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Per Capita Reform Agenda Series Speech

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Change the Rules

Arbitration is fundamental to a Fair Industrial System

CHECK AGAINST DELIVERY

Our industrial system is seriously out of balance – working people do not have strong and easily enforceable rights. This means employers now have too much power.

This is bad for workers stuck in insecure work.

It's bad for workers who are victims of wage theft.

Think about the workers at 7 - Eleven, Dominos Pizza and Caltex. People who work for companies that are household names have not even been paid the minimum wages our laws require.

Think about visitors to our country on temporary visas housed in miserable, over-crowded accommodation and paid a pittance by unscrupulous employers.

It is bad for workers who can't get a pay rise.

Think wage increases across the economy stuck at 2% or less.

Think 14,000 public sector workers in the Department of Home Affairs who haven't had a pay rise in almost 5 years.

Think working women in violent relationships who need time off to deal with family and domestic violence.

This is not the way we want to be. We need a balanced system that delivers fairness to all.

It's also bad for the economy. We're seeing this writ large with record low wage growth. If workers have too little power, wages stagnate and the economy slows.

That is bad for jobs. Less pay means less spending. Less spending means less business. Less business - fewer jobs.

So, we have to increase the rights of workers to bring balance to the system. We need to increase the capacity of workers to get a fair go. To get a secure job. To stop wage theft. To get a pay rise. To improve conditions of employment over time.

Workers have lost power because our rules at work are broken.

It's hard to get a pay rise. It's difficult to enforce rights.

One of the key problems is that we don't have an effective independent workplace umpire.

The independent umpire has been weakened. It no longer has the ability to listen to workers and resolve workplace problems. It's lost its power to arbitrate.

The minimum wage can't rise to deal with poverty.
Pay disputes go on and on. They can't be resolved.

Improvements in award conditions to deal with insecure work and DV leave can't be awarded.

This is because the ability of the Industrial Commission to arbitrate, to make decisions after listening to both sides, has been taken away.

Disputes about pay, disputes about conditions of employment, disputes about unfair treatment can no longer be resolved quickly and easily by the independent industrial umpire.

We still have an industrial Commission, but it can't do much.

It has some powers to assist workers who have been unfairly dismissed or are being bullied. It has powers to review awards. It does this by applying rules set by parliament. It has been reviewing awards for so long now it seems to only know how to take things away from workers.

Think how it took away low paid workers' penalty rates. It did this under an Act that requires it to place business before workers.

The Commission doesn't apply a merit test anymore. It applies lists such as the "modern awards objective". The test of fair and reasonable has gone.

In the Family and Domestic Violence Leave case, that the ACTU ran last year, the Commission found the claim had merit. In its decision the Commission made these findings:

- The ACTU's submissions and evidence established family and domestic violence is a workplace issue which requires a workplace response.

- Family and domestic violence is a significant problem that has significant impacts on those who experience it and their families.

- Family and domestic violence has significant economic impacts both for the individual and the general community.

- Whilst men can experience family and domestic violence, it is a gendered phenomenon, it disproportionally affects women.

- The impact on women who experience family and domestic violence is different to the impact on employees who experience other forms of violence.

- Family violence is not simply a private or individual issue, it is a systemic one arising from wider social, economic and cultural factors. Effective measures to address family violence need to operate in both the private and public spheres.

- The evidence established that the circumstances faced by women who experience family and domestic violence require a special response.

The Commission also accepted the ACTU evidence that:

- Domestic and other forms of violence have real and tangible impacts on employees and employers in the workplace.

- Employers have understood the significance of the issue, and voluntarily implemented domestic violence leave provisions in response

- Violence against women costs the national economy $21.7 billion per year, including the cost of delivering health services, the loss of productivity on businesses and the increased demand on the criminal justice system.

- There are unquantifiable psychological impacts that family and domestic violence has on victims.

- The processes in dealing with family and domestic violence (such as preparing for and attending court proceedings) are time consuming.

- The current leave provisions for victims of family and domestic violence are inadequate.

Clearly, the Commission was of the view that the case for paid domestic violence leave was compelling. I have no doubt that if the test was whether the claim was for "fair and reasonable" the Commission would have awarded our claim.

But the test has little to do with fairness. The Commission was then required to apply the modern award objectives. In doing so it found that while there was a compelling case for paid domestic violence leave it was not necessary to meet the modern award objective.

Instead, only 5 days of unpaid leave could be granted.

That's not enough. It will be of limited assistance to women and children who need to flee a violent home. It does not provide any financial support at all. It fails to recognise the time it takes to find a place to live, to deal with trauma, to care for children, to deal with authorities, and, to be safe.

I don't want to re-run the case. I just want to point out that the claim was defeated not because it was without merit but because it didn't fit within the constraints of a limited test about what should or shouldn't be in awards.

Of course we should have paid domestic violence leave, but the rules won't let us.

It wasn't always like this. We used to have the best system of conciliation and arbitration in the world.

You could run test cases for an 8-hour day, for paid annual leave, paid sick leave, for superannuation, retrenchment pay. All of those things that unions have campaigned for and won over the years. We could run those cases because there was access to an independent umpire which could grant claims on merit and improve conditions as circumstances allowed.
Under that system we would have paid Family and Domestic Violence Leave.

When employers complained about the industrial umpire 20 years ago they said it was all too complicated. There were State Commissions and a Federal Commission. The Federal Commission was constrained by the use of the conciliation and arbitration power in the constitution. This made things complicated. Paper logs of claims involving ambit, dispute findings, roping-in, respondency lists. There were thousands of awards. And in addition to that there were the State systems with different awards, often overlapping, operating as common rule awards. It was all a bit much.

And you know something? It was complicated.

One thing the Industrial Commission has done over the last 20 years is to spend a lot of time and resources simplifying, rationalising and modernising our award system.

As the law changed the Commission was told to tidy up awards.

And it did so. We now have 122 Awards instead of over 3,000 and thousands of State Awards are now effectively defunct.

Recent demands by extremist employer groups to abolish the remaining awards are dangerous. For most working people Awards underpin their rights at work and their pay. We need our award system. It should form the basis of improving the rights of workers. Reducing the number of awards might have made sense. Stripping back of award rights did not. We need to use the new streamlined award system to ensure a strong and relevant foundation for everyone. Things such as penalty rates should be restored. Our awards should reflect industry standards. They should not be merely a safety net - 2.3 million workers rely on them.

And to do that we need an independent umpire which has powers to consider what is fair and reasonable. The Commission should be able to determine cases on their merits, not be constrained by the current rules.

The Work Choices end game was about abolishing Awards. It was also about taking fairness out of the system. One of the key ways it achieved that was to reduce the powers of the industrial umpire. In particular to take away the power of arbitration.

The Industrial Commission used to be a strong umpire. Work Choices relegated it to being an occasional linesman.

It now makes a few calls here and there, but it's a long way from the main game.

We used to have an independent umpire that could resolve disputes. If you were being underpaid you could go to the Commission and get it sorted. Quickly, easily and cheaply.

I don't think most people fully appreciate that the independent umpire isn't there anymore. And that's a big part of the powerlessness that working people now feel in the workplace.

It's not just about making awards. We need a tough cop back to deal with wage theft. Disputes about pay have to be taken to courts. The Commission can't help.

But court processes take a long time; they are technical; they are costly.

Ordinary working people can't take their employer to court. They can't afford to. If they do, they often face victimisation and risk their job. If they are victimised they have to go to court again, doubling up on the cost, and time, and complexity. It has become almost impossible to resolve workplace disputes through this system.

Disputes over the payment of correct wages should be dealt quickly and informally. That's in everyone's interest.

Instead a claim just to be paid correctly has to go to court. Going to court means lawyers. You need them to prepare the paperwork, which is complex and takes time. You need them to go to directions hearings and prepare pleadings, draft affidavits and write submissions. You need them in court to present your case and argue about evidence and conduct cross examination. This all takes time. It costs money. A simple underpayment claim can take 18 months to resolve, if you're lucky, and cost tens of thousands of dollars in legal fees. No wonder there is so much wage theft, employers know the system is stacked in their favour.

A better way to deal with this is to have an Industrial Commission that can enforce the rights workers already have. A body that will deal with it quickly, talk to the parties, conciliate and, if necessary, arbitrate. This is what Industrial Commissions once did. Even through the complexities of the old system there was room for industrial justice. But not anymore. Our rules are broken.

The lawyers in the room will be aware that over the last 20 years in other parts of our legal system courts have embraced alternative dispute resolution to resolve otherwise lengthy, complex and costly legal disputes.

Things like commercial arbitration, court ordered mediation, administrative law tribunals, tenancy tribunals, family court mediators and consumer complaint tribunals are accepted ways of

resolving legal disputes. At the same time the Industrial Commissions powers to provide quick, simple, accessible justice has disappeared.

The Workplace Ombudsman has been given a role as cop on the beat. It has a number of roles. It is supposed to educate about, and promote harmonious workplace relations. It provides information about workplace rights, it conducts research about workplace issues, and it's meant to police non-compliance. But it is under-resourced and conflicted. It has 200 inspectors to deal with a workforce of 12 million workers. Its recent record includes meddling in industrial disputes and competing with other institutions such as the Industrial Commission.

It prosecutes unions, it prosecutes employers. It sends investigators to sit in the back of Industrial Commission hearings to gather intel so it can do so. At the moment it's investigating both the union and the employer involved in the Oaky North dispute in Queensland. The parties have resolved that dispute. The workers had been locked out for 237 days. It was a bitter dispute but now it's resolved. Except that the Fair Work Ombudsman wants to pore over it to see if it can prosecute someone.

That dispute should have been resolved by the Industrial Commission much sooner. The Ombudsman seems to think it now has a role to reignite the dispute in the courts. Instead of quick, informal dispute resolution our rules have created a complex, legalistic system that results in disputes going on and on.

We need a one stop shop for the resolution of workplace disputes. Our institutions shouldn't be competing with one another to deal with disputes. Disputes should not be taken to the courts. They should be resolved by the Industrial Commission with a strong arbitration power.

Our current rules allow for conciliation but not for arbitration.

But the key to resolving disputes informally and quickly is the threat of compulsory arbitration.

For over 100 years workers have had access to compulsory conciliation and when necessary arbitration. When the Commission had authority to move quickly to arbitration, if conciliation failed, all parties had an incentive to agree to a reasonable compromise in conciliation.

Employers and employees understand that the best outcome is an agreed outcome and often the possibility of the Commission deciding the matter is what is needed to help them reach agreements.

Awards and agreements have dispute procedures but they're not required to include arbitration. If you have a grievance at work you have to take it to your manager and then more senior managers and then you might be able to take it to the Industrial Commission but the Industrial Commission can't resolve the dispute by arbitration unless the boss agrees. The boss seldom agrees. Why would they? In practice this means workers find it very difficult to enforce the rights they already have.

The simplest things, like whether a change to your roster that stopped you from picking up your kids was fair, can't be resolved. You can complain but if you get to the Commission, even if the Commission agrees with you, nothing can be done about it.

It shouldn't be like this. Workers should have somewhere to go if they are treated unfairly.

The Commission has a role in fixing wages through the Annual Wage Review. Each financial year, the FWC's Expert Panel conducts the Annual Wage Review and issues a decision and national minimum wage order, which applies to employees not covered by an award or agreement. The minimum wage can only be varied if the FWC is satisfied that the variation is justified by work value reasons.[1] There are now 2.3 million workers who are dependent on the Annual Wage Review for an increase to their wages.[2] 2.3 million workers currently paid the lowest that the law permits.

The process of the Annual Wage Review involves the Expert Panel receiving submissions from organisations and individuals. This panel is made up of the President of the Commission, three full-time members from the Commission, and three part-time members who are individuals with experience in: workplaces relations; economics; social policy; business; industry, or commerce. Unlike the former national wage cases, there is no application before the minimum wage panel to determine. There are no 'parties' nor is there any 'dispute' to resolve. Instead, there is a process of public inquiry, where decisions are made in an administrative way rather than by arbitration.

In May 2016, there were 2.3 million employees reliant on the minimum wage review to get a pay rise, that's about 23% of all employees.[3] Around 36 % of employees were paid according to a collective agreement and 37.3% were paid according to an individual arrangement. The proportion of employees paid according to the minimum wage has risen in recent years, after falling during the previous decade. Based on the ABS Employee Earnings and Hours data,[4] in 2000, around 23 % of employees were award-reliant, which decreased during the 2000s, to a low of 15 % in 2010. Award reliance rose to 18.8% of employees in May 2014, and then to 23% in May. The proportion of collective agreements fell 5% over the same period. In real terms, this means that there were an extra 450,000 workers dependent on the national minimum wage at May 2016, compared with May 2014 - with a corresponding fall of 375,000 workers on collective agreements over that same period.[5] More recent figures suggest this trend is continuing.

[1] FWA ss 156(3), 157(2)
[2] ACTU submission Annual Wage Review 2016-2017, 29 March 2017, 1.
[3] 0 ABS EEH Cat 6306, employees includes OMIEs (Managers of Incorporated Enterprises at 63060DO005_201605
[4] Above n 20, 13.
[5] Ibid.

In the National Wage Review the Expert Panel acknowledged that it was constrained by the "minimum wages objective". In its 2017 decision the Panel acknowledged that the National Minimum Wage would not lift all full-time workers out of poverty, particularly those households with dependent children and single-wage earners.

An arbitrated minimum wage that was decided on the basis of what is fair and reasonable would lift workers out of poverty. That has been the underpinning principle of our wage system for over 100 years.

The rules on minimum wages are broken. We need to change them.

The other significant area for the fixing of wages is enterprise bargaining. Many changes are needed to our bargaining system. One of them is to provide for arbitration to ensure fairness. Enterprise bargaining has left most disputes about pay to be finally determined between the parties. This has seen the trading away of conditions, the introduction of flexibility and improvements in productivity. Pay rises have generally followed. However, if the boss says no to a pay rise in bargaining then you can't go to the Commission and ask for assistance. And it appears that the boss is increasingly saying no.

The Trends in Federal Enterprise Bargaining publication released by the Department of Jobs and Small Business in September last year recorded a steady decline in average annualised wage increases in enterprise agreements from 3.5% in September 2014 down to 2.9% in September 2017.

In enterprise bargaining the Commission has various roles. It can make things called scope orders, and majority support determinations. It can make good faith bargaining orders. It can make protected industrial action ballot orders, it can make orders that stop industrial action but it can't deal with the subject matter of bargaining. It can't stop the boss from refusing to give no pay rise at all. In fact, it is required to help the boss in bargaining by terminating earlier agreements so that hard won terms and conditions disappear.

This isn't fair.

The independent umpire should be there to knock heads together. It should be there to help parties reach agreement.

In the past we had an arbitration system with well established and maintained standards of fairness. Commissioners referred to these when they are acted as arbitrators or as conciliators. The public nature of the arbitrated standards allowed them to be applied in conciliation as well as in arbitration. There was an overlap between the processes of conciliation and arbitration.

But fairness has disappeared. The Commission just applies check lists formulated by parliament in a one size fits all manner. It doesn't have the flexibility to do what is fair.

When the tribunal had authority to move quickly to arbitration if conciliation failed, parties had every incentive to agree to a reasonable compromise. That incentive has gone.

And the Commission should have broad powers to arbitrate. It should have strong powers to compel parties to attend conferences and hearings. Arbitration is the key as it focusses the mind. The law needs to have broad coverage so that the Commission can deal with all aspects of a dispute.

If there is a dispute over pay at one 7-Eleven store then the Commission should be empowered to summons not just the store owner but the franchisor. If there is a dispute over entitlements on a building site then where appropriate the Commission should be able to make orders against not just the sub-contractor but also the head builder.

The Commission as a public body must act fairly and transparently. It will be open to scrutiny and will be required to afford procedural fairness.

In the two examples, the current laws are complex. The Fair Work Ombudsman took years to deal with 7-Eleven – no doubt because of the complexity of the arrangements. Decisions of the Ombudsman were not transparent and not subject to scrutiny. In the second, the ABCC is more interested in chasing the CFMEU than ensuring construction workers get paid. It's not interested in dealing with security of payments issues at all.

In bargaining disputes the Commission should be able to arbitrate outcomes when parties cannot reach agreement. The Department of Home Affairs example shows how difficult it is to gain arbitration and how complex arbitrations have become. 14,000 workers have been waiting almost 5 years for a pay rise. The first 3 and a half years the Government said they could only have a 2% increase and that would be funded from trading off other conditions such as allowances. There were 3 votes of workers with 80 to 90% of workers rejecting the offers. There was industrial action that the Government said was a threat to national security. That led to an 18 month arbitration. The Commission has to apply a list of criteria, only one of those is the merit of the case. The Government said they agreed to nothing so every term and condition had to be arbitrated. That arbitration has taken 18 months and the 14,000 workers are still waiting, 5 years after their last wage rise, for an outcome.

This sort of dispute shouldn't happen.

There are of course other examples. The picket at Exxon at the Longford plant, which is protesting about maintenance workers being replaced by cheaper labour, has been going on for almost a year. There should be capacity for the Industrial Commission to step in and resolve that dispute. If arbitration is necessary it should be available.

Other high profile disputes such as the Streets dispute, the CUB dispute, the Qube dispute on Webb Dock and the Oaky North dispute would all have benefitted from the involvement of an Industrial Commission with meaningful powers of arbitration.

If we had arbitration powers in the Commission Qantas would never have gotten away with shutting its airline in 2011.

In a changing economy we are better served by institutions that are flexible and responsive. The current rules make our industrial system cumbersome and inefficient. It is not fit for purpose. It can no longer resolve workplace disputes. It is not empowered to ensure fairness is afforded at work.

This needs to change. Our independent umpire should have teeth. It should be able to arbitrate.

We need to change the rules.