

# LABOR

TAFE teachers along with most Australian unionists voted to remove the Howard Government because of its anti-union laws. The Rudd Government has commenced the removal of those laws, but often with more regard for the views of employers than unions.

Whether TAFE teachers will be subject to these laws depends on negotiations with the states; Victorian, ACT and NT members will be, but for the rest the future is unclear.

Regardless, it is imperative that all of us are informed and active about reform of the industrial relations laws.

The AEU along with all other unions are continuing the campaign to press for positive reform of industrial relations laws; the consequence otherwise will be the sort of drift away from Labor that can be seen in Britain.

In this article Federal Industrial Officer **Rob Durbridge** analyses the state of play thus far in the reform of federal laws.



# goes **CORPORATE** on

By Rob Durbridge

IN THE past, whenever a Labor Federal Government was elected employers saw portents of doom. But in 2008 there are no cries of imminent ruin from employers. Where are the Hanrahans of yesteryear? Right now, they are welcoming the demise of the old award system which for a century underpinned the relative equity of Australian society and the rights of workers. Not that the system was perfect; far from it, but it endured under a rough consensus by maintaining a degree of independence from politicians.

In 2008 it is the union movement confronting Labor's requirements for the standardisation of all existing award provisions into 'Modern Awards', a move which potentially increases inflexibility across industries and unfairness for employees. Standardising pay and conditions across an industry or occupation inevitably means there will be losers... potentially those least able to bargain and most vulnerable, such as casual and women workers. If this is not what the Minister wants, she should amend her 'Request' to the Commission and direct it otherwise. Or better, restore to it the powers to make and vary awards on merit after hearing those actually engaged in the industry who know and understand its needs best. ALP policy itself calls for the use of 'all the powers' in creating a national IR system.

Individual employment arrangements have not disappeared with the Howard Government. Instead of AWAs, which will eventually be phased out, the Labor government requires a 'flexibility clause' to be included in each Modern Award, and collective agreement to allow individual employment agreements within the system, regardless of the views of the majority in the workplace. Individuals will continue to be induced by employers to sign these agreements. The protection of a written no-disadvantage undertaking and the ability to terminate are inadequate protections.

Instead of regulating employment via an independent tribunal, the power endorsed by the High Court in the 'WorkChoices' case allows the Minister to directly regulate workers' standards and conditions. The National Employment Standards purport to create a safety net, but they are more illusion that real enforceable standards giving rise to rights. This must rate as one of the most important missed opportunities ever by an ALP Minister on workers' rights and standards. And it means employment in future will be under the direct hands of politicians of whatever hue. This is why the minimum pay rates in the US rarely

get increased, and sets a dire precedent for future conservative governments.

## Smiling Employers

While unions are being consulted about all this, it is apparent that employers are being consulted more and are happy with the prognosis. In 2008 the smiles behind the hands are all on the employers' side. Australian Industry Group's (AIG) Chief Executive, Heather Ridout, sees in the government a "willingness to listen to industry's concerns" which "bodes well" for the future. The Minerals and Metals Association (AMMA) welcomed the government's Transition Bill as "a new high point in consultation in IR terms". The Australian Chamber of Industry and Commerce (ACCI) was able to quote the Minister Julia Gillard's commitment to individual flexibility before the Federal Commission, which in turn declared itself bound by the Minister's 'Request' in rejecting the submissions of the Australian Council of Trade Unions (ACTU).

A 'Request' has the force of law under the Transition Act which commenced in March 2008 by virtue of S576C, and gives the Commission no discretion:

- (1) *An award modernisation process must be carried out in accordance with a written request (an award modernisation request) made to the President by the Minister.*

The symbolism in all this is real and supremely ironic. After conducting a campaign for rights at work which all sides of politics agree was decisive in the Howard Government's defeat, the unions find that employment law is under the control of a political hierarchy which is highly attuned to the interests of employers. Specifically, they face the consequences of agreements made by the Labor

leadership with employers in August 2007, known as the 'Policy Implementation Plan' which revised the 'Forward with Fairness' ALP policy adopted only three months previously at an ALP National Conference. This is the basis of the 'mandate' which the Federal Minister claims is driving the strategy for reform.

On the surface things have changed. Instead of copping abuse from Reith and Howard, unions are now being consulted, but under the Reith-era Workplace Consultative Council they are outnumbered and outgunned by employers. The Australian Labour Advisory Committee (ALAC) was only convened after consulting employers and the architecture of the new system was well in place. Some of the same employer law firms which drafted 'WorkChoices' are again getting rich at public expense in the employment law drafting business.

## Fairness opportunity missed

It did not need to be like this. After the High Court in its 'WorkChoices' decision gave the Howard Government the power to savage the role and influence of unions so effectively, the Rudd government has an opportunity and a mandate to use these constitutional powers to restore and expand the rights which Australian workers enjoyed for most of last century.

At this stage it is evident that this opportunity will be missed in favour of introducing an industrial relations system which is acceptable to global corporations. The elements we already know about; National Employment Standards and Modern Awards have been commenced under the hand of the Minister with little regard to union concerns and submissions. Instead of using 'all the powers' available to create a decent system as ALP policy

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supports, Minister Gillard intends to rely almost exclusively on the Corporations Power, which deals with the rights and obligations of trading corporations.

This is a profound break with one of the ALP's founding principles; the creation of independent tribunals to resolve industrial disputes through conciliation and arbitration which provide rights and obligations to unions, as representatives of workers, in recognition of inequality of power in the workplace. While enterprise bargaining overlaid the award system from 1993, the award powers remained. The award system created by tribunals was a distinctive ALP contribution to Australian society and work, and according to former High Court Justice Michael Kirby, 'profoundly affected the conditions of employment, and hence of ordinary life, of millions of Australians'.

Professor Ron McCallum has argued that industrial relations laws 'based on upon the corporations power [alone] will be centred around corporations.... inevitably they will fasten upon the economic needs of corporations and their employees will be viewed as but one aspect of the productive process in our globalised society'. Justice Kirby in his dissenting judgement in the 'WorkChoices' case also found laws based on upon the corporations power would unfairly favour employers.

This was precisely why unions formed the ALP and in turn the ALP established independent tribunals; to provide a guarantee of a fair hearing along with powers to balance the power of the employer in the workplace, often a global corporation with enormous strategic and tactical advantages to create and dispose of their workforces.

The experience of New Labour in the UK appears to prefigure that predicted by Justice Kirby for Australia. This is the result of politicians legislating in the interests of global competitiveness, economic efficiency and labour market flexibility at the expense of fairness at work. The consequence for British society has been growing income equality, with the proportion of wealth held by Britain's richest 10% rising from 47% in the 1990s to 54% in the current decade.

The consequences of the political direction taken by Minister Gillard on the new national IR system operating under the Corporations Power have already been seen. The Australian Industrial Relations Commission (to be replaced by Fair Work Australia in 2010) has not determined the National Employment Standards (NES) or the Award Modernisation process. They have been politically determined and established without recourse to genuine processes of determination by the tribunal on merit.

The NES were legislated following an enquiry by a committee of the Minister's Department which took submissions on a draft prepared by the Department. No significant changes were made to

the draft despite submissions by unions and others, directly and to the Senate, that the standards were inadequate in content and enforceability, and could by no means be described as rights.

Submissions by the ACTU and unions to the Australian Industrial Relations Commission on award modernisation were largely ignored by the Commission, as it explained, because it was acting on the basis of a Ministerial Request. Its task was to apply the Act and the Request, not to determine the issue independently.

This logic can be expected to continue through the Award Modernisation process, under which the most vulnerable workers, those dependent on awards, stand to lose pay and conditions on the basis that in the end only one award rate will apply across Australia in for each job in each industry. Awards are to be restricted to ten items. This is the antithesis of flexibility; where bargain-



ing is possible it can provide flexibility, but with declining union density in the private sector the award-dependent sector will grow, particularly among low-paid and vulnerable workers.

Public sector workers face massive confusion which the Minister needs to deal with by amending the modern award request. The Commission pointed out that a modern award cannot apply to employers where an 'enterprise award' applies, being an award applying to a 'single business', which includes government departments. Neither can a modern award apply where the corporations power does not go... to government employees of the states. In rejecting the request to make aged care and nursing the subjects of priority modern awards, as sought by the ACTU, the Commission drew attention to these circumstances. Unions are pressing for this defect to be addressed in the substantive Act.

The role of unions in the new system will be limited compared to the previous system. For example, the Commission is required to 'consult'

unions but not to hear them and determine the issues on merit in making modern awards; unions will not be parties to them as previously. They will therefore not have the rights of parties but they will be bound by modern awards. While legislation has always governed how this will occur, the parties to awards themselves had rights, while in future those bound by awards will only be 'recognised' and their rights to initiate changes left in the hands of the Minister.

Australian unions are some of the most highly regulated in the world due to the 20th century laws which gave them legal rights in exchange for compliance. In future they will be expected to comply without having the rights they previously enjoyed. Compliance includes the Minister's stated intention to keep a 'strong cop on the beat' in the building industry and to continue to generally restrict union right of entry to worksites by continuing the 'WorkChoices' restrictions.

### Facing the challenges

While they face the challenges of globalisation, structural change and declining membership density, unions remain by far the largest voluntary membership organisations in Australia. The union movement has shown in the 21st century that it is capable of winning public support for its campaigns. But the ALP now seems to believe that unions are dispensable, that the main game is corporate approval and that the corporate globalisation path for labour market reform is the only game in town. Perhaps a glance at New Labour in the UK would be useful; when the 'true believers' feel betrayed the electoral consequences can be disastrous.

The Australian labour movement pre-dated and created the ALP, and no doubt will unfortunately see the successor to the Rudd Government. If that government is hostile to unions and employment rights, as is likely, the IR system being established will be easily 'reformed' again directly by politicians under the Corporations Power. The union movement's strategies for growth and influence will have to adapt to the new national IR system as it unfolds; reliance on the government will not be one of them. For the government, reflection on how successful an IR system can be without a measure of consensus would be worthwhile; in the end employers need that too. One doesn't have to look back too far to find an example. ❖

Rob Durbridge is the Australian Education Union Federal Industrial Officer.

