Building a better industrial relations future?
Howard's way

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John Howard, Federal Shadow Minister for Industrial Relations, is a man with an almost missionary zeal about industrial relations reform and during the past few years his message has begun to dominate the political debate on a range of industrial relations issues. He has, of course, been aided by the print media which has largely adopted his message as its own.

But what does the Howard 'message' really entail and who actually supports it? If implemented by a future Liberal Government will it, as Howard says 'build a better future' or will it tear apart the social fabric of our nation and lead to greater industrial injustice and inequality?

As I will argue, my answer to the first question is that the crude ideology underlying Howard's message is widely understood and supported, but the substance of the message — the reality of the Liberals' industrial relations policy — is known only to a few and would be abhorred by the majority of Australians if they understood its practical implications. The answer to the second question is, I believe, that the implementation of the policy will undermine the egalitarian nature of our industrial relations system and will lead to a less equal, less just society.

Individual contracts, an end to award protection

The Howard message, at the level of ideology, is fairly simple. It is centred on the notion of freedom of contract and freedom from union power. If individual workers are able to freely negotiate their employment terms with their employer this will result in greater productivity and mutual benefits for both, i.e. higher profits and higher wages. But the core assumption is that similar productivity gains cannot be delivered by the existing industrial relations system. Thus we find that the substance of Howard's strategy involves a direct attack on the industrial relations system. In order to bring about a regime of individual contracting it is necessary to both de-collectivise and deregulate the system, in other words, to destroy union bargaining power and to undermine the system of industrial award regulation.

Few Australians realise that the central plank of the Liberals' industrial relations policy — the proposed voluntary agreements — involves a direct attack on the award system. Howard himself said this was the aim of the policy during the 1990 federal election campaign. What it entails is that workers will be free to 'bargain' individually with their employer and to register their bargain as a 'voluntary agreement' which will have the force of an award — even if it contains pay, terms and conditions inferior to the relevant award. Howard argued that the Shepparton Preserving Company ('SPC') saga justifies such a policy,[1] but the analogy does not withstand scrutiny. In December 1990, SPC negotiated *collectively* with its workforce (even if it excluded unions) to arrange changes in work practices and wage reductions (for Saturday and Sunday work and on the afternoon shift) below award rates. The relevant unions and the Victorian Trades Hall Council entered the fray and sought to negotiate a deal which preserved award conditions. The dispute was then heard in the Australian

Industrial Relations Commission and under its auspices an agreement was reached between SPC and the unions which allowed SPC to make most of its desired changes — to reduce over award benefits and to improve productivity through changed work practices — *within* the industrial relations system. The lessons from SPC are that most unproductive work practices are not entrenched in awards and can be eliminated by informed and strategic industrial relations management.

If Australians become sufficiently informed of Howard's policies there will be public outrage. The award system provides the core of employee rights to about 80% of the workforce. Private and union negotiated over-award conditions simply top up award wages and conditions. A basic legal principle (expressly provided for in many industrial statutes) is that workers cannot privately contract for less than award wages and conditions. Not enough has been done to educate Australian workers about the nature and content of their award rights (and this plays into Howard's hands) but generally awards regulate (and provide rights about) wages (including shift and penalty loadings), work classifications, annual leave (including the 17½% loading), sick leave, long service leave, maternity and paternity leave, severance pay, protection from unfair dismissal, as well as a range of union rights designed to ensure award compliance. Workers who negotiate their own 'voluntary agreement' for short-term gains run the risk of being denied rights which have taken unions most of this century to achieve.

Another way in which Howard proposes to undermine the award system is by promoting labour-hire arrangements along the lines of Troubleshooters Available in the building industry. Howard's high profile in explaining and supporting the Federal Court's recent decision[2] that Troubleshooters' workers are independent contractors rather than employees is part of this strategy. In a recent article, after noting that independent contractors are 'outside the award system', Howard said: 'the significance of this can barely be overstated'.[3] Indeed! But despite protestations to the contrary, labour hire arrangements are generally a sham designed to avoid award protection. There is a close analogy with tax avoidance schemes. All that is required is the creation of the legal fiction of an independent contractor. The work is the same as that done by employees; the putative 'employer' still tells the workers what to do. The only real difference is that the putative employer passes on the 'wages' to the labour hire agency which then pays the worker. The court in the *Troubleshooters* case placed considerable weight on the professed desire of the workers involved to be 'independent', but in reality the decision means that they are 'free' to be exploited, to be paid less than award rates, conditions, etc. The court also ignored the possibility that if such labour hire agencies become widespread, the award system will be undermined and that so-called individual 'freedom of contract' will then form the *basis* of our industrial relations system.

Howard's strategy of freeing up the labour market also relies on undermining the freedom of workers to strike. By destroying workers' ability to take collective industrial action to defend award conditions, or collectively negotiated benefits, the labour movement will be powerless to prevent Howard's new era of individual contracting. Of course, employers may prefer enterprise bargaining with 'enterprise based bargaining units' but Howard's policies will assist this process too.

How will Howard emasculate the unions and deprive workers of the freedom to strike? By doing nothing other than encouraging employers to exercise their *existing* rights under s.45D of the *Trade Practices Act* and the industrial torts!

No freedom to strike

The truth is, there is no freedom to strike in Australia. Every time a union encourages or advises its members to take industrial action, it commits the tort of inducing breach of contract and is liable in damages. A graphic illustration of the effectiveness of these legal weapons — and their potential to assist the implementation of the Howard strategy — is the *Troubleshooters* case itself. When building unions became concerned about Troubleshooters' workers working at construction sites for 'all in' payments (and being excluded from award conditions such as sick leave, annual leave and long service leave etc.) but working alongside employees receiving award conditions, they not surprisingly threatened industrial action at these construction sites if Troubleshooters' workers continued to work. The unions and their members felt that their hard won award conditions were under attack — and they were! But Troubleshooters succeeded in obtaining injunctions (based on alleged breaches of ss.45D and 45E of the *Trade Practices Act* and of the industrial tort of inducing breach of contract) preventing the unions from taking or threatening such industrial action. Troubleshooters also pursued — and are likely to succeed in gaining — substantial damages claims against the building unions. No wonder John Howard is pleased about the *Troubleshooters* case!

If we want to maintain a system of industrial relations in Australia which confers a floor of minimum rights for workers, based on principles of equity and justice, then we *must* retain our system of industrial award regulation. The Howard formula will undermine these egalitarian values and replace them with ones based on raw economic power. Freedom of contract really means the freedom of employers to exercise untrammelled economic power. It is obvious that unions will not be able to protect existing employment rights, under a Howard industrial relations regime, unless they are given the freedom to strike. Legislation enshrining a freedom to strike should therefore be a major priority for the labour movement while the Labor Government is in power. But to succeed in the long term, the labour movement must recapture or redirect the ideological debate about industrial relations reform. Can it do it?

In recent times, and with considerable assistance from the media and some employer bodies, Howard has hijacked the ideological debate. With economic rationalism sweeping Australia and dominating federal government policy making, it has been difficult to find a mention of equity and justice issues. Industrial awards, unfair dismissal laws, even unions themselves are seen as warts in the labour market landscape — requiring removal to ensure its free operation.

But the Howard message is vulnerable on ideological as well as practical grounds. First, it threatens basic award rights which most Australians take for granted and it arguably will create a more unequal society where those with limited economic power in the labour market — women, migrants, etc. — will undoubtedly suffer. Second, the philosophy of freedom of contract is inconsistent with a lack of a freedom to strike. This is particularly so when coupled with a policy of enterprise bargaining which sits alongside the Liberals'

voluntary agreements policy. How can there be genuine enterprise bargaining without a freedom to strike during negotiations? This fundamental fact is recognised in US labour law where unions are free to strike during negotiations over the collective agreement. It is also recognised in International Labour Organisation (ILO) Conventions which Australia has ratified.[4] The ILO is a specialist agency of the United Nations (not, as Howard suggests, 'the industrial relations club in full plenary international session')[5] and in 1991 its Committee of Experts on the Application of Conventions and Recommendations (an eminent and independent body of international jurists), in a direct request to the Australian Government, stated that s.45D and the industrial torts are not in conformity with the requirements of Convention No. 87. This leads us to the third weak point in the Howard message. The freedom to strike is seen as a fundamental human right in international law and our anti-strike laws unquestionably infringe our obligations under international law. Isn't it ironic, then, that one of the main arguments the Liberals had against the Labor Government's political advertising ban legislation was that it infringed UN human rights covenants. Yet Article 8 of the UN International Covenant on Economic, Social and Cultural Rights, requires signatories (of which Australia is one) to 'undertake to ensure . . . the right to strike'. Does John Howard propose that we withdraw from this important UN obligation?

Unfortunately the labour movement's response to the ideological debate has been left to too few — largely the ACTU and the irrepressible John Halfpenny. Liberal democrats outside the labour movement, including the increasingly pragmatic academic community, have been worryingly silent. The ACTU has so far failed to make any real impression on the debate. Not only has it been fighting an uphill battle in the media, but as an Accord 'partner' it has also had its hands tied by its close association with the Government. It could not condemn too loudly the use of the industrial torts during the pilots' dispute because it was so antagonistic to the pilots. In the aftermath, the ACTU line is that the *Pilots'* case[6] was just an exceptional case (which it was — but its precedent value is inestimable). Again, according to the ACTU the *Troubleshooters* case was just a 'flash in the pan', quickly to be forgotten (though John Howard does not think so).

True it is that the ACTU supports freedom to strike legislation, but federal industrial relations Minister, Senator Cook, received very little public support for his recent proposals on this issue. Indeed the recent debate over the freedom to strike epitomises the failure of the labour movement to capture any share of the ideological debate. Instead of the focus being on the *freedom* to strike (with its implicit notion that it is a basic human freedom which ought to exist alongside others) it was on the *right* to strike (which implies enshrining as a legal right something which already exists in a *de facto* sense). Howard has run amok with the argument that unions should not have a legal *right* to do something which places them 'above the law'. Unions, he says, should be 'equal before the law'. No-one has pointed out publicly that the law itself is not equal, that the industrial torts and s.45D are specifically aimed at collective industrial action — or in other words at unions.

Will Howard succeed?

Howard needs the support of employers to implement his policies and it is by no means clear that such support will be forthcoming. There is little employer support for his voluntary agreements policy and although employers oppose freedom to strike legislation they prefer to use anti-strike laws sparingly (though less sparingly than in the past). A shrinking number of employer bodies still supports the mainstream industrial relations system — Howard says this is so because they are part of the 'industrial relations club' and rely on the system for their existence. But employer support springs from pragmatism and even the Business Council of Australia seems moderately pleased with the gains which it has made towards enterprise bargaining within the system. The lessons from Thatcher's Britain are that employers prefer to work with unions, rather than attack them head-on with repressive legislation.

But is Thatcherism a valid parallel from which we can reliably predict the effects of a Howard regime? After all, Thatcher never took away the right to strike. What Thatcher legislation required was a successful secret ballot of employees prior to a strike which was then legal — immune from the industrial courts. Moreover collective bargaining has remained the normal mechanism for conducting industrial relations in Britain. No system of *individual* contracting where the contract could undermine the statutory floor of rights (e.g. rights to sick pay, redundancy pay or unfair dismissal rights) was ever contemplated.[7] The only comparable country to have gone down the Howard road is New Zealand, and only since May 1991.[8] New Zealand will thus become an important litmus test for the Howard model. We should watch carefully. No doubt John Howard will.

[Editor's note: See the article following by Suzanne Hammond on the New Zealand experience.]

References

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3. *Herald-Sun*, 28.3.91.
4. Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948; Convention No. 98: Right to Organise and Collective Bargaining, 1949.
5. See Creighton, Breen, 'Inside the big decision-maker', *Workplace*, Summer 1992, 36.
6. *Ansett Transport Industries (Operations) Pty Ltd v AFAP* [1991] 1 VR 637.
7. See Dickens, L., 'Learning to live with the Law? The Legislative Attack on British Trade Unions since 1979', (1989) *New Zealand Journal of Industrial Relations*, 14; Lewis, R., 'Reforming Industrial Relations: Law, Politics and Power', *Oxford Review of Economic Policy*, Vol. 7, No. 1, pp.60-75, and Ewing, K.D., 'Economics and Labour Law in Britain: Thatcher's Radical Experiment', *Alberta Law Review*, Vol. 28, No. 3, pp.632-47.
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New Zealand's Employment Contracts Act
Freedom at work?

Suzanne Hammond

Radical changes to New Zealand's industrial law are a timely warning to the Australian labour movement which faces similar threats from the Coalition industrial policies

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Historically there has been a 'closeness' between the Australian and New Zealand systems of industrial relations. The defeat of the trade unions during the 1890s Australasian Maritime Strikes resulted in workers in both countries seeking state intervention to improve their wages and conditions. In 1894 the New Zealand Government passed the *Industrial Conciliation and Arbitration Act* which introduced a system of compulsory arbitration and in 1904 the Australian Government followed by passing the *Conciliation and Arbitration Act* 1904.

Both the Australian and New Zealand Acts pursued similar objectives. They both gave formal recognition to trade unions; provided a system of legally enforceable 'awards' which set basic wages and conditions for workers; and set up quasi-legal bodies which would handle negotiations and disputes about the employment relationship. It was believed that a specialist body would better handle employment disputes than the common law system.

In both Australia and New Zealand there has been continued debate about the effectiveness of these industrial relations systems and recently both have undergone significant changes. Naturally, any change that occurs in one country influences the debate in the other. In 1990, the New Zealand Government introduced radical changes to its industrial relations system. These changes have created much interest in Australia especially among those who want similar change to the Australian industrial relations system. This article briefly discusses the new industrial relations legal regime in New Zealand and, albeit too early to discuss empirical trends, discusses some effects of this policy.

The Employment Contracts Act

In 1990, the New Zealand National Party Government introduced a law that has remodelled the employment relationship. As stated by William Birch, Minister for Labour, when presenting the *Employment Contracts Bill* to Parliament, the 'purpose of the Bill is to establish an entirely new framework for industrial relations in New Zealand'.[1] The *Employment Contracts Act* has dramatically altered the philosophical underpinnings of collective labour law to a regime which embraces the notion of the individual employment contract. The Act locates the employment relationship at the individual level in the workplace.

This dramatic shift in public policy can only be understood by considering the political context within which this change was fostered. The aim of the legislation according to Philip Burdon, Minister for Commerce, 'is to promote the establishment of an efficient labour market that is based on the principles of freedom of association and freedom of contract'.[2] The *Employment Contracts Act* is a response to the demands of those espousing the policies of free market economics. The Act aims to create a purely market driven labour force with minimal intervention and is based on philosophy which expounds the need for flexibility, decentralisation and internationalisation. The legislation was grounded in the policies associated with Thatcherism and propounded in New Zealand by the 'New Right' employer and business organisation, the Business Roundtable.

The *Employment Contracts Act* 1991 abolishes the award wage system, removes state support for the encouragement of unionism and collective bargaining and has considerably increased the power of employers either to refuse to bargain or to control the course of bargaining. The bargaining process and any contract resulting from it has been removed from the centralised authority and is now a matter for negotiation between employer and the employee.[3]

Main features of the Act

1. The Act reintroduces voluntary unionism. It provides that nobody can lawfully require an employee to remain or become a member of any 'employee organisation'. An employee cannot be lawfully prevented from leaving an employee organisation (s.6). It is unlawful for any person to confer any preference or fringe benefit on an employee as a result of the employee's membership or non-membership of an employee organisation (s.7). No person can lawfully exert influence on any other person to try and stop them from joining/leaving or remaining a member of