2008: ANOTHER ‘WATERSHED’ YEAR IN THE INDUSTRIAL RELATIONS HISTORY OF AUSTRALIA?

Gordon Stewart (Central Queensland University) and Sandy Horneman-Wren (Barrister at Law)

Abstract

In a previous paper, the authors (Stewart & Horneman-Wren 2006) argued that the enactment of the Workplace Relations Amendment (Work Choices) Act 2005 represented a ‘watershed’ in the history of industrial relations in Australia. At that time, Gordon Stewart and Sandy Horneman-Wren (2006, p. 31) argued ‘that there will be no easy or obvious turning back to an era dominated by a comprehensive system of industrial awards, which are maintained by a quasi-social partnership of governments, trade unions, employer associations and tribunal members’. They further argued that ‘the movement away from the conciliation and arbitration power towards the corporations power of the Commonwealth Constitution has substance’.

Be that as it may, the purpose of this particular paper is to assess the extent to which the Rudd Government’s industrial relations legislation modifies or qualifies this assessment of the significance of the Howard Government’s Workplace Relations Amendment (Work Choices) Act 2005.

Introduction

The Workplace Relations Amendment (Work Choices) Act 2005\(^1\) was the centrepiece of the Howard government’s policy ‘to introduce major reforms to the regulation of Australian workplaces’ (Stewart 2008, p. 28). This policy succeeded to the extent that the authors of one academic textbook identified a ‘New Workplace Relations System’ (Sappey et al. 2006, p. 224) at the federal level in Australia. In 2007, the Howard government was defeated at the polls and replaced by the Rudd government. At the time of writing the Rudd government has commenced the implementation of its industrial relations policy with the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008\(^2\) and the introduction of the Fair Work Bill 2008. That latter legislation is intended to ensure that a ‘new workplace relations system’ is fully implemented and operational on 1 January 2010 (Gillard 2008a; Gillard 2008b).

This paper is attempting to determine in effect, whether or not the Rudd government’s ‘new workplace relations system’ is substantially different from the Howard government’s ‘new workplace relations system’. If that proves to be the case, then the implementation of the Workplace Relations Amendment (Work Choices) Act 2005 is not the ‘watershed’ event in the history of Australian industrial relations that the

---

\(^1\) Using Andrew Stewart’s legal text (2008, p. 28) as a guide, the Workplace Relations Amendment (Work Choices) Act 2005 will be abbreviated as the Work Choices Act throughout this paper.

\(^2\) The Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 will be abbreviated as the Transition Act throughout this paper. This abbreviation was used in a speech by the Minister for Employment and Workplace Relations, Julia Gillard (2008a, p. 4).
authors considered it to be in an earlier paper (Stewart & Horneman-Wren 2006). Of course, this analysis begs the obvious question; does it matter?

The processes by which the terms and conditions of employment are determined within a society have always mattered. Such matters provide an insight into the core values of that society. Furthermore, it is assumed by many commentators that there is a direct relationship between the type of industrial relations system and economic outcomes such as the level of employment and productivity within a labour market. This assumption is undoubtedly exaggerated, but it nevertheless allows for the differentiation of the policies of the main political parties in Australia at election time. Finally, any analysis of the extent to which the Rudd government’s legislative programme differs from that of the Howard government’s legislative programme is relevant to any discussion regarding the future direction of Australian industrial relations (See Bray, Waring & Cooper 2009, Chs 12 & 13).

There are at least two limitations to this type of academic paper. First among these is the fact that at the time of writing, the Rudd government’s legislative programme is yet to be fully enacted. Notwithstanding the introduction of the Fair Work Bill 2008 and its passage through the House of Representatives the final content of what will be the Fair Work Act remains unknown, as does the content of the regulations which will provide much of the detail of the legislative scheme. Nonetheless, the proof or rejection of the thesis of this paper does not require a detailed analysis of the legislative components of this particular programme. There is enough information available in the Bill and otherwise in the public domain to allow for some limited and tentative conclusions to be reached regarding the question of the extent to which the Rudd government will reverse the industrial relations policy of the Howard government.

A second limitation concerns the emphasis of the paper on federal as opposed to state legislation. The importance of the industrial relations legislation and more particularly the industrial relations policies of the six state governments within the Commonwealth of Australia should neither be underestimated nor discounted. Nonetheless, one of the critical points in favour of the argument that the enactment of the Work Choices Act represents a ‘watershed’ in the history of Australian industrial relations is the fact that at the very least it was intended that this legislation would regulate the terms and conditions of employment for approximately three-quarters of the Australian workforce. Unsurprisingly, in these circumstances the state governments (amongst other parties) challenged the constitutional validity of this federal government legislation in the High Court. The failure of this legal challenge added weight to Andrew Stewart’s and George William’s view that ‘the Work Choices legislation was the most radical shake-up of our industrial relations system in more than century’ (Stewart & Williams 2007, Ch. 1). Finally, a strong case can be made that events since the election of the Hawke government in 1983 have supported the dominance of the federal industrial relations system. The Accord relationship between the Hawke and Keating federal governments and the trade unions dominated industrial relations policy in Australia until the election of the Howard government in 1996. Furthermore, the expansion of the range of the constitutional legislative powers that can be used and which successive federal governments are willing to use to support their industrial relations legislation has ensured the continued dominance of the federal industrial legislation agenda (Gardner 2008, p. 35).
‘Watersheds’ in the history of Australian industrial relations

The authors (Stewart & Horneman-Wren 2006) have previously argued that in the history of industrial relations in Australia there have been two genuine ‘watersheds’. The enactment of federal legislation. In the case of the first designated ‘watershed’, the core legislation was the Commonwealth Conciliation and Arbitration Act 1904. In the case of the second designated ‘watershed’, the core pieces of legislation were the Keating government’s Industrial Relations Reform Act 1993 and the Howard government’s Workplace Relations and Other Legislation Amendment Act 1996 and the Workplace Relations Amendment (Work Choices) Act 2005.

With regard to the Arbitration Act, the argument was that 1904 (the year in which the Arbitration Act was enacted) “was a ‘watershed’ year, following which there was no ‘turning back’ to the arrangements that preceded the strikes of the 1890s” (Stewart & Horneman-Wren 2006, p. 26). The Arbitration Act effectively entrenched conciliation and arbitration tribunals as key components of the new federal system of industrial relations. In simplistic terms, a compulsory arbitration system displaced a system of collective bargaining at the centre of the industrial relations system in Australia. For approximately ninety years after the Conciliation and Arbitration Act 1904, as Margaret Gardner and Gill Palmer (1997, p. 15) put it; the history of ‘Australian industrial relations is the history of the making and unmaking of the arbitral model. So dominant were the federal and state arbitration systems that they shaped Australian industrial relations from the beginning of the twentieth century through to the 1990s’. This ‘arbitral model’ was in effect, a joint decision-making model in which employers, trade unions, the process of collective bargaining and the conciliation and arbitration tribunals played a key role in managing industrial conflict and economic change (Gardner & Palmer 1997, Ch. 2; Lansbury & Wailes 2004; Stewart & Horneman-Wren 2006).

In the 1990s of course, federal legislation reduced the central role of the ‘arbitral model’ and moved the industrial relations system in Australia towards what Gardner and Palmer (1997, p. 37) call ‘private interest contractualism’:

Here bargaining between employers and unions is one part of a system of employment regulation that, while underpinned by some minimum conditions and rights, rests on the notion that employers and employees at enterprise level are individual agents engaged in setting conditions of employment.

Under this revised model, decision-making in this particular industrial relations system was no longer the exclusive preserve of labour market institutions such as

---

3 The definition of a ‘watershed’ that is provided by The Australian Pocket Oxford Dictionary (Moore 1996, p. 1233) is of a ‘turning-point in affairs’.
4 The Conciliation and Arbitration Act 1904 will be abbreviated as the Arbitration Act throughout this paper.
5 The Industrial Relations Reform Act 1993 will be abbreviated as the Reform Act throughout this paper. Margaret Gardner and Gill Palmer (1997, p. 37) use this abbreviation in their textbook.
6 The Workplace Relations and Other Legislation Amendment Act 1996 will be abbreviated as the WROLA throughout this paper.
employer associations, trade unions and conciliation and arbitration tribunals. In summary, the ‘broad framework of employment regulation through collective representation by unions, with the public interest interpreted by the arbitral tribunals, has been replaced’ (Gardner & Palmer 1997, p. 37). The system of employment regulation that replaced it constituted in the view of the authors (Stewart & Horneman-Wren 2006), the second ‘watershed’ in the history of Australian industrial relations.

For the purposes of this paper (and with the benefit of hindsight since the writing of our earlier paper), there are three key stages on the road to the implementation of this new industrial relations system in Australia. Indeed, a case can be made that each one of these separate stages represents a ‘watershed’ or ‘turning point’ in the history of industrial relations in Australia in its own right. The first stage of the process was outlined in the Industrial Relations Reform Act 1993. This legislation has been described as ‘innovative in many ways’. The ‘innovations’ of most interest to this paper concern the diminution of the previously central and unchallenged role of the arbitral dispute-settlement tribunals and the trade unions within the system, as well as the expansion of the constitutional powers used by the federal government to underpin its legislative changes to the system. The Reform Act placed enterprise bargaining and collective bargaining at the centre of the industrial relations system. Henceforth, the conciliation and arbitration award system would be reduced to the role of providing a ‘safety net’ of minimum wages and conditions that underpinned enterprise bargaining (Gardner & Palmer 1997, p. 38; Bray, Waring & Cooper 2009, p. 274). The principal dispute settlement institution, the Australian Industrial Relations Commission (AIRC), would now have ‘a more circumscribed role’ within the system. Similarly, the process of changing the role of trade unions within the system commenced with provision being made for non-union collective agreements (Enterprise Flexibility Agreements). Furthermore, the Keating government relied on the ‘corporations power’ of the Constitution to support these new non-union agreements. The ‘conciliation and arbitration’ power of the Constitution would no longer provide the only obvious Constitutional support for the establishment, operation and development of the Australian industrial relations system. Finally, the legislation encouraged the legal rights of individuals within the system with regard to the matter of ‘unfair dismissal’ (Lansbury & Wailes 2004; Bray, Waring & Cooper 2009, p. 274).

The Keating government’s Industrial Relations Reform Act 1993 is therefore a critical first legislative stage in the development of a system of industrial relations in Australia that does not place unions and tribunals at the centre of its decision-making processes. Under this particular legislation, ‘the crumbling of the arbitral model is clear’ with Enterprise Flexibility Agreements constituting ‘a decisive break from the previous arbitral model, which had encouraged and enshrined union participation in its processes’ (Gardner & Palmer 1997, pp. 37-39). In one sense however, the Reform Act does not represent a completely clean break from the past. The system was still underpinned by a philosophy of collective decision-making. Even with the presence of Enterprise Flexibility Agreements in the new industrial relations system, ‘collectivism continued to dominate, but it was a very different form of collective regulation’. Furthermore, despite the fact that the creation of an ‘unfair dismissals jurisdiction represented an expansion of individualism’, this new legal jurisdiction did not replace ‘traditional forms of collective regulation’ (Bray, Waring & Cooper 2009, p. 274).
The truly ‘decisive break from the previous arbitral model’ occurred with the enactment of the Howard government’s *Workplace Relations and Other Legislation Amendment Act 1996* (WROCLA) and the *Workplace Relations Amendment (Work Choices) Act 2005*. In this ‘new federal workplace relations system’, the role of the Australian Industrial Relations Commission was curtailed, whilst that of the trade unions was constrained by the law and relegated to the margins of the system. Taken together, these two pieces of legislation effectively ended the compulsory arbitration system and the historical role of the unions within the traditional system as the representatives of the majority of employees, quite irrespective of whether or not they were actually members of a union. The process that commenced with the *Industrial Relations Reform Act 1993* was continued under the *Workplace Relations Act* and completed under the *Work Choices Act* (Gardner & Palmer 1997, pp. 37-40; Lansbury & Wailes 2004; Sappey et al. 2007; Bray, Waring & Cooper 2009, pp. 133-35).

The role of the Australian Industrial Relations Commission was ‘substantially reduced’ under the WROCLA and the Work Choices Act. The long-standing power to arbitrate industrial disputes was to all intents and purposes removed. The power to approve agreements was transferred to another newly created body within the new system (in the first instance, the Office of the Employment Advocate; subsequently, the Workplace Authority). The power to determine wages was transferred to a new Commission, the Australian Fair Pay Commission. In effect, whereas once the AIRC had provided a reasonably comprehensive ‘safety net’ of wages and conditions of employment; these roles were now the responsibility of new institutions in a new system. Furthermore, in this industrial relations system, the powers of the executive branch of government were greatly enhanced, as well as augmented by the use of the Constitution’s ‘corporations power’. The traditional ‘conciliation and arbitration power’ of the Constitution and the principal institutional mechanism by which the state had attempted historically to resolve industrial disputes, the Australian Industrial Relations Commission, were both declining in importance (Bray, Waring & Cooper 2009, pp. 133-35).

In terms of any debates regarding ‘watershed’ legislation, the fundamental changes that have occurred within the Australian industrial relations system were encouraged, supported and facilitated by the *Industrial Relations Reform Act 1993*, the *Workplace Relations and Other Legislation Amendment Act 1996* and the *Workplace Relations Amendment (Work Choices) Act 2005*. This suite of federal laws constitutes a legislative ‘watershed’ in the history of Australian industrial relations. And yet even within these laws, there is a deeper divide. The traditional, approximately century old system of industrial relations rested upon collective decision-making in the labour market, whereby representative bodies such as employer associations and trade unions bargained to secure terms and conditions of employment that were underpinned by a protective ‘floor’ or ‘safety net’ of minimum wages and conditions. These minimum wages and conditions and standards were established in large part by the decisions or awards of conciliation and arbitration tribunals. These tribunals constituted the most obvious intervention of the state in matters regarding the regulation of the labour market. Of course, the original justification for the existence of the tribunals was to ‘prevent and settle industrial disputes’. At the federal level, the state derived its legislative authority from the ‘conciliation and arbitration power’ of the
The philosophical basis of the system rested upon a view that the prevention of damaging industrial disputation required the state to intervene in the labour market ‘in the public interest’ and that furthermore, the ‘public interest’ was best served by employers and employees being collectively represented by associations and unions respectively. Of course, should these ‘parties’ be unable to resolve their differences, then these differences would be conciliated and if needs be arbitrated by another ‘third party’; the state’s dispute settlement tribunals. The institutions of the industrial relations system approached the problems of the Australian labour market from acollectivist perspective (Gardner & Palmer 1997; Lansbury & Wailes 2004; Sappey et al. 2006; Bray, Waring & Cooper 2009). This core collectivist approach still underpinned the Keating government’s *Industrial Relations Reform Act 1993*, in which there remained a ‘continuing acceptance of unions’ (Stewart & Horneman-Wren 2006; Bray, Waring & Cooper 2009, p. 84).

The position with respect to the Howard government’s *Workplace Relations and Other Legislation Amendment Act 1996* and the *Workplace Relations Amendment (Work Choices) Act 2005* was quite different. The symbolic heart of the Howard government’s industrial relations legislation was undoubtedly its support of individual statutory employment arrangements known as Australian Workplace Agreements (AWAs), which were in effect non-union contracts of employment. The significance of this type of agreement being sanctioned by federal legislation was that individual agreements or contracts had not been previously available to ‘individual employees who were usually covered by an award or collective agreement’ (Bray, Waring & Cooper 2009, pp. 243-47). In contrast to what had previously been the case, the legislative changes that were made by the Howard government emphasised ‘individualistic’ solutions to the problems of the labour market with unions and tribunals being peripheral players in the new Australian industrial relations system (Lansbury & Wailes 2004).

The specific argument that the *Workplace Relations Amendment (Work Choices) Act 2005* represents a ‘watershed’ in the history of Australian industrial relations is based in part on the view that this legislation ‘took the now-established collective bargaining regime that was still working its way through the system and moved it decisively towards a more individualist and voluntarist system’. This ‘collective bargaining regime’ had replaced the previously dominant ‘arbitral model’ principally through the enactment of the *Industrial Relations Reform Act 1993* and the *Workplace Relations and Other Legislation Amendment Act 1996*. If this assessment holds true, then the abolition of Australian Workplace Agreements by the Rudd Government’s *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* should validate the thesis that the true ‘watershed’, or in Margaret Gardner’s words, ‘a policy martingale’ (that is, ‘the point at which policy may diverge from its previous path’), followed the enactment of the Keating government’s *Industrial Relations Reform Act 1993* (Gardner 2008). However, before any definitive conclusion can be reached
regarding this matter, some key features of the Rudd government’s legislative programme need to be outlined and considered.\footnote{A paper of this kind is not the place for a detailed analysis of the precise terms of the legislation. The \textit{Fair Work Bill 2008} runs to some 613 pages in length.}

**The Rudd government’s policy**

The legislative programme of the Rudd government commenced with the enactment of the \textit{Workplace Relations Amendment (Transition to Forward With Fairness) Act 2008} in March 2008. This legislation had as its two central features the abolition of future Australian Workplace Agreements (AWAs) and a new award modernisation process to be conducted by the AIRC. With the abolition of future AWAs, a new form of transitional instrument, an Individual Transitional Employment Agreement (ITEA), was also introduced. Individual Transitional Employment Agreements could be made only by employers who were utilising AWAs as at 1 December 2007, and only during a transitional period ending on 31 December 2009. A further feature of the \textit{Workplace Relations Amendment (Transition to Forward With Fairness) Act 2008} was the repeal of the former provisions of the \textit{Workplace Relations Act} which prevented employees returning to the conditions provided under an underpinning award or Notional Agreement Preserving State Awards (NAPSA) upon the termination of a workplace agreement. These measures can be seen to be a movement away from individual employment arrangements towards collective employment arrangements, particularly in the abolition of AWAs and the continued relevance of previously arbitrated outcomes.

On 25 November 2008, the \textit{Fair Work Bill 2008} was introduced in the House of Representatives. It is clear that the Bill is not, and is not intended to be, a return to the arbitral model. In her Second Reading Speech the Minister for Employment and Workplace Relations, Julia Gillard, stated:

\begin{quote}
The world is a lot different to the one in which Australia devised the original conciliation and arbitration system more than 100 years ago. Economic reform, globalisation, new technologies and rising levels of education have rendered the old ways obsolete (Gillard 2008b, p. 11197).
\end{quote}

The Bill does though contain a number of features which distinguish the ‘new workplace relations system’ of the Rudd government from that of the Howard government. Those changes are in respect of both the laws themselves and the institutions which shall administer them.

The Bill establishes a set of ten (10) employment conditions known as the ‘National Employment Standards’ (NES) relating to weekly hours of work; requests for flexible working arrangements; various forms of leave; public holidays; notice of termination of employment and redundancy pay.\footnote{Chapter 2, Part 2-2 \textit{Fair Work Bill 2008}.} The Bill also provides for a system of ‘modern awards’ (currently being developed by the AIRC, essentially on industry lines).\footnote{Chapter 2, Part 2-3 \textit{Fair Work Bill 2008}.} Certain matters are required to be included in modern awards, including coverage terms; terms permitting individual flexibility arrangements; terms about settling
disputes; and terms relating to ordinary hours of work. Other matters are permitted to be included in modern awards including terms relating to minimum wages; types of employment; arrangements for when work is to be performed; overtime rates; penalty rates; annualised wage arrangements; allowances; leave, arrangements for the taking of leave and leave loadings; superannuation; and consultation, representation and dispute settlement procedures. Together the NES and modern awards are to provide ‘a comprehensive safety net of minimum wages and employment conditions that cannot be stripped away’ (Gillard 2008b, pp. 11190-91).

Foremost amongst the changes at the institutional level is the creation of a new body called Fair Work Australia (FWA). This body is not a continuation of the AIRC, although the government has indicated that all current members of the AIRC will be invited to become members of FWA. However, some of its functions will be very similar to those previously performed by the AIRC before the diminution of that institution’s role under WROLA and the Work Choices Act, particularly in relation to determining minimum wages. Fair Work Australia will be required to undertake a review of modern award minimum wages and the ‘national minimum wage order’ on an annual basis. In making such a review FWA must make a national minimum wage order and may make determinations affecting modern award minimum wages. Fair Work Australia will also be required to perform reviews of modern awards on a four-yearly basis. The purpose of the review of modern awards is ‘to ensure that they maintain a relevant and fair minimum safety net and continue to be relevant to the needs and expectations of the community’. In conducting such four-yearly reviews, FWA will only be able to make a determination varying modern award minimum wages ‘if justified by work value reasons’ (Gillard 2008b, pp. 11190-91).

Bargaining at the enterprise level remains a central feature of the new system. The potential role for unions in that process is however considerably enhanced. Where an employer seeks to make an agreement with its employees, any union which has at least one member who will be covered by the agreement is a ‘bargaining representative’ for the purposes of negotiating the agreement. This means that there may be a number of unions which would be recognised bargaining representatives in respect of any particular agreement. An employer must not refuse to recognise or bargain with a bargaining representative. Furthermore, in circumstances in which an employer does not want to make an agreement with its employees (as proposed by them or on their behalf), FWA has jurisdiction to make a ‘majority support determination’. Fair Work Australia must make such a determination if satisfied that a majority of the employees who will be covered by the agreement want to bargain for it. An application to FWA for a majority support determination may be made by a

---

12 See the objects of the Act set out in Section 3(b) and (c) of the Fair Work Bill 2008.
13 Section 285 Fair Work Bill 2008.
14 Section 156 Fair Work Bill 2008.
15 Subsections 156(3) and (4) Fair Work Bill 2008.
16 Section 176 Fair Work Bill 2008. This assumes that the relevant employee, or all relevant employees, who are members of a union have not appointed another bargaining representative. The employer itself is also a bargaining representative unless it has appointed another in its place.
17 Section 179 Fair Work Bill 2008.
18 Section 236 Fair Work Bill 2008.
19 Section 237 Fair Work Bill 2008.
bargaining representative which, for reasons set out above, includes a union with the requisite single member (Gillard 2008b, p. 11192).

The main practical effect of these provisions of the Bill is that an obligation is imposed upon bargaining representatives to bargain ‘in good faith’. The ‘good faith bargaining requirements’ are that:

- the bargaining representatives attend and participate in meetings at reasonable times;
- disclose relevant information in a timely manner;
- respond to proposals made by other bargaining representatives in a timely manner;
- give genuine consideration to the proposals of other bargaining representatives and give reasons for their responses to those proposals;
- refrain from capricious and unfair conduct that undermines freedom of association or collective bargaining.

If satisfied, upon the application of a bargaining representative, that another bargaining representative has not met, or is not meeting, the good faith bargaining requirements, FWA may make a ‘bargaining order’. A bargaining order may specify various matters relating to the future conduct of the bargaining for the agreement. These powers are very broad. Contravention of a bargaining order may lead to the imposition of a civil penalty. Moreover, if a bargaining representative commits a serious and sustained contravention, or contraventions, of a bargaining order which has significantly undermined bargaining for the agreement, FWA may make a ‘serious breach declaration’. If a serious breach declaration is made and the bargaining representatives do not settle within 21 days after the declaration is made all matters that were at issue during the bargaining for the agreement, FWA must make a determination which includes all the terms agreed and, in respect of matters not agreed, terms which FWA considers deals with those matters. Thus, through these provisions it is possible for a union to ultimately obtain a form of arbitrated determination in respect of an agreement which it has proposed where it is able to establish that the employer has failed, on a serious and sustained basis, to negotiate in good faith (Gillard 2008b, pp. 11192-93).

Fair Work Australia is also able to make a ‘low paid authorisation’ upon the application of a union. A low paid authorisation allows an agreement to be pursued in respect of particular named employers. Where a low paid authorisation has been made and the bargaining representatives are genuinely unable to reach agreement on the terms that should be included in the agreement, and there is no reasonable
prospect of agreement being reached, FWA has jurisdiction to make a determination in respect of the terms of the agreement.\textsuperscript{31} The position of unions has also been enhanced in respect of their rights of entry to workplaces.\textsuperscript{32} The right is no longer dependent upon the union being party to a relevant industrial instrument, but rather upon membership of employees at the workplace or coverage of employees engaged there (Gillard 2008b, pp. 11193 & 11196).\textsuperscript{33}

Each of these measures in the \textit{Fair Work Bill 2008} and the \textit{Workplace Relations Amendment (Transition to Forward With Fairness) Act 2008} can be seen to be a further movement away from individual employment arrangements towards collective employment arrangements. Significantly however, in respect of its coverage and the constitutional basis upon which that is achieved, the Bill makes no break at all from the position established under the \textit{Work Choices Act}. In our earlier paper, the authors (Stewart and Horneman-Wren 2006, p. 30) argued that:

Having now made the seismic shift in the constitutional underpinnings, it is difficult to imagine that any government will, in the future, return to the conciliation and arbitration power as the substantive source for federal industrial laws. The substance and content of those laws may change from time to time, but the constitutional authority for their making is unlikely to change.

The \textit{Fair Work Bill 2008} provides no reason for any revision of that view. As was the case with the \textit{Work Choices Act}, the Bill expressly states an intention to cover employers to the full extent of the Commonwealth parliament’s ability to do so based particularly on the corporations power in the \textit{Constitution}. This is primarily achieved through what has been defined to be a ‘national system employer’ in section 14 of the Bill. Further, the Bill contains an express intention to exclude State and Territory Industrial Laws with exceptions which effectively mirror those under the \textit{Work Choices Act}.\textsuperscript{34} The shift to the corporations power as the substantive constitutional source of power for Commonwealth industrial relations legislation has effectively been entrenched in the \textit{Fair Work Bill}. This movement supports the thesis that the \textit{Work Choices Act} was a ‘watershed’ in industrial relations in Australia.

\textbf{Conclusion}

There are at least two legislative ‘watersheds’ in the history of the federal system of industrial relations in Australia. Unquestionably, the first ‘watershed’ occurred with the creation of an ‘arbitral model’ through the enactment of the \textit{Conciliation and Arbitration Act 1904}. This ‘model’ has been succinctly described by Margaret Gardner as ‘a justice system’ that regulated the labour market through the decisions of tribunals. In this industrial relations system, trade unions played a key role as the designated representatives of the majority of employees. The ‘transformation’ of this

\textsuperscript{31} Chapter 2, Part 2-5, Division 2 \textit{Fair Work Bill 2008}. This is subject to FWA also being satisfied that the terms and conditions of those employees who will be covered by the determination were substantially equivalent to the minimum safety net of terms and conditions provided by modern awards together with NES; that the making of the determination will promote future enterprise bargaining; and that it is in the public interest.

\textsuperscript{32} Chapter 3, Part 3-4 \textit{Fair Work Bill 2008}, particularly Division 2.

\textsuperscript{33} Section 484 \textit{Fair Work Bill 2008}.

\textsuperscript{34} Chapter 1, Part 1-3, Division 2 \textit{Fair Work Bill 2008}, particularly section 26.
compulsory arbitration system into a ‘new’ system that emphasised enterprise as opposed to multi-employer pattern bargaining, whilst restricting the decision-making of the tribunals and limiting the representative rights of unions commenced with the Industrial Relations Reform Act 1993 and continued with the Workplace Relations and Other Legislation Amendment Act 1996 (Gardner 2008, pp. 35-36). Therefore, from this perspective the enactment of the Reform Act and the Workplace Relations Act represents a second legislative ‘watershed’ in the history of industrial relations in Australia. This proposition is however debatable because quite irrespective of differences in the content of the legislation and irrespective of the differences in the intentions of their respective framers, collective bargaining was an important component of the Australian labour market under these Acts. On the other hand, individual bargaining was emphasised in the Workplace Relations Amendment (Work Choices) Act 2005. Therefore, from this perspective the enactment of the Work Choices Act represents the true second legislative ‘watershed’ in the history of industrial relations in Australia.

It is indisputable that there has been a second legislative ‘watershed’ in the history of industrial relations in Australia, but it is no easy matter to be definitive as to when it occurred. Much depends on an assessment of the content of the Rudd government’s legislative programme and industrial relations policy. Being incomplete at the time of writing, this task is difficult to undertake. Nonetheless, the abolition of the Howard government’s legislative ‘innovation’ of Australian Workplace Agreements in the Rudd Government’s Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 implies a return to the industrial relations policy of the Keating government’s Industrial Relations Reform Act 1993 (Gardner 2008; Bray, Waring & Cooper 2009). Yet, despite the apparent strength of this particular argument, the relevance of the Howard government’s Workplace Relations Amendment (Work Choices) Act 2005 to any discussion of legislative ‘watersheds’ should not be discounted.

Ron McCallum (2008, pp. 26-28) has argued that despite the fact ‘that individual workplace agreements are to be abolished’, the key features of ‘the Rudd labour law vision’ constitute ‘mild labour law changes’. Indeed, Russell Lansbury (2008) has summarised the case in the following way:

Industrial relations will regain some of the institutional features of the former award-making system (with Fair Work Australia) but there will be a reduced role for unions. There will be greater continuity with the Howard government’s policies than either a return to the Hawke/Keating era or a radical change to the now well-established trend towards individual employment arrangements at the enterprise level.

Significantly, our earlier view that ‘the movement away from the conciliation and arbitration power towards the corporations power of the Commonwealth Constitution has substance’ (Stewart & Horneman-Wren 2006, p. 31) still holds true. The Rudd government is continuing the Howard government’s quest for ‘the holy grail’ of a uniform industrial relations system in Australia. Furthermore, a future federal government may well restore some form of individual employment contract or agreement in its industrial relations legislation. Indeed, the reintroduction of these arrangements is easily facilitated as long as the corporations power remains the substantive constitutional source of power for Commonwealth industrial relations
legislation. In any event, whilst noting the significance of the legislative changes that were introduced by the Reform Act (Gardner 2008; Lansbury 2008; McCallum 2008; Bray, Waring & Cooper 2009), events may well confirm that the Work Choices Act is a legislative ‘watershed’ in the history of industrial relations in Australia.

References

Fair Work Bill 2008, various sections.