

**SPEECH TO THE INDUSTRIAL RELATIONS SOCIETY OF QUEENSLAND'S
PATRONS LUNCH**

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It is an honour and a pleasure to be invited to speak today at the Industrial Relations Society of Queensland's Patrons Lunch.

The Australian Industry Group (Ai Group) has had a long involvement with the Queensland industrial relations system. Our registration in the Queensland system dates back to 1943 – adding on to registrations in New South Wales in 1902 and federally in 1926.

We can also rightfully claim to be a very good training ground for members of the Queensland Industrial Relations Commission. Current Deputy President Bloomfield and Commissioner Asbury were both appointed to the Commission while officers of Ai Group's predecessor organisation – MTIA.

It is an interesting and important time for workplace relations. The new Government is intent on building a new system and is moving quickly and with determination to do so.

Already, much has occurred. The Government's Transition Legislation came into operation in late-March signalling an eventual end to the era of AWAs. Key areas of current activity include:

1. Award modernisation; and
2. The National Employment Standards.

The next phase is the Government's substantive workplace relations legislation.

(A "map" of the development process for the new workplace relations system is **attached**.)

Times are interesting. Inflation is on the rise and wages are drifting

upwards, despite this week's soft Labour Cost Index figures. Some major bargaining rounds are coming up. Thousands of construction industry agreements expire this year and hundreds of manufacturing agreements expire in the first half of next year.

All this points to considerable risks if we get the shape or details of the new workplace relations system wrong.

There are many speeches to be made about this issue, both about the substance of it and the dynamics driving it. Today I want to concentrate on the substantive legislation and some key outstanding issues.

Labor's IR policy

When the ALP released its "*Forward with Fairness*" policy statement in April last year, business had its first detailed account of Labor's apparent intentions and by and large we didn't like what we saw. Ai Group led the criticism of the original policy.

To its credit, Labor responded by releasing an "*Implementation Plan*" in August. This went some way towards alleviating industry's concerns, including in regards to the transitional arrangements for AWAs. It was an important sign that a Labor Government would be prepared to listen to genuine concerns and take a practical approach to implementation.

For much of the past 12 months, the plan to abolish AWAs, and how this would be implemented, has been the focal point of debate. But, as Ai Group has emphasised from the start, other elements of the Government's policy are of equal or greater importance. The statistics vary, but give or take a per cent or two either way, only five per cent of the workforce are covered by AWAs. This contrasts with 38 per cent¹ covered by registered collective agreements. It is also noteworthy that over 60 per cent of the collective agreements operate in the manufacturing or construction industries where the unions are strong.

¹ ABS, *Employee Earnings and Hours*, Cat No. 6306.0, May 2006

Important announcements

Some important announcements have already been made by the Government which will assist in preserving the current harmonious industrial environment:

- Industrial action will only be permitted when negotiating workplace agreements;
- Industrial action in pursuit of pattern bargaining will remain banned;
- Secret ballots will continue to be required for industrial action;
- There will be immediate access to Courts for injunctions and damages if unlawful industrial action is taken;
- The secondary boycott provisions of the Trade Practices Act will be retained;
- Bargaining agent's fees for non-union members will remain banned; and
- The existing right of entry laws will remain.

Despite these announcements, critical areas of the Government's collective bargaining policy have yet to be resolved.

Good faith bargaining obligations

From Labor's policy statements we know the following things about the proposed good faith bargaining system, the full details of which will be revealed in the substantive legislation:

- If the majority of employees in a workplace want to bargain collectively, the employer will have an obligation to bargain collectively "*in good faith*";
- If an employer refuses to bargain collectively, the employees or their union will be able to apply to Fair Work Australia for an order requiring the employer to do so;
- Good faith bargaining will not require bargaining participants to make concessions but if protracted industrial action is taken, which is causing significant harm to the parties, Fair Work Australia will have the power to end the industrial action and arbitrate an outcome for the parties.

The gateway to bargaining obligations – majority support

Labor policy: *“Labor will allow Fair Work Australia to determine the level of support for collective bargaining...Fair Work Australia will have discretion about how it does so, for example using evidence of union membership, petitions or a secret ballot. Under Labor, if a majority of employees at a workplace want to bargain collectively, their employer will be required to bargain collectively with them in good faith.”²*

It can be seen from this extract from *Forward with Fairness* that the proposed gateway to good faith bargaining obligations is a very rickety one!

A secret ballot will not necessarily be required in determining whether a majority of employees support the negotiation of a collective agreement. Under the policy, a petition will apparently do.

If the Government proceeds with this approach, what will stop a union official on a recruitment drive making unrealistic claims to employees about what is achievable in bargaining and then asking the employees to sign a petition in support of a collective agreement? The employees will not need to join the union or make any investment in time or money. If the majority sign the petition, Fair Work Australia will almost certainly order the company to bargain over a collective agreement.

In the US and UK, secret ballots are required before any bargaining rights are triggered (unless all parties agree otherwise) and Ai Group can see no reason why a similar requirement should not apply in Australia if the Government proceeds with its good faith bargaining system.

Ai Group’s preferred position is that the Government retain an entirely voluntary bargaining system as has been in place since the Keating Government introduced enterprise bargaining in 1993. Employees should have the right to seek a collective agreement if they want one; to take industrial action in pursuit of one; and to be protected by a fair safety net whether or not they have one - but employers should not be legally compelled to bargain.

² *Forward with Fairness*, April 2007, p.14.

A majority of what?

Labor's policy does not specify which group/s of employees will be included when assessing whether there is majority support for a collective agreement. Will the relevant population of employees include, for example:

- Only those employees who have been covered under any previous collective agreements in the workplace;
- Only award-covered employees; or
- All of the employees which the union pursuing bargaining rights would like to be covered by the proposed collective agreement (including, say, blue-collar staff plus admin, professional and managerial staff)?

Many manufacturing and construction unions have the ability under their eligibility rules to represent various white collar staff but to date have had very little success in including them under collective agreements. Claims have been pursued from time to time but companies, for obvious reasons, have refused to abolish their individual merit pay arrangements for their white collar staff. These staff members have often preferred individual arrangements.

This issue needs to be addressed in the Government's substantive workplace relations legislation.

In heavily unionised workplaces the vast majority of employees are often blue collar. In such circumstances it would be very easy for a union to gain majority support for a collective agreement covering both blue and white collar workers - even if none of the managers, professionals, supervisors, administrative or technical staff want to be bound by a collective agreement.

Under Labor's policy, once majority support is gained, bargaining rights and obligations are triggered and if agreement is not eventually reached, compulsory arbitration will be available in some circumstances. The eventual outcome could be a collective instrument covering all employees.

In the US and UK, the issue of who participates in the secret ballot to trigger bargaining rights is often contested. Both unions and employers often adopt a tactical approach in arguing which group/s should be included in the vote to determine whether a majority exists. Any contest over this issue is resolved at the secret ballot stage.

In determining the issue in the US, the Labor Relations Board considers whether “community of interest” exists amongst the proposed grouping of workers. This concept goes to such issues as the similarity of work and the method of supervision. The group of employees included in a previous collective agreement is powerful evidence of “community of interest”.

A key concept in the UK system is that the grouping of employees for the purposes of determining bargaining rights must be “compatible with effective management”. Again, this concept goes to the similarities in the terms and conditions of employment amongst the employees in the proposed grouping.

If the Government proceeds with its policy of majority support triggering good faith bargaining obligations:

- Secret ballots should be required, unless all parties agree that majority support exists;
- Any dispute about which workers should be grouped together for the purposes of determining whether a majority exists should be resolved by Fair Work Australia before the secret ballot is held;
- In resolving a dispute about the grouping of employees, the US and UK concepts of “community of interest” and “compatibility with effective management” appear practical, and should be explored in the Australian context; and
- If Fair Work Australia determines that a particular grouping of employees is appropriate for the purposes of determining whether a majority exists, and majority support is subsequently attained, this must not prevent a company maintaining a bargaining position that it will only enter into a collective agreement for a different grouping of workers.

What are the good faith bargaining obligations?

So far I have been talking about how good faith bargaining obligations are triggered. Another extremely important issue is what the specific good faith bargaining obligations will be.

Labor policy: “The obligations are simple, such as:

- *Attending and participating in meetings at reasonable times;*
- *Disclosing relevant information in a timely manner, subject to appropriate protection for commercial in confidence information;*
- *Responding to proposals made by a party in a timely fashion;*
- *Giving genuine consideration to the needs of the other parties, and providing reasons for their responses; and*
- *Refraining from capricious or unfair conduct or conduct that undermines freedom of association or collective bargaining.”³*

It appears from Labor’s policy that there will be no obligation to make concessions during bargaining. This is important. It will also be important that a company cannot be held to have acted “capriciously or unfairly” for maintaining a position during bargaining, for example, that:

- Whilst genuinely consulting with the union and employees about their desire for a collective agreement, and listening to their arguments in support of one, the company is not convinced that it is beneficial to abandon its existing pay setting arrangements;
- Whilst Fair Work Australia may have determined that both manufacturing and clerical employees should be included for the purposes of determining whether majority support exists, the company is not prepared to enter into a collective agreement covering its clerical employees.

Good faith bargaining provisions were in place under the Keating Government’s IR laws⁴ but such provisions were held in the *Asahi*⁵ case, in which Ai Group was heavily involved, to only require a party to **meet or confer** and to comply with various procedural obligations. **It is vital that any new good faith bargaining obligations not extend beyond such concepts.**

As a five member Full Bench of the Australian Industrial Relations Commission (AIRC) said in the *Asahi* case - “compulsion” and “bargaining” are totally incompatible. “An agreement cannot be reached with a person who does not want to agree and negotiations for an agreement cannot take place with a person who does not want to negotiate”. Bargaining is conceptually a voluntary thing.

³ *Forward with Fairness*, April 2007, p.15.

⁴ S.170QK of the Industrial Relations Act 1988

⁵ *Asahi Diamond Industrial Australia Pty Ltd v AFMEU*, 1994, Print L9800.

Is the new requirement to bargain “in good faith” similar to the existing requirement to “genuinely try to reach agreement”?

A further very important issue is the link between the obligation to bargain “in good faith” and the existing requirement to “genuinely try to reach agreement”.

In several Federal Court and AIRC decisions it has been held that the two concepts are the same thing. For example, in *AMIEU v G & K O’Connor Pty Ltd*⁶, Justice Marshall said that he could “see no material distinction between the concept of bargaining in good faith and the concept of a genuine attempt to reach agreement.”

It is very important that the existing obligation to “genuinely try to reach agreement” not be disturbed. Under the existing *Workplace Relations Act*.

- Parties are required to have “genuinely tried to reach agreement” before they have the right to take industrial action;⁷
- If a party has not “genuinely tried to reach agreement” before organising or taking industrial action, the AIRC must suspend or terminate the bargaining period;⁸
- The pattern bargaining laws, which the Government has committed to retain, revolve around the concept of “genuinely trying to reach agreement”. The concept is defined within the Act in terms of behaviour that constitutes bargaining at the level of a single business;⁹ and
- The secret ballot laws, which the Government has committed to retain, are linked to the requirement to “genuinely try to reach agreement”. Parties must satisfy the AIRC that they have met this requirement before they can obtain a secret ballot order.¹⁰

In Ai Group’s view, the easiest approach would be to simply use the term “genuinely try to reach agreement” in the substantive legislation, rather than introduce a new term called “good faith bargaining”. The two concepts are essentially the same thing but the big difference is that the existing term is woven into many vital current legislative provisions.

⁶ *AMIEU v G & K O’Connor Pty Ltd* (1999) FCA 310, 22 March 1999, para 45.

⁷ s.444

⁸ s.430

⁹ ss.421, 431, 439 and 497

¹⁰ s.461

Some examples codifying the requirement to “*genuinely try to reach agreement*” could be set out in the Act (such as those in the dot points in the extract from Labor’s policy that I referred to a moment ago). In fact, this was one of the recommendations of the Cole Royal Commission into the Building Industry.¹¹

Compulsory arbitration of workplace agreement outcomes

Labor policy: “*where protracted industrial action is causing significant harm to the bargaining participants.....Fair Work Australia will have the power to end the industrial action and determine a settlement between the parties.*”¹²

As I have said, the Government has announced that good faith bargaining obligations will not require that the parties make concessions. Circumstances will arise where reaching agreement is not easy. Ai Group does not see this as a problem that needs to be fixed. Enterprise bargaining was not meant to be easy. If one party is able to access arbitration against the will of the other party, the outcome is not an “agreement” at all.

Arbitration (other than by agreement between the parties) should only be available in extremely limited circumstances and only where the interests of the community outweigh the interests of the bargaining parties, such as where a dispute is threatening to damage the economy, or the welfare of the Australian population. This is the way the Act has been structured for the past 15 years, since enterprise bargaining was introduced.

If a negotiating party is aware that arbitration is available, there is less incentive for the party to make concessions in order to reach agreement. A union would be able to make a series of excessive claims which no company would agree to, organise industrial action in pursuit of those claims, organise financial support for the workers, and then wait for a “compromise” position to be arbitrated. This would represent a return to the old days of arbitration around ambit claims. Arbitrated outcomes (particularly those favourable to unions) would undoubtedly flow-on across industries. This would occur as a result of unions pressing other employers

¹¹ Recommendation 8, Final Report of the Royal Commission into the Building and Construction Industry, February 2003

¹² Forward with Fairness, April 2007, p.16.

to accept the arbitrated outcome and also through other similar outcomes being arbitrated by Fair Work Australia and the doctrine of precedent.

It is noteworthy that compulsory arbitration does not occur in most overseas good faith bargaining systems. In the US, the President must declare that a dispute is damaging the US economy before arbitration is imposed upon the parties. In the UK, arbitration is only available if all parties agree. Under the national laws in Canada and New Zealand, compulsory arbitration is technically available but the hurdle is set so high and the requirements so stringent, that arbitration has never been accessed.

Labor's policy is to allow arbitration to be accessed:

- If "protracted industrial action" is occurring; and
- If the industrial action is "causing significant harm to the bargaining parties".

The first question which arises is - what does "protracted" mean? Even though it was never implemented, the Cole Royal Commission recommended that, in the construction industry, after a period of 14 days a compulsory cooling-off period should apply.¹³ Commissioner Cole made this recommendation on the basis of the huge costs typically associated with industrial action in that industry. In most industries the costs of industrial action would not be so high even with a much lengthier stoppage. The problem is that once a particular period is set by legislation, a party is able to "budget" for the amount of pay that will be lost. If the perceived gains from arbitration outweigh the costs, the legislation could have the effect of encouraging industrial action.

The second question that arises is - will the significant harm need to be occurring to both parties or just one of the parties? It appears from the policy that the harm would need to be occurring to both parties. Any other approach could be readily manipulated. During a strike a union would be able to readily argue that employees are struggling to pay their mortgages and car payments and therefore significant harm is occurring to one of the bargaining parties. Of course the employees can end the harm at any time by returning to work.

¹³ Recommendation 11, Final Report of the Royal Commission into the Building and Construction Industry, February 2003. Notably, Commissioner Cole did not recommend any form of compulsory arbitration.

A third question is - what does “significant” mean? This is the same word as used in the provision which allows the AIRC to terminate a bargaining period and arbitrate if industrial action is causing significant damage to the economy¹⁴. If the Government proceeds with its proposal, the harm should be actually occurring and be very substantial for both parties.

A fourth important question is - how will Fair Work Australia assess whether significant harm is occurring? In this respect the **views of the parties should be the key test**. If a party does not agree that it is being significantly harmed, Fair Work Australia would find it extremely difficult to reach a different conclusion.

A bargaining claim pursued at one workplace within a corporate group may be of such importance to the overall operations of the company and the industry in which it operates that even a very lengthy and costly strike at the workplace could not be validly held to have significantly harmed the company. Far more harm may be caused to the company by conceding the claim. One of our member companies experienced a seven week strike in 2001 over a union push to establish a very costly and ill-conceived trust fund called Manusafe. If it had conceded that union claim, far more harm would have been done to the company and the manufacturing industry than the cost of that strike.

The new provision in the Government’s Transition Act,¹⁵ relating to the termination of collective agreements, has some similarity to the concept proposed. This provision requires that in deciding whether to terminate an agreement the AIRC is to have regard to the views of each party to the agreement, the circumstances of each party and the likely effect on each party if the agreement is terminated.

A final important question is - will conciliation or mediation be required before arbitration occurs? This is a sensible approach and is consistent with the procedures which were in the *Workplace Relations Act* prior to WorkChoices,¹⁶ in circumstances where a dispute was damaging the economy.

¹⁴ The meaning of “significant” in the context of the former s.170MW(3) of the Act was considered by the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47 (31 August 2000).

¹⁵ S.389 of the WR Act

¹⁶ See former ss.170MX and 170MY

As I have said, Ai Group is worried about the Government's compulsory arbitration proposal and will continue to argue that it should be abandoned. In Ai Group's view, access to arbitration should not be extended beyond the circumstances presently provided for in the Act (eg. where a dispute is damaging the economy).

Content of bargaining claims and agreements

During bargaining, other key questions arise, including - what claims can be pursued and what matters can be included in a workplace agreement?

Labor policy: *"A Rudd Labor Government will remove...onerous, complex and legalistic restrictions on agreement content. Under Labor's system, bargaining participants will be free to reach agreement on whatever matters suit them...The only requirements will be that the terms of the agreement are lawful, the bargaining is conducted in good faith, the employees covered by the agreement are better off against the safety net and a majority of employees vote in favour of the agreement. Labor's system frees employers and employees from having to resort to side agreements and other deals to set out their arrangements..."¹⁷*

Three key issues stand out when considering this extract from the policy:

1. Labor has expressed a broad policy position on what clauses will be able to be included in a workplace agreement - that is, clauses which are "lawful";
2. The policy does not define specifically what matters will be "lawful"; and
3. Labor has not expressed a policy position on what the boundary will be for the right to take protected industrial action in pursuit of bargaining claims, and whether this will be the same as the boundary around lawful agreement content.

¹⁷ *Forward with Fairness*, April 2007, pp. 14 and 15.

Will there be a separation between the boundaries of lawful protected action and lawful agreement content?

In Australia, the issue of, firstly, what matters can be the subject of protected industrial action; and, secondly, what matters can be included in a workplace agreement, have traditionally been the same.

This is not the case in the overseas jurisdictions upon which Labor's new good faith bargaining system appears to be heavily based, such as the US and UK systems. In these overseas systems a narrower set of matters can be the subject of industrial action than the set of matters which can be included in agreements with the support of all parties.¹⁸

The Australian Government has not yet declared whether the two boundaries will be the same in its substantive workplace relations legislation.

It is important that the two boundaries remain the same. Otherwise if a union is pursuing 10 claims – only 8 of which are allowed to be the subject of industrial action – how can it be sure that the action is not being taken in pursuit of the other 2 claims. The union would of course say that the action is only being taken over the lawful claims, but how could the employer be sure?

Our colleagues from the US and the UK tell us that this is a tactic frequently deployed by unions in their countries. A bargaining claim relating to, say, an internal union matter can be included in agreements but cannot be the subject of industrial action. This could be the most important outstanding issue in the bargaining negotiations, but the union will typically not reach final agreement on at least one claim that can legitimately be the subject of industrial action (eg. wages) until the company is forced through the industrial action to agree to the other claim.

¹⁸ In the **UK**, the right to strike applies only to bargaining over **pay, hours and holidays**. Parties can voluntarily bargain over other matters if they wish but there is no right to take industrial action in pursuit of them. In the **US**, the National Labor Relations Board has over the years determined that bargaining content falls into three broad categories: (1) **Mandatory subjects of bargaining** - which can be included in agreements and industrial action can be taken in pursuit of them, eg. wage increases, leave and hours of work; (2) **Permissive subjects of bargaining** - which can be included in agreements but cannot be the subject of industrial action, eg. pension benefits for retired workers; and (3) **Illegal subjects of bargaining** - which cannot be included in agreements and cannot be the subject of industrial action, eg. closed shop provisions, discriminatory provisions and secondary boycott provisions.

What should the appropriate boundary/ies be?

As I have said, Ai Group's position is that the two boundaries should be the same, and that the appropriate boundary is best described by what has become known as the *Electrolux* principle – named after a 2004 decision¹⁹ of the High Court, in the *Electrolux* case, which Ai Group pursued and funded to preserve the integrity of Australia's bargaining system.

The principle is essentially that bargaining claims and agreement content must relate to matters which pertain to the relationship between the employer and the employees.

The principle is not a new one. It has been confirmed in many decisions of the High Court²⁰ and other Courts over the years.

The current *Workplace Relations Regulations*²¹ define prohibited content for workplace agreements. The general *Electrolux* principle is included, together with a list of specific items which, in the main, codify the general requirement.

The *Electrolux* principle is an important one because unless bargaining rights are limited to matters pertaining to the employment relationship unions will be able to take industrial action during bargaining in pursuit of a wide range of political, social, academic, managerial and other matters that do not relate to the employment relationship. Unions would be able to pursue claims that benefit them, rather than the members they represent. Examples would include: strike action to coerce a company to contribute to a union campaign fund, or to force the company to only purchase Australian supplies, or to force it to make a substantial donation to a particular political party, and so on.

The unions clearly agree with Ai Group's view that the two boundaries should be the same but, not surprisingly, they have a very different view on what the boundary should be!

¹⁹ *Electrolux Home Products Pty Ltd v The Australian Workers Union and Ors* [2004] HCA 40

²⁰ For example, see *The Queen against Portus and Another; Ex parte Australia and New Zealand Banking Group Limited and Others* 1973 127 CLR 353; and *Re Alcan Australia Limited and Others; Ex parte FIMEE* (1994) 181 CLR 96

²¹ Regulation 8.7, Chapter 2, Part 8, Division 7.1

ACTU Secretary Jeff Lawrence gave a speech last week at an Ai Group Conference which was the subject of a front page article in the *Australian Financial Review*. In the speech, Mr Lawrence argued that the unions should have the right to take strike action and have the right to include provisions in agreements about a wide range of social issues such as a company's environmental policies and practices.

In the environment area, industry is subject to a raft of regulations backed up by tough penalties. The regulatory burden and cost of compliance will increase markedly over the years ahead as carbon trading and other measures are implemented. Strike action has never been lawful over an issue such as this and should not be lawful now.

Mr Lawrence also argued that the *Electrolux* principle is a creature of the Conciliation and Arbitration Power under the Constitution and has no place under a workplace system underpinned by the Corporations power. This claim does not stand up to scrutiny.

It is true that that the principle was first developed by the courts in the context of the matters which can be the subject of industrial disputes and included in awards, but time has moved on. The concept has been in the legislation for many years - first within the definition of an "industrial dispute" and later to set an appropriate boundary for strike action and agreement content for collective workplace agreements between corporations and their employees. These latter provisions of the Act have been underpinned by the Corporations Power, not the Conciliation and Arbitration Power, since 1996.

It is easy to get bogged down in technicalities in this area. At the end of the day a practical and reasonable boundary needs to be set to ensure that all parties get a fair go during the bargaining process. The *Electrolux* principle sets a practical and reasonable boundary. If a more specific approach is needed, then the general *Electrolux* principle could be supplemented in the Act with some explanatory wording and examples.

Here in Queensland, section 141 of the State *Industrial Relations Act* states that a workplace agreement must be "*about the relationship between an employer and a group of employees (whether all employees, or a category of employees) of the employer*"²²

²² S.141

Obviously the Conciliation and Arbitration Power under the Constitution is not directly relevant to the content of the State IR Act. The variation on the *Electrolux* principle, which has been drafted into the State IR Act by the Queensland Government, was no doubt inserted to create what the Government saw as an appropriate boundary for agreement content.

To not have a boundary, as the unions are pressing the Rudd Government for, would be totally inconsistent with widely accepted workplace relations principles in the federal IR system and various state IR systems, and would be very damaging and unfair to industry.

Definition of “lawful”

As I said earlier, the *Forward with Fairness* policy states that only “lawful” matters will not be permitted to be included in agreements. There is, however, no definition of “lawful”.

In a letter which was circulated to Ai Group and other industry bodies prior to the Federal election and reported in the media, the now Deputy Prime Minister, the Hon Julia Gillard MP said:

“it would be unlawful for a union or employees to seek an agreement that breached Labor’s freedom of association provisions. Therefore, under Labor things like union preference clauses in hiring or promotion, bargaining fees and preference for particular, highly unionised contractors will not be lawful.”

A statement was also released by the Hon Craig Emerson MP, now the Minister for Small Business, Independent Contractors and the Service Economy, on 1 October 2007 which said, in part:

“the terms of an agreement must be lawful and cannot breach discrimination laws, OHS laws or Labor’s principles to guarantee freedom of association. This means clauses which involve matters such as union preferences or union bargaining fees cannot be included in an agreement, nor can agreements prescribe that contractors be engaged or not engaged on the basis of their industrial arrangements.”²³

²³ Available at www.contractworld.com.au.

Given these statements, we know of some of the issues which it will be unlawful to include in a workplace agreement under the Government's substantive workplace relations legislation, but hopefully the statements do not represent the entire picture.

Under the current Act, the "prohibited content" list (including the *Electrolux* principle) defines what is "unlawful". It is not yet clear whether the Government's substantive workplace relations legislation will define "lawful" and/or "unlawful" content in terms of a list, a definition, or in some other way.

Multi-employer bargaining

Labor policy: *"where more than one employer and their employees or unions with coverage in the workplaces voluntarily agree to collectively bargain together for a single agreement they will be free to do so."*²⁴

This extract from the policy indicates that the Government could remove the existing restrictions on multiple-business agreements and allow parties who want to negotiate such agreements to do so. This would be a retrograde step that would threaten Australia's successful enterprise bargaining system.

When the Keating Labor Government introduced enterprise bargaining into the Act in 1993 multiple-business agreements were not permitted. The Howard Government introduced the multiple-business agreement provisions in 1996 but with very tight limitations. Given the limitations, very few multiple-business agreements have been sought or approved. This is in the public interest.

At the moment, multiple-business agreements are only permitted where the matters dealt with in the agreement are not more appropriately dealt with in a workplace agreement. This limitation is in place for very good reasons. Multiple-business agreements do not encourage an employer and its employees to tailor working conditions to the needs of their enterprise and they limit the capacity for productivity improvement, innovation and competitiveness. Also, there is no right to take industrial action in pursuit of a multiple-business agreement.

²⁴ Forward with Fairness, April 2007, p.13.

Such agreements fuel inflation because wage outcomes often extend across numerous enterprises and even whole industries.

Once a multiple-business agreement is in operation it is extremely difficult to revert to genuine enterprise bargaining during later bargaining rounds.

There is the substantial risk that freeing up the multiple-business agreement provisions of the Act could mark the beginning of the end of genuine enterprise bargaining in Australia, particularly in those industries where the unions are strong and have long preferred industry or pattern bargaining, such as construction, manufacturing and transport.

Facilitation of multi-employer collective bargaining for low paid employees

Labor policy: *“Fair Work Australia may also facilitate multi employer collective bargaining for low paid employees or employees who have not historically had access to the benefits of collective bargaining, such as employees in the community services sector, cleaning and childcare industries.”*²⁵

It is unclear at this stage what the Government has in mind in respect of this section of Labor’s policy.

Undoubtedly, in the industries referred to in the above extract from the policy, there are few collective agreements. But in these industries the award safety net and legislated minimum employment conditions are particularly relevant and important. The role of the safety net is to ensure that workers who do not have a workplace agreement receive fair wages and conditions of employment and Australia’s substantial safety net is doing its job.

As I mentioned a moment ago, multiple-employer agreements should only be allowed if the existing stringent tests are met and industrial action should remain banned. If the tests are met, Fair Work Australia can play a useful role in providing information to employers and employees in low paid industries and mediating, if this is what the parties want.

Any more interventionist or directive role by Fair Work Australia would not be sensible.

²⁵ Forward with Fairness, April 2007, p.14.

The good faith bargaining obligations which the Government intends to implement, as discussed earlier, will most likely lead to an increase in workplace agreements in low paid industries. If the majority of employees support a collective agreement, the employer would be forced to bargain over one. This is a big change from the existing position.

Unfair dismissal laws

The unfair dismissal section of Labor's *Forward with Fairness* policy refers mainly to the abolition of the small business and the "genuine operational reasons" exemptions, both of which were introduced under WorkChoices

A commitment is given to retain the exemption for high paid award-free employees²⁶ and to maintain a qualifying period (12 months for employers with less than 15 employees, and six months for others).

Little is said in the policy about the other exemptions, many of which have been in the Act for 15 years. These include the exemptions for:

- Short-term casuals (up to 12 months);
- Irregular casuals;
- Fixed term (held to include apprentices);
- Fixed task;
- Seasonal employees;²⁷ and
- Trainees.

It is very important that all of these exemptions are retained and Ai Group will continue to stress the importance of them to the Government.

With regard to the "operational reasons" exemption, the unions' criticism of this has focussed on how broadly the exemption extends beyond redundancy scenarios. Rather than abolishing the exemption, this issue is more logically addressed by narrowing the exemption to situations where an employee is terminated due to redundancy. In these situations,

²⁶ That is, those earning more than \$101,300 per annum.

²⁷ It is not unusual for food manufacturers to increase their workforce three or four-fold during particular seasons. The seasonal employment exemption was introduced after the AIRC, in a decision relating to SPC Ardmona (PR953151), held that two seasonal employees were free to pursue unfair dismissal claims against the company, despite the fact that they were specifically engaged as seasonal employees and terminated at the end of the season. SPC Ardmona engages more than 2500 seasonal employees each year.

redundancy payments are typically made and it would be double-dipping to allow an employee to claim compensation for unfair dismissal as well.

In conjunction with the abolition of the small business exemption, the Government has announced that a Fair Dismissal Code will be developed to *“provide small business owners with clear information so that they can easily understand their rights and obligations under the law about dismissal”*.²⁸

While new to the Australian system, similar codes exist around the world, including in the UK. The UK Code of Practice on Disciplinary and Grievance Procedures uses examples to highlight the key issues, rather than setting out rigid procedures. This is a good approach.

Fair Work Australia

Labor policy: *“Fair Work Australia will provide a ‘one stop shop’ to provide practical information, advice and assistance, to settle grievances and ensure compliance with workplace laws.”*²⁹

The Government plans to abolish the AIRC, the Fair Pay Commission, the Workplace Authority, the Workplace Ombudsman and the Australian Building and Construction Commission and replace them all with Fair Work Australia. It appears that various functions of the Federal Court will also be taken over by Fair Work Australia.

Under Labor’s policy, Fair Work Australia would be responsible for advising on the law, investigating alleged breaches, pursuing prosecutions, determining whether breaches have occurred and imposing penalties.

Ai Group is concerned about this approach. Unless very clear divisions are established between different functions serious conflicts of interest will undoubtedly arise.

It would be much like combining the functions of the police, the Director of Public Prosecutions and the Courts. In the workplace relations context, it is the equivalent of the Industrial Relations Commissioner and the advocate for one of the parties being the same person.

²⁸ Forward with Fairness, Policy Implementation Plan, August 2007, p.19.

²⁹ Forward with Fairness, April 2007, p.17.

In Ai Group's view justice requires that at least the following three functions remain entirely separate:

- **AIRC / AFPC / Workplace Authority** – advice, dispute settlement, awards, minimum wages, agreements and unfair dismissal;
- **Workplace Ombudsman / ABCC** – investigation and prosecution;
- **Federal Court** – judicial determination.

ABCC

The Government has announced that from 31 January 2010, the Australian Building and Construction Commission (ABCC) will be replaced with a specialised Division within the Inspectorate of Fair Work Australia. The Government has also committed to maintaining the ABCC's current structure, powers, resources and funding until that time. Consistent with that commitment, the Budget this week contained the necessary funding commitments.

The Government has not yet had detailed consultation with industry about the proposed new arrangements. When it does, Ai Group will no doubt be involved given its large membership in the construction industry. Any new body which replaces the ABCC will need to have strong powers and be well resourced if it is to achieve its objectives and Ai Group will be pressing these issues very strongly with the Government.

The ABCC has been a very important agency in achieving industrial peace and lawful behaviour in the construction industry.

Currently the construction industry is experiencing a period of unprecedented industrial harmony. The industry has never been a better place in which to work and invest as is evident from the record low level of industrial disputation, high wages growth and higher productivity.

ABS statistics starkly illustrate how much things have changed in the industry and the vital role played by the ABCC and the other elements of the construction reform program. **3.1** working days were lost per thousand employees in the September quarter 2007. Compare this with the **37.4** working days lost per thousand employees in the September quarter in 2005 and **263.9** working days lost in the same quarter in 1996!

It would be a tragedy to return to the ways of the past.

National Employment Standards

The National Employment Standards have been released as an Exposure Draft. The Government can be commended for this approach. Problems can now be identified and dealt with long before the operative date of 1 January 2010.

Ai Group has made a substantial submission highlighting a number of concerns and recommending various changes to the draft Standards.

Award modernisation

Work is also proceeding apace on the other key element of the safety net – the award system.

The award modernisation process has kicked off in earnest and is going to consume substantial resources of registered organisations like Ai Group. Although there is considerable goodwill, completing the process by 1 January 2010 will be extremely difficult.

The simplification of the Metal Industry Award in 1997/98 took 2000 hours of our professional staff's time and the Graphic Arts Award took another 1000 hours. The current exercise is far more ambitious and we have a significant interest in more than 500 awards. It is tiring just thinking about it!

Progress on award modernisation is vital because of the strong link between the abolition of AWAs and a more flexible award system. Award flexibility is required so that a common law contract can replace an AWA in circumstances where an employer and employee want to enter into an individual agreement.

All awards will be required to contain an award flexibility clause to enable an employer and an individual employee to agree on arrangements to meet their needs. Draft model award flexibility clauses, including one proposed by Ai Group, are attached to the Award Modernisation Statement released recently by the President of the AIRC. In contrast to the one proposed by the ACTU, Ai Group's clause is simple and practical.

The Award Modernisation Request from the Government to the Commission makes it clear that the process must not increase costs for employers or reduce entitlements for employees. These are important principles that, whilst difficult to achieve, must not be overlooked during the process.

Importance of aligning the operative dates of the key elements of the new system

The Government has announced its intention to introduce the substantive workplace relations legislation into Parliament this year.

Announcements have been made about the operative dates of some of the elements of the new system - Fair Work Australia, the National Employment Standards and the modern award system will all commence on 1 January 2010. However, no announcements have been made about when the other elements of the substantive workplace relations legislation will come into operation, including the new collective bargaining laws, the unfair dismissal laws and numerous other legislative amendments.

In Ai Group's view, the best approach, by far, would be to have all of the key elements of the new system come into operation from 1 January 2010, including the new bargaining laws and the new unfair dismissal laws. Otherwise, further transitional arrangements will need to be implemented, thus creating confusion and complexity for employers and employees. Already, the Act has hundreds and hundreds of pages of transitional arrangements from the WorkChoices reforms and the Rudd Government's Transition Act.

The new bargaining laws are closely interrelated with the National Employment Standards, modern awards, and the role and powers of Fair Work Australia. All should operate from 1 January 2010.

The new unfair dismissal laws are also obviously closely interrelated with the role and powers of Fair Work Australia. Again, it is logical that the new laws come into operation on 1 January 2010.

This week's announcement regarding new secret ballot arrangements

As an aside, it was interesting to read the Government's announcement in the Budget this week that new secret ballot funding arrangements will come into place from 1 January 2010.

Under the existing laws, a union pursuing a secret ballot order is required to pay 20% of the cost of the ballot and the Government pays 80%. The Government now intends to pay 100% of the cost.

Ai Group has always had the view that the 20% contribution which unions are required to make to the cost of secret ballots is an important moderating influence when unions are considering whether to organise industrial action. In the UK, unions are required to pay 100% of the cost of secret ballots.

It will be important to monitor over the years ahead whether this change results in an increase in secret ballot orders and consequent industrial action.

Conclusion

In the nearly six months that the Labor Government has now been in office, it has shown a commitment to consultation and a genuine willingness to listen to industry's concerns in the development of the new system. This bodes well for the outcome of the process and the longer term stability of the system.

The present period of reform offers the opportunity for Australia to develop a workplace relations system that is fair, flexible and productive. Importantly, it should also be one that offers longevity and stability. The decisions the Government makes this year will be critical in determining whether these aims are achieved.

Map of the new Workplace Relations System

