its heart.

The arbitral model that resulted from that nineteenth century debate was an exceptional Australian story about a system that quickly spread gains for workers, in general reduced the severity of industrial conflict (if not its frequency), and gave a place for employers' and workers' representatives to sort out the broad framework of their relationship. The system was a way of mediating the conflicts that arose between the interests of employers versus the interests of workers, but with an added element. The tribunals had always an eye to the broader public interest and in this provided assessments, sometimes too bound by the views of the parties but always removed from the immediate pressures of public opinion.

It was far from a perfect system of industrial relations – there are none that claim to be so. Control of much that happened in the workplace remained with employers and their rights in this matter were generally supported by tribunal decisions. Conflict in general had a particular set of routines and expectations. Only when it spilled into large intractable disputes was it

beyond the tribunal and in the realm of government. These large conflicts sometimes led to legislative change but more often to a temporary recalibration of enthusiasm by workers and employers for such drawn-out and desperate disputes in future.

Regulation set the expectations and spread the gains or the losses, too widely for some and too slowly for others. It was an unusual system where government had an active role as a party and through its tribunals in shaping the outcomes of the system – a system more corporatist than collectivist.

It was at the high point of centralised wage fixation and trade union influence in the 1980s that the arbitral model finally faltered. In the success of the Accords and the transformation of Australia to an open economy in this period lay the beginning of its end. The changes were made to match a more open and flexible economy, to strengthen workplace-based representation by unions, and to provide a stronger national platform for protection of low-paid workers through setting minimum conditions in legislation.

The destruction of this arbitral model took its first legislative form in the Keating government's *Industrial Relations Reform Act 1993*. This was what can be called a 'policy martingale' (March and Olsen 1989) – this was the moment of the decisive shift in the shape of Australian industrial relations. And this shift was a consensual one in which there was broad agreement that the system needed to move towards collective or enterprise bargaining and away from the arbitral model.

From that time, Australia has been in the throes of reshaping its industrial relations to meet the new economic and social circumstances that were ushered in over the final decade of the twentieth century.

The change from the arbitral model to introduce a collective bargaining regime was profound. It drove much industrial relations regulation to the enterprise or workplace level. And of the four major features of the 1993 changes[2], two were especially significant. These were the introduction of a

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- [2] make enterprise agreements the centrepiece of the system, rather than national wage policy translated through industry and occupational awards;
- introduce an individual rights base in the legislation protecting a number of minimum conditions, where previously, conditions were embedded in awards;
- recast the tribunal's role as arbiter of the 'safety net' or minimum conditions and facilitator of bargaining, rather than regulator; and

legislative base of minimum employment conditions and a new stream of agreements that could be made with limited union involvement. This legislation also retained a series of protections for union action and for individual employees.

The bargaining industrial relations regime introduced in the 1990s was in essence a liberal collectivist regime. In other words the collective or enterprise bargaining introduced was still seen as a framework within which the interest disputes of employers and workers were played out. Both systems still contemplated employer associations and trade unions seeking to achieve their respective collective agendas.

There are aspects of what has happened in subsequent legislation that are a 'working out' of the underlying logic of those 1993 changes. In the *Workplace Relations Amendment (WorkChoices) Act* 2005 the federal industrial relations legislation moved from reliance on the Constitutional powers of conciliation and arbitration to the corporations power, effectively removing state jurisdictional coverage and making the new industrial relations system truly national not federal. This was in part the inexorable result of creating an industrial relations system that was responding to a national economy and enterprises that spread across state boundaries. And this change while not central to choice or fairness debates is important for the speed of change of industrial relations systems.

Looking back we can see the corporatist elements of our arbitration systems. Arbitration systems are pre-eminently 'justice' systems that work to give effect to aspects of procedural fairness and in the Australian system through national tribunal determinations in the main, they also had a strong role in broader regulation of the economic outcomes for the parties and their 'fairness'. In other words the arbitral model was set up to mediate the conflicting interests of the parties and in that mediation also to take into account the interests of the community as a whole – the 'public' interest.

Collective bargaining systems also have rules and are often accompanied by tribunals or access to the courts for matters that require procedural fairness. However unlike arbitration the bargains made resolve the conflicting interests of the parties without reference directly to the public interest, and are openly a resolution based on each side's market power.

The shift to a collective bargaining system in the 1990s recognised more directly and explicitly the interests of the parties and their comparative

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- provide a new stream of agreements that could be made with limited union involvement.

market strength. It also signaled a change to the way collective representation and regulation of employment would be incorporated in industrial relations legislation because it contained explicit recognition of non-union bargaining. Fundamentally, however, while more based in markets, it was a collectivist system.

The step to *WorkChoices* introduced a more market individualist, rather than a liberal collectivist system. It was the rights and choices of the individual that became the symbolic centerpiece. In doing so *WorkChoices*, by attempting to restrict the collective market power of workers, effectively reinstituted and reinforced the asymmetric power of the employer over individual employee in the name of strengthening individual choice. By attempting to restrict the ambit of collective action and representation it effectively ensured that the ability to choose rested largely with the employer, not the employee. It was rarely the individual worker who chose as the 'standard' individual workplace agreements revealed.

The *Fair Work Act 2008* was conceived as a major break with this legislation, and provides for a stronger role for the collective and for a tribunal mediating disputes. There are many elements in this legislation that are familiar, from the awards, through the protections for collective representation and action, to the tribunal now called Fair Work Australia that mediates disputes and makes determinations on national minima in pay and conditions. But it remains at bottom a collective bargaining system.

And, it also has embedded within it a stronger focus on individual rights and on the ability of the individual to seek redress or fair treatment. The arbitral model and collective bargaining typically assume the outcomes for the individual are deeply dependent on the union that represents them or the tribunal's decision for their occupation or industry. This legislation recognises the need to deal with individuals not so represented.

Individual rights not only to fair treatment, but also to fair and just outcomes are more central to this new legislation. This can be seen in a number of places. First the legislated minimum employment standards are available irrespective of whether the worker's occupation or industry has union coverage or an award in place. Second there is a stronger rights emphasis in these employment standards, such as the right of a parent to request a change in working arrangements to care for a child.

The third is the recognition in various aspects of the legislation of the many workers who are not effectively covered by unions, such as independent

contractors and the low-paid. For example, the *Fair Work Act* provides that Fair Work Australia is able to facilitate multiple-employer bargaining for employees who are low-paid and those who have not historically had access to the benefits of collective bargaining (r 177 page xxxix)[3]. Bargaining representatives may apply on behalf of employers or employees for a low paid authorisation, which will allow for Fair Work Australia to facilitate bargaining for a specified list of employers (r 179 page xxxix).

This has some resonance with pre-1990s industrial relations where wages boards or industrial tribunals made determinations on wages and conditions that would not have been available were workers to rely on a bargained outcome. But it is also a way of securing fairness for individual workers who are not part of a union.

Elements of earlier legislation such as the ability to put individual flexibility arrangements in place "to meet the genuine needs of the employee and employer" are also found in this Act.

The Fair Work Act looks back to aspects of the arbitral model in its awards and tribunal determinations, retains at its heart the collective bargaining (and flexibility) to which Australia shifted in the 1990s but grafted to this a much stronger focus on individual employment rights. The combination of collective bargaining and legislated protection of employment standards and rights is arguably closer to European industrial relations regimes than our previous Antipodean model.

And from this survey we can see that no industrial relations legislation of the past two decades has ignored fairness or choice (if choice is understood as flexibility). The reality is as always more grey than the rhetoric. But the rhetoric cannot be ignored because it corresponds to the intention for the legislation and for the system that it underpins. It can take a decade or more to see the working out of intention following a major legislative change – and it is important that we do not mistake the residual practices of past industrial relations regimes for the future that the intent of the new system portends.

[3] This relies on the regulatory analysis prepared by the Department of Education, Employment and Workplace Relations included in the first 80 pages of the explanatory memorandum to the *Fair Work Bill 2008* to which the following regulatory impact (r) and page references refer.

Just as the interests of employers and employees diverge, there has always been debate about the extent to which the system serves or protects the interests of each. Typically the core of this debate has been about the regulation of industrial action and trade unions. However what was new in the most recent joust was the use of 'choice' to wind back minimum employment standards and reduce significantly the ability to collectively organise and take industrial action – the move towards market individualism. This was an attempt to create a system more characteristic of the nineteenth than the twentieth century. Since the introduction of the first federal Conciliation and Arbitration Act in 1904 the core of the system created had been about fair and just outcomes. To make choice the centre of industrial relations legislation is a major change in intent.

Choice versus fairness and individualism versus collectivism

At present it remains unclear, whether there is substantial bipartisan consensus about the future shape of our industrial relations system. And so there is no reason to assume that the current model will hold for many years. The lesson from the 1990s and beyond is of more frequent change in labour legislation, as the bipartisan consensus on labour relations has been eroded. Unless this changes there will be instability at the heart of future labour relations as legislation changes when the political party in power changes.

As we look forward we may face a period more akin to the nineteenth century when direct government intervention becomes more important because there is no compact about the nature of the system. When this is the case, agreement is forged issue by issue with the government often directly involved, such as on maternity leave. In another era this was a matter for a tribunal to broker between the employers and unions or for employers and unions to set the arrangements between them.

When there is no agreement about the nature of the industrial relations system, conflicts find many different paths to resolution. In a unitary or national system there are no checks and balances at State level for the shifts brought about through national legislative change. What is remarkable about the previous 100 years is that an accommodation was found and held for such a long period. The future requires another accommodation to be found.

Conclusion

There are three features of changed economic and social circumstances

that remain cogent for this latest circumstance. They are the increasing scope of atypical employment arrangements in the workforce, and related to this, the increasing numbers of workers who are in circumstances where their employment arrangements are effectively individual. They are not represented by or not able to be reached by unions. And, there is a need for industrial arrangements that can reflect and adjust to the circumstances of different industries and enterprises – in other words room for some flexibility in arrangements. These are the realities of a globalised economy.

It is unlikely there will be political consensus about the roles of unions as representatives of workers – this has always been the most politically contested territory. However the range of minimum conditions (and their adjustment) that should be in place for all workers, and third party mediation and arbitration role to resolve major disputes are more likely places to build greater agreement. In the last decade or so these three matters have been the core of an ideological battle not only about industrial relations, but about whether there is any role for amelioration of the asymmetric power of the employer in the employment relationship.

Let me return to the reasons for a stronger bipartisan consensus about the shape of our industrial relations system. There is now, in effect, only one industrial relations system in Australia and it is national. Without the checks and balances of a federal system, it is important that the regulation of employers and employees is not subject to major volatility. Volatility in the legislative base has a tendency to create more disputes about interpretation, leave unclear many aspects of employment arrangements, thereby increasing risk for employees and employers. It adds to conflicts about interests, conflicts over the rules of the game.

There is reason for incremental not major change in a system such as industrial relations. A new consensus should build on the current areas of agreement in the way of any good negotiation - beginning with yes before assaying the nos. Industrial relations experts should remind those in power that while employee and employer interests diverge, in the negotiation of those differences a good negotiator knows long-term interests are not served by a winner takes all approach.

The reason for a collective bargaining system was to recognise differences in interests and market power. It depends on recognition that workers can form collectives and be effectively represented by them. The reason for a range of minimum standards is because some individuals have very little market power and are vulnerable to exploitation. To have a just society needs protection of the vulnerable.

To this end I want to briefly outline the range of areas on which I believe

there is agreement. In the category of agreed foundations is that bargaining is central, that there is a need to specify minimum conditions to underpin the arrangements of all workers and particularly the vulnerable, and that unions should be able to represent workers who are their members. There is also clear understanding that an independent body is needed to check that the legislation is complied with, that disputes over rights under the legislation can be dealt with, and that industrial action should be regulated.

There are matters to be resolved in each of these areas. In attempting to provide flexibility in bargaining, the enterprise became the focus. There is, however, no reason that the enterprise should be the focus for all bargaining. The rise of atypical employment, the fragmentation of some industries and consolidation of others, all argue for recognising that in some cases multiple employers may wish to bargain together and in others individual enterprises. We should continue to recognise a range of bargaining arrangements.

The range of minimum conditions must be specified and a mechanism for their adjustment put in place that is at arms length from government. The range of minima will be subject to debate between employers and unions, but there is, I would argue, a clear and accepted set generally in operation at any period. In order to adjust these over time, there is a need to be at one remove from government and that requires an independent tribunal.

If unions can and should represent their members, then there must be arrangements that allow them to gain access to potential new members and to their existing members in order to understand their aspirations and grievances. Unnecessary restrictions in these areas amount to practical repudiation of freedom of association.

There are a range of regulatory and compliance requirements. There is a need to adjust minimum conditions and pay, to check that legislative requirements for bargaining and agreements have been complied with and can be enforced and that breaches of the legislation are addressed.

The shift to bargaining as the core of the Australian industrial relations system means that there will be no return to the arbitral model as it developed in the last century. As we enshrine a stronger rights-based approach to employment arrangements, we would do well to use previous Australian experience to keep industrial relations as much as possible out of the courts and in the realm of pragmatic tribunal resolutions and determinations.

There is no going back to the arbitral model. There is no way we can rely on collective agreements to address the multitude of employment arrangements we now confront. And so to secure that fairness and social

justice that should underpin our employment arrangements, and encourage employers to innovate and improve, we must rely on legislation that enshrines minimum conditions and rights.

No system where interests collide can proceed without a means to break deadlocks in negotiations or redress major asymmetry of market power. Here an independent tribunal has form and reason and there is a need to ensure the ability of workers to organise collectively and have effective representation is protected. Once these foundational matters seemed straightforward in Australian industrial relations. Only in the last decade have we had to reassert their importance.

Choice cannot be the heart of an industrial relations system, which is pre-eminently about the reconciliation and compromise of divergent interests. Choice only makes sense as a synonym for flexibility not as a notion about being able to give effect to preferences. A bargain is where the preferences of the employer and employee are reconciled – not all preferences or interests can be accommodated. There must be flexibility to allow for differences not only between industries and occupations, but also between enterprises and individuals. And this is always the real challenge – how much flexibility before fairness is compromised. This cannot be resolved in the abstract but only in the bargain.

We face a federal election. We know that one side is committed to a collective bargaining regime, which is underpinned by legislation to support collective representation ad to secure fair employment standards and treatment. There is room for flexibility of arrangements – we will see over time how effective these elements are.

The policy of the other is not yet clear. Before the debate is enjoined, as industrial relations experts, and as 'good' employers we have a responsibility to provide advice about what we expect. In closing I offer some thoughts from my perspective about what those expectations should be. I expect a system that supports fairness at its core – fairness in treatment of employers and employees and justice in outcomes so that the vulnerable, the unrepresented are not ignored. And so we need legislated minimum standards and they should be referenced to community norms.

There is also a need for flexibility to recognise the needs of particular organisations. Workers should have a right to negotiate collectively and to be so represented, so that the interests of the employer face the interests of employees. There should be mechanisms to break deadlocks in negotiations and to ameliorate industrial action, because the unfettered

action of market power in these areas does not assist the public interest. There is no need to specify as in previous legislation what matters can be the subject of agreement or exactly what the responses of the individual organisation should be to industrial action. And there is a need to make sure that the battleground of industrial relations is in the collective bargains and the system that supports their resolution and not in constant shifts in the size and shape of the battleground by frequent changes to the legislative field.

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