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Chapter 3

The Fair Work Act 2009: A Case of Unrealised Expectations

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The 2007 Federal election saw industrial relations as a major campaign issue. The Australian Labor Party (ALP) firmly tied its electoral fortunes to a commitment to overturn the Liberal-Coalition Government’s Work Place Relations Amendment (Work Choices) Act 2005 (hereafter simply referred to as the Work Choices Act 2005), arguing that it was extremist legislation that denied fundamental trade union rights and undermined the fair treatment of Australian workers. Under its ‘Forward with Fairness’ campaign, the Labor Party promised that if elected it would introduce a fairer, simpler and more equitable system of industrial relations (ALP 2011). In promoting these views the Party hoped to tap into widespread fears held by workers towards their current and future conditions of employment. It was a campaign vigorously supported by the Australian Council of Trade Unions (ACTU) and its affiliated trade unions, which organised a series of nationwide public rallies to highlight the failures of the Work Choices Act 2005. The movement also engaged in a widespread media campaign under the banner of ‘Your Rights at Work’, which sought to inform the working electorate as to how the Act infringed upon employment rights (YourRightsatwork 2011). Collectively these campaigns promulgated the prospect of reforming legislation that would provide greater protections for workers through an improved ‘safety net’ of terms and conditions of employment, as well as reorientate industrial bargaining around collective rather than individual labour contracts. The campaigns appealed to the electorate and no doubt contributed greatly to the Labor Party winning office in October 2007.

The incoming Labor Government soon after set about introducing two pieces of legislation to honour its electoral commitment to ‘roll back the excesses of Work Choices’ (ABC News, 2008). The first was the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008, which became operable in March
2008 and sought to provide both sides of industry with time to work through the transition to a new system with the minimum of disruption. The second and focus of the present paper was the current Fair Work Act 2009, which has been fully operable since July 2010. This new reforming legislation has been the cause of considerable change in the way Australian industrial relations is governed. Not surprisingly, the nature of this change has generated a considerable debate over its virtues and vices from both sides of industry, as well as from independent commentators engaged in research on its varied impact. This paper canvasses these debates in relation to the more controversial provisions of the Act.

The National System of Industrial Relations and its Governing Bodies

The Labor Party's much heralded intention at the time of the election was to see the Work Choices Act 2005 replaced by entirely new legislation that would create a fairer and more equitable system of industrial relations (ALP 2011). After the Party won office, Julia Gillard, the then Minister responsible for the new legislation, argued that the Fair Work Act 2009 would create a fairer system of industrial relations by balancing workplace rights and obligations. Employers would have certain rights when bargaining with trade unions and certain obligations with respect to implementing legislated minimum conditions of employment. Workers would have certain rights to representation in bargaining processes and certain obligations with respect when and how industrial bargaining would proceed. It was envisaged by the Government that such a balance would encourage greater cooperation between labour and capital to the benefit of all, which in turn would improve workplace productivity and secure the country's economic prosperity (Gillard 2008).

Important to this legislative aim was an acceptance by the Government that industrial relations was a national issue that required national solutions. This had not always been the case from this side of politics, for only four years earlier when a national system was first introduced under the Work Choices Act 2005 it had been unsuccessfully challenged in the High Court by several state Labor Governments, a challenge that was supported at the time by the trade union movement (Evans, et al. 2007). The Fair Work Act 2009 carries over the pre-existing national system by relying on the 'constitutional corporations' provisions of the Australian Constitution, with no hint of intention to return to the century long reliance on its 'arbitration and conciliation' provisions that operated under the legislation preceding the Work Choices Act 2005. In stepping around this option the Labor Government and trade union movement more generally implicitly accepted the national system introduced under this Act, viewing its benefits in providing a simpler, more standardised and more cost effective process for negotiating and settling labour contracts (Owens 2009). Business
groups have been similarly unified in endorsing the move to a national system for the similar reasons (e.g., BCA 2011; ACCI 2008). That said, whilst the majority of states have now referred their industrial relations' powers to the federal jurisdiction, Western Australia has still resisted and Tasmania has talked of withdrawing, stating that the Act's complexities are largely irrelevant to the state because of its smallness (Workplace Express, 2010).

Under the new Act the operation of a national system was given institutional form with the establishment of Fair Work Australia, a so-called 'one-stop-shop' charged with the responsibility for overseeing its implementation and operation. This independent body replaced a range of bodies set up under previous legislation (i.e., Australian Industrial Relations Commission, the Australian Fair Pay Commission, the Australian Industrial Registrar and the Workplace Authority Office of the Employment Advocate). Fair Work Australia has been given the power to settle industrial disputes through the application of 'majority support orders', 'scope orders' and 'good faith bargaining orders'; adjudicate unfair dismissal claims; set minimum pay rates; vary and rationalise existing awards; and approve enterprise agreements and new so-called modern awards. In addition, Fair Work Divisions have been established in the Federal Court and Federal Magistrates Court, which have responsibility for making determinations on disputed matters arising out of the Act. An Office of Fair Work Ombudsman has also been established to provide information about the application of the Act, as well as to investigate any breaches in its terms (Fair Work Australia 2011).

One aspect of this new array of institutions is that they have more power to intervene in the conduct of industrial relations than existed under the previous Work Choices Act 2005, which had greatly limited the prerogatives of federal bodies (in particular the Australian Industrial Relations Commission) to intervene in such matters. Business groups have regarded this development as stifling or potentially stifling the ability of businesses to negotiate flexible conditions of employment to suit their operational and market circumstances (Hannan 2010). These concerns have been typically directed towards the various 'orders' that allow Fair Work Australia to intervene in bargaining processes as a means of settling industrial disputes, as well as compulsorily determining the terms and conditions contained in awards and enterprise agreements (e.g., AiG 2010; Kates 2011). Trade unions have generally welcomed the development, seeing in a re-empowered national body capable of adjudicating the settlement of industrial disputes and labour contracts as providing some measure of balance between the two sides of industry, as well as ensuring a greater degree of fairness and equity is played out in Australian workplaces (ACTU 2009).

Independent commentators have tended to fall across this divide, some supporting trade union claims that interventions by Fair Work Australia have
benefitted workers whilst not overly burdening industry (e.g., Cooper & Ellem 2009), others citing evidence to the contrary (e.g., Corset & Lafferty 2010). Of greater note are findings which suggest there is considerable confusion within the business community over interpreting the requirements necessary to be compliant with the legislation, a condition that is held to be compounded by a lack of definitive or conflicting advice being issued by Fair Work Australia and the Fair Work Ombudsman. This, it is suggested, has led to inadvertent breaches of the Act which have been costly and time consuming to remedy (Sloan 2010; Collier 2010; Todd & Hutchinson 2011). To add to the problem, Parker (2009) has noted that both agencies have held ignorance of the law to be an inadequate defence for non-compliance. Trade unions also have their problems with how Fair Work Australia applies its prerogatives in relation to workplace access rights. Historically they have played a major role in monitoring business compliance with award and legislative obligations, but on-going restrictions placed on their access rights under the terms of the current Act continue to frustrate the full realisation of this possibility (Hardy & Howe 2009). Of considerable contention, also, is Fair Work Australia’s involvement in determining who, when, and under what circumstances such notices are granted, which is seen by some trade unions as a major restraint on their ability to access and represent their members (e.g., ETU 2009). Both sides of industry therefore have their issues with the extent or way Fair Work Australia and the Fair Work Ombudsman intervene in industrial relations, a condition that will no doubt ease once the vagaries of applying the Act are played out through test cases heard and determinations made by these two bodies.

National Employment Standards and Modern Awards

Prior to the Work Choices Act 2005, minimum terms and conditions of employment had been settled through the arbitration and conciliation processes of the Australian Industrial Relations Commission, which made its determinations in response to the independent claims and counter-claims made by trade unions and businesses groups. Under the Workplace Relation Act 1996, such claims and counter-claims were largely open to the parties concerned within the limits of broadly-interpreted ‘20 allowable matters’. The Work Choices Act 2005 changed this by greatly reducing the number of allowable matters that might be bargained over and applying four legislated minimum standards, which, under most circumstances, could see the terms and conditions of labour contracts reduced to four bare entitlements: namely, (1) hours of work, (2) annual leave, (3) parental/carer’s leave and (4) sick leave. The Fair Work Act 2009 carried on this legacy of legislating minimum conditions of employment, but increased their number to ten so-called National Employment Standards (NES). These standards
are elaborated elsewhere in this book, but cover: (1) maximum weekly hours, (2) requests for flexible work arrangements, (3) parental and adoption leave, (4) annual leave, (5) long service leave, (6) personal/carer’s leave and compassionate leave, (7) community service leave, (8) public holidays, (9) notice of termination and redundancy pay, and (10) a Fair Work Information Statement. Such Standards are aimed at providing a ‘safety net’ of conditions that would protect workers and provide them with a fairer system of employment, especially for those engaged in precarious forms of employment or who were without trade union representation. Under the terms of the Act it is also possible for ten additional entitlements to be included in modern awards and enterprise agreements, which are able to be negotiated with or without trade union involvement. These entitlements cover the following areas: (1) minimum wages, (2) the status of employment, (3) when work was performed, (4) overtime rates, (5) penalty rates, (6) annualised wages and salaries, (7) various allowances, (8) annual leave and annual leave loading, (9) superannuation and (10) consultation rights (Fair Work Australia 2011).

The legislated NES and the array of additional entitlements capable of being bargained over have understandably divided business groups and trade unions. Some business groups have argued that the legislated standards are antithetical to workplace flexibility (AiG 2008), others have suggested they represent a costly impost (Kates 2011). Trade unions have endorsed the Standards, seeing them as offering an acceptable floor of conditions that cover workers most likely to be exposed to unscrupulous employers or exploitative labour management practices, and particularly those who have with little or no possibility for recourse in changing or challenging their employment circumstances (ACTU 2009a).

Independent commentators are similarly mixed in their views. Todd and Hutchinson (2011), for instance, have argued that the NES offer better outcomes for employees not covered by awards, which make for a fairer system of employment, whilst Goolan (2009) has stated they in addition they provide a clear understanding to employers and employees of their rights and responsibilities. Sloan (2010), in the other hand, has suggested that that the Standards merely reconstitute a ‘one size fits all’ notion of labour contracts, such that they are unlikely to be operationally beneficial for business or business profitability. Collier (2010) and Parker (2009) also contend that they have led to higher business costs, whilst Buchannan and van Wanrooy (2009) have argued that the NES provision that allows for the use of Individual Flexibility Agreements to vary awards and workplace agreements, when combined with the NES, can only encourage the wider use of casual and contract labour. Moreover, that when further combined with unfair dismissal provisions that absolve small businesses from being subject
to unfair dismissal claims, there is 'the potential to undermine the integrity of the Standards.'

**Fair Work Australia and Industrial Bargaining**

One of the key features of the *Fair Work Act 2009* was the removal of Australian Workplace Agreements from the menu of possible labour contracts. Such agreements were favoured over collectively bargained agreements under previous *Work Choices Act 2005*. The new Act shifts legislative support back to collective agreements, with the mix of offerings being confined to modern awards that cover occupational groups across industries, and workplace agreements that apply to individual enterprises. Of these two types of agreement, it is clear that enterprise agreements are favoured over modern awards, with multi-enterprise agreements being all but banned. That said, modern awards are favoured in the Act as a means of covering low-paid workers and workers engaged in precarious forms of employment, whilst enterprise agreements are encouraged for those workers who are capable of striking a deal that suits particular business circumstances. In support of this shift, the 'no disadvantage test', which was removed by the *Work Choices Act 2005*, has been reinstalled in the form of a 'better off overall test', the aim being to ensure that negotiated terms and conditions contained in enterprise agreements do not leave workers worse off by comparison to those contained in applicable awards (Fair Work Australia 2011).

In the settlement of modern awards and enterprise agreements the powers of Fair Work Australia to resolve industrial disputes over their terms and conditions have been the subject of some debate. These powers are now less pervasive than those of the former Australian Industrial Relations Commission operating under the *Workplace Relations Act 1996*, but they are also not so emasculated as they were under the *Work Choices Act 2005* (Stewart 2009). Fair Work Australia is now able to make compulsory 'orders' to resolve disputes and settle the terms and conditions of labour contracts. Of the three forms these orders take, the grounds upon which 'good faith bargaining orders' can be made is proving to be the most contentious. Such orders legally require the parties to industrial bargaining to attend and participate in meetings at reasonable times and disclose information relevant to the bargaining. They also require the parties respond to proposals on offer by giving them genuine consideration and to offer reasoned responses. They furthermore require the parties refrain from capricious or unfair conduct that might undermine freedom of association or the bargaining process more generally. Parties deemed to be not bargaining in good faith allows Fair Work Australia to make workplace determinations on the matters in dispute. Built into the good faith bargaining provisions are legal requirements that effectively confer trade unions with representational and bargaining rights of an order that was unavailable under the previous *Work Choices Act 2005* (Fair Work Australia 2011).
Businesses groups have been critical of a re-empowered federal body and the legislative measures it oversees in support for trade union involvement in workplace bargaining. Many see these developments as providing too great a leverage to trade unions in bargaining processes, arguing that the greater scope for trade union access to workplaces and bargaining processes have proven costly and disruptive (e.g., AiG 2009; ACCI 2011; Kates 2011). Trade unions have understandably supported these developments (ACTU 2011), though some see the reforms as not going far enough, arguing that the Act continues to hobble their ability to represent members adequately. Here the restrictions placed on the timing and content of industrial bargaining, limitations placed on industrial action and the ban on pattern bargaining are common areas of criticism (e.g., ETU 2009a).

Independent commentators generally hold trade unions to have regained a measure of lost influence in the workplace (e.g., Copper 2009; Gollan 2009). But there have also been mixed results to this end. Todd and Hutchinson (2011), for instance, have found that the types of bargaining encouraged by the Act are contributing to greater inequity between different employee cohorts. For those workers with extensive trade union coverage, the restitution of trade union bargaining power has seen significant improvements in their terms and conditions of employment. For those not so represented and thus reliant on the legislated NES, the opposite is the case. They conclude that the Act is heralding the early signs of a growing disparity between the high and low ends of different categories of employees and occupations. Cooper and Ellem (2009) offer another line of argument by suggesting that the Act leaves open the door for businesses to step around union negotiated agreements through clauses which allow for the conclusion of Individual Flexibility Arrangements and non-union collective agreements.

Individual Flexibility Arrangements, in their own right have become increasingly disputed area as their settlement or attempted settlement has unfolded. These Arrangements allow businesses to come to an agreement with individual employees that vary the terms and conditions contained in modern awards and workplace agreements. The aim of the Act was to allow such Arrangements to be struck that better suit the individual circumstances of enterprises and the individuals they employ. Indeed the Act makes it compulsory for modern awards and enterprise agreements to include clauses that allow for such agreements, which in turn must be capable of passing a ‘better off overall test’ before being granted the force of law. Moreover there is a Model Arrangement set out in the Act which is expected to be followed in the event that more personalised Arrangements cannot be agreed (Fair Work Australia 2011).
Business groups have been critical of the operation of Individual Flexibility Arrangements, particularly the legal requirement that they be negotiated through the agency of trade unions. The common problem cited is that many businesses seeking to conclude such Arrangements have found trade unions to be highly resistant to any changes that differ to the Model Arrangement set out in the Act (e.g., AMMA 2010). Trade unions have also been critical, seeing the Arrangements as a ‘back-handed’ way of re-introducing individual agreements onto the bargaining process and thereby undermining the collectivity of the workforces they seek to represent (e.g., AMWU 2009).

Many independent commentators have endorsed the trade union view. Forsyth and Stewart (2009), for instance, have found that Individual Flexibility Arrangements have opened the way for employers to get around the ban on individually bargained agreements. Waterhouse and Colley (2010) have similarly concluded that the Arrangements represent little more than a ‘back door method’ for reducing the conditions of employment. Moreover it is argued that the oversight of such Arrangements provided by Fair Work Australia is inadequate to the task. Todd and Hutchins (2011) have confirmed that trade unions are indeed resisting agreements that contain terms and conditions which differ to those contained in the Model Arrangement. Zhang (2010) has furthermore argued that the most vulnerable workers are at risk of exploitation because they are less able to ask for or negotiate Individual Flexibility Arrangements. There is thus a need to make employees more aware of their legal rights when negotiating them, as well as a need for more education so that they might negotiate terms and conditions to their benefit. McCrystal (2010b) goes further by suggesting that the inclusion of Individual Flexibility Arrangements as a compulsory item within modern awards and enterprise agreements is indicative of a Federal Government that fundamentally supports the maintenance of individual agreements, in spite its rhetorical support for collectively bargained agreements.

Still another area of contention exists in the on-going restrictions placed on protected industrial action. Business groups are quite naturally supportive of the restrictions (e.g. AiG 2009), and if anything would like to see them made still tighter (e.g., ACCI 2010b). The present restrictions arising out of the Act surprisingly attract little comment from the trade union movement. Those that do offer criticisms commonly point to restrictions placed on the timing of industrial action to designated bargaining periods, as well as to the logistics and costs of having to run secret ballots prior to taking industrial action (e.g., CFMEU 2009). Independent commentators offer additional criticisms. McCrystal (2010b), for example, has argued that limiting the scope or conditions under which industrial action is legally protected inhibits employee ‘voice’, thus raising the prospect of increasing employee ‘exit’ and diminishing the vitality of the bargaining process.
Sharples (2009) furthermore notes that the restrictions go so far as to breach International Labour Organisation’s Conventions of which Australia is a signatory.

Yet another source of contention is the legacy carried over from the Work Choices Act 2005 in the way minimum wages are settled. Prior to this particular Act the establishment of minimum wages was determined through the arbitration and conciliation processes of the AIRC. Under these processes business groups and trade unions would independently make claims and counter-claims, which would then be adjudicated by the Australian Industrial Relations Commission in accordance with certain principles that regarded industry’s capacity to pay and what could be economically justified in support workers’ living standards. The Work Choices Act 2005 changed this by establishing for the first time a quasi-independent panel that would hear submissions from all parts of the community when deliberating on minimum wages, with the key concern being the impact any rise in wages rates would have on levels of unemployment. The Fair Work Act 2009 carries over processes of establishing the minimum wage through quasi-independent body (i.e., the Minimum Wage Panel), but differs in that the Panel is now required to take account of a larger number of issues, such as prevailing living standards, what is considered fair and reasonable, the state of the economy and industry’s capacity to pay, in addition to unemployment (Fair Work Australia 2011).

Business groups and trade unions have generally had no great issue with the processes of how the minimum wage is struck, though have differed in the usual way over the outcomes issued and the reasoning given by the Minimum Wages Panel (see: The Australian 2010). From more independent sources, Harper and McKibbin (2010) believe the wider array of issues now considered by the Minimum Wages Panel invokes the spirit of the Harvester Decision, in that wage rates are now stuck in terms of the widely accepted and time-honoured notion of a ‘fair day’s pay for a fair day’s work’. Wooden (2011), on the other hand, has argued that the new array of considerations applied by the Minimum Wage Panel present business with new pressures, and particularly so for small businesses. Moreover, that determining increases in minimum wage rates on the basis of assessing the relative living standards and needs of the low paid is bound to be inaccurate, since low income earners are not always in low income houses and on average are dispersed throughout the household income spectrum. Wooden (2011) concludes that minimum wage increases based on such a spurious measure will put unnecessary financial pressures on businesses, leading to increased unemployment.
Trade Union Rights of Access

Another area of debate concerns the ‘right of entry’ provisions of the Fair Work Act 2009. Under the previous Work Choices Act 2009 this right was severely limited. Union officials were only able to enter workplaces after being granted the right to do so by the Australian Industrial Relations Commission, and then only to talk to members about matters pertaining to negotiating labour contracts or ascertaining breaches in their terms, and only then in certain workplace areas and at times designated by the employer. The Fair Work Act 2009 has reduced many of these limitations, but application for the right of entry is still needed from Fair Work Australia, and certain restrictions still persist on the matters and membership before entry permits are issued. There are also restrictions placed on the ‘type’ of union officials able to be granted access, which is limited to those Fair Work Australia deem to be of proper standing (Fair Work Australia 2011).

For business groups the right of entry provisions under the current Act have allowed trade unions to impose a greater presence on the workplace, which often extends in a practical sense beyond the conditions set out in the Act and thus heralding a return to the adversarial forms industrial bargaining that existed in the past (e.g., ACCI 2010a). Some businesses in addition believe the greater trade union presence has been the cause of a growing number of demarcation disputes (AFEI 2011). Others have implied that the right of entry limitations are being side-stepped by union officials who are increasingly using occupational health and safety issues to gain access work-sites (MBA 2010). For trade unions, the general feeling is that the reforms of the current Act in relation to rights of entry have not gone far enough Those arguing along these lines typically point to the restrictions being against internationally recognised International Labour Organisation Conventions to which Australia is a signatory (ETU 2009). From independent sources Hardy and Howe (2009) support the view that the right of entry provisions have increased the workplace influence of trade unions by comparison to the previous Act, whilst Champion (2009) suggests that there are still sufficient restrictions in place that provide businesses a measure of protection from being held hostage to trade unions.

Unfair Dismissal Changes

One of the more contentious issues arising out of the Fair Work Act 2009 refers to changes in its unfair dismissal provisions. Under the Work Choices Act 2005, these provisions only applied to businesses employing 100 or more full-time employees. The current Act has reduced this number to 15 or more full-time employees. The claim by business groups is that the reduced number now captures a large number of small businesses that do not have the financial wherewithal or expertise to contest unfair dismissal claims. As such, they are prone to employing less labour by comparison to the previous legislation (AiG 2011). Trade unions are
generally content with the wider coverage of protection offered to employees (ACTU 2009b), though many also argue that the size of firm provisions should be rescinded (e.g., ETU 2009a). From independent sources, Todd and Hutchinson (2011) have found that many businesses see the change as making it too easy for workers to claim unfair dismissal. Moreover, that as a consequence many businesses are prone to simply paying ‘go away money’ rather than test unfair dismissal claims in the courts. Sloan (2010) has found that the greater coverage afforded by the Act has caused the rate of unfair dismissal claims to rise substantially, which in turn has seen a rise in the time, effort and costs being borne by businesses in dealing with such matters. Finally, small businesses on the borderline of the legislative requirements have been found to be the most vulnerable in terms of non-compliance. Many are simply unaware of how the unfair dismissal provisions should be applied, at the same time have no ready access to industrial relations experts capable of giving advice in this area (Kenna Tealsdale Lawyers, 2011).

Conclusion

The Labor Government’s Fair Work Act 2009 sought to inject a greater degree of fairness and equity into the conduct of Australian workplace relations. At the same time it sought to ensure processes of exchange between the two sides of industry and their outcomes continued to generate improvements in workplace productivity and flexibility, as well as advance the cause of national economic prosperity more generally. From the arguments presented in this paper the realisation of these intentions has been mixed. Trade unions appear divided across two positions. They either believe the reforms have not gone far enough or else hold them to be the most that can be hoped for under the present political and economic circumstances. Their criticisms of the Act are diverse, but centre mainly on the on-going restrictions placed on bargaining agendas, bans imposed on pattern bargaining, and the limitations posed on their right to organise and undertake industrial action. In short, the focus their objections to the Act relate mainly to their rights to represent the interests of members in a manner of their own choosing.

Business groups and those on the political right are more unified in their criticisms, holding many of the reforms to have gone too far in conferring workers with standards of employment that are either unsustainable or likely to impact too heavily on managerial prerogatives and operational flexibility. Moreover they hold the Act to have conferred too much power on trade unions and Fair Work Australia to intervene in the processes of industrial bargaining. This disadvantage is held to have reduced the possibility of achieving contract outcomes that allow for the type of flexible labour practices needed for business success in a dynamic and largely uncertain economic environment. That said, the criticisms from this
quarter have been measured rather than frantic. Most businesses have a history of operating within an interventionist system not unlike the one that presently exists, with the relatively brief aberration of the Work Choices era being accepted as realising at least some gains within the present legislative regime.

The studies by independent commentators have divided along similar lines when interpreting the practical virtues and vices of the Fair Work Act 2009. Most see benefits in raising the floor of employment standards for the low paid and those inadequately represented by trade unions, and the evidence they offer typically supports the view that these cohorts of workers have been the major beneficiaries of the Act. Those criticising the Act are largely concerned about the increased rights of trade unions and a re-empowered Fair Work Australia, offering evidence that suggest both developments have had a detrimental impact on organisational flexibility and the employability of labour. That said, many of the same commentators appear to hold the reforms to be shallow. Typical are suggestions that they are little more than 'cosmetic' (Davidson 2010), a view that seems supported by the fact that the wording of many clauses contained in the Work Choices Act 2005 have been replicated in the wording of clauses contained in the Fair Work Act 2009 (Stewart 2009a).

Common areas of agreement across all those canvassed in the present paper are rare to find, with two possible exceptions. The first relates to the general agreement about the operation of a national system of industrial relations, with few suggesting any return to the bifurcated system that existed under pre-Work Choices legislation. Some States still weigh in to claim there is an issue of state rights in this regard, but in the main such claims are not considered a serious option by the main parties involved in the day-to-day processes of industrial relations, nor also their commentators. The second refers to the institutional manner through which minimum pay rates are determined, with seemingly widespread agreement over the Minimum Wage Panel being a best form of agency for determining such matters, even if the principles under which it operates and the determinations it reaches remain the subject of contention.

Whether it is the key players in the industrial relationship or those independently commenting on them, it is surely a case of competing visions as to what constitutes an appropriate relationship between labour and capital. Each side of the various debates listed in this article clearly has their own agenda or understanding to promote or relay in accordance with these competing visions. The test of which side is right will no doubt be played out as the outcome of more labour contracts are concluded and their impact on the wages and conditions of employment, on the productivity and profits of business, and on the course of national economic wellbeing more generally, become available. In so doing the claims made by the Federal Government that the Fair Work Act 2009 heralded a
new era of fairness and equity in the conduct of Australian industrial relations will be proven or otherwise.

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