# WORKPLACE RELATIONS – Welcome to my day job

As much as it frightens me to say, in one form or another, I have held a law degree and practiced in employment and workplace relations law for approximately 20 years now. In that time, I have worked in private practise, worked as a Federal Court judge's associate, and briefly as a Commonwealth public servant. And even more briefly, I worked in house for a trade union.

As further evidence of my longevity, I rely on the following:

1. Too much grey hair;

2. I know what it was like to thumb through the pages of the *Conciliation and Arbitration Act* 1904;

3. I have appeared in cases before the Industrial Relations Court; and

4. I knew Stuart Wood when he was a left wing student at Melbourne University.

There are a number of standard rules that have held me in good stead thus far in my career. They include:

(a) I only act for respectable clients;

(b) When litigating against any of the following – Steven Amendola, Freehills or Stuart Wood QC, my client is always right; and

(c) If my client is unsuccessful against these opponents, the Judge got it terribly wrong.

**REFLECTIONS ON THE IR DEBATE**

In the last 20 years, industrial relations has regularly been the subject of intense political scrutiny and controversy. Throughout this period, we have endured countless debates about the shift away from centralised wage fixing towards enterprise bargaining, the right to strike, unfair dismissal laws, the merits of collective bargaining as opposed to individual employment contracts, right of entry laws and of course more recently, following the introduction of the Fair Work Act 2009, the Productivity debate.

What I have observed with growing frustration throughout this period is that the quality of the industrial relations debate is consistently abysmal.

We should not think that industrial relations is immune from the trends affecting Australian political debate which is now regarded as deplorable. However, the poor quality of industrial relations debate has in many ways preceded more recent events.

We cannot blame the advent of social media or the 24-hour news cycle either. Again, the IR debate was atrocious well before these developments.

By and large it is a debate that occurs without any scientific, factual or empirical basis. It lacks rigour, logic, fact and integrity. It is enough to make a cretin weep.

I would like to demonstrate this abysmal state of affairs using three examples that I have witnessed up close during my career.

**UNFAIR DISMISSAL LAWS**

We have had unfair dismissal laws in one form or another, in Australia for over 40 years. South Australia first introduced unfair dismissal laws in 1972. Federal unfair dismissal laws were introduced in 1993.

Since that time, the laws have been subjected to constant and ferocious attacks by politicians, employers and their advocates like the AIG. To some extent, those attacks have not been contested. The attacks have then found an endless echo in much of what we now describe as mainstream media or old media: print journalism and a conga line of shock jocks.

At the heart of the attacks on unfair dismissal laws for many years was a simple proposition: that such laws deter employment and lead to higher unemployment. At its highest, such claims are said to have been "supported by" anecdotal evidence and a smattering of surveys, particularly of small business, with such surveys usually conducted by industry groups.

The claims have been relentlessly pursued in order to argue for the abolition of unfair dismissal laws or reductions in the protections they provide employees. The technique adopted by one of those at the forefront of such claims, Peter Reith, was simply one of endless repetition. If you repeat the claim that unfair dismissal laws cost jobs often enough, it gains a currency and it must be true.

When such claims are given any sort of rigorous scrutiny, a different picture emerges.

The issue found its way into the Federal Court in 2001 in the case of Hamzy v Tricon International Restaurants FCA 1589 (16 November 2001). The case concerned the validity of a regulation excluding casual employees from accessing unfair dismissal

under the WR Act. The Minister for Workplace Relations intervened in the proceedings and called expert evidence from Professor Mark Wooden, a conservative economist at the University of Melbourne. He gave evidence that giving casual employees access to unfair dismissal laws would 'be likely to have an adverse effect on job creation in Australia'.

He and the Minister offered no empirical evidence to support the view. Wooden was cross- examined and conceded that "there certainly hasn't been any direct research on the effects of introducing unfair dismissal laws".

He was forced also to concede in cross examination that ABS figures on employment growth showed that following the introduction of federal unfair dismissal laws in 1993, employment growth was stronger than later periods in which far less employees had access to them. He acknowledged that "the peak in increased employment happens to coincide with the most protective [unfair dismissal] provisions".

A Full Bench of the Federal Court found that Wooden's view was "an entirely theoretical construct". In other words, a theory unsupported by any empirical evidence

The Court found that there was no proven link between unfair dismissal laws and employment deterrence or increased unemployment.

The idea that unfair dismissal laws have any significant bearing on unemployment has not been established since the first such laws were introduced in South Australia. In other words, we have had over 40 years experience of such laws without a single, credible piece of peer reviewed research that would support such an attack.

The Court's finding echoes that of other credible economists and IR academics who have examined this issue. Unfortunately, the views of these experts have been largely ignored in the debate.

**INDIVIDUAL EMPLOYMENT CONTRACTS**

I recently represented an executive employee based in London and assisted her to negotiate her individual contract with an ASX listed company. As an experienced employment lawyer, this was an extraordinary experience.

There were, in fact negotiations between the employee and the Company, and the ultimate terms of the employment contract reflected those negotiations. It was, in effect, an agreed compromise.

Why was this extraordinary?

Because an employment contract that is actually negotiated by an employer and employee is about as rare as a mortgage contract negotiated by a bank and a customer.

The reality for most people on individual contracts is that they have no bargaining power. An employment contract  is a take-it or leave-it proposition.

Yet this reality has been completely ignored in the ongoing debate about IR laws and policy.

This debate reached its zenith in the WorkChoices era when statutory individual agreements or AWAs were created. The myth that such agreements were in any way negotiated and thus individually tailored was a constant feature of the debate.

The Howard Government and most business groups maintained that AWAs were mutually beneficial for employers and employees, often promoting the view that 'flexibility' was paramount:

> "*AWAs give employers and employees flexibility in setting wages and conditions, and enable them to agree on arrangements that suit their workplaces and individual preferences. AWAs offer an employer and employees the opportunity to make an agreement that best suits the specific needs of individual employees. An existing employee cannot be forced to sign an AWA.*"

The myth infected the WorkChoices legislation with provisions establishing the right of employees to appoint “bargaining agents” who could, in theory at least, negotiate such AWAs on their behalf.

On one occasion, as something of an experiment, I assisted a bargaining agent to initiate discussions with Telstra to try and negotiate the terms of an AWA. Such was Telstra’s shock that an employee was attempting to negotiate the terms of an AWA, that the bargaining agent turned up to a meeting to be faced by 4 senior Telstra managers. They solemnly explained that there must have been some misunderstanding and that the AWA on offer was not negotiable. Indeed, Telstra went on to put over 10,000 of its staff on such non-negotiable, take it or leave it agreements. The agreements were in standard template form and were unilaterally imposed by Telstra.

Where is the evidence of negotiation? Where is the evidence of an AWA that was tailored to the "specific needs of individual employees". I am still looking for one. And I am prepared to offer a handsome reward.

To this day, Wikipedia describes an AWA as "a formalized individual agreement negotiated by the boss and employee." The myth is powerful and continues.

What is notable about these events is the lack of scientific rigour or integrity in the arguments put by the business community, politicians and employer groups. This is compounded by the echo effect experienced when reading a newspaper.

I have no difficulty in engaging in debate about the merits of individual contracts and or a comparison of their advantages and disadvantages with collective agreements. I like a good, interesting debate. Generally speaking, a well informed debate is better than a debate that occurs in an information vacuum. All too often, the IR debate resembles the latter rather than the former.

If we are to have a rational, honest and informed debate about individual employment contracts or AWAS or some other form of individual agreement in this country, it would commence with an acknowledgment that in all but exceptional cases:

(a) they are take it or leave it contracts;

(b) they are not negotiated or individually tailored to employee's circumstances

(c) they do not offer employees flexibility; and

(d) they are used by employers who wish to unilaterally determine terms and conditions of employment.

Such an approach would inevitably open up a real and honest debate about whether there is merit in Australia moving to a post-bargaining workplace environment.

Should we shift away from recognition of collective bargaining as a legitimate means of determining wages and conditions? If so, what are the pros and cons? What are the economic, social and other impacts to be considered? Should employers have the unilateral right to determine some or all terms and conditions of employment.

Such questions raise other relevant considerations.

If we are to truly improve the standard of the debate, we need access to high quality, relevant information about Australian workplaces.

There should be freely available, reliable data produced by the equivalent of a Workplace Census reflecting terms and conditions within the workplace. It would reflect remuneration, working hours, flexible work arrangements and so on. The provision of such data would, for example, enable comparisons between the working conditions and remuneration obtained through collective bargaining and under individual contracts and would inform a better standard debate and policy outcomes.

Instead, during the WorkChoices era, in 2007 when information started to appear confirming that AWAs frequently slashed employee remuneration and conditions, the Federal Government moved to shut down the provision of such information. It directed the Office of the Employment Advocate to cease publishing data that would enable a proper analysis of AWAs and their effects on terms and conditions of employment.

Since the introduction of the Fair Work Act, once again the usual suspects have renewed their calls for greater use of individual agreements, invoking the same mythical “flexibility”.. Such calls have been duly echoed by elements of the mainstream media without any discernible scrutiny.

**WHICH BRINGS ME TO THE PRODUCTIVITY DEBATE**

Productivity is a ratio. It measures the efficiency of production by analyzing inputs required to produce outputs in the form of goods or services.

The main determinants of productivity growth are: investment, innovation (eg new technologies, new products), skills (including managerial skills), enterprise (the pursuit of new business opportunities) and competition.

Since the introduction of the Fair Work Act, there has been a consistent campaign by employer groups and others within corporate Australia, to argue that it is slowing down productivity.

Those within corporate Australia claiming that the FWA Act is harming productivity include: Tony Shepherd from the Business Council, Don Argus, Michael Chaney ( a repeat offender) to name a few. Heather Ridout has also jumped on the bandwagon.

Now I might be hopelessly out of touch, but if you are running a major listed company in this country and you choose to enter the public debate about an important economic issue, you would be well advised to check your facts to ensure you protect both your reputation and credibility and that of your company.

The problematic nature of the IR debate is compounded by the behavior of mainstream media. In particular, I would like to single out 2 newspapers, the Australian and the opinion and editorial pages of the Australian Financial Review.

As has been pointed out by a number of commentators, much of the content published by The Australian does not bear any resemblance to independent journalism as we have traditionally understood that term.The newspaper is now widely understood as embracing a partisan and right wing ideology.

For example, the malaise can be illustrated by examining an article by senior and respected journalist Paul Kelly of 'The Australian' in August of 2011 entitled 'Bell tolls for IR law'.

The article seeks to depict the Fair Work Act as an outdated fossil, slowly torturing Australian productivity to death.

> "Australia is now part of a bigger world story that reduces our industrial relations structure enshrined in the Fair Work Act to the wrong side of history…
>
> The bell is tolling but the Gillard government is deaf and in denial. For political reasons, it cannot retreat from the industrial relations settlement it legislated off the back of its famous 2007 election victory. Yet in economic terms that settlement is now failing and will only fail further.
>
> The question cannot be avoided: how long must Australia wait and how much human damage will be done before the industrial clock is re-set?
>
> While Labor is fixated on resurrecting a scare over Work Choices the entire economic debate is shifting against the productivity deadening system it has installed when the premium in developed nations is to be smart, flexible and efficient in the workplace."

It quotes Michael Chaney, chairman of Woodside and NAB:

> "If the government is serious about productivity improvements it has to make some amendments to the act," Chaney said. Chaney warns some resources projects will be jeopardised: "A lot of projects being evaluated are moving to
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> marginal economics because of recent cost increases. Any further increases in costs due to industrial factors or loss of productivity are likely to make some projects non-viable".

Australian Industry Group chief Heather Ridout is also quoted: "At an over-arching level we are worried about productivity. The evidence so far is that the Fair Work Act is impeding productivity, not contributing to it."

“The tide is turning and the anger is building.”

Within Kelly’s article is a spectacular illustration of all that is wrong with the IR debate. The article is based on bald assertion by vested interests. Those vested interests are industry groups and employers who have relentlessly contested Australian IR laws for the last 20 years.

Kelly applies no rigour, science, research, scepticism or factual inquiry to test the assertions of a link between the Fair Work Act and productivity performance. Instead, he embellishes the assertions of business advocates and relies on them to opine in emotive and frightening tones that the country faces a crisis.

The article contains no analysis of the multiple critical factors recognised by economists that contribute to productivity improvements. It does not even attempt to assess the relative importance of IR legislation to productivity. It does not seek to contextualise productivity issues by comparing productivity performance during the

WorkChoices era (when productivity fell) to that of the FWA era and so on. It does not look at productivity internationally. It ignores the fact that our recent productivity performance is superior to most other developed countries. It confuses productivity with profitability.

The article is simplistic, misleading, lazy and hopelessly partisan. It is economically illiterate.

The article comes from a journalist who has won a Walkley Award for "Journalism Leadership" and is now described as Editor at Large of the Australian.

Just over one month after Kelly's article was published a Report on Productivity was published by one of Chaney's employees, Rob Brooker. Brooker is the senior economist at NAB. The report concluded that most of the recent decline in productivity growth relates to issues in the mining and utilities sector. Specifically, high levels of investment in projects during the mining boom and the resultant delay in those projects becoming operational. Brooker's report concludes:

> "A plausible case can be mounted that much of the decline in productivity performance in Australia since the middle of the last decade is attributable to special and cyclical factors. These include high levels of investment in the mining and utilities industries that have not yet come on stream, the impact of slower GDP growth during the GFC and an apparent stalling in the growth of real wages faced by producers, even outside the booming mining sector."

Brooker's report found support to varying degrees in those of other economic reports of the Australia Institute and to an extent, the Grattan Institute. Saul Eslake's report for the Grattan Institute highlighted Australia's improved productivity performance in

construction and manufacturing while arguing that productivity was a major economic problem.

Much research has been conducted over the years into productivity, both in Australia and overseas. Virtually none of it ranks IR legislation as a top tier issue or even a second or third tier issue.

Too much content contained in both the Australian and to a lesser extent, the AFR, is merely the mindless repetition of baseless “key messages” and propaganda churned out by those I have described. Unfortunately, those perpetrating the malaise have considerable success in using such strategies to further their commercial or other political objectives. For example, unfair dismissal laws have been whittled away to a remedy of last resort for sacked employees.

The voices of rationality who may challenge these orthodoxies are largely ignored by much of the old media. They tend to reside in the new media.

Industrial relations and employment law are important issues in this country and deserve far better.

I agree Australia needs to lift its productivity performance. And that this requires a considered analysis of issues including infrastructure e.g. ports, roads, rail and air, technology, innovation, skills and yes, managerial competence. Does anyone seriously doubt that we need to improve our managerial capability in this country?

Just as importantly, we need to lift our game in the quality of public debate about IR. The same old spear throwers from the ranks of corporate Australia are overdue for some retraining or replacement. Perhaps Alan Jones can assist after he has graduated from his training course.

Similarly, we need to carefully evaluate the notion of journalism in this country in light of recent developments. Queensland economist, John Quiggin, reminds us that journalism carries with it certain privileges, responsibilities and protections. At what point does published material cease being journalism? Are there any limits? If so, what are they? Is the material I complain about in *The Australian* fairly described as journalism. John Quiggin argues not, suggesting the News Ltd publication now functions as a right wing blog. That is a debate that has barely begun, but for health of our polity, is one worth having.