H R Nicholls Society XXXI conference

How fair is Fair Work Australia?

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Introduction to proceedings Saturday, 2 April

Its time to examine the costs and benefits of the Fair Work Act regime, introduced on 1 July 2009, in view of occasional and increasing concerns about its operation at least since the middle of 2010, such as:

- Fair Work Australia denying two teenagers their after school jobs, on 9 July 2010: NRA and ors, General Retail Industry Award 2010 [2010] FWA 5068
  ,
- BHP Billiton, no less, predicting "negative productivity impacts" of low level industrial activity across Australia since the introduction of the Fair Work Act: Australian Financial Review, 8 October 2010.

- The reintroduction of compulsory FWA arbitration in government work, contrary to the freedom in the Act in this regard: AFR 8 October 2010.

- Impediments created by the Act in shifting employees between subsidiaries: AFR 14 October 2010.

- Australian Mines and Metals Association on the burden, expense and disruptiveness of good faith bargaining under the Act: booklet October 2010; as well as its later concerns about the Act.

- The prime minister's desire that two million non- and under-employed "re-engage with the workforce" (some of which huge number could be the product of the FWA regime): The Australian, 2 February 2011.

Now, just three days ago, Heather Ridout herself, the chief executive of the Australian Industry Group, who in 2009 described the legislation as a workable compromise, and who was closely consulted by Rudd and Gillard on the Act, says "problems with the Act are becoming more apparent by the day" and she details 17 problems: see The Australian, May 16, 2009 and her speech of 30 March 2011 to the International Forum on Employment Relations Reform ...."

The AIG's is one view of the Fair Work Act, but it is the view of a player, like that of a social worker or anthropologist. Today's conference will present views of segments of industry and about segments as well political perspectives from Senators Abetz and Fisher. Better still would be the views of employees, employers and unions.

For the union perspective we hope at a future conference to hear from Dean Mighell, State Secretary of the Electrical Trades Union, Victorian Branch, as he has offered to do. (Family

commitments prevented him from attending this conference.). He has wished the Society all the best for this conference and I thank him for that. To hear from workers is understandably difficult but I mention now that if any employee wishes to ventilate success or a difficulty with the FWA the society would like to hear. For example how did Jetstar pilot Joe Eakins, who was said to be sacked last December because he publicly criticised cost cutting, go before the FWA?

But the most difficult party to hear from is an actual employer, for whom the excuse is given: why should they put their head above the parapet? The effectiveness of business' campaign against the mining profits super tax, the continuing campaign of the smaller (Australian) miners against the tax, and the growing business campaign against a carbon tax show they can speak up without being victimised. And if you are victimised, what are you going to lose: a place on the Reserve Bank board? All political parties would make fewer and less dopey IR laws if employers spoke up.

This society was founded on the voice of victimised employers such as Robe River and Dollar Sweets. New brutal practices, of which we will hear today, warrant employers taking a stand. To them the society offers a platform.

Two other features of the landscape to be surveyed are the opposition's position and the conduct of unions.

May I partly pre-empt the opposition senators from whom we will hear. The opposition's supposed lack of IR policy is not wholly a weakness. When they fully, and promptly, consider Heather Ridout's 17 FWA problems, the rort which is "adverse action" mentioned by Dr Kates' last night, unfair dismissal to be addressed by Leyla Yilmaz etc, the solution may well be greater or lesser dismantlement, and certainly not the building of a new IR regime. This would be consistent with Tony Abbott's view eight days ago to a breakfast in Hawthorn, that it is the vision of individuals that he wishes to foster rather than a vision imposed on them by the alternative government.

Finally a feature of the FWA decisions to be surveyed by Des Moore is that grievance by workers is pretty well absent and the cases are about what unions want for themselves, and certainly not on behalf of workers. In the controversial JJ Richards case[1] decided before Christmas the only fact remotely connected to work was that the union asked Richards, who collect garbage, to discuss an enterprise agreement. That's all: no discussions in fact took place, no draft agreement or points of claim were made by the union. The only evidence about the workers was that they were harmonious and convivial. However the union wanted and got, by majority, a decision that these workers be compulsorily balloted on the question of whether they should strike. But about what? There was no dispute. The union's remoteness from worker issues was further illustrated by its sloppy identification of who it wanted to agree with, which ranged from Richards workers generally - which would have included those in New Zealand - to Richards' workers in New South Wales and finally, by the intervention of the tribunal on the basis of a letter that the employer never received (!!!), to just those working on the Canterbury Council waste contract. Neither the employer nor FWA seemed to focus on facts or the proper issues.

[1] JJ Richards and Sons Pty Ltd v Transport Workers Union of Australia [2010] FWAFB 9963

In fostering cases like JJ Richards the Fair Work Act is merely catering for what unions want for themselves, it is not dealing with workplace relations nor worker grievances. This undermines even the government's rationale for much of the Act.

Comrades, we say, with Heather Ridout, its time - to expose the problems with the Fair Work Act, which is what today's conference will seek to do.