Labour standards, flexibility and economic renewal:
Advice to the Senate Education, Employment and Workplace Relations Committee Inquiry into the *Fair Work Bill* 2008

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Introduction

The Senate is to be congratulated for conducting an inquiry into the proposed significant changes in Australia labour law contained in the *Fair Work Bill* . The fact that all interested have at least a month or so to absorb its content is particularly welcome. The *Bill* is well drafted and well structured. The systematic sequencing of chapters and parts, with their clear summary/overview sections, is a major advance over other recent changes in Australian labour law. I cannot comment on all aspects of such a comprehensive piece of legislation. Instead, I provide advice on the issues on which I have done most recent research. This concerns whether the Bill lays the foundations for economic and social renewal by nurturing both decent standards and flexibility in the labour market.

The changing context: recent economic developments mean the changes proposed by the Bill are more, not less, necessary.

The global financial crisis and allied general economic downturn have been a long time in the making. Since the dramatic events of late last year it has become clear that the guiding principle of public policy since the 1980s – ie the alleged superiority of 'markets' and the alleged inferiority of government 'intervention' - is unsustainable. All now agree that a new balance between market, state and civil society is required. Recent calls by parts of the business community for preserve 'flexibility' in current labour law to give firms the ability to handle impending economic upheavals should be treated with caution. Such calls have their roots in habits of policy thinking that nurtured the current situation. This mindset and its allied policy prescriptions are part of the problem not part of the solution. I, along with many academic colleagues, have established this in large scale studies of the restructuring work in Australia since the late 1970s over a number of books and article. (eg acirrt 1999, Watson et al 2003, Buchanan and Pocock 2002, Buchanan, Watson, Briggs and Campbell 2006)

The changing policy landscape: A new openness at the international level

The restoration of faith in public sector leadership for economic renewal appears, at first sight, somewhat unexpected. Extensive government funding for financial institutions and widespread talk of the virtues of nationalisation by people like Alan Greenspan were unimaginable only a year ago. Clearly the domain of policy debate is now far broader than it has been for a generation.

This situation has, however, been emerging for some time. Institutions like the World Bank, the International Monetary Found (IMF) and the Organisation for Economic Cooperation and Development (OECD) have traditionally been very supportive of free-market or neo-liberal policies. In recent years, especially since the turn of the decade, they have released a number of more reflective studies in which they have acknowledged the need for more humility and a more evidence based approach to policy development. A summary of some of this thinking is provided in Attachment 1 and Attachment 2 (section 3).

Three conclusions from this recent literature are especially relevant to the Committee's deliberations.

(a) *there is no clear evidence that any particular institutional approach to bargaining delivers superior efficiency outcomes*

This means there is not compelling analytical reason to privilege the enterprise as the primary unit for bargaining. Indeed, coordination for bargaining across enterprises can often result in superior outcomes on matters such as skill formation, fairer sharing of hours of work and the adjustment of wages to macro-economic shocks. (see Attachment 1 for more details)

(b) *the one agreed relationship between bargaining structures and outcomes is that decentralised, deregulated systems are consistently associated with greater inequality*

The 2004 OECD Employment Outlook's assessment of the connection between wage setting institutions and outcomes was blunt on this point. While it noted strong conclusions could not made on most matters, it finished it's assessment of the matter as follows:

> This chapter's analysis confirms one robust relationship between the organisation of collective bargaining and labour market outcomes, namely, that the overall earnings dispersion tends to fall as union density and bargaining coverage and centralisation/coordination increases. It follows that equity effects need to be considered carefully when assessing policy guidelines related to wage-setting institutions (OECD 2004: 166)

(c) *an inclusive industrial relation system extends the gains of 'the strong' to 'the weak'. Maintaining the integrity of such a system requires minimising the ability of employers to use 'exit options' to side-step labour standards.*

The OECD, drawing on a large literature, argues that in making sense of wage setting arrangements it is important to pay attention to two factors: union density and collective bargaining on the one hand and the importance of what it calls 'extension mechanisms' on the other. As is well known, union density rates have fallen in many countries in recent times. This has not, however, necessarily resulted in declining bargaining coverage. This is affected by employers' practice. It is also affected by public policy. As the OECD notes, through a process of 'extension' public authorities can

> make a collective agreement generally binding within an industrial sector, covering all employers who are not members of its signatory parties. In several countries, 'enlargement' beyond the agreement's initial domain is also possible (OECD 2004: 147)

The importance of such 'extension' arrangements for protecting the vulnerable in the labour market has been highlighted in a recent large scale study of 'low pay Europe' commissioned by the Russell Sage Foundation in the USA. One of its key conclusions concerned the importance of maintaining the effectiveness of labour standards by limiting employer's ability to get 'exemptions' from them. That study focused on the low paid. It noted that the size of low pay sector was primarily determined by the nature of the industrial relations system – not just policies concerning low pay. Inclusive systems – that is, those that cover all workers - limit the growth of such sectors, fragmented ones nurtured them. (See especially Section 3 in Attachment 2)

Current Australian realities: findings from large scale studies of employers, workers and agreements

One of the ironies of the *Work Choices* revolution is that it precipitated a new 'golden age' in industrial relations research. Prime among these have been studies based on surveys of over 2,300 employers, 8,000 workers and all agreements in retail and hospitality as well as

employer green field agreements in 2006 (Considine and Buchanan 2007, Evesson et al 2007 and van Wanrooy et al 2007 and 2008). A summary of this literature has been provided elsewhere (Buchanan et al 2008 – copy at Attachment 3.) The key findings from this material are as follows;

(a) *employer preferences, not problem, are driving policy on labour law*. For example while recent labour law reform has been preoccupied with issues of limiting industrial action and union operations, strikes and union activity are at historically low levels

(b) *the reality of enterprise bargaining has not been increased customisation of employment arrangements, but rather a redefining of labour market standards.* For example, a study of all registered agreements – most non-union – in retail and hospitality in 2006 revealed that 24 percent were identical and 49 percent came from one of six templates. As Evesson et al (2007) noted:

> … in sectors where workers have limited bargaining power the key dynamic at work appears to involve policy induced, consultant facilitated employer determination of collective contracts (page 47).

(c) *the inequality of bargaining power is neither uniform nor non-existent*. It exists at the bottom of the labour market – but also in unexpected places where skilled workers have few choices.

(d) *individual and collective arrangements are complements not substitutes*. For example many workers on AWAs had similar wage movements to colleagues doing like work. Many workers on collective arrangements also had a component of their pay individually determined.

(e) *Awards continue to play a key role in pay determiniation, even for those earning $100,000 or more per year*. Currently around two in five workers report this, with 28 percent of those on high incomes noting this is the case. (van Wanrooy et al 2008: 96,

(f) *Working time is a problem for many workers*. Around a third of workers want different hours of work. Many full timers want shorter hours, especially when they work over 45 hours per week. Many part-timers want more, especially when they work less than 15 hours per week. (van Wanrooy et al 2008: 97)

(g) *There is a need to redefine 'standard' employment*. Traditional labour categories like 'permanent' and 'casual', 'employee' and 'contractor' no longer adequately deal with the realities defining contemporary working life (van Wanrooy et al 2008:98)

The importance of building on institutional legacies: agreements and the independent resolution of difference.

In many matters of public life Australia's still suffers from a cultural cringe. If we need to learn something new we invariably look overseas for the latest policy 'innovation'. In the realm of IR policy the vision of the USA has been particularly attractive to many commentators – of both the right and the left. In moving forward it is important that we recognise Australia has something distinct to offer the world – the lessons from 100 years of jurisprudence and labour market practice involving an unique blend of individual contracts, collective bargaining and arbitration. It is important we keep the best of this legacy and not marginalise it. As Professor Margaret Gardner has noted:

> No system where interests collide can proceed without a means to break deadlocks in negotiations or redress major asymmetr[ies] of market power. Here an independent tribunal has form and reason …(Gardner 2008: 40)

The importance of this legacy was noted by Justice Kirby in his powerful dissent in the *Work Choices* case:

> As history has repeatedly shown, there are reasons of principle for preserving the approach of our predecessors. The requirement to decide industrial relations issues through the independent process of conciliation and arbitration had made a profound contribution to progress and fairness in Australian law on industrial disputes, particularly the relatively powerless and vulnerable. [*Work Choices Case* per Kirby 649]

The key strength of this approach, according to Kirby is that where there is significant conflict independent decision-makers:

> were obliged to take into account not only economic considerations but also considerations of fairness and reasonableness to all concerned and the consistent application of principles of industrial relations in Australia. [This] … imposed a 'guarantee' for employer and employee alike that their respective arguments would be considered and given due weight in a just and transparent process, decided in a public procedure that could be subjected to appeal and review, reasoned criticism and continuous evolution. (*Work Choices* case per Kirby 565].

Further details about the importance of building on the best of the past to help navigate the future in Australian labour law can be found in Buchanan 2008 (Copy provided in Attachment 4)

Implications for *the Fair Work Bill*

As noted at the outset the *Fair Work Bill* is a huge piece of legislation that is a major improvement – substantively and stylistically – to its predecessors. I cannot comment on all provisions. I have had the benefit of reading the submissions of Professors Stewart and Peetz. They provide excellent suggestions on how to improve a number of specific provisions which I endorse. My suggestions, drawn directly from the research noted above, concern two basic matters: avoiding legal rigidities and ensuring the integrity of the labour standards is maintained over time.

(a) Avoiding legal rigidities

(1) *The scope of agreement making*. There is nothing in the research literature that shows there are benefits in stopping the parties to collective bargaining reaching agreement on any matter of importance to them. The history of Australian case law on 'industrial matter' and 'pertaining to the employment relationship' shows the only real winners where such provisions exist are lawyers. As we move to an increasingly carbon constrained future it is unclear why our labour law is clinging to nineteenth century notions of managerial prerogative and thereby limiting the ability of the parties to enforceable agreements to reach innovative solutions to the problems they encounter. The suggestions by Professor Stewart on this matter should be adopted.

(2) *The power of industrial tribunals to arbitrate*. It is good to see the role of industrial tribunals partially restored. It is disappointing, however, that considerable scope to challenge the exercise their authority is provided by the considerable hedges placed on Fair Work Australia's discretion to act. Instead of having highly detailed provisions as contained in the Bill it would be far better to give tribunal members simple, clear guidelines: preference to be given to the parties to reach agreement if possible, but where this is not the case tribunal members should be given a free hand in settling disputes. The issue here is not just what was or what was not written in the *Forward with Fairness* policy statements. Our new labour law is going to integrate State and Federal systems. At State level active systems of arbitration have worked well without stifling bargaining. It is important the congealed wisdom embodied in these arrangements is carried through into our new national system. (see eg Gardner

2008 for arguments about positive lessons from the Queensland IR reform experience.)

(b) Maintaining the integrity of our new labour standards regime

As noted above, where there are exemptions from labour standards they need to be tightly controlled. In addition to the research noted in recent OECD and Sage Foundation studies – Australia already has negative experience to reflect on. The growth of 'casual' employment in Australia has been more an artefact of gaps in our labour law than due to any increased growth in itinerant work. Around half Australian casuals have been in their jobs for a year or more – hence the great Australian oxymoron – 'the permanent casual'. Two issues in particular need attention here.

(1) *Keeping the 'high income threshold' under control*. It remains somewhat of a mystery as to what the policy rational for this feature of the Act is. As noted above, our research shows, for example, over one in four employees earning $100,000 per annum report that awards play a role in setting their wages and conditions. Clearly these people are set to suffer a reduction in their enforceable rights at work. Professor David Peetz's proposals to make determination of this a matter of statute and not delegated legislation is very important. I also suggest that in keeping the threshold under control the rate should be adjusted not simply by reference to the CPI or AWE. In addition - given that only about 5 percent of employees earn more than $100,000 per year[1] – the cap should be adjusted to ensure that no more than the top 5 percent of employees are excluded from award coverage with the passing of time.

(2) *Keeping track of individual flexibility arrangements (IFAs)*. The Bill makes provision for written, unregistered agreements to vary award and collective agreement provisions. Such 'individual flexibility arrangements' (IFAs) will have the force of either award or agreement status provided they meet certain minimal requirements. Prime among these are that they be 'genuine' agreements, written and leave the worker 'better off over all' (ie the so-called BOOT test). Over-award arrangements have long been a part of Australian labour law. What is potentially different here is that over-awards used to operate on top of, not potentially in place of, award provisions. Clearly the BOOT test is inspired by the old 'no disadvantage test' (NDT). The impact of the old NDT has been little studied.[2] What analyses are around showed that it did little to protect the maintenance of decent labour standards. Given that standards slid where agreements were collective in nature and subject to public scrutiny, the prospect for their erosion where they are individually made and not publicly registered is a matter of significant concern. The experience of consultants in devising templates for employer driven agreement making is a matter that deserves special attention. To help minimise the potential undermining of standards I propose the following matters accompany the provisions for IFA:

- all employers should be on notice that FWA will be authorised to call in such agreements with no notice for spot audits – ideally on a sectoral or regional labour market basis

- where such agreements are obtained they should be made available for independent scrutiny by researchers to help ascertain the impact they are having

- where any breach in labour standards is established, the worker affected should be entitled to 10 times the amount of the breach in

[1] This estimate is taken from ABS, *Employee Earnings and Hours,* Australia, Cat No 6306.0, May 2006

[2] See for example the important work by Richard Mitchell and his colleagues at the University of Melbourne in the latter 1990s and early 2000s report in Mitchell et al 2005.

compensation. This will provide an incentive to employees to notify FWA of such breaches and make employers think twice before promoting agreements of marginal legality

- any consultant involved with the propagation of template IFAs that are found ultimately to have failed the BOOT test should be liable to a punitive fines (eg $100,000 for the first offence and multiples of that for each template and sector/sub-sector organised on the basis of a template).

These recommendations may seem heavy handed. They are proposed on the basis of experience with non-union collective agreements under *Work Choices*. Where public policy grants parties a capacity to negotiate individually it is doing so on the basis of trusting the parties to be fair. Without trust our labour law does not function well. Where trust is violated it eventually breaks down completely. Where parties are found to have violated trust they should pay a very high price.

(c) Improving the quality of information available on enforceable rights

NESs, awards and registered agreements will be available for public scrutiny. This is important for maintaining standards. If proper analysis of the evolution of enforceable rights is to occur, however, there is a need for the links between instruments and the relevant occupations covered by them to be reported. To date this has not occurred and limited our ability to track how labour law in practice affects enforceable rights. The Committee should ensure that adequate data collection practices are put in place – either by statute or regulation to - ensure the best possible scrutiny of enforceable rights at work is possible.

Conclusion

The literature on IR and economic performance reveals that labour standards primarily impact upon the quality rather the quantity of jobs. As the economic crisis unfolds the need for strong labour standards rises, it does not subside as some luxury to be taken up in 'better times'. The *Fair Work Bill* marks a major improvement in Australian labour law. It builds on the best of past experiences and offers new ways forward for negotiating the future. Instead of pitting standards against flexibility, it offers a framework of standard for flexibility. In moving forward, however, there is a need to avoid excessive legalism over the content of agreements and the scope of tribunal operations. There is also a need to ensure the new standards regime is not white-anted by the 'high income employee exemption' and 'individual flexibility arrangements.' I look forward to discussing this submission with the Committee.

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Attachments to submission by John Buchanan

1. Recent policy research on the association between labour relations arrangements and economic performance released by the World Bank, the International Monetary Fund and the OECD

2. John Buchanan and Gillian Considine, 'The significance of minimum wages for the broader wage setting environment: understanding the role and reach of Australian awards' in Australian Fair Pay Commission, *2008 Minimum Wages Research Forum Proceedings, Volume 1*, Research Report No 4a/08, [AFPC, Melbourne] October 2008 pages 47 – 62

3. John Buchanan, John, Brigid van Wanrooy, Sarah Oxenbridge and Michelle Jakubauskas, 'Industrial Relations and Labour Market Reform: Time to Build on Proven Legacies', *Economic Analysis and Policy* (Journal of the Economic Society of Australia (Queensland), Vol 38 No 1 March 2008: 9 - 17

4. John Buchanan, 'Labour market efficiency and fairness: Agreements and the independent resolution of difference', in Joellen Riley and Peter Sheldon (eds), *Remaking Australian Industrial Relations*, CCH Sydney, 2008 pp:175 - 188

5. Chris Briggs, John Buchanana and Ian Watson, *Wages Policy in an Era of Deepening Wage Inequality*, Academy of the Social Sciences in Australia Policy Paper No 4, 1/2006, Canberra [http://www.assa.edu.au/Publications/op/op12006.pdfhttp://www.assa.edu.au/Publications/op/op12006.pdf]

6. Brigid van Wanrooy, Michelle Jakubauskas, John Buchanan, Shaun Wilson and Sean Scalmer, *Australia at work. Working Lives – Statistics and Stories*, University of Sydney, October 2008 [available from www.australiaatwork.org.au]