The industrial relations reform agenda

By Bob Whyburn

After many months of speculation, the prime minister has formally announced the detail of the Federal Government's proposed changes to the industrial relations system in Australia.

The key points of the prime minister's statement in the House of Representatives on Thursday 26 May were:

- new arrangements for setting minimum wages and conditions outside the Australian Industrial Relations Commission;
- a more streamlined process for the making of workplace agreements;
- greater award simplification;
- dramatic changes to the unfair dismissal laws; and
- the goal of a national industrial relations system.

The role of the Australian Industrial Relations Commission in setting wages and conditions will be exercised by a new body to be called the Australian Fair Pay Commission. This new Commission will set both minimum rates and wage rates contained within awards. The real focus of the proposed change is to have as many workers as possible employed under individual workplace agreements (AWAs) rather than awards. The Australian Industrial Relations Commission will lose its power to vet collective agreements in the workplace; and in future, all collective and individual agreements will be approved on lodgement with the Office of the Employment Advocate. Consistent with this approach, awards will be simplified to cover only basic entitlements. Entitlements covered by other legislation (including long service leave, superannuation, etc), will no longer be

contained in awards.

In a bold move not anticipated either by employer or employee organisations, the prime minister announced that businesses with up to 100 employees will be exempt from unfair dismissal claims, and businesses with more than 100 employees will be able to impose a probation period on new employees of six months, compared with the current three months. This effectively means that there will be a reduced degree of job security for those employed by smaller employers.

At a recent meeting, the prime minister asked all state premiers, other than the Victorian premier, to cede their industrial relations powers to the Commonwealth, thereby facilitating the establishment of a national industrial relations system. Victoria ceded its powers in 1996 under the then Liberal government of Premier Kennett, and the current Labor Premier, Bracks, has done nothing to overturn that decision. Other states refused and the government has announced that it will pass legislation based on Section 51(xx) of the Constitution, the Corporations Power. So far, the states have indicated that they will join with unions to mount a High Court challenge to such a move. There is a division of legal opinion about the success of such a challenge. The dominant view, however, seems to be that such a challenge would be unsuccessful.

Other measures, including stronger laws in relation to industrial action, providing a single right of entry regime, and discouraging pattern bargaining, are all aimed at reducing the role and influence of unions in the industrial relations system.

One matter that received very little media attention was this paragraph contained within the prime minister's statement:

> 'Establish the Australian Safety and Compensation Council to oversee implementation of national occupational health and safety standards and pursue a national approach to workers' compensation.'

No further detail has been provided in relation to the proposed national workers' compensation 'approach'; however, this warrants careful monitoring.

On the same day as the prime minister's statement, the *Australian Financial Review* published a letter that I had written to the editor. Under the heading, 'Fairness Missing in IR Laws', I wrote the following:

> 'Fair will not be "fair" under the proposed IR changes ('Fair's still fair under IR changes' – *AFR*, 24 May 2005). The federal government's proposed changes are directed at removing fairness from the industrial relations scene. What's fair about an individual employee being given a contract to sign and being told "sign it or get out" which is what will happen under the new regime? There is no "level playing field" in these cases.
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> 'Pesutto in his article suggests that employees will be able to use the common law to exercise their rights. The vast majority of employees that I see do not have the resources to access the common law system and anyway why would you encourage a worker to commence proceedings in, for example, the District Court of NSW in relation to an employment dispute when it might take two years for the matter to be heard with the risk of losing and having to pay $30-40,000 in costs?
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> 'The current IR system in NSW and elsewhere works because it is accessible to all parties in terms of resources and time, and all parties know that a decision will be made swiftly and fairly and that, whatever the outcome, it will be enforced.
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> 'To say that employees will continue to have rights under the proposed new regime is like saying that all the apples are still on the tree but they've all been moved up to the top branches and the ladder has been cut in half. Rights are one thing but accessibility and enforceability are what count; that's where fairness lies.'

As of 1 July, the Howard government has a majority in both Houses of the Parliament. However, there is still some discontent in government ranks over the proposed changes. New senator, Barnaby Joyce, from Queensland, has made it clear that the prime minister cannot assume that he will vote in favour of any proposed legislation, stating that he is concerned that the proposed amendments, and in particular the move towards a national system, raises a states' rights issue. It appears that he sees his role as a senator as being a protector of the rights of the state he represents.

I will be watching with interest to see how the prime minister deals with that issue politically, because he needs the votes of all coalition senators if the legislation is to pass the Senate. Another potential voice of dissent that may impact on the government's majority vote in the Senate has come from the new Family First Party senator, Steve Fielding.

Meanwhile, the union movement has mounted a public education campaign to alert all employees to the consequences of these changes. With interest rates still historically very low and many workers committed to large mortgages, the question of job security is important. It is estimated that the majority of employees will not have access to any unfair dismissal remedy, and so far there has been no guarantee that those employers with more than 100 employees will not set about re-organising their structures so as to create a number of companies with fewer than 100 employees. Those who remember the Waterfront Dispute involving the MUA and Patrick Stevedores will recall that the employer used similar tactics.

The prime minister has repeatedly said that the changes are necessary if productivity in Australia is to be increased, and a recent report issued by the Australian Treasury purports to support that view. However, the experience in New Zealand following the introduction of similarly draconian legislation in the mid-1990s is evidence that this claim is not necessarily correct.

The social impact of these changes has not been mentioned and, I suspect, not even considered by the government. By removing the protection afforded by awards and by dramatically reducing the power of the Australian Industrial Relations

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Commission, the government is exposing lower-paid workers to the possibility of becoming what is known in the US as the 'working poor'. Australia's long tradition of wage fixation has always had regard to those at the bottom end of the wage scale. If this is removed, we can expect to see a situation where households are economically poor, even though at least one member of that household is in full-time employment. There is certainly nothing fair or laudable in that.

This is a watershed time in industrial relations in this country and, whatever the outcome, it will shape the industrial relations system for many years to come. Any hopes that a future ALP government would roll back the present administration's changes have recently been dashed by the leader of the Opposition, Kim Beazley. He has made it very clear that the ALP would not rescind any changes, but would seek to make amendments to ensure that whatever the system was, it was fair to all. Obviously, the ability of any future ALP government to make effective changes will require a majority, or majority support, in the Senate.

While a precise timetable has not been fixed for the presentation of the proposed legislation, a draft Bill should be prepared and ready for presentation to the Lower House in approximately September/October this year, with a start date some time in the first half of 2006. Clearly, any High Court challenge will take some months to be heard and decided. While the High Court will not issue any orders prohibiting the implementation of the legislation, it is likely that the Court will seek an undertaking from the government that it will delay its implementation until such time as the Court has delivered a decision. To do otherwise would give rise to considerable uncertainty and, should the Court rule in favour of the challengers, mean that a giant scrambled egg would have to be unscrambled.

There is a long way to go in the process of change, and one can only hope that proper consideration is given to the social consequences of any legislation and that proper consultation takes place to ensure that all Australian employees continue to get 'a fair go'. ■

Note: 1 *Australian Financial Review*, 26 May 2005.

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