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Policy Forum: Workplace Relations Reform

Workplace Relations Reform: Where to Now?

Mark Wooden
Melbourne Institute of Applied Economic and Social Research
The University of Melbourne

1. Introduction

A feature of the 2004 federal election was the limited debate about the likely direction of further workplace relations reform under a re-elected Howard government. Indeed, the debate tended to focus on what a future federal Labor government might do rather than on what the Coalition might do if re-elected. There is little doubt in my mind that the pre-election debate was shaped by the expectation that further reform would continue to be stymied by a hostile Senate. Of course, as we now know, the election result turned out very differently—the Coalition gained control of the Senate. Most commentators thus expect that the government will not only implement its 2004 election policies, but after 1 July will introduce a raft of other reforms designed, on one hand, to further reduce the role for third parties in bargaining and the influence of labour law in general and, on the other hand, to unify labour law into a single national system.

The objectives of this Policy Forum are to re-examine the cases both for and against further reform of workplace relations regulation, and to consider the likely shape and consequences of future reform. The forum includes contributions from advocates for, and critics of, the government's reform agenda. In addition, we have a contribution from a labour law expert who analyses at length how a single national system of industrial (or workplace) relations could be brought about; something the Prime Minister has recently made very clear he is committed to.

In this introductory piece I seek to set the scene by identifying and discussing a number of key reform proposals thought to be under consideration by the Howard government during its fourth term. In particular, I focus on:

- unfair dismissal laws and other measures to assist small business;
- independent contractors legislation;
- minimum wage setting; and
- a single unified national system.

2. Unfair Dismissal Laws (and Other Measures to Assist Small Business)

The highest priority on the government's workplace relations agenda must surely be reforms intended to assist small business. This, for example, was one of the few areas where the Coalition made significant commitments in its workplace relations election policy. In particular, the Coalition signalled its determination to reintroduce legislation to the Senate that would exempt small businesses from the unfair dismissals provisions of the *Workplace Relations Act 1996* and from having to make redundancy payments. It thus should be entirely unsurprising that the relevant pieces of legislation (the Fair Dismissal Reform Bill 2004 and Small Business Employment Protection Bill 2004) were reintroduced to the parliament late last year.

Critics often argue that exemption of small businesses from the unfair dismissal laws are not all that significant given (i) most small businesses operate under state laws with their

own unfair dismissal statutes, and (ii) the marked decline in unfair dismissal applications in recent years. The first point is well taken and why I would expect to see the reintroduction of a Bill which would extend the coverage of the federal unfair dismissals jurisdiction to all corporations, and not just those covered by federal awards or agreements.[1] This second point, on the other hand, is less relevant. Just because there are fewer applications does not mean the unfair dismissal provisions are not costly to business; many settlements are reached without coming before the Australian Industrial Relations Commission (AIRC).

Ultimately, the more significant criticism is that unfair dismissal exemptions protect workers against unfair, and in some cases malicious, treatment by employers. But perhaps tolerance for unfair behaviour on the part of some employers is a cost worth paying if it helps our most disenfranchised members of society find jobs. Some might argue that there are more civilised ways of getting people into jobs, but they probably forget that we are talking about small business. For many owner-managers of small businesses hiring and firing decisions are no small matter. They do not have specialists who are trained in recruitment and selection, their businesses are not large enough to retain employees on their books who do not contribute to a healthy bottom-line, and they often do not have enough time to be regularly monitoring and supervising workers. Indeed, for many small businesses there are good reasons to employ no one, which possibly helps explain why many businesses do just that. According to Australian Bureau of Statistics (ABS) data for 2000–01, half of all private sector businesses employed no one (ABS 2002). And many others only employ family members and close friends, staying away from people they do not know and who may be costly and difficult to retrench.

Also of significance for small business employers is the Choice in Award Coverage Bill 2002 which was introduced into parliament in late 2002 and subsequently blocked in the Senate. Indeed, Chris Briggs and John Buchanan believe that this piece of legislation, if reintroduced, would have the potential to pave the way for a growing sector of award-free employees. As Briggs and Buchanan explain, one of the aims of this legislation is to constrain the ability of unions to extend award coverage to small businesses which do not have any employees who are union members, and of course very few small business employees are union members. Again, the weakness of this legislation is that most small businesses are covered by state awards and hence will be unaffected. Nevertheless, if this reform could be extended beyond the federal jurisdiction there seems little doubt that it would be far-reaching. In theory we would have, in the small business sector at least, the outcome advocated by Des Moore—employment conditions in most small businesses would depend entirely on the relative bargaining strength of the employer and employee, and would not be constrained by minimum standards specified in awards.

3. Independent Contractors Act

Another reform measure that the Coalition committed itself to prior to the election, and which is of potentially large significance for small business, is the introduction of legislation—a new Independent Contractors Act—designed to protect and enhance the freedom to contract and to encourage independent contracting. What this might involve has been discussed in more detail in a recent government discussion paper (Department of Employment and Workplace Relations 2005). At a minimum we can expect the introduction of amendments to the *Workplace Relations Act* to prevent awards and agreements from containing clauses that restrict engaging independent contractors and labour hire workers or impose conditions on their engagement. More importantly, serious consideration is being given to ensuring that this new Act will override state laws on deeming (that is, laws that deem that contractors within particular sectors or industries are employees and therefore subject to the same workplace regulations as employees) and unfair contracts.

This proposal is discussed at much greater length by Briggs and Buchanan who, in contrast to the views expressed in the article by

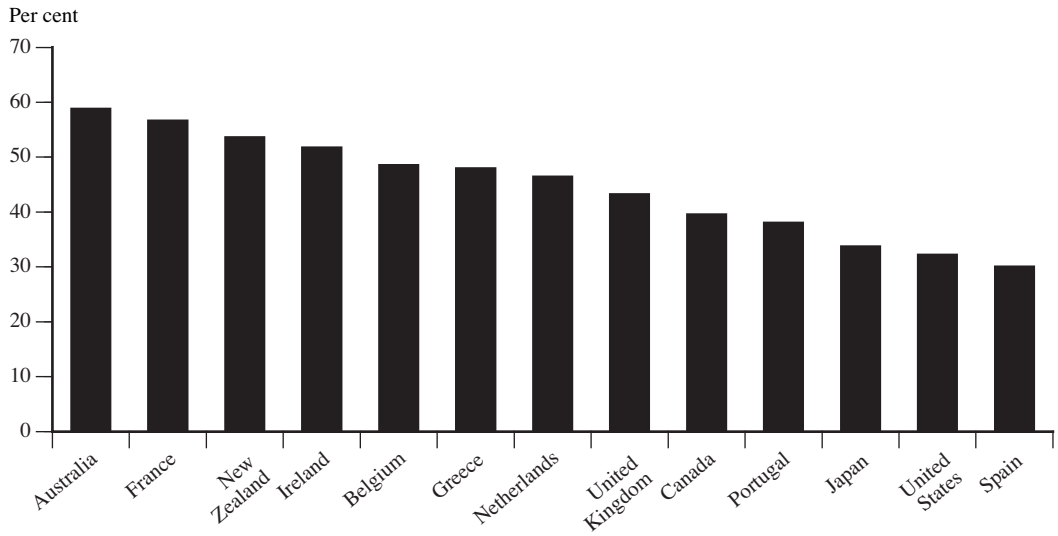
Moore, are alarmed at the ramifications of this type of reform. They are particularly worried about the potential for employers to take advantage of this legislation to establish 'bogus' contractor arrangements with some or all of their employees. The government, on the other hand, has indicated that it will consider the introduction of civil penalties for employers who deliberately avoid employer responsibilities through establishing false independent contracting arrangements. Of course, how effective those penalties are will depend on their size. More importantly, the courts have long wrestled with the issue of how to determine employment status, and it is generally now believed that determinations can only be made on a case-by-case basis and that it is impossible to apply tests of employment status on a consistent basis. Preventing sham arrangements is thus likely to be difficult and costly, with only the legal fraternity guaranteed to come out ahead.

4. Minimum Wage Setting

One of the ideas floated since the election result is reducing, if not eliminating, the role for the AIRC in setting minimum wages. Briggs and Buchanan, for example, suggest that the government appears likely to establish a panel similar to the UK Low Pay Commission which would comprise economic experts and industry representatives. If it operated like the UK Commission, then it would provide advice directly to the federal government with responsibility for varying the federal minimum wage moving to parliament. An alternative model would be for that panel to make recommendations to the AIRC with legislation preventing the AIRC from awarding wage increases in excess of that recommended.

The case for a change of this type can be made on at least four grounds. First, as noted by Matthew Ryan, Australia's minimum wage is relatively high compared with most other developed countries. The recent report of the UK Low Pay Commission (2005, pp. 233–41), for example, reported on data for 13 OECD countries for 2004 which showed that relative to full-time median earnings, the adult minimum wage in Australia was higher than for any other country in its list. These figures are reproduced in Figure 1.[2] For most economists, including Ryan and Moore, minimum wage to median earnings ratios of close to 60 per cent are indicative of a system that prices many of the unemployed out of the labour market. The actions of the AIRC, however, in persistently raising the federal minimum wage over time indicate that either it does not care about the jobless or that

Figure 1 Adult Minimum Wages Relative to Full-Time Median Earnings, Mid-2004: OECD Countries



Source: UK Low Pay Commission (2005, p. 237, Table A4.2).

it believes there is no relation between the price of labour and the quantity demanded.

Second, the AIRC has little or no expertise that would enable it to make sound decisions which take account of the economic effects of minimum wage increases. Briggs and Buchanan contest this claim, arguing that the application of 'exacting standards of evidentiary proof' ensure that the AIRC's decisions are economically sound and as a result its decisions have been 'broadly in line with other international institutions'. The latter conclusion, however, flies in the face of the figures reported in Figure 1. While the AIRC may have been handing down similar rates of increase in minimum wages as in other OECD countries, Australia is starting from a very different base. As recognised by Card and Krueger (1995, p. 393), who ignited the global debate about minimum wages and jobs in the 1990s, their finding that minimum wage increases do not harm employment only apply to the levels of minimum wages that existed in the United States, and beyond some point, minimum wage increases must harm employment. As Figure 1 reveals, the minimum wage in the United States is still well below that in Australia.

Third, and as emphasised by both Moore and Ryan, minimum wage increases are not the most obvious method for dealing with the income needs of Australian households. They certainly cannot help improve the living standards of those without jobs. Further, as highlighted by Ryan, income data have consistently shown that minimum-wage workers are not concentrated in low-income households but can be found dispersed throughout the income distribution. Increases in minimum wages are thus unlikely to be very effective in redistributing income from the rich to the poor. Instead, income redistribution is best left to our extensive tax and transfer system.

Unfortunately, while our tax and transfer system is a highly effective means for redistributing income, some of its features, and especially means-testing of eligibility for payments, mean that many low-income families face relatively high effective marginal tax rates. This reduces the incentive to work and further reduces the effectiveness of minimum wage increases in dealing with income needs. Indeed, in the most extreme case, a full-time minimum-wage worker with a non-working spouse and two young children would actually earn less income after the wage increase, not more. Income taxation (at the marginal rate of 30 per cent) together with the withdrawal of both Parenting Payment (at 70 per cent) and the Low Income Tax Offset (4 per cent) more than counteract the increase in gross wage income. Not surprisingly, relatively few parents in single-earner couple households are on the minimum wage—if they cannot secure jobs paying much higher wages either the non-working partner moves into the workforce or they gravitate towards a life of welfare dependence.

This same line of reasoning, however, implies the need for a much more radical change than simply shifting responsibility for minimum wage increases from one body to another. Instead, decisions about minimum wages should be made in tandem with decisions about taxes and welfare support. Reform to our minimum wage setting institutions needs to occur in tandem with the often promised, but so far undelivered, reforms to our welfare system. Simply restraining minimum wages, for example, will do very little for employment creation if out-of-work benefits continue to rise.

Finally, an adversarial judicial system is not the ideal forum for making deliberations about the economic impact of wage increases. While Briggs and Buchanan clearly endorse the current system, this is exactly the wrong type of environment for bringing out the 'truth'. The parties to the proceedings have strong incentives to adopt extreme positions and then to present their evidence in as favourable a light as possible, while doing their best to undermine the evidence presented by the opposition. Further, given this environment, it is even more critical that the commissioners have the skills and expertise to make sense of the evidence presented before them and to be able to determine what is irrelevant or misleading.

5. A Unified National System

Another reform initiative that the federal government now appears committed to is that of

bringing about a single national labour law system. How it might achieve this is discussed at length by William Ford. Politically, the only viable option would appear to be to extend the operation of the federal workplace relations laws to all corporations by invoking the corporations power in the Constitution. While such an approach is unlikely to go unchallenged, Ford's analysis suggests that a new corporations-based unitary system would be constitutionally feasible. While this would not eliminate a role for the state systems—the states would still have responsibility for employees of unincorporated businesses and, presumably, state public sector employees—it would effectively eliminate overlapping jurisdictions.

The question, however, remains as to why the federal government would want to pursue this option. Ryan argues that there are clear efficiency gains from eliminating the wasteful duplication of activity that arises when employers have to deal with both federal and state systems, an argument with which Ford appears to concur. Nevertheless, both Ford and Briggs and Buchanan suggest that proponents of reform often oversell the benefits. The proportion of businesses affected by multiple systems of regulation is almost certainly quite small, and restricted mainly to the well-resourced large multi-state businesses. Briggs and Buchanan also highlight the much greater complexity of the federal system compared with that of the states; a single unified system could thus actually create more problems for employers, especially small employers, than it solves. Further, there would have to be concerns about the potential political fallout from Canberra flexing its muscle in this way. This is not the first time that a federal government has sought to centralise responsibility for industrial relations law, and on those previous occasions it often ended in disaster for the government.

There is, however, one obvious and important reason why the current government is seriously pursuing this option. A unified single system ensures that its reforms will extend to cover employees of all businesses (or at least all incorporated businesses) and not just employees of larger organisations. As should be clear from the foregoing, the government's new workplace reform agenda is largely a small business agenda. In contrast, the earlier reform agenda of the 1990s, with its emphasis on promoting the spread of enterprise agreements, was targeted much more at large and medium-sized businesses. According to ABS data, for example, less than 10 per cent of employees in small businesses (that is, businesses with less than 20 employees) in 2004 were covered by collective agreements (ABS 2005, p. 32). Instead, conditions of small business employees tend to be much more closely tied to awards (though the majority of small business employees are still paid at rates above the award rate). But as has been repeatedly emphasised, the majority of small businesses (with the notable exception of those based in Victoria) currently operate under state jurisdictions. While the government can use piecemeal approaches to ensuring its federal laws override state laws, there is obviously considerable attraction in having a system where laws apply to all employers, large and small.

6. Concluding Remarks

The issue of workplace relations reform remains highly contentious and reaching a consensus on the direction of reform, let alone its scope, is unlikely. This difference in opinion is reflected in the contributions presented here. Moore, for example, is clearly in favour of a system which would impose minimal obligations on employers, mainly in the area of workplace safety and discrimination, though he appears to concede that a radical overhaul of the current system is unlikely. Ryan too is a supporter of change that facilitates fewer restrictions on employers. His main argument, however, is that regulation of workplace relations should be focused entirely on the efficiency goal with equity objectives left to the tax and transfer system. Briggs and Buchanan, on the other hand, believe that the likely direction of future reform is unfortunate. They agree that labour laws in this country are in need of 'modernisation', but the challenge is how to allow for new 'flexible' working arrangements while at the same time preventing

the emergence of a US-style low-pay, bad jobs sector. They believe that the proposed reforms will only worsen the existing problems in the Australian labour market.

The lack of consensus is also reflected in marked differences in the stance of the major political parties. For example, in a speech delivered at the recent Melbourne Institute Economic and Social Outlook Conference in April, Peter Costello, the federal Treasurer and Deputy Leader of the Liberal Party, identified workplace relations reform as being very high on the government's reform agenda. To quote him:

> [W]e need a new dose of active wide-reaching and vigorous industrial relations reform in this country. No single reform would boost productivity in the Australian economy to the same extent. [Costello 2005]

In contrast, at a speech delivered at the same conference, Kim Beazley, Leader of the Opposition, explicitly rejected the need for further workplace relations reform. In his view, the scope for productivity gains from such reform has been exhausted (Beazley 2005).

It thus seems clear that whatever the outcome of the next round of reforms, workplace relations is unlikely to be an issue that is going to disappear from public debate any time soon.

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Endnotes

1. For some reason the Small Business Employment Protection Bill 2004 includes a provision that would enable this law to override state laws as they apply to corporations whereas the Fair Dismissal Bill 2004 does not.

2. The Australian figure reported here uses earnings data from the ABS Labour Force Survey. If data from the ABS Survey of Employee Earnings and Hours are used instead, the ratio declines to 55.1 per cent.

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