Farewell the fair-go country

By John de Meyrick MBE

There has always been some disagreement as to whether New Zealand, South Australia, New South Wales or the Australian Government was the first to establish a comprehensive system of industrial arbitration.

But there can be little doubt that from the outset in the early 1900s it was the Australian Government that introduced to the world this form of workplace justice. And although it was to be adopted and experimented with in some other countries it has never been embraced elsewhere with quite the same dedication or measure of acceptance.

Now, after more than 100 years in which it has been integral to the Australian way of life and its economy, and firmly embedded in its psyche of a 'fair go', that system has been effectively disrupted, if not altogether negated, by the changes which the federal government has made to its industrial relations laws.

So conscious is the government of the sensitivity of these changes that it spent over $50m in a pre-legislation advertising campaign to soften up the public to what is to come. It also proposes to spend a further $452m on their implementation.

According to the rhetoric (and the 691 pages of legislative amendments that have since been enacted) what is to come is not only good for the economy and good for employers, but also good for the workers who are going to prosper like they never have before. Indeed, it seems that what is proposed will unshackle workers from the chains of a system that has been holding them and the country back for years.

Now workers will be free to go out there in the market place and do some hard-nosed bargaining for themselves. Labourers, clerks, shop assistants, mechanics, juniors, et al, will be free to negotiate their own contracts with their employers who will be constrained to bargain in good faith under (quote) 'a fairer system with better balance in the workplace for employees and employers'.

So what's all the fuss about? Is it not a good thing if the system were simpler, fairer, more flexible with more choices, less rules, regulation and red tape, existing awards preserved, and with minimum wages, the right to join a trade union, and a number of specified conditions assured?

Why would this not make for a happier, fairer and more agreeable relationship between employers and their employees? Why does it not make good sense for all concerned and for Australia?

For that matter, what is so precious about industrial arbitration? They don't have it in that powerhouse economy the USA; nor is it part of the system of any of our Asian neighbours. Are their workers any worse off for the want of it?

On the other hand, if the present system has been holding back the nation and the ability of its workers to do so much better for themselves, why has the Australian economy been booming now for so long, with very low unemployment and the lowest incidence of industrial unrest on record whilst many of our trading neighbours have not been so buoyant?

In short: has industrial arbitration and trade unions passed their used by date, or are we headed back to the 'bad old days' of social inequality and confrontation?

Let's revert for a moment to the pre-1850s. Up until then workers had suffered centuries of slavery then various forms of feudal serfdom and servitude before eventually there emerged in time for the Industrial Revolution and thereafter as the basis for workplace relations: the contract of employment.

Since then every employee throughout the industrialised world, from the lowest paid worker in the country to the managing director of the largest corporation, has a contract of employment, whether written on a piece of paper or just made by oral agreement and/or by performance.

The present changes have not been needed in order for employees to negotiate those contracts. Every worker has always been free to go out into the market place and enter into some hard-nosed bargaining as to the terms and conditions of their employment. After all, contracts are entered into by mutual agreement, and when one is (say) selling a used car or selling a house, one can

Industrial relations rally at Martin Place.
Photo: Britta Campion NSW / News Image Library

always haggle for a better price. Why can't that be the case when it comes to negotiating one's employment?

Well, that is not quite how it works in the industrial relations market, especially at times during a labour surplus where employers have little difficulty in filling jobs. And the more ordinary the job and the larger the pool of applicants the more one-sided is the bargaining, if any.

The fact is few employers advertise a position on the basis of inviting applicants to sit down and work out the terms and conditions of their agreement. In virtually every case it is a matter of take it or leave it. Even at management level.

That's how it was for centuries, and to a very large extent still is. Although the gradual intervention of governments over the years has provided some commonly applied laws in relation to such things as workers' compensation, public holidays, annual leave, standard hours of work, superannuation, etc.

In Australia as elsewhere, contracts of employment have been made subject to a variety of these common rule conditions and requirements. Such regulation intrudes into the otherwise private bargaining relationship between the parties, with no employer or employee being able to bargain them away.

However, in addition to these common conditions, there has been since the beginning of last century in Australia (until the new changes were enacted) the overall supervision of industrial relations under a system of arbitration that has provided by way of industrial awards, a great deal more benefits and protections. Such conditions as minimum margins for skill, overtime penalty rates, casual work loadings, meal breaks, allowances for shift work and hazardous and dirty conditions, etc.

Leaving aside the kind of benefits that a government may care to apply to its citizens generally by way of legislation, in all other such matters of employment it must be recognised that there are very few workers who are in a position, even with the help of a trade union, to negotiate with their employer the particular conditions of their contract on anything like equal terms.

Indeed, up until the mid-1800s there was very little government legislation of the kind referred to anywhere in the world, and what there was usually favoured the employer. Most certainly there was no statutory minimum wage or maximum ordinary hours of work, or other basic entitlements that are available today.

The parties were totally free to bargain. Not on any fair and balanced basis of negotiation but, as history shows, on the employer's terms.

In this, the traditional courts could not assist. Courts only exercise judicial authority and that does not allow them to decide disagreements between employees and their employers in any matter that is not strictly to do with the enforcement of their contracts, whatever that involves.

For example, if the contract was for (say) 12 pounds a year (as was the going rate for domestic service in the early-1800s) and the employee received only six pounds then, assuming the employee had the money and the fortitude to take the employer to court (and risk becoming unemployable thereafter), the court would uphold the contract and force the employer to pay up. But if the employee complained that the rate of pay and the hours of work were unfair and wanted the contract changed then that is not something a court can do. The same applies today.

It is in that simple difficulty that industrial arbitration was born. For judicial authority can only enforce existing rights whilst arbitral authority can grant new rights.

It is also in that important difference between judicial authority and arbitral authority that the Devil is to be found in the changes to the present industrial relations laws.

For what those changes do not trumpet is that by exposing workers to the harsh reality of contract law they are reverting to the bad old days before arbitration, albeit with some props and safety nets that are obviously too well embedded, long conceded and too politically hard to remove.

To explain: In an ordinary contract for (say) the sale of goods or the provision of services, if there is no provision to meet any changes in costs or circumstances and one of the parties is losing on the deal, then the party that is disadvantaged is stuck with what has been agreed. A court cannot help. As the High Court recently held (in *Romanos v Pentagold Investments* (2003) 217 CLR 367 a court will not intervene 'to reshape contractual relations in a form the court thinks more reasonable or fair where subsequent events have favoured one side or the other'.

Yet that is precisely what arbitration can do and has been doing for centuries in matters of commercial contracts, from the days when merchants in Genoa and The Hague sought the help of a respected independent businessman or councillor to resolve their disputes and, if necessary to do so, on terms different to what they had agreed to.

It is also precisely what industrial arbitration can do and has been doing since its introduction in Australia in January 1905 as a response to the crippling decade of strikes and disturbances in the waterfront and shearers disputes during the severe depression that followed the 30 years 'long boom' of prosperity in Australia between 1860 and 1890.

Judicial authority can only enforce existing rights whilst arbitral authority can grant new rights.

Two years after its introduction, Justice H B Higgins in the (then) Commonwealth Court of Conciliation and Arbitration (the forerunner of the present Australian Industrial Relations Commission) set about establishing in the celebrated Harvester Case judgment of November 1907, a minimum (basic) wage in Australia, based on the average weekly living expenses of an unskilled worker with a wife and three children, for rent, groceries and other essential needs.

The result was to award the (then) landmark sum of seven shillings (70c) a day for a standard 48 hours, five day working week (ie., $4.20 per week).

Employers were outraged but, based on that criterion, business and industry advanced and, with national tariff protection from the dumping of foreign goods, the economy grew. Rural production and manufacturing thrived and the 'common wealth' of the country was more fairly shared among its population. The concept of a 'fair go' was born.

With a system of regular indexation and adjustment that on occasions had stalled and had even gone down between 1931 and 1941, this basic wage lasted until 1967 when the commission introduced the total wage concept, and later the National Minimum Wage.

This process has had the effect of keeping an adjustable economic base under the nation's unskilled workforce, barely adequate as it is for many such workers, and upon which all other occupations have been able to maintain their margins for skill, including those covered by industrial awards. Even those in middle management and others who, although award free, have been provided with a base upon which to establish individual work value and to justify salary increases from time to time.

The government has not abolished this minimum wage process. It has only stifled it somewhat by taking it from the Australian Industrial Relations Commission (AIRC) and vested it in a separate business-oriented and somewhat less than independent Australian Fair Pay Commission.

According to the prime minister, people will look back later and wonder why on earth they were ever concerned about these changes, and will say how much better off they then are. Some may. But... business may look back and wonder if it quite turned out the way they expected.

That new and additional body will also fix the minimum rates for award classification levels and for juniors, trainees, apprentices, casuals, piece workers and disabled workers. What will be left for the AIRC to do will be significantly curtailed, very little of which could be regarded as arbitration.

Over time, industrial awards, which are a form of tribunal-made statutory regulation, will cease to provide an underpinning economic and work-related social base for the wages and conditions of the nation's workforce.

Predictably, as this base begins to erode and to lose its relevance, the effect will be to create a growing underclass of workers unable to meet the basic standard of living (as Justice Higgins might have seen it), let alone keep up with the widening gap between that standard and the level of income needed to meet the ever increasing expectations of a consumer-driven society.

In effect, fewer will have more and far more will have less. That reverses some of the essential cogs and levers that presently drive the economy.

This, for a time, will push up the pointer on the business gauge marked 'profitability' but elsewhere on the economic machine the pressure gauge of 'social equity' will move down scale. Welfare demands (notwithstanding any justifiable welfare-to-work reforms) will rise significantly. Average household income will fall in real terms. Expenditure will be curtailed. Debt levels will rise. Profitability will then weaken and fall away.

According to the prime minister, John Howard, people will look back later and wonder why on earth they were ever concerned about these changes, and will say how much better off they then are.

Some may. But the scenario just outlined would suggest that ultimately, business may look back and wonder if it quite turned out the way they expected.

The chief objects of the original *Conciliation and Arbitration Act 1904*, inter alia, were stated to be 'to promote goodwill in industry [and] to provide means for preventing and settling industrial disputes not resolved by amicable agreement…' Those objects have now been replaced, inter alia, with the object of 'ensuring as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and the employees at the workplace or enterprise level.' Full stop.

The abrogation of the role of the AIRC in this way, which it has discharged over the past 100 years and which is replicated with variations within the systems of each state (including Victoria prior to the Kennett Government giving up its industrial relations powers to the Commonwealth in 1996), will do more than just remove the power to fix rates of pay. It will prevent that tribunal from deciding other terms and conditions and independently settling disputes in relation to the particular circumstances of specific industries and occupations.

True it is that at times the AIRC's role has been abused by certain aggressive unions that have used strike action and industrial blackmail to gain unreasonable ends. But relieving the AIRC from its dispute settling and award-making powers will not avoid such action. It is more likely to exacerbate it. Also without recourse to a body with such powers the parties have only the ordinary courts to fall back on and, as indicated, those courts cannot resolve such disputes or do anything except impose sanctions. That rarely helps.

The arbitral functions of the AIRC (and of the respective state tribunals, if these new federal provisions are found to operate with paramount force, at least in respect of companies) have now been diverted back to the parties; not so much by providing some better means of resolving disputes, but rather by leaving the parties (including employers faced with hard-line union action) with no where to go for effective help.

In future, industrial disputes are to be resolved in the workplace, or taken to a private alternative dispute resolution service. The AIRC will be able to mediate industrial action (strikes) that will be a lot harder to engage in, but not to arbitrate and settle anything by way of an award. In this, powerless private mediation and arbitration organisations are no substitute for an independent sanction-backed statutory tribunal.

Under these changes certain long-standing and politically untouchable conditions (such as annual leave, long service leave, 38 hour week, etc.) have been preserved. Industrial awards have been frozen (except to remove some 'lurky' benefits such as union picnic day and paid trade union training). However, such benefits as public holidays, meal and rest breaks, annual leave loadings, allowances, penalty rates and bonuses, may be traded away in future contract negotiations.

A very significant and discriminatory change is that, except on certain grounds (such as illness, racial discrimination, etc.), the current laws relating to unfair dismissal in future will not apply to businesses with less than 100 employees. Thus, there is not only a double standard introduced depending on the size of the enterprise, but the vast majority of employees involved will be subject to dismissal without reason, justified or otherwise, and without recourse to any kind of justice.

Even those employees who work for organisations with more than 100 staff members are vulnerable if the employer is able to show that one of the reasons (not necessarily the main reason) for the dismissal is based on an 'operational reasons'. (It is not yet clear but even recourse to the common law for breach of contract, which has never been a real alternative in most cases anyway, may also be denied.)

True it is that some employees are well deserving of dismissal. Also that some employers are distracted at times by unjustified claims of unfair dismissal which can be particularly disrupting for small businesses. But this is not a significant factor preventing employers from taking on more staff, as the Government claims. Nor is it a reason for denying justice in appropriate cases.

It is also ironic that statutory protections abound in providing recourse to consumer tribunals and the like for persons who may have been disappointed in the purchase of some product or the rendering of some service for a few hundred dollars but that the unfair breach of a contract upon which the livelihood, reputation and well-being of a worker depends can be statutorily denied.

These new changes also exempt employers from the unfair dismissal laws in respect of the first six months of every new employee's term of engagement. That may assist very small enterprises such as shops and cafes that are able to turn over staff anyway using casual labour. But for others it will also prevent many employees who are in secure jobs from risking a move to improve themselves. Employers may find it necessary to offer greater incentives to recruit quality staff just to make the taking of that risk worthwhile.

What those who have never experienced it cannot appreciate is that whilst no one thinks badly about an employer who loses an employee to another job, if that employee is sacked unfairly and/or without reason, that employee carries a stigma thereafter; a question mark that hangs over that employee's future prospects of employment and career that has to be explained away in the next job application, and the ones that follow after that.

It also invariably has a devastating effect on the dismissed employee's ability to find another job, as well as that employee's family, personal health, finances and psychological well-being. This is all the more hurtful the older, more responsible and more dedicated the employee is to the position, and the more repercussions there are for that employee's life resulting from the termination.

So really what the government has done is to rule a line under the 'fair go' system as it has developed over the past 100 years, clamp down on areas where it is considered that employees have had it too good for too long, allow certain well-established processes to continue under tighter control, leave alone certain politically untouchable entitlements (some of which may be traded away) and generally bring back the contract of employment as the future means of conducting industrial relations in preference to an independent supervisory arbitral system.

It also hopes to have done this not only for workers under the federal system but, by using the corporation power under the Australian Constitution, to extend these changes to the state arbitration systems as well (at least in respect of companies).

That aspect of the changes is expected to be challenged in the High Court by the

states and by them also shoring up their own legislative provisions. Without going into an examination of the subject or speculating on the prospects of success, one wonders how the federal government may enlarge its power in respect of section 51 (xxxv) of the Constitution relating to the prevention and settlement of industrial disputes extending beyond the limit of any one state, by subsuming that power in a separately circumscribed and disparate provision, placitum (xx) relating to corporations? But well, watch this space.

Meanwhile these changes, or Work-Choices as the government has labelled them, have excited the passions of the Labor Party Opposition, the trade union movement (which could not have asked for a better cause to revive its declining membership), as well as the usual chattering classes, in an area that has been the quietest for some time. One must wonder why on earth the government needed to invoke such adverse political opportunity.

Certainly, there was a need for some changes in a system that had become overly regulated and inflexible, as well as unyielding to the reasonable and sensible present-day needs of both employers and employees. But there is little merit and no choices to be had in these WorkChoice changes. There is also nothing to suggest that the system will be made fairer and simpler. The opposite is already manifest.

Long-standing union barriers to sensible production needs and other restrictive practices have been, in many cases, just bloody-minded impediments to the common good, whilst various benefits such as long service leave have long lost their original purpose and for most employees would be better cashed in or, preferably, paid as superannuation.

In many ways too, trade unions have done such a good job that they have virtually put themselves out of business. Progressive employers have come to realise that the value of their business lies in the way they value their staff. Strike action is also now regarded by the majority of employees as economically stupid and an unsophisticated weapon in achieving appropriate industrial relations outcomes.

But without the safety valve of an independent and effective industrial arbitration system that may all change. Who knows what the economic outlook may be ahead? Perhaps another depression like the 1890s, or the 1930s, or even a recession like we had in the 1980s? How long will our present buoyant economy continue? Who knows?

One thing is certain, the vast majority of employees are not going to be in an equal bargaining position with their employers, whatever the labour market and the economic situation may be.

No employer, large or small, is going to enter into individual negotiations with each and every employee and have a variety of arrangements to deal with in their enterprise. It will be one size fits all, and for the majority of workers that will mean the basic cut-down, bare bones award or an award-free standard workplace agreement. Sign it or go.

That may appeal to many employers as restoring the balance of power they thought they had lost. But given time, it will prove to be a case of back to the future. It will all have to be redone again. Dispute after dispute. With nowhere to go for effective help.

Certainly it is true that many of our industries are unable to compete with other countries due largely to our labour costs. But then it is also true that because of our 'fair go' sharing of our Commonwealth we have created a way of life that many other countries envy.

Of course it must also be recognised that, by current world standards, our way of life is to some extent unsustainable. But the answer is not to develop a growing underclass of workers. Helping the people of other countries to achieve our standard of living is preferable to lowering ours to better compete with the world.

The Howard government that has done much to improve the economic prosperity of Australia has been badly advised in respect of these changes. They are ill-conceived. Far more would be achieved by way of taxation and business compliance reforms than by turning back the clock on industrial arbitration.

These so-called 'reforms' came into effect on 27 March 2006. A day which will be seen by many industrial relations historians as the day when justice and a 'fair go' were taken from the Australian workplace and workers exposed to the harsh reality of contract law.

Time will no doubt show that one does not mess about with the Australian way of life without inviting trouble. For no amount of political assurances will justify these changes to those who make the nation's wheels go round.

These so-called 'reforms' came into effect on 27 March 2006. A day which will be seen by many industrial relations historians as the day when justice and a 'fair go' were taken from the Australian workplace and workers exposed to the harsh reality of contract law.