Rudderless in a Sea of Choices

The Defeat of Your Rights At Work—Analysis and a Possible Response

Harry Glasbeek

Professor Emeritus and Senior Scholar,
Osgoode Hall Law School, York University,
Toronto
and
Visiting Professorial Fellow,
Victoria University,
Melbourne.

harry.glasbeek@vu.edu.au

Nature of this exercise

The Federal government has laid out its proposals to revamp the federal industrial relations regime. We have been told how the ALP will make good on the explicit and implicit promises it had made during the electoral campaign that carried it to victory. The Rudd-Gillard team had profitted greatly from the well-orchestrated union campaign run against the previous government's Work Choices legislation and had declared itself to be at one with it. Do the legislative proposals live up to the ALP's enthusiastically publicized endorsement of that union campaign? To answer this question, it is useful to sketch out the context that gave rise to the Your Rights At Work campaign. This will make it possible to judge whether the unions are getting what they set out to gain or whether they have been sold out.

The union campaign—its demands and essential nature

The unions' "Your Rights At Work" campaign was a political campaign. It was so in three distinct, but interrelated, senses of that phrase.

First, and foremost, it was political in the conventional sense of that term in that it aimed at unseating the loathed Howard government that had imposed its Work Choices legislation on workers. The effectiveness of the Your Rights At Work campaign played a major role in the ALP's victory. The Coalition had promoted, and then defended, the legislation with a passion rarely manifested in electoral politics. This ensured that it would become a pivotal issue in the election. This was reflected when, having been defeated and faced with the ALP's initial amendments to Work Choices that would see the erosion of that much-derided anti-union tool, the Australian Workplace Agreements (AWA's), the Coalition further damaged its already tattered public image. There was acrimony and confusion amongst its members. Some of them clearly remained convinced that, in Work Choices, they had designed an efficient regime whose lofty ideological underpinnings warranted defence in principle. But, after some internal and public backbiting, the Coalition abandoned its opposition to the repeal of the AWA's because it was forced to acknowledge that the voters had spoken. The electorate's rejection of the Coalition signified that it did not want the retention of these instruments that, not so long ago, had been defended with love and vigour by Howard, Andrews, Costello, Hockey et al. In this way, the right-wing of the political spectrum acknowledged that the Your Rights At Work politics had been a key to the *electoral* contest between the major parties.

Second, the campaign was political in opting for a different kind of politics. Unions used their resources and roots in their communities, not just simply in the workplaces they had organized, to change the political landscape. They not only wanted to kick out the government and to have the Work Choices regime kicked-out with it, they were also engaging workers and the broader community in a debate around what kind of social relations ought to take hold in Australia. A remarkable aspect was that the Your Rights At Work campaign targetted ordinary community members in 24 marginal federal seats,

involving non-union activists in the struggle. It was a grassroots kind of politics. In recent years, especially since the end of the Accords, unions had been providing support for the ALP in electoral politics by supporting the agenda designed by the ALP and by lobbying for reforms and for more job security, better wages, etc.., which, they hoped, would be their reward for supporting a successful ALP. These kinds of union politics could be analogized to pressure group-type politics, engineered and operated from on high. Unions used the resources and the legitimacy derived from their largely passive members and contributors to win amelioration for workers within the existing regulatory framework. This time out, however, unions had gone out of their way to set the ALP's agenda, as well as that of voters. The Your Rights At Work *mode* of doing politics allowed them to claim, with credibility, that they had material and political support from rank and file union members and from large segments of the voting public. Hence, the unions' political efforts were more akin to the politics of a social movement pursuing the interests of the working class than they were to pressure group or NGO-type politics. There had been a good reason for going for this *different*, this *class-based*, approach: it was a logical response to the changed political scene.

At a point in history when it appeared that there was large scale acceptance by the public and, indeed, by many in union and formal Labor Party circles, of the idea that the old class war rhetoric should be abandoned because it had no salience in modern liberal market economies, the Howard government's Work Choices was irrefutable evidence that the Coalition was bent on initiating class warfare. Crucial to an understanding of the Coalition's defeat is the fact that it raised the spectre of a class-divided society in starker terms than had been done in recent history. The naked class warfare instigated by the Coalition demanded an appropriately designed response. It was this in-your-face adversariness that provided the impetus for the best political campaign run by Australian unions in a long time. The existing scheme of regulation was so odious that unions felt that it did not demand amelioration—as other employer-driven reforms had—but rejection. This was the third way in which this campaign differed from previous ones. Unions determined that they should not work within an improved version of the regulatory regime.

This is why the agenda of "Your Rights At Work" was, first, to change the government of the day and, then, by doing politics differently, the political milieu of to-morrow.

But…

In mature liberal market capitalist states the overt politics of class are eschewed by mainstream politicians. The Your Rights At Work campaign could not be forthrightly cast in class terms, certainly not by the ALP and by some of the less radical unionists. For these reasons, then, the union campaign did not ask voters, or, indeed, many of the supposedly politically astute unionists and ALP adherents, to question the values of market capitalism directly. To have made that interrogation the centrepiece of the campaign would have allowed the Coalition to argue that it was not it, but unions and their allies, who were calling for outmoded and unproductive class warfare, enabling it to type them as dangerous and irresponsible radicals, a damaging characterization during an

otherwise traditional election campaign. Consequently, the class aspect, the objective of creating a new political economic entente, was left to sly implication. It was not directly enunciated in the brilliantly successful disparagings of the Work Choices' regime and of its daily workings.

The unions' attack on Work Choices hammered away at its unfairness, in its design and in its operations. Australians were told about the fact that the safety net had been gutted, that those responsible for administering the remaining tatters of the impoverished safety net had no obligation to be fair in any way; that workers had lost their defences against imperious employers who wanted to dismiss them capriciously, that hapless workers would be forced to accept exploitation by the employers' ability to coerce them into the individualistic and unequalled bargained-for AWA's, a clear indication—if ever there was one-- that the Work Choices scheme really was a No Choices regime. The ready availability of those AWA's allowed employers to get desperate work-needing people to trade-off hard-won award and statutory protections for peppercorns. More, as the AWA's were given pride of place by the No Choices legislation, they undermined the ability of workers to be represented by unions, to bargain collectively and thereby to fend off the disadvantages their lack of wealth imposed on them when selling themselves to employers. In all of this, the Your Rights At Work campaign was helped by the conduct of some craven and cupid employers. Some of them jumped at the new opportunities to exploit their workers and to assert the increased powers they (rightly) believed Work Choices had bestowed on them. Some politically embarrassed Coalition Ministers were heard to muse that these employers should have kept their powder dry until the next election had re-instated the government. These gung-ho employers' aggressive uses of Work Choices made things politically difficult for the Howard government during the election. In the upshot, the government was embarrassed into making some changes to the operation of Work Choices. As it turned out, this was too little too late.

Note here that all the claims made to establish that Work Choices was an unacceptable measure by which to regulate capital/labour relations were based on the assumption that, if left unchecked, employers will use their wealth to oppress workers, to exploit them as much as possible. Inherent in all these claims, then, was the contention that the relationship between employers and employees is not fundamentally one of free contracting equals; it is not a kind of partnership voluntarily entered into between equals to generate wealth for themselves and all others; it is not a symbiotic relationship, but a relationship between unequals; it is a relationship of superiors and inferiors. All the claims were based on the understanding that, in a capitalist society, normal employment relations are class relations. The fact that this was not said outright does not mean that there was not an implicit understanding—and subliminal communication--of this objective truth. Not only, then, was a different means of doing politics being essayed but, underneath the explicit anti-Howard, anti-Work Choices rhetoric, there lurked a promise—a menace, if the observer was a member of the Coalition, business think-tanks and supporting media—that the contemporary mantra that TINA (there is no alternative) to the current variant of market capitalism, was about to be rejected. This promise/menace had potency precisely because the design of the Your Rights At Work campaign was a response by the union movement to the danger that Work Choices

presented not only to its political legitimacy, but also to its very existence. That is, the campaign was not just about protecting workers against impending catastrophe; it also set out to resurrect a vigorous and unco-opted trade union movement. “Your Rights At Work” was a not-so-hidden cry for a reconstituted *political* union movement. This needs some elaboration.

To the true blood conservative, the ALP traditionally has been seen as providing respectability to a leftish, social democratic/Keynesian approach, often (mis-)labelled socialist by the more fundamentalist protagonists of capitalism found in think-tanks like the H.R.Nicholls Society. For those committed to neo-liberal policies, it always was highly desirable that this potential be squeezed out of the political system. They favoured an assault on potentially left-pushing unions as the means to still the voices inside the ALP that favoured more regulated markets and some re-distribution of wealth. The proof is in the eating of the pudding. For a long time now, assaults on unions, with tactics varying from red-baiting, allied to charges of corruption, to featherbedding and demagoguery, had been a way of life for the apostles of a laissez-faire political economy. Work Choices was their latest and most focussed-yet choice to get rid of profit-hindering unions and, simultaneously, to destroy any tendency to have the ALP remain as a Trojan horse stuffed with hidden socialist ideals. It was needed because unions had been slow to fold up their tents.

During the long reign of compulsory conciliation and arbitration, trade unions had become legitimate political participants. They had won the right to represent workers in an industry or occupation before a formally and functionally independent tribunal (the AIRC and its predecessors). The AIRC took the public welfare into account when settling disputes between employers and their workers. It had a political role as its tasks had a legislative character: it set market rates for categories of occupations and industries below which no worker, whether unionized or not, could be employed. The unions played a pivotal role in these polycentric award-making exercises. The regime of dispute settlement depended completely on them. They were allowed to represent the claims of all workers who potentially fell inside the sphere of occupational categories set out in the Registrar’s documentation. Hence, once a dispute could be said to be interstate and to affect industrial matters, criteria that became easier and easier to satisfy, in respect of the determination of work conditions the identity or nature of the employer named as a respondent by to the union’s demands did not matter. It was the union identity and occupational coverage that counted.

Over time, the AIRC also came to lay down floors in respect of national rules that established standards (often subsequently legislatively enshrined) in respect of such fundamental conditions as a minimum family wage, gender parity, redundancy, termination and severance pay, work and family life balance, and the like. To do so, the AIRC heard evidence and submissions from governments, employers, the public at large and, of course, from unions. It was a scheme that blunted the impacts of unfettered labour markets and treated trade unions as senior political partners in the design and operation of a would-be social democratic political economy. **The unions were seen as pivotal political agents in the system.** And their role as political participants arose out of, and

was coupled to, their direct representation of workers as a class in their everyday struggles (symbolized by the unions' uncontested right of entry into workplaces) with their employers. Workers had a democratic say over trade unions, while unions had a legitimated role at the policy tables in respect of macro-economic and social issues. The political and economic roles of unions were dynamically integrated.

The trade unions' position as a linchpin in this elaborate mechanism of adjustment of capital/labour relations was reflected in the grant of legal personality to them, giving them the same legal standing as market capitalism's flag ship, the for-profit corporation. This privilege, of course, came with baggage as the trade unions' affairs were subjected to external scrutiny. Nonetheless, it was an acknowledgement of their legitimacy, both in the wider polity and in respect of the workings of the regulatory regime. The security of tenure and organization that came with all of this gave trade unions a platform from which to educate politically and to organize the delivery of a great number of votes to the party of their choice; more often than not this was the ALP. The ALP, in turn, portrayed itself as a worker-friendly party, whose historic task it was to provide the public's overall material welfare and to distribute that material welfare to satisfy workers' reasonable aspirations. The ALP's deep links to a union movement of that kind gave rise to deepening anxieties to neo-liberals during the three decades that followed World War II.

From the late 1970's on, the phenomena gathered together under the rubric 'globalization', were taken to amount to an irreversible economic development. Politicians scrambled on board of the new wealth-seeking spaceship and almost unanimously conceded that, to generate economic wealth in the novel circumstances, there was to be more flexibility for management at the local production level. Consequently, local bargaining engendering more flexible practices and better adapted modes of production were to be encouraged. Efficiency by means of localized agreement-making was the catch-cry. The rather old laments by the likes of the H.R. Nicholls Society about the rigidity and inefficient impact of political unions with participatory roles in a third party interventionist system that set industry-wide standards, now found newly manured and more fertile soil in which they could plant their beliefs. The Business Council of Australia, the Niland Report and the Confederation of Australian Industry, just to mention a few, added their weight to the calls for the recognition of the superiority of voluntary *private* agreement-making over any kind of co-ordinated *public* planning of a social democratic kind. Workers, they argued, would be better served by private bargaining than they had been by public decision-making regimes. A series of politically mounted legal assaults that had invoked the help of that most respectable bastion of *private* contracting, the judiciary, now gained salience. The employers' successes in those cases (Dollar Sweets, Mudginberri) had done their bit to enhance the standing of *private* contractual arrangements; the results legitimated the narrowing of the sphere of disputation that should be tolerated by regulatory law. These results, therefore, furnished an ideological boost for the anti-collectivism of the Trades Practices Act, enacted by the profoundly anti-worker Fraser government in a slightly earlier period. A welcoming atmosphere for libertarianism had been established the mid-1970's and now provided the basis for regime change.

The 1980's pervasive acceptance of the 'fact' of globalization permitted this long-term ideological push to have policy-makers acknowledge the superiority of the private wealth creation model, one that logically called for a reliance on the market to attain both welfare and equity, to be implemented. This is what led the ALP to react to the 'fact' of globalization by implementing the Accords. They were deals consummated between the ALP governments and top level union officials in the peak union organizations. More workers were to be pushed into private bargaining. They were to be allowed wage gains only if they could show that they had rewarded their local employers by helping them obtain productivity gains by, say, working more in line with their employers' contemporary market and stock-piling needs, by accepting new modes of operation and welcoming technologies that might otherwise have been resisted. Unions at the peak level undertook to limit job actions. To be fair, the unionists who concluded these arrangements with the ALP squeezed out some significant sweeteners, such as a national pension scheme, the promise of a national occupational health and safety regime, tax cuts, better job security protections and an enriched safety net for the most vulnerable. The point here is not to evaluate the Accords' period, but to get a glimpse of the change in relationships between workers and their unions, on the one hand, and between unions and the ALP, on the other.

The conciliation and arbitration institutions and the award system were still in place, but had been rendered less significant. The regime now privileged local, narrow economic bargaining over centralized political and economic condition-setting exercises. That bargaining was to be done by localized workers and their immediate union representatives. By definition, demands made at singular enterprises could not be political demands of the kind made when a tribunal was asked to take industry- or occupation-wide conditions into account, as well as macro-economic factors. A fissure between the daily operations of unions at the local level and the machinations of union leaders at the government decision-making table was opening up. Unionists at the coal face were *economic, bread and butter*, actors; their daily tasks and problems were connected to, but no longer an integral part of, the *political* machinations of the union leadership, even though those leaders were helping to set the metes and bounds for their coal face comrades engaged in *local* economic bargaining. But, that framework for bargaining was just that: an outline. The designers of the Accords were committed to the principle that employers and their employees knew best what would work economically: it was their task to find ways to be productive. The goal was to let the *market*, a supposedly *impersonal* force of nature, rather than *politics* motivated by *human desires*, hold sway. The politics of the Accords were a politics to depoliticize the settling of capital-labour disputes as much as possible. It was a top down kind of politics, a trickle down kind of politics. This had a cost.

The unionists active in the rarefied atmosphere of this summit kind of politics had accepted the impetus for establishing the Accords wholeheartedly, that is, they internalized the logic of deregulation and privatization. It was understood that this would cause pain to previously protected workers. The gradual abandonment of the regime that had given workers via their trade unions something of a say in quasi-legislative decision and policy-making, needed to be off-set by the unions to assure workers that the turn to

the private market as regulator would not cause too much harm to the more vulnerable. But, despite the gains made on issues like unfair dismissal, this abandonment did signify a different and less grassroots-based political role for trade unions and, by way of a different kind of trickle-down consequence, it lessened the urge of the ALP to be a proponent of the redistribution of wealth and income. Implicitly, and likely not seen by the proponents of the Accords, this change also diluted the logic for the maintenance of an organic relationship between the ALP and unions as the direct representatives of workers.

The ALP and the leadership of umbrella groups of the union movement had internalized and implemented prescriptions for the disease that has been identified as globalarrhea by the political philosopher Gregory Elliott. Unsurprisingly, the enemies of the working class pounced on the opportunities thus presented to them. In 1996, Howard was able to introduce the radical revamping of the capital/labour relations regulatory regime by exploiting the ideological and structural changes accepted by the ALP and much of the union leadership. The Coalition took the logic of the privileging of the private regulation of dispute settlement to its extreme. Its Workplace Relations legislation promoted private bargaining and voluntarism. The purest form of private bargaining and voluntary agreement-making is the individual contract. And Howard and his right-wing allies were nothing if not purists! They sought to bolster their message by direct assaults on the legitimacy of trade unionism by singling out—using despicable tactics and distortions of the truth-- the alleged rogue unions of the waterside and building trades' workers. These very public negations of the virtues of collectivism and planning were complemented by a positive spin on the admirability of individualism and competition. There was a tsunami-like flood of pronouncements (largely not countered by the ALP) about the centrality and merit of small, Horatio Alger-like, business.

When the Coalition won control of both chambers of the federal Parliament, the frame for the soon-to-be hated Work Choices legislation was firmly in place. Private bargaining, initially encouraged by the ALP, was to be given its natural head and replace the already down-graded conciliation and arbitration regime. National standard-setting was to be marginalized. Individual private bargaining was to be preferred over collective private bargaining. Collective bargaining, now clearly cast as an adulteration of the purest form of voluntary bargaining, namely individual bargaining, was to be more restrained than ever. It was to approximate individual bargaining as much as possible and, therefore, if engaged in at all, to be confined—as individual employees were—to the making of demands of one employer at a time only. Such demands, therefore, only could be *narrow economic* ones as private sector employers cannot engage in deal-making about political matters. To ensure the integrity of this scheme, unions wishing to exercise the right to strike in respect of the limited matters about which they could bargain with any one employer, were required to clear costly, time-consuming and humiliating hurdles. Unions were no longer *central* to the system and, obviously, no longer *political* participants. Only the fact of their continued presence on the ground required the government to extend a small measure of tolerance for their existence. And, as individual bargaining in an unfettered labour market was the logical and ultimate goal of this schema, the Howard forces were able to justify their natural meanness by holding out that the integrity of their

market-driven model required them to 'permit' workers to enter into contracts with just the barest amount of protection from free-contract inhibiting minimum standards. Thus, the Coalition set out to gut as much of the safety net that the ALP had crafted when it began to step away from conciliation and arbitration that it felt it could do without suffering too much political backlash. A cruel calculation, if ever there was one. But, there was a conceptual integrity (a peculiar phrase to use vis-à-vis the Howard government!) to the scheme.

This is why the Your Rights At Work campaign was imbued with a regime-changing spirit. All that had seemed solid was melting. As noted, however, the electoral imperatives muted the class-based nature of the campaign. The overt manifestations of the deeply held resentment of the neo-liberal regime was a series of exposes of the malevolent spirit that had led Howard and his collaborators assault the most vulnerable of workers and violate international norms of human rights, such as the freedom to associate. In practical terms this meant that, when the ALP had to state what industrial relations system it would institute to replace the Work Choices scheme it was opposing, it could, and did, say that it would not be radical. ***The ALP made it explicit that it was not questioning the conceptual integrity of Work Choices***, namely, its implementation of measures that dovetailed with the privileging of private competition over central planning, the preference for voluntarism over the imposition of terms, the virtue of small business in free markets, the minimization of the use of collective economic power by workers to attain political end. The ALP merely promised to be more humane and cognizant of international obligations than Howard et al. Of course, given its own recent past, it also felt itself bound to say that it would not go back to the pre-Accord, to the pre-globalarrhea, past. To win, the Your Rights At Work campaign did not make an issue out of the fact that these minimalist undertakings were falling well short of its more revolutionary aspirations. This has brought us to the current problem: how is the Your Rights At Work campaign to deal with the concrete industrial relations policies of the victorious Rudd/Gillard team that it had done so much to install?

The deal—acceptable compromise or sell-out?

The ALP acted with alacrity, if not with conviction, on those facets of Work Choices on which it had taken a definitive position. It legislated an end to the rightly maligned AWA's. It proscribed future AWA's and stipulated that existing ones would not be allowed to be rolled over when their natural term expired unless there was a truly voluntary agreement to this effect. In addition, the pressure on the government by some employers claiming special needs, caused it to allow something it named Transitional Employment Agreements to be negotiated. Notionally, some of these may last until 2013. In short, the ALP's action against AWA's was a little less sanguine than its rhetoric had indicated it would be. To be fair, however, the ALP also provided that the Transitional Employment Agreements would sound less like the quacking of the AWA duck because the terms of these transitional agreements would not be allowed to sink below the safety net to be furnished by the newly devised National Employment Standards safety net. Whatever cavils are raised, then, the trend was good even if it is becoming clear that, now that it is in office (contrast power), the ALP can see some merit in the pro-individual

private bargaining arguments made by the Howard forces This ought to cause some unease, a lingering apprehension that is reinforced by the ALP's encouragement of flexibility clauses that will permit awards and collective agreements to be varied by private contracts; the unease is tempered only slightly by the proviso that any such variations has to meet a new no disadvantage test.

In this short catalogue of the apparent ambivalence of the ALP toward the ideology and fundaments of Work Choices, two other points are noted. First, the welcome enhanced and enlarged National Employment Standards safety net is to be the result of legislative action. This will make it universal in scope but, unlike the built-in adaptability and dynamism of the previous national test case regime that could take note of changed circumstances and expectations as directly presented to tribunals by affected workers, employers and governments, standards are going to be dependent on much less directly accessible legislators of various stripes These legislators will not be constrained by criteria that bind tribunals charged with making decisions based on the established rationala for precisely defined and published criteria. Second, in order to demonstrate its sensibility to the needs of ideologically prized small businesses, the ALP has thrown small enterprises with less than 15 employees a bone by not granting the same protection to their employees in respect of unfair dismissal that, in its lambasting of Work Choices, it had argued every worker should have as a matter of basic human rights. That is, the principle of worker protection is to be compromised to give the kind of flexibility and prerogative of managerial power that Howard et al., said most employers needed. The difference between the ALP and the Coalition is where the line is to be drawn, politically and for market purposes, but it is not a real difference in principle.

Still, all these amendments are substantively good; they do improve the position of vulnerable workers to some extent (even though the National Employment Standards are not to be given effect until 2010). And, to be fair, the shortfalls were telegraphed by the ALP during the election campaign. This is also true of the other changes that are scheduled to be implemented. They are concerned with the scope of bargaining and the amount of bargaining powers that unions are about to be given. More, on the face of it, they reflect some of the demands made while the Your Rights At Work campaign was in full swing. It is proper to acknowledge that some of the disappointments the unions have to confront now are, in part, a consequence of their own tactics when they diluted their demands to suit the ALP's electoral campaign. The original Forward with Fairness Policy, promulgated in 2007, was stronger in its demands than the Forward with Fairness Implementation paper written by the Your Rights At Work campaign when it sought to help the ALP in its efforts to make itself look less than radical during the election struggles. Centrally, the demands for collective bargaining and strike rights were not detailed with all that much precision. The now governing ALP, in its endeavour to look reasonable in neo-liberal terms and still claiming to be committed to fairness ("fair" being a key word in all the statements made by the ALP), has taken advantage of this elasticity to give truly miniscule bargaining rights and powers to workers.

As the new amendments are introduced and piloted through a restive caucus and a potentially pesky Senate, there will undoubtedly be some positive changes to the

proffered collective bargaining provisions. It would be foolish to anticipate what they are likely to be but it is clear that they will not alter the essential nature of the collective bargaining scheme envisioned by the Rudd/Gillard team.

The vision is that of an industrial relations regime that mirrors the North American ones. Saying this out loud ought to ring alarm bells everywhere. The union movement in the U.S. is moribund; the plight of workers there is unacceptable. There are many reasons for this parlous state of things, some of which, such as the declining rate of profit and momentous changes in terms of the relative significance of finance and industrial capital, dispersion of the locus of productive activities, ecological stresses, and the like, all impact on Australia. Nonetheless, this ought not cause us to be distracted from the fact that the collective bargaining choices made by the ALP in its response to Work Choices are craven and dangerous to workers.

Regardless of the details, in essence the proposed scheme limits workers' collective bargaining with strike rights attached to *firm by firm* bargaining. While it will be possible to bargain with more than one employer at a time, this will only be permitted where the employers are commercially related, engaged in a joint venture and/or common enterprise. That is, where functionally they are but one enterprise. Multi-employer bargaining may also be authorized where the employers are connected via a franchise agreement or are funded by a common source and are not in competition with one another, as say in the case of public hospitals. In brief, ***competitive*** *firm by* ***competitive*** *firm* is the essence of model. There is to be no occupation-wide, industry-wide adversarial bargaining, although agreements may be reached on that basis provided the workers do not use their strike powers to obtain a deal. That is, they have been empowered to talk and, *if it suits employers*, to make a deal. Stability of production in a fragmented competitive market is the core of the ALP's vision.

The ALP understands how employer-favouring and worker-enfeebling this approach is. It has elected to permit, multi-employer- and related employer-negotiation where workers are truly vulnerable, as in the child care, community work, security and cleaning spheres, where contingent employment, disproportionately exploiting women, is rampant. This proffered protection is an acknowledgment that it is known that employers organize themselves to avoid responsibilities and that this causes hardship. Of course, this kind of strategy is true in all sectors of employment and commercial activities, as the MUA and the James Hardie affairs exemplified. The employing class is a responsibility challenged one and can be counted on to use its legal manipulative powers to the fullest extent possible in all sorts of circumstances. The ALP implicitly is acknowledging these truths by providing an exception to firm by firm bargaining where the workers most obviously vulnerable to this kind of scheme are to be found. It is holding out to the public that it is more compassionate than its predecessors. Of course, not that much more compassionate: the vulnerable workers will be given a means to pierce byzantine employment arrangements to enable them to negotiate with the relevant parties, but the emphasis is on negotiation. *Again, they are not allowed to strike to enforce their demands.*

This solicitude for the easily oppressed only serves to draw attention to how little the ALP is offering to workers in general. Worker power is mistrusted, even as the government demonstrates that it knows that employers use their powers to oppress workers to the fullest extent permitted by law (and often beyond). For those workers who can back up their demands by striking, they are to be constrained in their use of the only real weapon they have. They may only strike during a protected period, after giving appropriate notice, holding a vote. Their demands are not to be as restricted as they were under the No Choices legislation, but they are not to be open-ended. Vital issues, such as decisions as to whether an employer may determine that a plant is too unprofitable to maintain, or that a particular supplier be preferred regardless of the workers' views, and other such managerial matters, are not to be subjected to the good faith bargaining requirements imposed on employers. They are not to be protected strike issues. The ALP believes that the prerogative of management is to be left unhampered when it comes to ultimate control over its capital. All that may be put in issue is the extent of the right of workers to do things in the firm, not to exercise rights over the firm. It believes in fairness at work, but not if it impedes what it envisions to be wealth owners' ability to function competitively in a market economy. This was emphasized in Minister Gillard's speech to the National Press Club on 17 September, 2008. She argued that an arbitrator would be allowed to impose a solution where protected bargaining is posing a threat to the economy or of significant harm to the parties. Obviously, such intervention only applies to situations where workers are party to harm-causing conduct; mere removal by employers of capital is not to be subjected, as a matter of law, to government intervention to avert harm, even if it leads to economic disaster, to wage cuts or unemployment. The reluctance to give workers' collectives real economic strength is palpable.

This brief account explains why the ALP has retained some of the more anti-union provisions devised by Howard and his associates. While they no longer will face mandatory pay deductions for a specified minimum of time for any work stoppage, workers will have pay deducted for the actual period of stoppage of work during a protected strike. More, an employer may not be asked to pay strike pay for a protected strike, an entitlement possessed by Canadian and American workers. If workers use their power to strike during an unprotected period, they will face a standard minimum 4 hour pay deduction, just as they did under No Choices. That is, the penalty is automatic, unlike the North American situation. In some instances, then, the Rudd/Gillard proposals are less worker friendly than the North Americans they are imitating.

While unions may bargain for dues check-off provisions, these are not automatic upon conclusion of a collective agreement as they are in many Canadian jurisdictions. This makes it more difficult to organize and to plan for unions. The exceptionalism, the aberrant nature of union in a firm by firm, market-oriented, scheme colours the ALP legislation, if not as obviously as it did under the No Choices statute. All this is underscored by the current unwillingness of the ALP to get rid of the vicious provisions that treat construction and building workers as incipient criminal conspirators. This sends a strong message.

In sum, even if some of the more obvious warts are burnt off as the union movement intensifies its representations during the legislative battles, the structural nature of the ALP proposals will not change. They represent a sell-out of the underlying thrust of the Your Rights At Work. Specifically,

(i) Bargaining is to be fragmented. Unions are to design their operational organization on the basis of the way in which profit-driven employers determine they should organize themselves.

(ii) Unions are no longer the linchpin of the system. What counts is who the employer is, not whether or not there is a union.

The corporation, not the trade union, not workers, are the central actors in the Fair Work regime, just as was the case under the Howard No Choices scheme. The corporation is capitalists' preferred institution by which to wage class war. The underlying political message is not that subtle. It is underscored by the fact that the registration of unions under the proposals appears to be contingent on having half their members employed by corporations or by being training or financial corporations in their own right. The old idea that unions should have a place as social and political actors in their own right has no salience in the ALP's anti-Choices regime/

(iii) Unions will no longer be able to organize themselves to take wages out of competition.

(iv) Unions will have no say in how a sector of industry ought to develop as they have no place at the industrial table. They may be invited to sit at the table but will be required to play by the hosts' rules and be well-mannered.

(v) There will be no direct participation in the setting of national standards, except as another lobby group when national employment standards are revisited

The social and political potential of trade unions as a social movement, exploited during, and hoped to be furthered by, the Your Rights At Work campaign has been seriously undermined.

(vi) Unions cannot make anything but narrow economic demands of their employers.

(vii) Unions will be representing only those workers covered by their good faith bargaining sphere. However that is to be determined, it places a limit on coverage. Unions become exclusive, rather than inclusive. The proof is in the North American pudding. There collective bargaining coverage has never extended beyond 50% of the working population as only a small number of

> non-unionists got the benefit of agreements obtained by unions. Non-unionists, always a majority and to-day a whopping majority, never had the benefit of this exclusionary regime of industrial relations. Australia, a polity in which nearly everyone was covered by the determinations won by unions, underscoring its claim of being a fair-minded nation (an achievement celebrated by the ALP as it moved away from the compulsory arbitration scheme that had given the claim some resonance), should be leery of such an institutionalized change in coverage of collective agreement-making.

The Rudd/Gillard team are establishing a collective bargaining regime that is as close to the individual contract scheme as it is possible to be while paying lip service to collectivism. The restrictions on the extent of collective bargaining, both in terms of subject-matter and reach, and the tight constraints on the only real power workers have, the strike, ensure that the ALP furthers the goals of No Choices when it set out to advance the cause of a market political economy in which a distorted form of voluntarism and competition was to reign. This is a negation of the principles that impelled the Your Rights At Work campaign.

Professor Stewart, a consultant to management labour law firms, but generally not worker unfriendly, has noted that the most significant contributions of the ALP proposals are the enhancement of "*individual* rights and protections of employees" (my emphasis), but that, where unions already exist, "the new bargaining rules, while important, are not likely to have a dramatic impact" on employers.

An editorial in the *Australian Financial Review*, a distinctly worker unfriendly source, noted that the Fair Work bill "is no union manifesto".

The Your Rights At Work campaign deserved better; workers deserved better.

This presentation's concern has not been whether or not workers, all other things going well, could possibly obtain better terms of employment under the Fair Work bill. To repeat: the new minimum standards ought to be a boon, at least until they fall below what changed economic circumstances demand. That said, it would be foolish to expect too much by way of protection from an industrial relations system aimed squarely at bargaining about a share of the pie baked within existing market conditions. Everything depends on existing conditions exogenous to the industrial relations system. As this is being written, the downturn in corporate profits and the failures of financial institutions, threatens to wreak havoc on the working class. The ability bestowed on the few by the ALP's new industrial relations system to bargain locally in respect of narrow bread and butter issues will not provide the safeguard needed by workers. This on-set of a crisis makes clearer what has been true for some time: the accepted way of creating overall welfare is to be rejected if workers are to do better economically and, even more significantly, democratically. What is needed is a different way to bake the pie and to share it. There is a need for a politics that reshapes the political economy, for a politics, in other words, that underlay Your Rights At Work campaign. The negation of those elements of that campaign by the ALP proposals becomes a grave problem. What is

needed, is a strategy that can put the ALP's feet to the fire, to make it re-think its approach. It is not too late.

Hoisting the ALP and neo-liberals on their own petard—the corporation

The old federal conciliation and arbitration regime had been posited on a specific conciliation and arbitration provision in the Constitution. While it did allow for some bargaining when incidental to compulsory arbitration, it was only to the extent that it was incidental. To have bargaining be the fulcrum of the industrial relations regime, the federal legislature had to find a different head of constitutional power. The one chosen was the one that bestows power on the federal government to make laws with respect to trading, financial and international corporations. In part, therefore, the choice of the corporate power was a kind of fortuity, a clever legal adaptation of a constitutional instrument intended for some other purpose. In part, however, it also reflected a general social and political movement as Australia's major political parties increasingly internalized the logic of the market. In that kind of economic and political frame, the corporation, as an efficient market actor and wealth generator becomes a vehicle central, indeed, indispensable, to governments. Their investment and de-investment decisions have major economic impacts and they gain ever increasing political clout. This improves their standing as legitimate political actors and governments entrust them with more and more regulatory powers. Self-regulation, voluntarism, governments steering but not rowing, are the catch phrases that encapsulate this palpable change in institutional power. In short, as unions have lost political participatory muscle, corporations have gained it. In this context, the use of the constitutional corporate power to anchor the new industrial relations regime had obvious appeal for the Howard forces. In line with fellow travellers in the U.S. and the U.K, the Coalition came to see its devotion to a market economy as naturalizing a push toward turning Australia into a market society. For it, the 'naturalness' of this tendency was caught in Thatcher's nihilism: "There is no society, just individuals".

But, the ALP thinks of itself, and holds itself out to be, a social democratic party. These ideological arguments supporting the use of the corporations power shold have little traction within its ranks. If pressed, the ALP undoubtedly would contend that, as it did in 1993, it currently is using the corporations power because it is a handy tool, but just a tool, to achieve its only ideological aim: a fair bargaining regime for workers. It would protest that, unlike the Howards of this world, it is not pushing a corporate agenda as part of an overall drive toward a market economy (the inevitability of which it concedes) that also requires that there be a market society.

The ALP, then, justifies its use of the corporations power on the basis that it is the best way to look after workers' welfare in an era of globalarrheoa. But, it has used this power to improve workers' bargaining rights from where the No Choices regime had left them by indirect means. Its choice of the corporations power to provide a constitutional foundation for the Fair Work bill means that the legal regulation of industrial relations comes in the guise of being a law about corporations This suited the corporate-minded Howard and his acolytes when they relied on the corporations power to push for private

bargaining. It made it easy for them to treat the well-being of the corporate sector as their starting point because, after all, that is the constitutional rationale for granting the federal government this legislative power. For reflective ALP adherents, however, this ought to be troubling. There is, therefore, an opportunity to urge the ALP to use the corporations power positively for workers, rather than use it to compromise workers' needs and ambitions to allow corporations to prosper.

Instead of pretending that it is regulating corporations when it defines bargaining rights for workers or devises protections for workers, why not directly regulate corporate employers, telling them what they may or may not do if they want to retain their privileges as trading, financial or international corporations? There would be an end to pretence:

What is currently cast as a law dealing with the industrial relations system by constitutional subterfuge, would be cast as statute dealing with corporate behaviour for the benefit of workers.

The corporate vehicle is useful to the owners of wealth, to the people workers once contemptuously called bosses, precisely because it hides the people, because it hides the bosses. It obscures the essential conflictual nature of, and thereby depoliticizes, the employment relationship, it makes the class-basis of the contract of employment less visible. Investors give over their property to a legal artifice, the registered corporation. Instantly, it becomes a legal person with the capacity to own property and to enter into contracts. It now owns all the invested capitals and deploys them to maximize profits. This is done by directors and executives appointed by the investors. Only the corporation is responsible for the acts of these executives; the investors, on whose behalf they pursue profits, are legally irresponsible. Their only risk is that they may lose their initial investment; their personal wealth is not at risk. The risk that they may lose their invested capital is small, especially if the corporation's shares are tradeable. The directors and executives may have to bear some of the costs of doing harm when acting for the corporation.

In sum: the corporation harnesses wealth and is capable of co-ordinating its deployment, probably more effectively than atomistically acting wealth owners. It is perceived as an impersonal individual market actor, when it is nothing of the sort. It is a collective; this is why it is so efficient as a wealth generator and accumulator. Its major characteristic, the one that makes it so appealing to capitalists, is that it is a risk-shifting device without pareil. Consequently, corporate decision-making emphasises the taking of risks in order to satisfy the greed of those who can pass on those risks (shareholders, executives) to the general public and, pertinently here, to workers. ***Capitalism may be the ultimate enemy but the corporation is its favourite tool.*** The irony of a would-be social democratic party such as the ALP saying that it merely uses the corporations power, and thereby the corporation, as its tool to help workers is manifest. If it is to be true to its claimed principles, it should really bend the corporations power, and thereby the corporation, to its will.

Here are a few ideas as to what a Fair Work bill, drafted as an implementation of the corporations power with the central goal of regulating corporate behaviour to benefit workers, might contain. The idea would be to assist workers directly in material terms and to attain the explicit and implicit goals of the Your Rights At Work campaign:

(i) The Fair Work bill could provide that a corporate employer could not pay its directors and executives more than, say, 25 times what the average worker employed by that corporation earns. The number '25' is chosen capriciously; it is way below the multiplier that prevails to-day, and still way above what it should be. The significance is that any such specific requirement draws attention to the need for fairness (the ALP's cri de coeur), to class and status divides and the need to repair them. More, in the current climate, this kind of platform would have popular appeal, making the idea seductive to the electorally sensitive ALP.

(ii) A Fair Work bill could provide that a corporate employer does not enter into take-over, merger or sell-off arrangements without getting the consent of a majority of its workers. This is a direct assault on the idea that owners of capital may dispose of it as they wish, regardless of the impact of their self-centred decisions. It draws attention to the fact that other contributors to the corporation, investing shareholders, do get to vote on all these issues, even though they have much less at risk because of their investment in the corporation than do workers who may not only lose income, income potential, their houses, but also their health. There is no limit to the potential liability arising out of their investment in the corporation. They get no vote; shareholders do. It is easy to show the lack of logic, the lack of fairness. It draws attention to the fact that people who do no work share profits and stand to lose very little get more rights than workers who contribute far more and take more risks. More: shareholders vote on a $1, 1 vote basis. This draws attention to the cries made by neo-liberals everywhere that unions with their one person, one vote schemes are undemocratic. These arguments are appealing to workers.

(iii) A Fair Work bill could provide that there be no introduction of potentially job-loss impelling, or health-damaging, technology without permitting workers to study the matter and to vote on it. Similarly, all joint health and safe and work design committees should have a majority of workers on them. The argument supporting these suggestions for the legal imposition of these kind of regulations on corporations is one of which corporate cheerleaders are fond: those most exposed to risk, should have most say in decision-making about the creation and control of the risk.

This ought to give a flavour of what is envisaged. If activists persuade themselves that they should pursue this line of attack, they will figure out what to demand, when. The argument here is that they should consider this seriously.

These kinds of proposal will meet, at first, with derision and, if maintained, with anger. Persistence is warranted because, in the end, these arguments are not easily rejected as unworldly. The supporting arguments are compatible with the existing professions of adherence to liberal market democracy. Indeed, some of the demands already have been met in other capitalist jurisdictions; for instance, the technology and health and safety provisions referred-to above, resemble what happens in Scandinavia; the demand for right to participate in ownership and control discussions has at least partial standing in some jurisdictions that have acceded to some industrial democracy modelling. Each one, by itself, is not a radical demand. True, in contemporary conditions, these demands will be characterized as extreme by neo-liberals. So be it. Working class activists should take a leaf out of the writings of Friedrich Hayek. He knew his ideas were swimming against the then dominant conventional wisdom that envisioned the maintenance of a strong public sector and Keynesianism. Nonetheless he forged ahead, arguing that "the main lesson which the true liberal must learn from the success of the socialists is that it was their courage to be Utopian which…is daily making possible what only recently seemed remote." Thatcher and Reagan took off from the ideas and ideologies he pushed forward. If the right can be visionary, why not the left? Why not muster the courage that Hayek recognized in the earlier socialist movements?

As noted, each of the suggested demands is not revolutionary in nature. But, if made as part of an overall blueprint, integrated with the spirit of the Your Rights At Work campaign, they could be. The suggestions made are really demands for the democratization of capital, for giving workers more say over their own lives, for forms of political participation that reach beyond the metes and bounds of electoral politics. They may be able to raise consciousness about the artificial divide between the private and public spheres, between the political and economic spheres, divides that suit the owners of wealth who can rule by dollars in the private sphere so conveniently not subjugated by the public, more democratic, sphere. In this way, the suggestions represent the potential for doing politics differently, for activating for a different kind of political economy. In this way, those elements of the Your Rights At Work campaign, so badly dented by the ALP's Fair Work bill, may be put back on the agenda.