REFORMING AUSTRALIAN INDUSTRIAL RELATIONS: THE COALITION'S PROGRAMME

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The Tenth Foenander Lecture in Industrial Relations was delivered by Mr Peter Reith, Shadow Minister for Industrial Relations, Liberal Party of Australia, at the Copland Theatre, The University of Melbourne, on Thursday 12 October 1995

The Foenander Lecture

The Foenander Lecture in Industrial Relations has been established to commemorate the life of Dr. Orwell de Ruyter Foenander. Orwell Foenander had a long and distinguished association with the University of Melbourne which began with his attendance as a student of law in 1909 and ended only with his death on February 22, 1985 at the age of ninety-four. Throughout this long period of association Orwell served the University with great distinction. He obtained first-place and the award of the Supreme Court Prize in the final honours examination in law in 1914. Thereafter he occupied a number of University positions, including a part-time lectureship in Economics and Industrial Relations, and eventually Associate Professor and Head of the Department of Industrial Relations in the Faculty of Commerce. For much of this time he was also a tutor in Ormond College.

Apart from his teaching and administration, Orwell's main academic achievement was in pioneering the study of Australian industrial relations, and in particular the study of the operation of the systems of conciliation and arbitration. This interest developed from advice given to him by the founder of federal arbitration, Henry Bournes Higgins, during World War I. In the period from 1937 to 1970, Orwell published no less than eleven books on industrial regulation. To this splendid achievement must be added the numerous papers and articles published by Orwell in international and local journals.

Orwell Foenander continued his formal association with the University and the Faculty of Economics and Commerce after his retirement in 1957. He worked as a part-time teacher in the Faculty until 1969, and thereafter continued to give the benefit of his extensive learning and experience to Faculty members through his frequent visits to the University.

Dr Foenander devoted a considerable portion of his life to ensuring that the debate about industrial relations in Australia was an informed one and for this we owe him a considerable debt of gratitude. Nevertheless, his efforts were not entirely successful; the other day a prominent media organisation which shall remain nameless but which really should have known better headlined an item "Government to enshrine sick leave in awards".

Tonight I will demonstrate why this lead was so inaccurate and therefore, why there is always scope to improve the quality of the industrial relations debate. I thank the University for its invitation to me to give the Tenth Foenander Lecture, as it allows me to give the Coalition's perspective on the industrial relations debate.

Tonight I want to delineate some of the differences between the Coalition's and Labor's industrial relations policy.

First, by contrasting the two sides' views of the Tweed Valley Fruit Processors' Enterprise Flexibility Agreement (EFA). Second, by contrasting the principles that inform the participants in this debate, and third, by rebutting Labor's slogan that under a Coalition Government, it will be a case of "Take the contract or take the sack".

Three points about the Tweed Valley case should be noted at once:

- Whilst the Coalition has made it clear that we are opposed to the cashing out of sick leave, the Government has insisted that it would never permit sick leave to be traded away and that the Coalition favours the abolition of sick leave. But the sick leave entitlement of Australia's 1.6 million casual workers is cashed out entirely, cash incentives to not take sick leave are common - to the point of being enshrined in awards, and the AIRC has approved both the trading away of sick leave and a reduction of the award entitlement of sick leave without objection from Labor

- The case has revealed a considerable difference between the Government's and the unions' view of which entitlements should be considered as core minima, and

- The Government's insistence that some entitlements are sacrosanct has been mirrored by an unusually expansive insistence by Keating and Brereton that other entitlements can be cashed out - for example, overtime and penalty rates

But Labor's whole scare campaign depends upon the claim that a Coalition government would see the end of overtime and penalty rates.

The debate about minimum standards is of course not new. Keating endorsed the concept of minimum standards in his April 1993 Institute of Company Directors speech in which he said:

Let me describe the model of industrial relations we are working towards.

It is a model which places primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals.

It is a model under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net.

The safety net would not be intended to prescribe the actual conditions of work of most employees, but only to catch those unable to make workplace agreements with employers.

Over time the safety net would inevitably become simpler. We would have fewer awards with fewer clauses.

For most employees and most businesses, wages and conditions of work would be determined by agreements worked out by the employer, the employees and their union.

These agreements would predominantly be based on improving the productive performance of enterprises, because both employers and employees are coming to understand that only productivity improvements can generate sustainable real wage increases.

It took the unions more than a year to stamp out this heresy. In *Working Nation* the Government was still toying with the idea that agreements should have to satisfy minimum criteria in as few as twelve areas.

Keating's 1993 goals that *The safety net would not be intended to prescribe the actual conditions of work*, and, *Over time the safety net would inevitably become simpler* are noteworthy, because with the exception of a handful of EFAs, this has not happened.

The current "no-disadvantage" test ensures that award conditions do, in fact, prescribe the actual conditions of work. The safety net has not become simpler.

In the eighteen months since the introduction of the "reformed" Industrial Relations Act, the Government insisted on the "comprehensive award safety net" interpretation of the "no-disadvantage" test and disavowed the concept of minima endorsed by Keating

For example, reacting to my 14 September announcement that the Coalition's industrial relations policy would include a "no-disadvantage" test against a set of fair and reasonable minimum conditions, Mr Brereton denied the very legitimacy and validity of the idea of minima. He said then in a doorstop interview:

We've got a no disadvantage test but it's applied to a comprehensive award basis, so that you can't be worse off. They're talking about ... one that is compared not to a comprehensive award but to basic minima.

So a month ago, Labor's position was that the idea of minimum standards was subsumed entirely within that of the "comprehensive award safety net". The idea of minima in itself was quite invalid.

But that didn't answer two very pertinent questions:

"Isn't that comprehensive award safety net actually made up of minimum standards?" and:

"Although for the purposes of the "no-disadvantage" test the value of these minima are to be taken in aggregate, do they have an individual rationale?"

The Tweed Valley case posed these very questions of the Government, the unions and the Coalition. And all the answers have been different.

I will deal first with the EFA's treatment of sick leave. This issue has come to dominate the debate over the case - though this has had the effect of obscuring other, no less important, issues raised by the EFA.

In the debate over the Tweed Valley EFA, Labor has sought to portray itself as the party in favour of sick leave and the Coalition as that wanting to abolish sick leave.

But Labor's claim to be champion of unreconstructed award-defined sick leave is highly disingenuous.

The vehemence of the Government's utterances on this issue gives the impression that they would never allow any deviation whatsoever from the principle of an award determined, accumulating pool of actual days set aside for paid sick leave. One would have thought that this would have quite ruled out any diminution of the award entitlement of the number of sick days available or payments in lieu of sick leave or cash incentives to not take sick leave. But in fact, Labor has supported all three.

The National Union of Workers (NUW) has endorsed a Federal Certified Agreement, the Vegco Agreement, which actually reduces award entitlements to sick leave from eight to five days. And the NUW Superannuation Fund has a one-third stake in Vegco. And yet Labor has the gall to say that they would die in a ditch protecting award conditions from the Coalition! And the Government has endorsed agreements which allow workers, in Labor's own terms, to "cash out" sick leave.

Page 146 of the Government's Annual Report on *Enterprise Bargaining in Australia 1994* actually highlights the Transport Workers/K&S Freighters Adelaide Road Agreement, which *gave employees an incentive not to take sick leave, by providing that after a minimum of amount of leave had been accrued, it could be partially paid out at Christmas or with annual leave.*

And the Enware Australia Enterprise Flexibility Agreement 1995 provides that employees may begin to commence what Labor describes as the "cashing out" of sick leave after they have accumulated a pool of 80 hours sick leave. This means that after a waiting period, a worker under this agreement can do what Labor insists cannot happen - they can trade away their sick leave.

One of the Labor's nominated concerns about more flexible sick leave arrangements is that they prevent the accumulation of sick leave. As Laurie Brereton said of the Tweed Valley EFA in a 19 September press release: *Under this agreement, a worker who has cashed out his sick leave might well get a few extra dollars pay a week but if he broke a leg he could be off work with no pay for an extended period of time.*

But would workers who were off sick for months under the K&S Freighters and the Enware agreements be significantly better off than those under the Tweed Valley EFA? No, they would not.

So much for Labor never permitting workers to trade away sick leave.

Turning to cash incentives, the NJ Phillips Enterprise Flexibility Agreement 1994 provides a "Sick Leave Bonus" *which will be paid to permanent employees as an incentive to achieve maximum attendance, and minimise absenteeism and lost time. The bonus will be paid ... at the end of each year of employment and will be determined by the number of sick days not taken for that year.*

So at the end of their first year's employment an NJ Phillips employee who has not taken sick leave will be paid a bonus of five day's pay. Clearly, these three agreements between them offer incentives to not take sick leave and provide for cash payments in lieu of sick leave. And there are legions of other examples.

Table 4.7 of the Government's *Enterprise Bargaining Report* shows that 25% of the 1360 Federal enterprise agreements struck during 1994 varied sick leave against the award provisions. And this is just in the agreement stream. In fact, all Australian governments since the 1960s have presided over awards that provide incentives to people not to take sick leave, in the form of allowing employees to cash in accrued sick leave on termination.

In the light of these examples, Labor's claim that they are True Believers in an award defined, accumulating pool of actual days of paid sick leave is simply not true.

The difference between the current practice exemplified in the Enware agreement - approved by the Commission and not objected to by Labor - and the Tweed Valley EFA is not the difference between sick leave and no sick leave.

The difference between the two is that an Enware employee who, after establishing a minimum pool, takes no sick leave and wants their award entitlement to be paid out can do so at the end of a twelve month period. A Tweed Valley employee does not have to amass a minimum pool - no help in the event of lengthy illness - and is paid over the course of the year. By Labor's own yardstick these are the only differences. Both workers can still take time off sick, both have equal protection against dismissal because of illness.

Turning to Labor's claim that the Coalition wants to abolish sick leave, by my yardstick the Tweed Valley EFA does not abolish sick leave. And under no circumstances will the Coalition countenance the abolition of core minimum entitlements.

For it to mean anything at all, "cashing out" must mean the surrender of an entitlement in exchange for a higher rate of pay. The EFA does not do this, but it does provide for a different method of its payment. To cash out sick leave, the agreement would have to bind employees to not take days off sick. But it doesn't. Until someone can show how a worker under the Tweed Valley EFA who takes the award-prescribed maximum of eight days off sick in a year loses out, then they cannot say that that worker has traded away their sick leave.

And what Labor is not telling people is that those Tweed Valley workers who do not take the whole eight days off sick - and average sick leave taken at the plant is 3-4 days per year - are better off, because on those other 4-5 days that they work, they are earning at the new higher hourly rate.

So the policy difference between Labor and the Coalition on the issue is not that between sick leave and no sick leave. Labor claims that the policy difference over the issue is a huge gulf; as I have shown it is actually a matter of detail. The policy difference is in fact that between the Enware and Tweed Valley agreements, between payment of award entitlements after a minimum pool is established at the end of a year or without a minimum pool during the course of it. It is a difference over the scope given to employees and employers in pursuit of productivity.

And the political difference over the issue is that between on the one hand Labor, a party that has nominally endorsed enterprise bargaining but which remains shackled to unions whose interests demand rigid adherence to unreconstructed awards and, on the other, the Coalition, which is not so bound. The unions' and the Government's intervention in the Tweed Valley EFA was motivated not by policy but by politics.

Throughout the negotiations, the union - the AFMEU - showed a distinct lack of interest in the EFA, to the extent of not attending a conference to discuss a draft of the agreement to which union officials had specifically been invited.

But a looming election concentrated Labor's mind wonderfully.

On the face of it, Tweed Valley was a firm that was doing everything right: employing people in regional Australia, adding value to primary produce, exporting and seeking a more productive workplace. It was so laudable that the Government actually provided $23,000 towards the cost of the negotiation of the EFA! And if Tweed Valley's sick leave arrangements had copied those of, say, Enware, the Government would have been highlighting the Tweed Valley Agreement in its next Annual Report.

But Tweed Valley was a fraction different, and with Labor looking for a suitable subject for a show trial for the election, it flew into their sights. All of a sudden, ACTU Assistant Secretary Tim Pallas was thundering away about the EFA constituting the *basest form of*

exploitation and the Government was working out how to get its $23,000 back. What hypocrisy.

In the light of the Tweed Valley case, if you were a small business that was employing people in regional Australia, adding value to primary produce, exporting and wanting to develop a high wage, high productivity workplace, why would you look to the industrial relations system as a means of achieving it? This is why there is still only a handful of Enterprise Flexibility Agreements. This is why Labor's industrial relations reforms have failed.

We are of course awaiting the verdict of the AIRC on whether it can review that EFA. The Government are confidently predicting that the Commission will overturn Commissioner Redmond's approval of the EFA. In fact, the issue currently at stake is the procedural one of whether the EFA will be referred back to the Commission. Only if it is, will the Commission then consider the merits of the EFAs sick leave provisions.

If the Commission then disapproves of the EFA, it will be interesting to see on what grounds it does so. I don't imagine that the Commission would wish its ruling to invalidate or undermine those hundreds of other agreements that vary award sick leave provisions.

The Tweed Valley case poses the following questions:

Is Labor opposed to a reduction of award sick leave entitlements in enterprise bargaining? If so, why did it not oppose the Vegco Certified Agreement?

Is Labor opposed to incentives to not take sick leave? If so, when will it seek to overturn not just those agreements which provide such incentives, but those awards that provide for "cashing in" sick leave on termination?

Is Labor opposed to "trading away" of sick leave? If so, when will it seek to overturn agreements such as K&S Freighters, Enware and all the other agreements that include such provisions?

Is Labor opposed to the cashing out of sick leave? If so, why does it permit Australia's 1.6 million casual workers to cash out their sick leave entitlements entirely?

If Labor cannot answer these questions satisfactorily, then its claim to be the party of sick leave is nothing but the rankest hypocrisy.

As a bridge between consideration of the question of sick leave and that of other entitlements, CCH's analysis of sick leave is illuminating:

Industrial tribunals take the view that sick leave is not a "right" an employee gains by virtue of performance of his duties; rather, it exists to meet the fact that sickness visits everyone ... In this regard, a distinction can be drawn between annual leave and sick leave; annual leave is related to performance of duties (i.e. working for twelve months) whereas sick leave is not so related, being merely compensation for the occurrence of illness.

A way of expressing this difference in political terms is to consider that whilst a politician, any politician, would unhesitatingly stand up and say "My party is absolutely committed to every Australian worker getting four weeks holiday a year", they might think twice before getting up and saying "My party is strongly in favour of all Australian workers being sick eight days a year" or "My party is strongly in favour of all Australian workers suffering bereavement three times a year".

This brings us to a consideration of the EFAs treatment of other entitlements. Contrary to the impression that Laurie Brereton gave on "Meet the Press" on 1 October 1995, the Government does not strongly support the union position on the Tweed Valley EFA. This is particularly true of the question of which minima should be considered sacrosanct.

At the 21 September 1995 AIRC Full Bench hearing in Sydney, the Government specifically refused to support the union's argument that jury service, bereavement leave, training provisions and public holidays were accepted community standards and that therefore, they could not be cashed out. As an aside, no Tweed Valley worker had been required to undertake jury service in recent times. And one of the public holidays abolished by EFA was the Union Picnic Public Holiday. Sacrilege? Not really - there's no union picnic any more. But it's strange to think how many people who would hoot with glee at the anachronism of a Queen's Birthday Public Holiday would be incensed at the suggested abolition of Union Picnic Public Holiday. At least the Queen still has birthdays.

Aware of the difference between the Government's and the unions' position, in answer to a Question Without Notice on 27 September, 1995 Laurie Brereton said, rather unconvincingly:

The Government's position is pretty simple. (It is anything but.) *We believe that non-cash entitlements such as annual leave, sick leave, long service leave, bereavement leave and family leave should not be cashed out.* Notable for their absence from this list were jury service, training provisions, holiday leave loadings and public holidays. So Brereton's *simple* Government position remained at clear odds with that of the unions.

And on 28 September Keating said *The Government has made it clear in the House before that such things as overtime, penalty rates and holiday leave loadings may be traded in ...*

Here Keating was saying to his favourite standard example of the overtime dependent worker - the nurse and the driver - that their overtime and penalty rates can be abolished. But hang on, isn't this the great sin of the Coalition? And when specifically asked by Barrie Cassidy three days later on "Meet the Press" about the holiday leave loading, Brereton refused to endorse Keating's view that it could be cashed out. He dodged the question.

The clear implication of all this is that the Government and the unions have different answers to the question "What is a minimum condition?" and that senior members of the Government are themselves not sure of the answer.

In contrast, the Coalition has made it clear that our minima will be fair and reasonable and that they will include, amongst other things:

- an hourly rate no less than the relevant applicable classification award hourly rate
- four weeks annual leave
- two weeks sick leave
- one year's unpaid maternity leave

So here's another question for Labor:

You say it is wicked and deceitful of the Coalition not to have announced further details of their minima. What are Labor's minima?

It is over two years since Mr Keating publicly supported the idea of minimum conditions and more than twelve months since *Working Nation* listed options for minima. So where are they now?

I want now to discuss the principles that inform participants in this debate. Labor likes to claim that they are the progressive party. I dispute this as a general point, but in terms of industrial relations policy, they are frankly reactionary. In no other portfolio do they emerge so clearly as the ones in the grey cardigans muttering fiercely about *class warfare*.

When Labor launched its infamous industrial relations scare campaign advertisement on 26 September I was struck by the self-revealing precision of the allegation that "John Howard wants to transport Australian workers back 100 years". Why 1895? Normally it is the 1960s (foreign policy) or the 1950's (macro-economic and industry policy).

No doubt Keating would say that it takes you back to before the establishment of a Federal industrial relations tribunal and the enactment of the Federal Conciliation & Arbitration Act. But the choice of 1895 is actually far more indicative of Keating's attitudes to industrial relations than it is of John Howard's. If you could transport Australian workers back to 1895, there to greet them would be Paul Keating, Laurie Brereton, Bill Kelty and Jennie George.

In a recent article Paul Johnson pointed out that much of the data that Marx used in *Capital* derived from Engel's 1845 *Condition of the Working Class in England*, the information in which itself derived from as early as the first decade of the 19th century. Johnson goes on

... No wonder the Bolsheviks went so crazily wrong when they started to apply its 'socialist principles' yet another half century on in 1917. It was like trying to circumnavigate the earth using Ptolemy's map.

This is precisely Labor's attitude to industrial relations. Labor perpetually harks back to 1895. They glory in visions of Australian dock workers sending money back to London to keep the great stevedores' strike alive, of the AWU standing up to the squatter, of heroic swagpersons flinging themselves into the billabong to escape the (no doubt) Coalition-voting troopers.

Part of Labor's nostalgia for 1895 reflects the unedifying comparison with 1995. In 1995 Australian wharfies on $80,000 a year are presiding over one of the most inefficient waterfront's in the world and dictating economic policy to the Government. In 1995, the AWU is wracked with internecine strife, preoccupied with turf battles with the CFMEU (as at Mt Isa) and has developed a reputation for profound disinterest in the interests of the rank and file. And with an unemployment rate of 8.5%, the unions aren't doing much for swaggies.

Labor's 1895 view of industrial relations has two fundamental premises. First, that Capitalism is incorrigible and the lust of employers to exploit innate. This applies to the managers of Australia's 800,000 enterprises from John Prescott right across the spectrum to the woman who runs the local hair dressing salon. And second, workers are too stupid to know what is good for them; they need the union to tell them what to do. This is the basis of Labor's approach to the Tweed Valley case where, in their view, the none-too-bright workforce were cheated by management into signing away their birthright.

For example, on 26 September the Assistant Minister for Industrial Relations, Gary Johns, said on the "News Channel" of the Tweed Valley workers that they

traded away their right to sickness leave. That's a stupidity. They shouldn't be doing that ...

Got that, Murwillumbah? Labor thinks you're *stupid.*

The philosophical difference between Labor and the Coalition on industrial relations is not that between 1995 and 1895.

It is the difference between a party which for political reasons remains shackled to an antique industrial relations system and can no longer take the reform process forward, and one that is genuinely looking to reform Australian workplaces to meet the challenge of the 21st century.

And if we can't meet that challenge, it won't be individual Labor apparatchiks who suffer. It will be the kids and the long term unemployed who can't get jobs because the system is too rigid, it will be the battlers who have seen their real wages decline under Labor.

The Coalition does not believe that the boss is the enemy. Certainly there will be a minority of employers who exploit their workers but I guarantee you that the Coalition's industrial relations policy will have mechanisms to check this. You have to have safeguards against exploitation, but that doesn't mean that you structure your whole industrial relations system around the principle of defence against exploitation.

And the Coalition does not share Labor's faith that the unions have a monopoly on the answers about what's good for workers. How can they, when union membership is down to 26% of the private sector workforce and plummeting? How can they when, when Martin Ferguson, Bill Kelty, Jennie George and Tim Pallas have between them a total of six years work experience outside the trade union movement? How can they, when Bill Kelty refuses

to allow details of ACTU officials' remuneration to be released? How can they when they seem to regard their positions as simply stepping stones to Federal political office?

In conclusion, I want to address one of the political implications of these differences between the parties.

One of the standard claims in Labor's scare campaign is that under a Coalition Government, people who are currently employed will be offered the choice of "the contract or the sack". This flows logically from Labor's belief in the innate rottenness of employers.

Well, I'm going to stop that claim dead in its tracks right here and now.

Under a Coalition government - as is the case now - sacking an award employee for refusing to take a contract will trigger the employee's right to lodge an application against an unfair dismissal.

One of Labor's pamphlets doing the rounds claims that the Coalition will abolish all protection against unfair dismissal. This is a flat lie. Our policy on this has been publicly declared on numerous occasions. What the Coalition will do in Government is to review the unfair dismissal provisions as they then stand and amend them as necessary. These amendments will address flaws in the system. The existing protection's against "take the contract or take the sack" will be retained. And if Mr Brereton believes his existing provisions are inadequate then let him say so now and we will support appropriate amendments.

I appeal to all who listen to or read this speech, next time they hear Keating or Brereton say "under the Tories it's take the contract or take the sack" to remember this:

Under a Coalition government, sacking an award employee for refusing to take a contract will trigger the employee's right to lodge an application against an unfair dismissal.

The Labor Party is desperate to deflect attention from its woeful record. It will enlist whatever lies suit its political purpose. The best antidotes are the bare facts and the commonsense of the Australian people.

The Department of Management and Industrial Relations conducts teaching and research in the areas of industrial relations, human resource management, organisation behaviour and marketing at the University of Melbourne.

The mission of the Department is:

- To contribute to research knowledge both in Australia and overseas in the areas of industrial relations, human resource management, organisational studies and marketing.
- To provide teaching instruction and programmes of study of the highest quality in the fields of management and industrial relations at both graduate and undergraduate levels.
- To contribute to the continuing education of the professions, business, trade unions and the public service in industrial relations and management.

The Department regards industrial relations and human resource management as a broadly defined area of study which draws upon knowledge and methods developed in the traditional disciplines of economics, law, psychology, sociology, politics and history.

The Department provides:

- teaching programmes in industrial relations and human resource management for postgraduate degree courses
- teaching services for undergraduate courses in industrial relations, human resource management, organisational behaviour and marketing
- non-credit short courses for practitioners in both the private and public sectors in various aspects and areas of industrial relations, and
- a research programme in industrial relations, human resource management and organisational behaviour.

PREVIOUS FOENANDER LECTURES

1986	Professor Keith Hancock	Industrial Relations in Australia
1987	Professor Di Yerbury	Industrial Relations After Hancock
1988	Hon. Justice Michael Kirby	Industrial Relations in the 'Frozen' Continent
1989	Professor John Niland	Transforming Industrial Relations in NSW
1990	Hon. Ian Macphee	The Pattern for Industrial Relations in the 1990's: Decentralising from Within the Centralised System
1991	Mr. Steve Harrison	Enterprise Bargaining: Threat or Opportunity for Australian Unions
1992	Mr. Bruce Rowe	Achieving Competitive Advantage Through Organisational Change: Managing Within the Australian Industrial System
1993	Hon. Phillip Gude MP	Changing the Landscape: Employee Relations Reform in Australia
1994	Justice Diedre O'Connor	Equity in the Workplace: The Implications of the Industrial Relations Reform Act 1993.
1995	Mr. Peter Reith	Reforming Australian Industrial Relations: The Coalition's Programme