

Symposium: Assessing the *Fair Work Act*

# The Fair Work Act: As Good as It Gets?

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## Abstract

*The Your Rights at Work Campaign in the lead-up to the 2007 Australian federal election successfully mobilised a groundswell of community opposition to the radically anti-union Work Choices employment relations legislation of 2005. There were hopes that its successor, the 2009 Fair Work Act, would usher in a new regime of good-faith workplace relations, support for collective bargaining and vulnerable workers' access to enforceable labour rights. Major gaps are the failure to address workplace power imbalance, especially in small workplaces, and lack of support for employee participation and voice mechanisms. A case is made for the inclusion of such mechanisms in legislative National Employment Standards. The article concludes by arguing that it is a mistake for unions to expect too much from legislation, rather than investing in the pursuit of the sort of community alliances which, after all, have made a restoration of Work Choices untenable.*

## Keywords

*Australian industrial relations; collective bargaining; discrimination; employee voice; Fair Work Act; labour-management relations; labour law; labour rights; low-paid workers; union-community campaigns.*

## Introduction

At the time of writing, a minority Australian Labor Party (ALP) government led by Julia Gillard had just been returned. During the 2010 Federal election, both the ALP and the Liberal-National Coalition indicated that the *Fair Work Act* would remain in place, thereby reducing the pivotal role that industrial relations had occupied in the 2007 Federal election. During the campaign, both the ALP and the Australian Council of Trade Unions (ACTU) had sought, with a vigorous advertising blitz, to resurrect the spectre of the Howard Coalition government's unpopular 2005 *Work Choices* legislation, which had restricted collective rights. The Opposition leader, Tony Abbott, formerly an advocate of *Work Choices* (Abbott 2009: 87–90), had been forced to declare and frequently reassert that it was 'dead, buried and cremated' (Johnson 2010).

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In the wake of the 2010 election, it seems timely to consider the challenges and opportunities the *Fair Work Act* presents for workers, unions, employers and all those concerned with industrial relations policy and legislation. These are the concerns to which the papers in this symposium are devoted, as they explore the likely impact of the *Fair Work Act* and its implications. Each paper arose from a forum on the Act jointly organised by the University of Western Sydney and the University of New South Wales Industrial Relations Research Centre, held in August 2009. The forum, organised around considerations of the 'Promises, Potential, Protections and Pitfalls' of the *Fair Work Act*, attracted a variety of contributions and participants from universities, employer associations, unions and community groups. A primary purpose of the day was to inform the diverse audience of the main tenets of the Act and likely impacts on different sections of the workforce and community, as the legislative changes played out in workplaces across the country.

Some forum contributors submitted revised versions of their papers to this *ELRR* symposium. The purpose of this introductory piece is to background the articles that follow by giving voice to the questions and debates that arose on the day, and the political and industrial context which gives them ongoing currency. It sets the context that gave rise to the Act and explores areas that it leaves only partially addressed, such as the need for greater worker voice and participation.

The *Fair Work Act* includes among its main principles and goals:

- Provision of legislation that is 'fair to working Australians';
- The ensuring of 'a guaranteed safety net of fair, relevant and enforceable minimum standards and conditions through the National Employment Standards, modern awards and national minimum wage orders';
- Prevention of the use of individual agreements to undermine this safety net;
- Encouragement of work-family balance through the promotion of flexible working arrangements;
- Protection of freedom of association and prevention of discrimination through effective grievance, dispute and compliance procedures and mechanisms;
- Requirements for good faith bargaining obligations and rules circumscribing industrial action, designed to strengthen enterprise bargaining (*Fair Work Act 2009*, s.3).

The articles in this symposium probe the ways the Act frames and gives effect to the concept of fairness. They were written in the historical context of *Work Choices*, the union and community Your Rights at Work campaign leading up to the 2007 Federal election, and the negotiations and compromises that shaped the Act's eventual form. The restorative capacity of the *Fair Work Act*, given the intense debates and conflicts that preceded it, remains a continuing point of contestation. Does the good faith bargaining provision encourage good faith relationships both within bargaining and in employment relationships more generally? What support does the Act give to unionisation and collec-

tive bargaining? Might the right under the Act to take protected industrial action also be seen as inconsistently confining the right to strike to those able to engage in enterprise bargaining? To what extent do the Act's provisions afford workers protection against discrimination and the potential to pursue suitable remedies? What potential does the *Fair Work Act* offer to improve the situations of low-paid, vulnerable workers, including indigenous workers and migrant women workers?

In terms of safeguarding fundamental employment rights and entitlements, and improving the situations of particular sections of the workforce, none of the contributors to this symposium sees the *Fair Work Act* as particularly radical. While several contributors express approval for the increased rights and protections afforded by the Act, especially for 'vulnerable' or 'marginal' workers, there is a general sense of missed opportunity — a feeling that the Act 'did not go far enough'. This leads to a re-evaluation of the faith we can invest in legislation and advocacy of the need to develop stronger workplace and community structures and strategies to achieve a 'fairness' of process and practice that will result in meaningful outcomes for Australian workers.

The first section of this introductory article provides a historical context for analysis of the *Fair Work Act*, examining the hopes raised by the 2007 Your Rights at Work campaign which brought the ALP to office, and the ways in which the Act failed to deliver on the promise, or at least the expectations, of a new industrial relations regime. The second section explores the potential within the Act, to provide protections against workplace discrimination, to support collective bargaining and extend it to low-paid workers, to encourage good faith employment relations, and to protect vulnerable workers. It concludes that this potential is very limited. The third section identifies pitfalls in the Act, including its failure to address questions of workplace power imbalance, especially in small workplaces, and its lack of encouragement for participation and employee voice. A case is made for the legislated introduction of effective workplace voice mechanisms, both union and non-union, possibly included among the National Employment Standards. The article concludes by arguing that at least the Your Rights at Work campaign ensured that return to *Work Choices* is untenable, and that the biggest pitfall is to invest excessive hope in legislation at the expense of organising in workplaces and local communities.

## Delivering on the Promise

The 2007 election, which paved the way for the passage of the *Fair Work Act*, was in many ways defined by the 2005 *Work Choices* legislation. The election campaign was distinctive for several reasons: for the first time in many years industrial relations was centre stage (Hall 2008: 371); trade unions mobilised significant resources; and employer groups pursued an overtly party political strategy (Hearn-Mackinnon 2008: 464, 472). The impact of industrial relations concerns on the outcome of the election was dramatically illustrated in the defeat of the Liberal-National Party Coalition, the failure of Prime Minister John Howard to retain his seat, and the delivery to the ALP of a clear mandate to scrap *Work Choices*.

The Your Rights at Work campaign, conducted in the lead-up to the 2007 election as a union and community based response to *Work Choices*, placed industrial relations at the heart of the election debate. It involved an unprecedented commitment of union resources with the explicit objective of bringing about a change of government. Its most visible manifestations included a series of nationwide rallies that made extensive use of new media (for example, satellite television hook-ups); public events such as rock concerts; and a set of TV commercials that drew voters' attention to the impact of *Work Choices* on individual workers and their families, rather than on its potential to constrain the core functions of unions (Barnes 2005, 2006). Less visible, though just as significant, was the union movement's marginal seats campaign, which involved the long-term commitment of resources to building local community networks. So effective was the Your Rights at Work campaign that the ACTU sought to revive this mood of popular apprehension during the tightly contested 2010 election campaign. On a smaller scale, 2007 strategies of television advertising and marginal seats electioneering were again used. The campaign slogan, 'Your rights at work: worth fighting for', which close to the 2007 election had become 'Your rights at work: worth voting for', was refashioned in 2010 into '*Work Choices*: whatever the name never again'.

Following the 2007 election, there was a widespread public perception that the election of the Rudd government had effectively fixed the problem of *Work Choices*. Nonetheless, many union activists were less sanguine about the ALP's preparedness and capacity to deliver on its promises. Many rank-and-file activists appreciated such features of the *Fair Work Act* as its abolition of the power conferred on employers under the *Work Choices* legislation to over-ride collective agreements with individual Australian Workplace Agreements (AWAs) offering inferior conditions. Still, there remained considerable disquiet that the Act did not deliver on the ALP's promise to 'rip up' *Work Choices*. As one newspaper report noted:

A few eyebrows must have been raised at Trades Hall, on reading a speech by a Labor IR Minister [Julia Gillard] outlining her Government's determination to stamp out snap strikes or bans that 'have devastating effects on employers with time-critical processes' (Forsyth and Howe 2008).

While the Your Rights at Work campaign clearly benefitted the ALP in 2007, it is not clear that it produced benefits of similar magnitude for unions and workers. In the aftermath of the 2007 ALP victory, trades and labour councils lobbied for changes to the proposed *Fair Work Act*. Although union peak bodies lacked the resources available to business groups, they did have greater access to Labor parliamentarians than many other organisations. The union movement's strategy involved meetings with MPs to discuss key aspects of the legislation and preparing fact sheets and briefing notes for parliamentarians and their staffers. The unions sought undertakings from MPs that they would raise their concerns in caucus, a strategy that met with some limited successes — for example, limiting an employer's ability to nominate where a union meeting could be held.

Nevertheless, the articles in this symposium indicate that key provisions of the *Fair Work Act* may have fallen short of union expectations, despite ACTU Secretary Jeff Lawrence's assertion, 'The ACTU campaign was not conducted as a favour for the Labor Party. The Government does not owe us anything and we are not seeking any pay-offs' (Lawrence 2008). Despite overwhelming electoral endorsement for change and an ALP strategy that exploited voters' fear of *Work Choices*, the legislation that replaced *Work Choices* is perhaps indicative of how little traction organised labour often has with Labor governments. The *Fair Work Act* has been called 'Work Choices Lite', because it has much in common with the legislation it replaced. Political expediency appears to have encouraged the ALP to distance itself publicly from unions. Examples include the continuing operation of the Australian Building and Construction Commission, a body set up under the Howard conservative government with draconian penal powers to investigate and constrain union activity on building sites, and the readiness of Julia Gillard, when Minister for Employment and Workplace Relations, to confront teachers and education unions (see ACTU [2010] Patty, Feneley and Harrison [2010]).

The pertinent question, therefore, is why the ALP Government believes that there is political currency to be gained from being seen to be tough on unions. Is it because the ALP, as the union movement's 'estranged offspring', (Muir and Peetz 2010: 220) does not wish to be, nor appear to be, beholden to any group? If so, why are the links between the Coalition parties and conservative business interests not viewed as being equally objectionable? Is it, as Paul Howes, National Secretary of the Australian Workers Union, suggests, because Opposition Leader Tony Abbott and his Liberal colleagues have succeeded in 'demonising unions'? (Howes 2010: 44) An endeavour to answer such questions poses yet more questions: How prepared should unions be to commit resources to the fighting of election campaigns or the long-term building of networks if the outcome is an unsatisfactory compromise? What role should unions play, if any, in the formulation of ALP electoral strategies? How should unions tackle the problem of union renewal in light of the obstacles thrown in their path by the major parties? How should communities across Australia be encouraged to engage in union activity?

These and many other questions remain unanswered, particularly in light of the 2010 election outcome. But, rather than focusing on a detailed dissection of the reasons for Labor's unexpectedly poor 2010 showing, it is perhaps more useful to focus on those questions that are of particular relevance to industrial relations. What opportunities are offered by the networks and 'campaign infrastructure' developed during 2007 (Oliver 2008: 453) and built on in 2010 provide unions? Is there a future for local Your Rights at Work groups that have a semi-autonomous campaigning capacity and which are able to be activated around particular issues? To what extent are unions wise to devote resources to increasing their political leverage, whether through local networks or through expensive television advertising?

In 2007 employer groups were far less effective in shifting votes to their parliamentary soul-mates than were unions. Employer groups appeared to be

taken by surprise and remained on the back foot throughout much of the campaign. But this advantage did not last. While the business campaign was 'openly partisan' in its support for both the *Work Choices* legislation and the Howard government (Hearn-Mackinnon 2008: 464; Muir 2008: 153), this partiality did not produce a backlash. There was no widespread public perception that conservative governments were beholden to business interests or, if they were, that this was unacceptable. By 2010, business had notched up significant victories in pressuring Labor to weaken the *Fair Work Act*. Its power to influence government policy and legislation appears to have been substantially unimpaired. Should this be attributed to a sympathetic media or perhaps to the ability of the business community to command greater resources than their union opponents? It is beyond the scope of this paper to answer these questions, but what is clear is that employers devoted considerable resources to highly effective lobbying of MPs, with Heather Ridout, Chief Executive of the Australian Industry Group, being referred to as the 'twenty-first Cabinet Member' (Keane, cited in Hearn-Mackinnon 2009: 361).

As a result, while *Work Choices* reflected the Liberal-National Coalition's anti-union agenda, the *Fair Work Act* embodies an accommodation to, and compromise with, the interests of business. The Act's focus is primarily on individual rights, which are narrowly conceived. It does not encroach upon managerial prerogatives to any significant degree. As Gollan has noted, 'For employers the *Fair Work Act 2009* presents a major challenge. Increased flexibility also brings greater discretion for managers, which can expose bad management and increase risk for firms' (2009: 268). The continuing legislative promotion of individual rights and the lack of any significant challenge to managerial prerogative emerge as a concern in the articles included in this special edition.

### **Assessing the Potential of the *Fair Work Act***

The articles that follow assess the potential of the *Fair Work Act* to achieve the goal of advancing employee rights and entitlements and expanding the scope of unionisation and collective bargaining. Simon Rice and Cameron Roles explore the new regime of protection against workplace discrimination afforded by the *Fair Work Act*. This offers further options for aggrieved workers beyond those provided by anti-discrimination legislation. Rather than overlapping with anti-discrimination legislation, the *Fair Work Act* provides a new set of general protections against attribute-based conduct by employers. Therefore, Rice and Roles interpret the *Fair Work Act's* 'anti-discrimination' provision as an 'attribute-based protection'. It may offer employees in certain cases a simpler method of pursuing their grievances than that afforded by anti-discrimination law, thereby providing a valuable, if limited, addition to the range of remedies available to employees.

Reflection on their discussion leads to further questions about the effectiveness of legal remedies. As the literature on employee silence (discussed below) reveals, workers experiencing unfair or discriminatory treatment may just struggle on or simply leave their jobs. Moreover, employers may be more than happy to bear the costs of litigation if it serves to (a) remove troublesome

employees, and (b) indicate their toughness to the remainder of the workforce. Many workers, especially if they belong to the non-unionised majority, may lack the resources to pursue legal action.

One of the *Fair Work Act's* more significant innovations is its provision for multi-enterprise bargaining and agreements. This provision potentially offers greater access to collective bargaining processes and outcomes, particularly for low-paid workers. Shae McCrystal, however, shows how the limiting of protected industrial action to the enterprise level effectively undermines the Act's commitment to voluntary collective bargaining, as unions are prevented from taking multi-enterprise industrial action. Thus the least powerful workers, for example those working in cleaning or aged care across workplaces, have no industrial power in their attempt to strike multi-enterprise collective agreements. The Act's failure to extend protected industrial action to multi-enterprise and pattern bargaining may be viewed as part of its broader favouring of individual over collective rights. It may, therefore, significantly hamper union efforts to extend and deepen the reach of collective bargaining processes across Australian workplaces.

Thus the *Fair Work Act* may contain inherent inconsistencies, rather than enunciating an internally coherent rationale. This concern is also expressed by Dorsett and Lafferty in their discussion of the Act's good faith bargaining provision. The Act has a compliance-based approach to good faith, which is confined to collective bargaining rather than extended to broader employment relationships. This, they argue, is likely to encourage a legalistic approach to good faith where the parties merely have to appear not to have acted in *bad* faith. Using the comparative example of New Zealand's *Employment Relations Act 2000*, in which the good faith requirement is extended to *all* employment relationships, Dorsett and Lafferty question the potential of the *Fair Work Act* to achieve a significant cultural change towards good faith. They conclude that the permeation of good faith throughout Australian workplaces is unlikely to be greatly assisted by the legislation and will depend on the efforts of employers, unions and employees (including those in non-unionised workplaces) to develop good faith relationships.

To illustrate these points, the symposium includes the voice of a community representative, Angela Zhang. Her non-refereed article, edited from the speech she delivered at the symposium, paints a picture that is far removed from the principle and practice of good faith. She provides voice for a substantial group of workers who may be described accurately as 'vulnerable' or 'marginal', and whose level of control over their own work is at most minimal. Her account of Asian Women at Work, a Sydney community organisation with over 1300 members of mainly Chinese or Vietnamese origin, provides a first-hand insight into an often pitiless world of work — a world of virtually unrestrained managerial prerogative, abuse of basic rights and conditions, and (often illegally) low pay.

The hope offered by Asian Women at Work embodies the most fundamental principle of union organisation: 'When we work together like this we are powerful'. The gulf between legislation and protection of a predominantly non-unionised workforce is also illustrated graphically: the women work in often unsafe,

unhealthy conditions, where harassment is commonplace and the threat of job loss is ever-present. As Angela Zhang notes, in the small businesses where the great majority of these workers are situated, the boss *is* the law. She argues that without education, enforcement and strong legal protection, the *Fair Work Act* is of little relevance for Asian Women at Work, who have taken it upon themselves to push for these changes. As she concludes: 'We are ordinary women, migrant women. We thought we were powerless, but we are not ... and we will continue to work hard to improve our working lives.'

### **Navigating the Pitfalls: Protection, Participation and the Question of Power**

The workers Angela Zhang represents belong to that large 'bleak house' section of the Australian workforce without any access to formal workplace voice mechanisms, either union or non-union (see Teicher, Holland, Pyman and Cooper 2007: 140-143). This highlights one issue that was not addressed in detail at the symposium: workplace power and participation (or non-participation). Evidently, the inequality in power relations between most employers and workers, which was ignored by *Work Choices*, is still not addressed systematically in the *Fair Work Act*. Encouragement of suitable voice mechanisms, to place some constraint on managerial prerogative, would seem a necessary counter-balance to this power inequality.

In this respect, union membership may be viewed as a sign of relative privilege (and we stress 'relative'), confined to only a minority of the workforce. Where unions are present and active, there is usually less need for individual employees to articulate grievances, but they are more likely to do so. Where unions are absent or inactive, in situations where there may be a pressing need for grievances to be articulated, individual employees are considerably less likely to do so (see, for example, Batt, Colvin and Keefe 2002). In many Australian workplaces, the absence of unions and a collective voice is accompanied by an absence of individual voice — that is, silence. The situation depicted by Angela Zhang embodies the worst combination of factors: deplorable working conditions with limited opportunities to address them. In order to draw attention to their situation, Asian Women at Work eventually took their grievances to Canberra, to lobby parliamentarians. But they should not have had to.

The status of the vulnerable worker is typically associated with silence, often for the reasons articulated by Angela Zhang — fear of recriminations and reprisals, including the threat of job loss. These are problems on which the growing literature on employee silence may shed at least some light, although this literature predominantly stems from a managerial perspective that envisages little or no role for unions (see, for example, Milliken, Morrison and Hewlin 2004). Notably, in his study of non-union voice in the lowly-unionised Auckland hotel industry, Haynes (2005) found that non-union voice mechanisms, usually introduced by management, did provide employees with some degree of influence, but that this was still heavily constrained by managerial interests. Although the absence of unions need not indicate an absence of employee voice, unions are able to create a climate in which employees feel safer to articulate problems.



Given low levels of unionisation in most of the private sector, non-union voice mechanisms have a definite role, but the quality of that voice is likely to be diminished if it is the result of a management initiative. Hence there is a compelling case for the encouragement of both union and non-union voice mechanisms that are not instigated by management. Legislative and regulatory intervention can make a crucial difference in encouraging such mechanisms. The European Union, for example, has introduced several initiatives over the past two decades, such as its Directives on Works Councils and on Information and Consultation, to promote the establishment of worker voice mechanisms (see Geary 2007). Perhaps counter-intuitively, the presence of non-union voice mechanisms does not discourage unionism — indeed, since collective issues are invariably raised through voice channels, there can be a strong affinity with union organisation. As Bryson and Freeman (2007: 86–95) have illustrated, the combination of unions with works councils may not only improve the industrial relations climate but may also enable unions to demonstrate their value to all participants in the employment relationship.

There is, then, a case to be made for more effective workplace voice mechanisms, both union and non-union, which could be integrated in the National Employment Standards. The most obvious silence is in smaller workplaces, particularly in light of the inequities mentioned by Angela Zhang. Again, this draws attention to the opportunities to enhance workplace fairness that remain unrealised in the *Fair Work Act*. Such issues merit further debate, particularly in the currently uncertain political context. To ‘promises, potential and protections’ we should add ‘participation’.

## Conclusion: As Good as it Gets?

The *Fair Work Act* does not constitute a radical philosophical or regulatory break with the individualist, anti-union agenda crystallised in *Work Choices* — a point made by the contributors to this symposium. Yet, while the *Fair Work Act* may have delivered only partially and unevenly on its promises, it has contributed significantly to a considerable shift in the contemporary political landscape. The 2010 election campaign, particularly the readiness with which the Coalition rejected the possibility of a return to *Work Choices*, illustrated how industrial relations has been effectively defused as an electoral issue. Only a very bold future Coalition leadership would attempt to resurrect either the spirit or letter of *Work Choices*.

The 2007 Your Rights at Work campaign was undoubtedly effective in both achieving electoral change and in eliminating the possibility of *Work Choices* re-emerging. But the ensuing process of lobbying (particularly by big business), negotiation and compromise that followed under the Rudd government led to an Act that did not fully deliver on its promises or potential. There remain extensive areas where the Act’s overarching principles could be given far greater practical impetus, such as encouraging mechanisms for worker participation or enhancing the capacity of unions to engage in multi-enterprise bargaining.

One of the greatest pitfalls we may face is to invest excessive faith in the capacity of legislation to deliver on its promises to improve the situation of

Australian workers and support unionism. In the current political context, the *Fair Work Act* may indeed be as good as it gets — at least in terms of legislation. A reinvention of the kind of union-community alliances forged during the 2007 Your Rights at Work campaign, which clearly inspired broad-based action on industrial relations issues, may be required to achieve greater practical realisation of the principles espoused in the *Fair Work Act*.

## Notes

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