

**AUSTRALIAN WORKPLACE RELATIONS SUMMIT**  
**WEDNESDAY 14 MARCH 2007**

**WORKCHOICES – UNFAIR, UNDEMOCRATIC AND UNSUSTAINABLE**

Thank you for the opportunity to speak to you today.

This is written from my perspective as National Secretary of the CFMEU – it is not necessarily the policy of the CFMEU or ACTU.

Frankly, the WorkChoices legislation is a disaster for Australian workers and the representative organisations of Australian workers, the trade union movement.

Neither the WorkChoices thematic approach in general or the detailed approach in particular was ever put to the Australian electorate at a general election.

WorkChoices is the culmination of the long-term efforts of various anti-labour movement, anti-worker forces including:

- our Prime Minister John Howard who has been on a political and ideological mission for 30 years to weaken and subjugate organised labour;
- the H R Nicholls Society (and other more recent neo-liberal think tanks) who has agitated for an extreme right wing approach to industrial relations in Australia for around 20 years;
- the representatives of big business such as the Business Council of Australia (BCA), Australian Chamber of Commerce and Industry (ACCI), the Housing Industry Association (HIA) and others who have urged (and funded) the development of extreme anti-worker policies over a long period.

## WorkChoices

With WorkChoices now being 12 months old there are various learned critiques of this far-reaching legislation floating around. To my mind the key elements of WorkChoices are as follows:

- the shifting of the bargaining power in the workplace dramatically in favour of the employer;
- the putting of structural impediments in place to retard collective bargaining while installing mechanisms to promote individual bargaining (AWAs);
- severely inhibiting the power of unions to bargain for their members on matters like content, length of the deal and the level (site or industry) at which the union can negotiate;
- disenfranchising the long term independent umpire (the AIRC) and shifting key powers to non-independent bodies such as the Fair Pay Commission, Office of the Employment Advocate and the Office of Workplace Services;
- introducing a vast panoply of legislation and regulations into industrial relations rules which empowers law firms and bigger employers who want issues dealt with in common law courts as opposed to industrial tribunals;
- stripping away the previous, well established no-disadvantage test and installing a much lower benchmark of only 5 minimum standards;
- introducing very high levels of regulation of trade unions and instigating very high penalties against trade unions (and employers who are seen to improperly co-operate with trade unions);

- introducing substantial executive powers placed into the hands of the Minister for Industrial Relations who can intervene in a wide variety of circumstances.

Many of these points speak for themselves so I won't develop them further. In rounding out what's wrong with WorkChoices let me borrow from the words of one of our prominent economic commentators.

“WorkChoices is so one-sided it's quite mistaken to think of it as “deregulation” of the labour market. Employers may have been deregulated but unions have been subjected to more, highly prescriptive regulation.

The new act will be more voluminous, there'll be more work for lawyers, no tribunals will be abolished but additional ones created, and the minister will be given greatly increased discretion to intervene in union affairs.

I doubt the public has any appreciation of just how anti-union WorkChoices is.

The emasculation of the Industrial Relations Commission and the diminished role of awards will weaken the position of the unions and their members – not to mention all the ununionised workers who've been protected by the old system without really knowing it.

But the most rabidly anti-worker aspect of the changes – and the thing that will make our wage-fixing arrangements more doctrinaire than anything in America or other developed countries – is the efforts to discourage collective bargaining.

Only in Australia will employees be denied the right to bargain collectively if that's what a majority of them want. Almost equally amazing is the provision that will allow employers to unilaterally terminate agreements (whether collectively bargained or individual) after their nominal expiry date, provided only that they give 90 days' notice.

When that happens, workers won't fall back on the provisions of their awards, they'll fall back on nothing more than the Government's five minimum conditions – the minimum wage set by the Fair Pay Commission, four weeks annual leave, 10 days sick leave, 12 months unpaid maternity leave and ordinary hours of work *averaging* 38 hours a week.”

The commentator in question is Ross Gittins of the Sydney Morning Herald - not a paid hireling of the trade unions, I'm sure you would agree.

### **Building Industry**

The legislation I have described does not help the estimated 700,000 blue collar workers employed in the industry I am from, the Australian building industry. But the story is much more grave for participants in the building industry (blue collar, white collar, managers and suppliers) than that just described.

Since 12 September 2005, Australian workers in the building industry have had to work under what could well be the most oppressive set of industrial laws anywhere in the world. On the 12<sup>th</sup> September 2005 Royal Assent was given and the Building and Construction Industry Improvement Act (BCIIA) became law.

In its crusade to bust the Australian building unions, the Howard Government has tossed aside the most basic democratic principles and introduced an industrial system that makes us look more like a Police State.

#### **Main features of these laws**

- The Australian Building and Construction Commission (ABCC) – a \$100m Government-funded and directed agency headed up by hand-picked political appointees. ABCC has the power to haul in anybody and force them to answer questions under oath in a secret interrogation. These are not inquiries about criminal matters, but about everyday workplace issues. A failure to comply attracts a **six month jail term**.

- Fines of up to \$22,000 for individuals and \$110,000 for unions as well as unlimited damages and other court orders, for taking unlawful 'building industrial action'. Almost any departure from normal work patterns can be penalised. Even disputes about health and safety can attract fines. When the laws were introduced some industrial action was **declared unlawful retrospectively back to 9 March 2005**.
- Up to 150 Government 'inspectors' (mostly ex-police officers) patrolling worksites, intimidating workers and 'assisting' employers to settle industrial disputes, as well as an army of taxpayer-funded lawyers intervening in court cases to side with the employers.

According to the ABCC's own figures, between 1 October 2005 and 31 December 2006, 41 Australians were interrogated by the ABCC under oath and behind closed doors.

We aren't told what they were questioned about because each one of them was forced to give an 'undertaking of confidentiality', meaning they could only discuss the process with their lawyer (if they had one). Not even their family would know what they were being questioned about.

We do know that these are not investigations about serious criminal matters or indeed any criminal matters at all, but about possible breaches of industrial laws that make virtually any form of dissent in the workplace illegal – 'Who voted to stop work? What did your workmate say during the union meeting? Who decided the job wasn't safe?'

Under these laws, it is a criminal offence to refuse to answer questions or hand over documents on the basis that to do so might tend to incriminate you. You don't have a 'right to silence'. [Sections 52 & 53]

Evidence given by you in your interview can then be used to prosecute your fellow workmates or your union.

The ABCC's 'purpose built interview rooms' have, their website proudly boasts, 'state of the art technology and appropriate security'.

The ABCC does not disclose the address of its offices.

The ABCC is not just an investigator, it is also a prosecutor. It has absolute discretion over what cases it takes to court and who it takes them against.

The biggest case taken on by the ABCC so far is the prosecution of 107 construction workers on the Perth to Mandurah rail project in Western Australia. The claim is that these workers took industrial action to support their union delegate who had been sacked.

The workers face fines of up to \$28,600 and the prospect of paying thousands more in court costs. The ABCC has warned that it may bring a claim for damages – which it can do whether the employer involved wants or not

This kind of legal action by the Federal Government against ordinary working people is unprecedented in Australia.

## **ILO**

The International Labor Organisation (ILO) of which Australia was a founding member, has been very critical of these special building industry laws.

The ILO's Committee on the Freedom of Association, in November 2005 when dealing with an ACTU complaint about the new building legislation, called upon the Australian Government to make substantial changes to the BCIIA. These changes included a request to amend the "unlawful industrial action" provision to bring it in line with Freedom of Association principles. It requested amendments to Sections 39, 40, 48, 49 and 50 to eliminate excessive impediments, penalties and sanctions against workers and unions for taking industrial action in pursuit of collective bargaining.

Similarly the Committee urged the revision of s.64 to let the parties determine the level of bargaining and urged the Government to take the necessary steps in line with Convention 98 to promote genuine collective bargaining in the building industry.

Further, the Committee expressed concern about the extent of the powers conferred on the ABCC and called on the Government to introduce safeguards to ensure the ABCC does not interfere with the functioning of trade unions and also that an appeals mechanism should exist from arbitrary decisions of the ABCC.

The Committee on the Freedom of Association reiterated these findings in June 2006.

To date the Howard Government has done nothing to respect these ILO views – rather it has claimed the learned Committee misunderstood the purpose and effect of the laws.

In contrast to what I've described above I now want to outline an alternative policy. The policy I outline is the result of an ACTU convened Working Party (that I participated in) that investigated other industrial relations systems around the world.

### **An Alternative Approach**

As a result of the working party's findings the ACTU adopted this new approach at its Congress in October 2006. Negotiations are currently underway between the ACTU and the ALP whereby we in the union movement are working to have the ALP adopt key planks of the new union approach. We are hoping this approach will form the framework of the policy a Rudd Labor Government would legislate for. The policy, as adopted by the ACTU Congress, has 6 key planks. They are:

#### **1. A right to representation**

Freedom of Association is a fundamental human right, but it means more than a right to join a union. It includes a right for workers to be represented in discussions with an employer and the right of workers to join a union so they can draw upon the combined voice of their co-workers in workplace discussion and negotiations.

For Australia's laws to comply with international obligations, then the law must provide that all workers have the right to union representation in collective bargaining.

It is proposed that the two concurrent streams of union and non-union collective agreements be simplified and streamlined into a single agreement-making process. This approach would still provide for collective agreements to be made without a union. However, where a union has a member, it would be entitled to represent the member and be party to the agreement with the union's ability to represent a worker continuing to be governed by the unions' eligibility and coverage rules.

## **2. An obligation to bargain in good faith**

Australia's industrial legislation should also be established upon the basis and on the assumption that parties will collectively bargain in good faith.

An obligation to bargain in good faith underpins the laws in Canada and New Zealand and even to some degree in the United States. It is a feature of our laws in a number of Australian states. Where bargaining is underpinned by an obligation to deal in good faith, the parties have every possible opportunity to reach agreement. Simply, it makes good industrial sense.

Employers and unions (within their area of coverage) should have the freedom to voluntarily enter into collective bargaining negotiations and to reach agreement, following which approval and certification processes should occur.

The obligation to bargain in good faith does not mean that parties must make concessions or reach agreement. Nor should the taking of protected industrial action in pursuit of a claim – including the taking of protected industrial action in pursuit of common claims and outcomes in more than one collective agreement – be seen as a breach of good faith. However, where a party is not collectively bargaining in good faith, the Commission should be able to make good faith bargaining orders.

Whether conduct amounts to be a breach of good faith should be for the Commission to decide, subject to clear guidance.

Where there is a failure to bargain in good faith, the Commission should have discretion, subject to legislative guidance, to grant orders to do, or stop doing certain things, and should be able to make remedial orders to restore the status quo in order to remedy a breach of good faith.

Consistent with the notion that parties should be free to bargain, collective bargaining and agreement-making which is entered into voluntarily on a single-business or multi-employer level should be available without recourse to the Commission.

### **3. A democratic voice for workers**

The obligation on the AIRC should be to promote bargaining in good faith towards the making of collective agreements, and the presumption should be that employers cannot refuse to bargain on the grounds that they oppose the making of a collective agreement.

However, over recent years there has been an increasing number of employers who have steadfastly refused to accept the principle of collective bargaining, arguing that they should be able to unilaterally determine the basis upon which they engage with their workforce.

These employers often falsely argue that their employees do not want to collectively bargain. Under the current law, there is no mechanism to test this claim. An employer has effective power to unilaterally determine the form of bargaining, regardless of the views of the workforce.

In the United States, Canada and the United Kingdom, an employer must bargain towards the making of a collective agreement if the relevant tribunal is satisfied that the majority of workers want a collective agreement.

Union members should have a right to representation that is not conditional upon the level of union membership at the workplace. However, in the Australian context as a matter of industrial common sense, we believe that bargaining by a union should be based upon the support of employees in the workplace.

The Commission must ensure that employee opinion is ascertained in a manner that is fair and free of intimidation or inducements. The Commission should be able to consider evidence from employees or their representatives, including evidence of a vote at a workplace or mass meeting; petition and/or workplace resolutions from employees; the result of a ballot conducted by a union(s); or the level of union membership amongst employees.

#### **4. A wide scope for collective agreements**

While collective agreement making will predominantly continue to be at the level of a single business, employer, or a group of related businesses bargaining as a single business (commonly described as enterprise bargaining), the parties should have greater capacity to pursue bargaining at different levels.

Consistent with ILO jurisprudence that parties should be free to determine the level at which they bargain, this policy advocates an industrial relations system that allows parties to consensually bargain at whatever level they choose.

The law should allow employees industrial action in pursuit of an agreement at a single business or within a group of related companies, or in pursuit of common claims across two or more single businesses.

The law should also provide for Industry Consultative Councils that facilitate consultation, negotiations and the development of industry-level framework agreements with the parties free to determine their own agenda.

## **5. Removal of restrictions on the right to strike**

Legally protected industrial action is integral to bargaining, as it provides the means to balance the economic power of the bargaining parties.

Australian labour law contains restrictions on strike action that are inconsistent with our international obligations and that are out of step with the rest of the developed world.

Taking protected industrial action in pursuit of an agreement to cover a single business (including the pursuit of common claims at more than one single business) should be available without recourse to the Commission. Where a multi-employer agreement is being pursued, protected action should be available where the Commission has noted the consent of the parties to a multi-employer bargaining process, or where the Commission has agreed that bargaining for a multi-employer agreement should occur.

Legally protected industrial action should be available to employees during bargaining, without the need for an outside authority to conduct a secret ballot.

Protected industrial action should not be able to be undermined by the use of external replacement labour, and industrial action by employers (lock-outs) should not be automatically available.

## **6. Access to arbitration as a last resort**

Good faith bargaining that is underpinned by a decent and secure safety net should take centre stage in our industrial relations system, and arbitration should be used as a last resort to ensure that parties come to the bargaining table in good faith. It is contended that bargaining with an eye to the prospect of arbitration as a last resort encourages parties to genuinely seek agreement.

In the event that bargaining breaks down or has failed and there is no reasonable prospect of reaching an agreement, or where good faith orders have been breached, the Commission must then be able to arbitrate as a last resort to resolve the dispute.

It is also proposed that the Commission be able to arbitrate if it is in the public interest to do so. In this regard, the Commission should consider the history of bargaining at the workplace, whether good faith negotiations have been complied with and are genuinely exhausted, the views of the parties and the workers, and the relative bargaining strength of the parties, in particular the needs of the low-paid.

## **Conclusion**

Australia's industrial relations system today is tipped decidedly in favour of employer interests and is strongly antipathetic to workers and their legitimate representatives, the trade unions.

The labour law regime in Australia's building industry is quite simply a disgrace to a so-called advanced, democratic nation.

This paper, while exposing the current harsh and undemocratic provisions against workers and worker representatives, has also sought to outline an alternative policy that would ground our industrial laws in the well established traditions of the ILO and the advanced northern hemisphere democracies.

I urge you to give proper consideration to these proposals and reject the Howard Government's propaganda that WorkChoices is 'modern', 'efficient' or 'job creating'.

WorkChoices will go down as a dark chapter in our nation's proud, democratic story.

Thanks

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