Industrial Relations Reform in Western Australia: An Opportunity Missed

Introduction

Thank you to the Society once again for inviting me to present a paper to a Conference.

The Society is often considered on the fringe of debate and its views are currently unfashionable, but so were Winston Churchill's between the wars, but history proved him to be correct. I have no doubt that history will judge you in the same way, if not in less epic circumstances!

The history of industrial relations in Australia has been well documented by this Society and others. Following the Harvester decision in 1907, there was a general settlement in the Western world that there was essentially a tripartite symbiotic relationship between employers, employees and unions. This settlement worked in a heavily protected manufacturing-based economy and essentially stayed in place right through until the 1980s. It survived governments of all hues, including those of a conservative strain.

That this is so causes a great deal of puzzlement for a younger man like me whose earliest political memory is of the Hawke Government. I recently read John Howard's memoirs, *Lazarus Rising* – which is actually a rather disappointing read – except for the pages he devotes to the years he was in the Fraser Government and he claims he was one of the first to realize and start agitating for IR reform.

Then in the 1980s, industrial relations suddenly became political. That this is so is not really surprising – the Labor Party's creation was to be the political arm of the trade union movement. No matter how they portray themselves these days, the Party still knows its roots and continues to attract members with a deep sentiment for the old order. Labor is always going to try and turn back the clock to recreate it.

The real activity in this area began when the Liberals finally woke up and realised that things needed to change. This realisation in the late 1980s presaged an era, which we still find ourselves in, where IR legislation basically changes radically when a government changes hands. This occurred at both Federal and State levels of government. Western Australia was no exception.

On 6 February 1993, Richard Court was elected Premier of WA and Graham Keirath, who has been an occasional guest at the conferences of this Society, became the Minister for Industrial Relations. At the 15th Conference of the Society in 1994, Mr Keirath proudly described the legislation that he had introduced in WA. This included the first use of individual statutory agreements anywhere in Australia at a time when Keating and Brereton were conversely advancing the cause of the trade unions via the federal *Industrial Relations Act 1993*. Mr Keirath was also responsible for the introduction of the first serious attempt at building industry reform with the creation of the Building Industry Task Force (BITF).

The WA legislation was undoubtedly one of the many reasons for the amazing oil and gas boom that WA experience in the 2000s, ironically they were fruits enjoyed by the succeeding Labor

governments. That capital flowed to a state where labour was more flexible than elsewhere is no surprise to most of us.

However, on 10 February 2001, the popular and successful Premier of Western Australia, Richard Court, lost government owing to a combination of factors, mainly the temporary unpopularity of the Federal Liberals and a strong showing for One Nation and the strange 'Liberals for Forests' phenomenon that afflicted the Golden State back then.

One of the first acts of the new Gallop administration was to immediately close the Task Force and amend the Industrial Relations Act to abolish individual agreements. It was this abolition of the Task Force that helped prod Tony Abbott to create the Cole Royal Commission in 2002.

The Cole Royal Commission reported that the abolition had resulted in the *"reappearance of all the restrictive practices which existed in the 1980s and early 1990s".* But the impact was immediate. Unions did not wait for the formal dismantling of the Task Force. Targeted companies found the unions at their gates the Monday following the election. The Royal Commission cites one case where Joe McDonald from the CFMEU turned up on the Monday and declared it was "*GST time. Get square time. We have waited for this for years*."

Another construction manager reported how a CFMEU organiser told him: *"Now that the Labor Party has won, we have 4 years to level the playing field. We will take one builder at a time and pursue them until they play with us or they crumble. At the moment, it's your turn."*

But of course Gallop knew all that would occur and was occurring. But it was an article of faith for Labor that changes had to be made to protect their mates.

We saw the same at federal level too. The 1993 Act was a highly political move for Labor whilst the *Workplace Relations Act 1996* was an immediate change wrought by Peter Reith in the opposite direction. Work Choices (2005) went even further still and then Gillard's first act in 2007 to go in the other direction with the ironically titled *Fair Work Act*. No doubt an Abbott Liberal government will make further changes should it ever get to the government benches.

Some would argue that so much change creates uncertainty for business. This is true to an extent, but why should that stop conservatives from taking steps to improve bad laws?

The Barnett Government

On 6 September 2008, the Liberals in Western Australia pulled off a massive upset victory in the State election and, in the process, ended the brief 10 month political hegemony that Labor was enjoying in all the major tiers of government in Australia. Many, myself included, hoped that WA would be at the vanguard of a move to introduce more labour market flexibility. Sadly, it has not worked out that way.

Colin Barnett is an excellent politician and a genuine kind of bloke. There was probably no one else in WA capable of leading the Liberals to government in 2008. Unfortunately he has never struck me as a man committed philosophically to the principles of economic liberalism. Certainly, he is a big supporter of business, as his former leadership of the WA Chamber of Commerce & Industry would attest to. However, so often this support for business means 'big mining companies', and he seemingly cares little for the small businesses who comprise the majority of employment in WA.

Small business comprises 88% of all enterprises in the State. Yet Woodside and Rio Tinto are sexy; Betty's Bakery in Balga is not. This attitude at times rubs off on the rest of his government.

Nonetheless, the WA experience all started so positively. Troy Buswell was appointed in 2008 as the Treasurer and Minister for Commerce, giving him purview of the industrial relations portfolio. Mr Buswell, despite his faults, has always struck me as one of the most capable and intelligent of all the current politicians in WA. He is also a former entrepreneur and small business operator in regional WA, so he well understands the real world and the need for flexible labour markets. He had an excellent grasp of his portfolio and knew what he wanted to do with it. He knew that small business people in WA were hurting from Labor's changes and were expecting the Liberals to do something about it.

I met Mr Buswell in late 2008 and I asked him what would be happening to the state IR Act. He immediately replied that WA would not be referring its powers to the Commonwealth, although he thought it would be a good idea to adopt the Fair Work Act, except with the bad bits excised. I thought these were good policies and told him so.

The Amendola Report

I was therefore filled with excitement when it was announced in early 2009 that Steven Amendola, a highly respected partner of the law firm, Blake Dawson, had been appointed to conduct a review into the State IR system with Terms of Reference summarised as follows:

1. *The review of the State IR system should take into account the Federal Government's Fair Work Act and identify:*
    a. *Which elements of FWA should form part of a reformed State IR system; and*
    b. *Potential areas for harmonisation of State and federal IR legislation.*

2. *The review of the State IR system should specifically identify areas of legislative reform including:*
    a. *Unfair dismissal;*
    b. *Employment agreements;*
    c. *State Awards;*
    d. *Union right of entry;*
    e. *Minimum wages;*
    f. *Dispute resolution; and*
    g. *Statutory minimum conditions of employment.*

Mr Amendola submitted his report and 193 recommendations to the Government on 30 October 2009 and was reportedly paid $850,000 for his efforts. The report however was not publicly released until 6 December 2010. By that time, over two years had passed since the Government was first elected and Mr Buswell was no longer a minister owing to the fallout from his affair with the Greens MLA, Adele Carles.

His replacements in the portfolio, Bill Marmion and, since December 2010, Simon O'Brien don't appear to have the same reformist zeal that Mr Buswell did. Accordingly, the Amendola Report has died a quiet and slow death. The momentum has now been lost. What a waste of $850,000.

Yet the Report itself was full of many excellent recommendations.

The State Industrial Relations System – After Work Choices

It would be unfair of me not to acknowledge that all the State IR systems have a lot less importance in a post-Work Choices world. The effect of the High Court decision in *New South Wales v Commonwealth* (2006) 231 ALR 1 was such that all 'constitutional corporations' are now captured by the Federal system – like it, or not.

Effectively this means that the respective State systems now only pick up public servants and employees of unincorporated businesses, e.g. sole traders and partnerships. By any measure, everyone accepts that this is a minority of Australian employers and employees.

Estimates vary, but Amendola's report cites a variety of statistics that suggest that approximately 30% of all employees in WA remain in the State system – about 300,000 persons. Of this, about 100,000 are public employees, leaving the other 200,000 to be employed by the myriad of micro businesses that have for whatever reason never incorporated.

300,000 workers is not an insignificant number and highlights to continuing need for a relevant and modern State IR system.

Amendola's Recommendations

Having identified the need to maintain a State IR system, Amendola then proceeds to make recommendations for what a new system would look like.

<u>Minimum Conditions of Employment</u>

The Report recommends the adoption of the National Employment Standards (as they were at the time of the Report), but for the 'right to request flexible working arrangements' and the requirement to provide a 'Fair Work Information Statement'.

The flexible working request was introduced for the first time in Australian law by the Fair Work Act at Section 65. Under this provision an employee with child under school age to request 'flexible' working hours and the respective employer can only refuse the request on "reasonable business grounds" which are undefined. Employers were never happy with this provision, as it creates uncertainty for business planning.

Section 124 requires employers to provide all new employees with a statutory Fair Work Information Statement that outlines all their basic workplace rights. Amendola characterises this Information Statement as tantamount to government trying to shirk their educative role by passing the responsibility to employers.

On the issue of working hours, the Report notes the generally accepted 38 hour maximum working week that has been enshrined in law and most awards for some years now. The controversy that has always raged amongst practitioners however for a few years now however was the issue of "reasonable additional hours". Neither the Fair Work Act nor its predecessor (Work Choices) provided any clarity on this issue. Amendola however recommends that the issue could simply be resolved by written agreement between individual parties. This seems to be a reasonable and simple solution.

The Report also quietly recommends a default loading of 20% for casual employees in lieu of leave accruals. This recommendation may seem rather innocuous, but one of the little

discussed aspects of Fair Work was the stealth introduction of a 25% casual loading for all which was deliberately aimed at undermining the use of casual employment.

Otherwise, on the issue of minimum conditions of employment, the Report recommends adopting the same provisions as FWA in terms of enshrining leave periods, e.g. four weeks for annual leave, ten days for sick, etc.

Awards

The Report noted that there are currently 338 State Awards. Of these, 52 are public sector and 71 are enterprise specific – almost all of which would now be in the federal system. The remaining 215 are private sector awards.

Many of these Awards prior to Work Choices were already hardly in use. Consider by example, the omnipresent *Aboriginal Police Aides Award* and the *Wool Scouring and Fellmongery Award*; or even the *Vehicle Builders' Award*, when there hasn't been a vehicle manufacturer in WA for years. With the advent of Work Choices, even more of these 215 awards have fallen into complete disuse.

Many of the Awards were also first written in the 1970s and can be prone to using impenetrable language at times. Further still, some awards contain horribly uncompetitive conditions that have been punishing employers unfairly for years. Take for example, all the building industry awards, including my industry's very own *Electrical Contracting Industry Award*. Thanks to a 1991 decision of the Commission, the phrase 'redundancy' has been interpreted to mean any termination of employment. This means that every time an employee resigns, the employer is actually obliged to make hefty severance payments to him, scaled upwards the longer the period of continuous service. I recently had an example of a small electrical contractor turning over less than $1 million a year. Two employees of ten years service decided to retire and he was suddenly up for $20,000 in 'redundancy' payments in addition to the usual termination cache. That was half of his annual profit wiped out in one hit.

Amendola is right to recommend that the State Awards need to be reviewed and modernised and any superfluous awards should be abolished.

Minimum Wages

The pre-Work Choices order was that of 'comity' – if the AIRC increased the minimum wage by $10, then all the state Commissions awarded the same increase. They still wasted everyone's time by conducting their own lengthy enquiries to justify their existence, but essential the real decision had already been made in Melbourne beforehand.

This all changed under Work Choices because the Fair Pay Commission was seen as political and so was ignored by the equally political state Commissions and they all got out of kilter. As a consequence, WA now has the highest minimum wage in the country at $569.70 per week, which is $25.92 per week more than the current Federal Minimum Wage.

The Report couldn't see the point of having divergent State and Federal minima. Accordingly the recommendation is that State Wage Cases be abolished and the power is invested in the Minister to decide how to translate the federal wage case decision into outcomes for WA awards.

Agreements

Some may recall that the Keirath legislation of 1993 was ground-breaking particular by way that it was the first in Australia to allow for individual statutory workplace agreements and non-union collective bargaining. Sadly, as I have previously described, this legislation was repealed by the Gallop Labor Government in 2002. To sate the employer critics, they instead created a fudge called "employer-employee agreements" of which 66 pages of the *Industrial Relations Act* are devoted setting out the content, form and process of making such agreements. Perhaps unsurprisingly, only 21 are still operational today.

Such 'employer-employee agreements' remind me greatly of the Individual Flexibility Agreements option that supposedly exists in the Fair Work Act as a sop to employers who wanted to maintain AWAs. I am still yet to meet a practitioner that has bothered to write such an Agreement as they are effectively useless – an employee can cancel them unilaterally on 21 days notice, yet the employer does not then have the power to terminate the employment. So why bother taking such a risk?

The absence of direct employer-employee bargaining in WA has meant that the only option for providing certainty on labour costs is to make a deal with the union. As most small businesses in WA (and other states) would have never encountered a union and hope to never do so, this means that attempting to make an agreement requires one to expose their bunker to the Katyushas. The corollary to this is that the business must therefore remain solely Award reliant – not a great foundation for modern labour practices.

The Report recommends the return of real AWAs (although that term is never actually used) and non-union collective agreements. The Report also recommends that agreements apply from lodgement, rather than having to wait for the slower processes of the Commission to approve them formally; however it would still be the job of a government agency to conduct a 'No Disadvantage Test' assessment after lodgement.

The Report's recommendations have the eerily familiar ring of the system which existed under Work Choices – in my opinion, not such a bad thing.

Industrial Action

The Report interestingly notes that, unlike Federal law since 1993, there has actually never been any statute in WA that allows for industrial action to be taken that would be immune from suit. Nonetheless, just as has been the experience elsewhere in Australia and the world, the illegal status of industrial action has never actually dissuaded anyone from doing it.

To quote Amendola: *"Does that sound like the 1970s and 1980s? I think it does"* (para 546).

Intriguingly however, the Report therefore concludes that some industrial action should actually be permissible in certain circumstances, e.g. during bargaining. Otherwise it should be outlawed and real penalties ought to apply for breaches in line with the current provisions of the Fair Work Act.

This is the 'legalise and regulate' theory of controlling vices. *"Drugs wouldn't be a problem if we legalized them and forced manufacturers to obtain strict licences",* etc.

Even more intriguing however was the opinion of the unions whom Amendola consulted during the course of compiling the Report. He posed the status of industrial action to them and, to his surprise; he found they were rather cold towards the idea of 'protected action'. Employers are naturally opposed to it, lest they be seen to tolerate such a practice, but the fact that the unions are also opposed shows that they don't consider the Commission to be anything but an ally in their battles. '*Why fix it if it ain't broke?'* a comrade may be wont to say.

Unfair Dismissal

For most employer and employees, unfair dismissal is the main game in industrial relations. It's the topic that attracts the most attention and passionate debates.

That this is so is unsurprising. Unlike esoteric arguments about transmission of business rules, unfair dismissals are one of the few areas of an IR system that affect everyone, even if they never make a claim. All employees know that they have a fall-back if they are unhappy with a termination and all employers know they have no certainty whilst ever they are potentially liable to face such a claim.

The unions realised this between 2005 and 2007 and stirred up these passions to convince a lot of people that their 'rights' had suddenly been destroyed by Work Choices. Such was the abject failure of the Howard Government – and particularly his Ministers responsible, firstly Kevin Andrews, and then later Joe Hockey – to counter this argument that it became an accepted fact. Yet the reality is that until 1993, Australia had never had a statutory right to contest a dismissal until it was introduced by the *Industrial Relations Act 1993* (Keating-Brereton Act). It was then quickly replicated across to the various State systems that didn't already have similar provisions.

The WA regime on unfair dismissals is perhaps the nastiest such provision anywhere in the nation. It is reminiscent of the first iteration of the Keating-Brereton Act before it was hurriedly amended in 1994 in the face of widespread complaints. The WA system has no restrictions on who can make a claim. Unlike the maligned Federal system, there are no restrictions on persons in their probationary periods or persons who earn above a certain salary cap. There's also no exemption by reason of 'genuine redundancies'.

The result is a system that makes employer trapped in the State system even less competitive than those trapped in the Federal, which is doubly compounded by the knowledge that there are relatively few employers in the State system anymore that have the size to be able to absorb this sort of nonsense. As I have already outlined, almost all sole traders and partnerships are in micro businesses, many of which operate out of family homes and have very limited equity and amazingly tight cash flows.

The Report intriguingly fails to make a firm recommendation but instead offers two options:

1) An exemption apply for any business with less than 20 employees; or

2) There be no employee cap, but all employees are restrained from making a claim until they have served a qualifying period of 12 months service.

I prefer Option 1, as it would effectively serve as a statewide exemption for all. State system employers with more than 20 employees (other than the public service) are extremely rare, and in this way, unfair dismissal laws in WA would exist in name only.

Child Employment

The International Labour Organisation (ILO) has created over 188 Conventions in its 92 year history, however only 81 are current and have not been superseded. It is not well-known by Australians that we have only ratified twenty of these Conventions as of 2011.

Whilst this may come as a shock to some that Australia's ratification tally is so low (by comparison, Cuba has ratified 37), such is the proliferation of standards that no country is even close to achieving full compliance. The Americans have only ever ratified seven Conventions and even the French have only ratified 47.

As such, the ILO began to take a new course in the 1990s to refocus its efforts by identifying 'Core Labour Standards' concerned with what it sees as being fundamental human rights. Consequently it has identified eight such Standards amongst its ranks and turned its energies to coaxing all nations to sign up to these eight 'core' standards. They are:

- the elimination of all forms of forced or compulsory labour (Conventions Nos. 29 and 105);

- the abolition of child labour (Conventions Nos. 138 and 182);

- freedom of association and the effective recognition of the right to collective bargaining (Conventions Nos. 87 and 98); and

- the elimination of any discrimination in employment and occupation and the recognition of equal remuneration for work of equal value (Conventions Nos. 100 and 111).

In this respect, most Australians would probably be shocked to learn that out nation has never ratified all eight of these core standards, even though the ILO has now successfully managed to get most of the world to – although as an aside, the Americans have only signed up for two. They still haven't even ratified the anti-slavery conventions! Although to be fair, this is because they would be prevented from making prisoners go to work.

For Australia, the offending article is Convention 138 – the *Minimum Age Convention 1973*. Under this standard, complying nations are prohibited from allowing any persons under the age of 15 from working. *Period*. That would mean no paper rounds or flipping burgers at Maccas for anyone prior to the end of 9th Grade.

To my great but pleasant surprise, somehow all of Whitlam, Fraser, Hawke, Keating, Rudd and now Gillard have resisted the temptation to wet the pants of the luvvies by ratifying this treaty and thereby making Australia a complete signatory to the ILO's core standards.

Gallop however didn't miss the opportunity. Despite the fact that Australia hasn't ratified the Convention, his Government nonetheless created the *Children & Community Services Act 2004*. This legislation general prohibits persons under 15 from working, although to be fair, there is an exception for 'delivery work' which is allowed to the age of 10 and retail work for persons as young as 13.

Similar legislation was adopted by Victoria in 2006, although interestingly NSW has never adopted any minimum age legislation.

The Report recommended that the existing legislation should continue and be further strengthened to prevent minors from doing unpaid trial work or becoming independent contractors.

Whilst the Report does not really analyse why such laws are even needed in the first place – there was never any evidence of children being overworked – I suppose such laws are also conversely fairly innocuous.

Restructuring the WA Industrial Relations Commission

The Report goes into some details about the long and varied history of the Commission and its predecessors in all their forms. Currently the Commission is a quasi-judicial body that would remind many of the NSW Commission. The commissioners have the same power as judges and the same right to life time appointments on salaries starting from $250,000 per annum.

The Commission has long considered itself omnipotent. Indeed, the legislation was deliberately designed to give it wide-ranging powers. Section 23 of the IR Act reads:

> *"… the Commission has cognisance of and authority to enquire into and deal with any industrial matter."*

"Industrial matter" is of course defined very broadly at Section 7 as any matter *"affecting, relating or pertaining to the work, privileges, rights or duties of employers and employees in any industry."* Combined with its judicial powers, this has given the Commission members a sense that they can make whatever orders they deem fit and in any matter they like, provided that it has at least a tangential connection with an employment relationship.

As a consequence of Work Choices, unsurprisingly the workload of the Commission has dramatically dropped. There were 2,987 applications made to the Commission in 2003. By 2009 this had dropped to just 620. Yet staffing levels remain the same. Currently the Commission is staffed by a President, Chief Commissioner, Senior Commissioner and six Commissioners, plus a total of nine Associates to accompany each of them. This means that each officer handles an average of 70 matters each per annum, or just under over one per week. A very light workload indeed.

The report sensibly recommends the Commission lose its status as a court and the number of members be reduced to just three. The Report correctly argues that the need for court powers is otiose if the Magistrates Courts are empowered to deal with contractual matters and pursue civil remedies. This restructuring would save the State $3.3 million per year just in wages.

The Report further recommends that the jurisdiction of the Commission be reduced in scope by removing the definition of "industrial matters" so that the common law meaning will apply and abolishing the Commission's power to arbitrate disputes.

> *"There has been a discernable shift in the past 15 years away from centralized industrial relations regulation towards empowering employers and employees to manage their own workplace affairs. That shift is one which recognises that employment legislation should*

> *focus on the parties and the relationship rather than paternalistically having a tribunal as the centerpiece of the system around which everything revolves."* (para 224)

The Report also specifically targets the scope of the existing Commission in determining road transport owner-driver disputes which it believes are best left to the operation of the *Independent Contractors Act* (Cth).

Other Recommendations

The Report also recommends the abolition of a raft of otiose legislation, most of which I have to admit most practitioners (myself included) wouldn't have even been aware of.

There are only two coal mining companies left in WA, both of which are now in the Federal system post-Work Choices. Yet for some reason we still have a Coal Industry Tribunal. The Report unsurprisingly recommends the abolition of this redundant instrumentality.

The Report also recommends repealing the *Conspiracy & Protection of Property Act 1900*. One provision of this Act was to introduce a fine of $20 or one month's imprisonment for any person who punishes another *"merely by reason of the fact that he belongs to a trade organisation such as a trades union."* The same Act also makes it an offence for a master to fail to provide his servant with necessary food, clothing, medical and lodging. The penalty for offending this provision is $40 or six months imprisonment.

As far as my research can ascertain, there has never been a reported case of someone being prosecuted pursuant to this legislation in the 111 years since it was enacted. It does seem to be relic of a long past age.

Government's Response

As I have previously outlined, by the time the Report was publicly released, the portfolio had long since moved onto a less interested Minister – one who was undoubtedly unfamiliar with the subject matter and is naturally more politically risk averse.

In its response of 6 December 2010, pretty much the only recommendations that were accepted was to consider broadening the power of the Commission to award costs against parties for vexatious or frivolous conduct…. Oh, and yes they also agreed to abolish the Coal Industry Tribunal. Somehow even the *Conspiracy & Protection of Property Act* will continue to fight another day.

I don't think its actually possible to have a meeker response than this.

The simple truth is the Barnett Government fears a fight with the unions if they dare to touch industrial relations – they have nightmarish visions of 'Your Rights at Work' posters lining telegraph poles. A strategic decision has been taken this isn't a priority issue and as such, they have tried to bury the Amendola Report in its entirety.

It makes you wonder why they bothered to spend $850,000 in commissioning it in the first place.

Conclusion

I'm not a politician and never will be, so I don't pretend to be an expert on the finer points of psephology. However being a New South Welshman by birth I was keenly watching the coverage of the NSW Election last week and the thing that all the commentators keep saying was that the electorate was finally fed up with a do-nothing government that was all spin and no substance.

The point of government is not to collect power but to provide leadership. Sometimes this means taking on vested interests and having a stoush in the interest of the greater good. I believe that this is a fight worth having. The business community elected the Barnett Government on the premise that they would uphold traditional Liberal values, yet Mr Barnett appears to only be interested in sating the appetites of the big miners and making shrill noises about cracking down on 'anti-social' behaviour on Saturday nights.

Small business meanwhile must continue to swim against the tide of an inflexible and very expensive labour market, in addition to all the other inflationary pressures being caused by the 'boom' in the West. They are crying out for help but these cries are falling on tin ears. They need leadership.

Benito Mussolini also once said: *"It's better to live one day as a lion, than a thousand years as a lamb."*

A bad person to quote, I know, but it's time that Mr Barnett stood up and became a lion.

The 193 recommendations of the Amendola Report ought to be implemented in full and without further delay.

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