

INDUSTRIAL RELATIONS SOCIETY OF NSW 2011 ANNUAL CONVENTION

KIAMA

FAIR WORK - MOVING BEYOND THE RHETORIC

- 1 The theme of this Conference is quite open ended. No doubt deliberately and appropriately so in order that speakers have sufficient latitude to express their views on matters relating to industrial relations.
- 2 The theme certainly invites debate about whether the fair work legislation has, as yet, lived up to the federal government's promises about implementing a fair work regime following Workchoices.
- 3 A few unions, not concerned about offending the government, would argue the results have not matched the rhetoric. Many employers, or at least those organisations that purport to represent them, would also argue that the regulation of industrial relations is not what was promised in that it is not a fair system because it is weighted too heavily in favour of unions. In other words, it is not a fair system that properly takes account of the needs and challenges facing Australian employers.
- 4 Now, that is a debate I do not wish to enter. To do so, I think, would be inappropriate.
- 5 Nevertheless, the theme of the Conference provides sufficient scope for me to identify a number of workplace related issues the treatment of which will necessarily involve questions of what is fair. The outcome or development of these issues will inevitably be used by unions and employers as additional benchmarks by which to judge whether there has

been a move beyond the rhetoric and whether the system for regulating industrial relations is, from their perspective, a fair one.

- 6 As I think it is fitting for someone opening the Conference I have taken a broad brush approach and in doing so I would hope to remind you of a number of contemporary workplace related issues and their present status.

Annual Wage Review

- 7 A central plank of the current system is the annual wage review conducted by the Minimum Wage Panel of Fair Work Australia ("FWA"). The outcome of annual wage reviews have rarely been uncontroversial and are inevitably used to judge whether the system is fair.
- 8 In the immediate term, unions will be anxious to see whether their claim for a \$28 wage increase in the national minimum wage¹ is delivered in the 2010-2011 annual wage review undertaken by the Minimum Wage Panel of FWA. Employers generally oppose the claim, ACCI contending, for example, small businesses had suffered as a result of last year's \$26-a-week rise in the minimum wage and that any wage increase should be limited to \$9.50 with exemptions for flood-affected areas and struggling industries.
- 9 Other employer groups (eg, AiGroup) are proposing increases up to \$14.00, but which would operate prospectively for employers who have been badly affected by the recent natural disasters.
- 10 A \$28 increase is equivalent to about 5 per cent of the national minimum wage of \$569.90. The 2010 increase was the equivalent of 4.8 per cent but this followed a nil increase awarded by the Fair Pay Commission the previous year.

¹ The ACTU has also sought an increase in minimum wages for workers employed at award classification rates equivalent to the C10 rate or below by \$28 per week and that workers employed at the C9 classification rate (or equivalent) and above receive a 4.2% increase to their minimum rate.

- 11 A low outcome, of the order of 1.7 per cent proposed by ACCI or even 2.5 per cent proposed by AiGroup would, I expect, be met with some dismay by unions in circumstances where inflation is running at 3 1/3 per cent, the Wage Price Index for 2010 was 3.8 per cent and there is relatively full employment.
- 12 On the other hand, employers are likely to be equally concerned at a 5 per cent outcome given that enterprise bargaining is only delivering 4.1 per cent (AAWI for June quarter 2010 (latest available)). Add to this the pressure that the high Australian dollar is bringing to bear on trade-exposed industries in particular and the pressure on some businesses caused by recent natural disasters.
- 13 The Minimum Wage Panel is required to deliver its determination by 30 June 2011. It will be an important decision. The NSW IRC is required to follow the decision of the Minimum Wage Panel unless there are good reasons for not doing so. In 2009 the NSW Commission declined to follow the Fair Pay Commission's nil increase and made an adjustment of 2.8 per cent.

Low paid bargaining stream

- 14 You will recall that in the absence of any effective arbitration mechanism to resolve industrial claims, the Commonwealth was forced to search around for some other means to address the low paid and those who have not historically had the benefits of enterprise-level collective bargaining. The necessity of contriving some means of addressing the low paid is not an issue under the NSW system because of the availability of arbitration.
- 15 In any event, FWA was provided with the power to facilitate multiple-employer bargaining for those classes of employees. A bargaining representative or an organisation of employees with relevant coverage

may apply to FWA for entry into the low-paid stream to bargain with a specified list of employers. FWA will then consider a range of factors to determine if the proposed multi-employer bargaining is in the public interest. These factors will include the questions of whether it would assist low paid employees and the history of bargaining in the industry in which the employees work. Fair Work Australia will also be required to consider the extent to which the applicant is prepared to respond to the needs of individual employers.

- 16 At any time, some or all of the parties can agree to FWA resolving the issues in dispute by making a consent low paid workplace determination. Fair Work Australia also has limited powers to make a binding special low paid workplace determination to settle matters in dispute during bargaining if, despite the best endeavours of FWA and the parties, the bargaining fails.
- 17 United Voice, previously the LHMU, sought an increase of \$8 - \$10 which would lift wages to about \$26 an hour on the current rates of \$15.92 for about 60,000 aged care employees employed by about 300 aged-care employers. It was the first Union to utilise the low-paid bargaining stream.
- 18 In a decision handed down on 5 May, the Full Bench of FWA granted the low paid bargaining authorisation, but excluded employees covered by agreements, which according to the union, locked out from any future industry bargaining, two thirds of those employees the union sought to have covered by the authorisation.
- 19 The Full Bench said it appeared likely that a number of aged-care agreements didn't on balance greatly improve terms and conditions and "in one sense those employees may still be 'low paid'". However, it said it would be "very difficult to analyse the terms of the agreements operating in the sector and the circumstances in which they were made with a view to deciding whether, despite the agreement, the authorisation should extend to the enterprise concerned".

- 20 The union was critical of the decision and has called on the government to amend the legislation but as one commentator observed, the outcome "goes back to that conundrum - this is an Act about collective bargaining, it is not necessarily about lifting people out of low pay".
- 21 I think it is pretty clear, despite the modest increase in the Budget for the low paid that United Voice would take the view that there has not been a move beyond the rhetoric as far as low paid employees are concerned.

Equal remuneration

- 22 Another important test case concerns equal remuneration. Fair Work Australia is presently reserved on an application by the Australian Municipal, Administrative, Clerical and Services Union, the Health Services Union, the Australian Workers' Union of Employees, Queensland, the Liquor, Hospitality and Miscellaneous Union and the Australian Education Union for an Equal Remuneration Order to apply to employees engaged in the social, community and disability services industry ("SACS"). It was contended that the 153,000 employees engaged in the SACS industry are predominantly women, that the work performed by employees employed in the SACS industry is undervalued and that such employees are paid significantly less than other employees performing similar or comparable work, for example in the state and local government sectors.
- 23 Employers have generally opposed the claim.
- 24 The Commonwealth has indicated its commitment to the principle that women should be paid the same as other workers performing work of equal or comparable value. Although, the Commonwealth noted in its submission to FWA that any 'significant' wage increases will involve additional funding. The unions have agreed to a five-year phase in of any increase awarded.

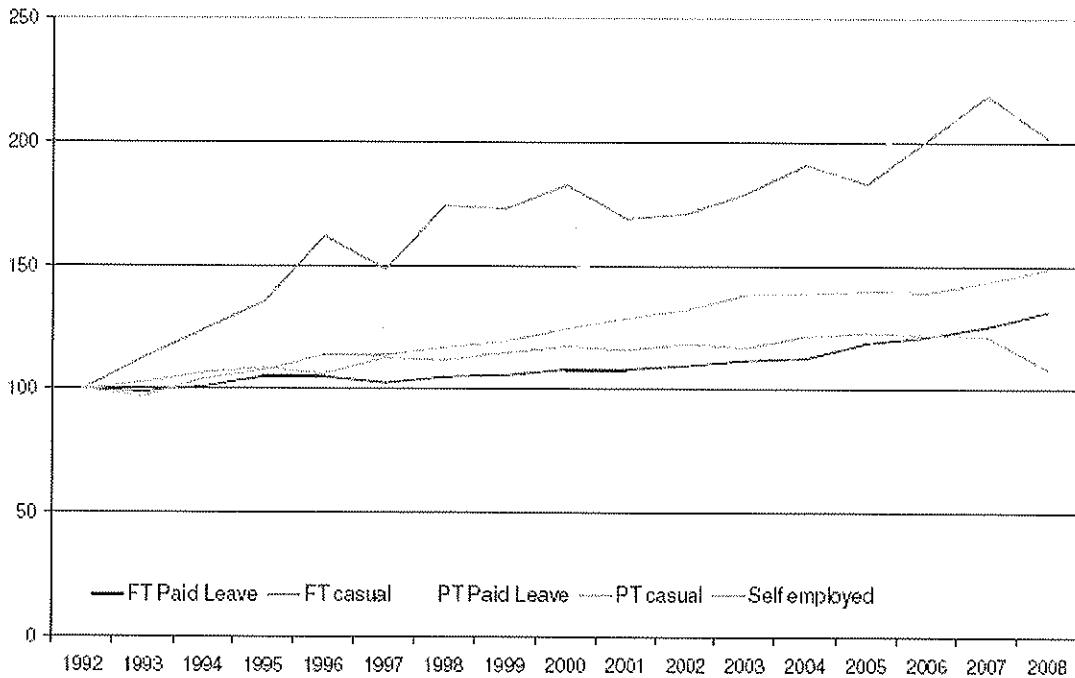
- 25 The previous NSW Labor Government generally supported the unions' position, arguing that FWA should adopt the NSW Commission's Equal Remuneration Principle introduced in 2000. The incoming Coalition Government, however, filed a late submission contending the unions' case was flawed and must fail. It was also argued the claim would cost \$1 billion and lead to service cuts and higher taxes.
- 26 The Sex Discrimination Commissioner has described the case as extremely important and that "If it succeeds, it will be a major step forward for the women who carry out this incredibly important work, which provides such critical support to our society as a whole."
- 27 There is no doubt that the decision in this matter will be one of the most significant for some years. Unlike the low paid case, the legislation (s 302(1)) provides a broad discretion to FWA to make "any order it considers appropriate" to ensure that, for employees to whom the order will apply, there will be "equal remuneration for work of equal or comparable value". The only real obstacle to a union in succeeding in an equal pay claim would seem to be its capacity to present the relevant evidence that demonstrates an undervaluation of the work that is the subject of the claim.
- 28 It may be accepted that is not necessarily an easy task but I do not think it could reasonably be argued, in the event of an unsuccessful claim that the legislation represented an impediment to succeeding in the claim and, therefore, that the government has not been fair in its approach to equal remuneration. Equally, I do not think it is reasonably open to employers to contend that the government has been unfair in legislating for the capacity to make an equal remuneration claim.
- 29 It is likely to come down to whether the case has been made out on the evidence.

- 30 I note in passing that some of the applicants in the case had the opportunity for many years in NSW of pursuing an equal remuneration case but never took advantage of the opportunity.

Job Security

- 31 Job and income security as an issue is not so much in the public eye these days because of full employment. But one must be concerned about the consequences for those in precarious employment if there is an economic downturn.
- 32 A full 21 per cent of all employees are casuals whose average weekly total cash earnings are \$468.60 compared to \$1,313.30 for full time employees. That is, casuals earn just over one third of the weekly wage of full time employees.
- 33 The growth in non standard forms of employment over the last 20 years or so has outstripped that of standard full time employment, defined as a working week in excess of 35 hours attracting paid leave benefits. The greatest growth has been experienced in full time casual and part time employment: see chart below extracted from the report "Shifting risk. Work and Working Life in Australia", Mike Rafferty and Serena Yu, Workplace Research Centre, University of Sydney, September 2010.

Chart 16. Growth in Non Standard Forms of Employment, 1992 – 2008,
Base Index = 100



Source: ABS (2009c)

34 The ACTU has indicated that it intends to campaign on the issue of job and income security, including the running of cases before FWA. The peak council notes that:

- About 2.1 million Australian workers are without paid leave entitlements
- More than 1 million workers have been casually employed in their current job for more than a year
- More than 325,000 have been employed casually in their current job for more than 5 years.
- Over 330,000 Australians work on a fixed term contract.
- There are more than 1 million independent contractors, of which 43% have no authority over their work.
- Almost 600,000 people found work through labour hire companies in 2008.

35 There is considerable disagreement amongst academic writers regarding casual employment. Critics of casualisation refer to the absence of leave entitlements, job insecurity, lack of training and career paths, marginalisation in the workplace, job dissatisfaction, adverse occupational health and safety outcomes, the erosion of labour market standards which is accelerated by the process of casualisation and the increasing spread to industries such as manufacturing not traditionally associated with casual work².

36 The defenders of casualisation contend³:

... the increased diversity in working arrangements associated with the shift away from the standard working time model has facilitated a better matching of worker preferences to the preferences of employers.

37 It is also contended by the defenders of casualisation that casual employment provides a stepping stone into some form of non-casual employment⁴, although critics argue this is not so and that (a) longer tenure at an employer locks in a worker in casual employment as it reduces both the chance to transit upwards (non-casual employment) and downwards (unemployment); (b) longer tenure in an occupation reduces the likelihood to transit downwards, but does not affect the upward transition rate; (c) both the length of the career and the share of time spent in non-employment reduce the likelihood to transfer upwards, but does not affect the downward transition rate⁵.

38 In the Secure Employment test case decision⁶ of the NSWIRC the Full Bench approved a model clause for the private sector which provided that:

² see, for example, "The return of 'labour-as-commodity'? The experience of casual work in Australia", Barbara Pocock, Ros Prosser and Ken Bridge, The University of Adelaide; "Contented workers in inferior jobs? Re-assessing casual employment in Australia", Ian Watson, The Journal of Industrial Relations, Vol 47, No 4, December 2005, 371-392.

³ (Wooden M, Are non-standard jobs sub-standard jobs? Australian Social Monitor 3: 65-70)

⁴ "Transitions from Casual Employment in Australia", Project 09/05, Hielke Buddelmeyer, Mark Wooden and Suzan Ghantous, *Melbourne Institute of Applied Economic and Social Research*

⁵ Centre of Full Employment and Equity, Working Paper 09-03, "Locked in Casual Employment", Riccardo Welters and William Mitchell, November 2009.

⁶ Secure Employment Test Case [2006] NSWIRComm 38

A casual employee engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a calendar period of six months shall thereafter have the right to elect to have his or her ongoing contract of employment converted to **permanent** full-time employment or part-time employment if the employment is to continue.

- 39 Additionally, the Full Bench was satisfied contractors and labour hire employees were exposed to greater risks to their health and safety in the workplace when compared to their co-workers who are direct employees of a host employer. The Full Bench approved a model clause requiring employers engaging employees in a labour hire or contract business to:
- consult with those employees about the workplace occupational health and safety consultative arrangements
 - provide appropriate occupational health and safety induction training and protective equipment to those employees;
 - ensure awareness of any risks in the workplace and any procedures to manage those risks; and
 - take all reasonable steps to provide those employees with suitable duties as part of any rehabilitation program for the employees.
- 40 Whether the approach taken by the NSWIRC is eventually followed at the federal level remains to be seen.
- 41 Looking at job security in another context, I have mentioned the significant growth in independent contractors. The protection such persons were afforded under the unfair contract provisions of the NSW IR Act was removed by the Workchoices legislation and that removal was maintained under the *Fair Work Act*. At the federal level the *Independent Contractors Act* was passed. It enables the federal Magistrates Court to review contracts which can be varied or set aside if found to be unfair. It is generally acknowledged that the protection provided by the provisions of the *Independent Contractors Act* is weaker and the remedies narrower than the unfair contract provisions of the NSW IR Act. The unfair contracts

provisions introduced by the Act have been criticised as a 'pale imitation' of both the New South Wales and Queensland unfair contracts regimes⁷.

- 42 The Australian Building and Construction Commission is currently conducting an inquiry into sham contracting in the industry. Sham contracting involves misrepresenting or disguising an employment arrangement as a contract for service. This can mean people who ought to be treated as employees are treated as independent contractors and miss out on legitimate entitlements like annual leave, sick leave, superannuation and all of the other protections afforded by the law to employees.
- 43 The previous NSW Labor Government, in its submissions to the inquiry noted the difficulty an applicant worker would have under the sham contracting arrangements of the *Fair Work Act* in proving a sham contract and argued the provisions are not fair or just. Simply being party to a sham arrangement attracts no consequences for an employer, other than exposure to a limited range of actions for underpayment of wages and other entitlements. The previous government called for the NSW unfair contract provisions to be adopted federally.
- 44 Among the questions the ABCC will consider in its sham contracting inquiry are:
1. Is there a better approach to identifying the difference between an employee and an independent contractor than the current common law test? If so, what is the best approach to identifying the difference between an employee and an independent contractor?
 2. Do you support the creation of a third category of worker that lies between an employee and an independent contractor? If so, what attributes would you ascribe to a third category of worker that sits between an employee and an independent contractor?
 3. Should economically dependent contractors be treated differently to independent contractors? How?

⁷ Anthony Forsyth, 'The 2006 Independent Contractors Legislation: An Opportunity Missed' (2007) 35 *Federal Law Review* 329 at 341.

- 45 Prominent academic Andrew Stewart, with his colleague Cameron Roles, in a submission to the inquiry strongly argued that:

[T]he freedom to choose to work or be engaged as a contractor rather than as an employee *must* be constrained, if the integrity of our labour law system is to be protected. The law does not permit an employee to agree – no matter how voluntarily, and no matter how well-informed they might be – to work for less than award wages, or to forego any right to take personal or carer's leave, or not to bring an unfair dismissal claim. So why then should it be lawful to achieve such outcomes by contriving a worker to appear to be a contractor, even if the worker consents to (or even initiates) the arrangement?

- 46 It was argued by some employer groups the inquiry is flawed and unnecessary because sham contracting is not rife in the industry. The main union, the CFMEU has declined to participate, contending the inquiry itself is a sham. However, in a report prepared by the CFMEU in March 2011 it was stated:

On the basis of official figures it can be estimated that **the number of sham contracting arrangements in the construction industry as at November 2010, is between 92,000 and 168,000.** This represents between 26-46% of all independent contractors in the industry. These are conservative estimates. **Anecdotal evidence and industry experience suggests the real figure is much higher.**

- 47 The debate over independent contractors and sham contracting reveals another deep divide between employers and unions.

- 48 When one considers the former protection available under the unfair contract provisions of the NSW IR Act, I think there has clearly been a weakening in the protection of workers who are or are designated as independent contractors and in my view the system of regulating independent contractor arrangements under the *Fair Work Act* and *Independent Contractors Act* was a backward step.

- 49 Whether there are widespread sham contracting arrangements, may be determined by the ABCC's inquiry. If such arrangements do exist on a large scale there may be a substantial case for legislative change.

Age Discrimination

50 Another area in which it has recently been shown that current regulation is proving ineffective and failing to prevent unfairness, is age discrimination. Age discrimination is essentially about being treated unfairly because of how old you are.

51 There are state and federal laws prohibiting age discrimination. However, National Seniors Australia, which commissioned a report by Sol Encel, “The Elephant in the Room”⁸ contends that despite these laws age discrimination is rife. It notes that:

Australia has the lowest workforce participation rate for the over-55s of all English-speaking OECD countries. Australian Bureau of Statistics figures released this week show that older Australians experience longer periods of underemployment than younger people [a person in their 50s who becomes unemployed will remain unemployed three times longer than someone of a younger age]. The average length of time older workers spend underemployed is between 85 and 90 weeks—over a year and a half. More than 200,000 older Australians who work part-time want to work more hours.

52 The report stated:

Age discrimination, although widespread, is “the elephant in the room” – palpable but unmentionable. Australia loses incalculable talent and energy through age discrimination. Paradoxically, while the federal government is encouraging people to stay in the workforce well past the once-mandatory retirement ages of 60 or 65, many older workers find themselves rejected. There is a painful gap between laws against age discrimination, and the practice of age discrimination.

The thrust of this report is that awareness of age discrimination law leads often to nimble side-stepping – compliance with the letter rather than the spirit of the law. Recruitment advertisements no longer mention age but resort to euphemisms. Where complaints of age discrimination have been made, in many cases complainants received only an apology. Very few people refused a job were subsequently offered that job, and compensatory payments were usually low.

⁸ Sol Encel died in 2010, not long after delivering his report to the National Seniors Productive Ageing Centre.

The effect of discrimination on older workers is often devastating. The case studies and personal accounts reveal the harrowing experience of older workers who have felt the weight of age discrimination and rejection. The policy implications emphasise that age discrimination cannot be ignored, even if it has become less overt, and more efforts are needed to overcome it.

53 The report further stated:

Age itself is on the way to becoming an aspect of social exclusion, especially when it is linked with employment and employability... The reality of exclusion is often masked by a vocabulary of euphemisms and circumlocutions. From the contributed personal accounts, such negative comments included:

- We didn't think you were right for the job.
- We didn't think you'd fit in.
- Overqualified (a code term for length of experience, which equates to age).
- Underqualified (too old to have obtained the current certificate or diploma qualification although experience may be of equal or superior quality).
- Why don't you go on the pension?
- Qualifications and experience not up to date.
- Would you be able/happy to work with a young team?
- We want someone with a high energy level.
- We doubt whether you could learn the required new skills in the available time.
- Standing in the way of younger people.

54 The report also noted that:

One effect of anti-discrimination laws is to change the nature of advertising for applicants. Employers are now forbidden to use age categories in advertising or in selection interviews. Before legislation, age preferences were commonly stated. Advertisers, of course, can use phrases whose implicit bias towards youth is obvious. Bennington made a study of job advertisements and found a variety of terms which were clearly aimed at people under 30, including buzzy, fast-paced, go-getter, high-flyer, can-do, switched-on, on the ball. Another device was to ask for years of experience or the date of graduation (Bennington, 2004).

55 The organisation argues, "The costs to the nation are huge. In a human sense we're creating an underclass more likely to experience social isolation, ill health and financial insecurity. In monetary terms, not

employing these people who want to work translates into a \$10.8 billion annual loss to the economy”.

- 56 The federal government announced last year that it will establish an Age Discrimination Commissioner in the Australian Human Rights Commission by mid-2011. That will no doubt allow a much stronger focus on this aspect of discrimination and perhaps redress some of the unfairness that currently operates against older workers.

Depression in the workplace

- 57 The next issue I wanted to raise was depression in the workplace. You might say what has that got to do with fairness? Well, it is a question of how persons suffering depression are dealt with. Both employers and employees often find it very difficult to deal with a person suffering depression. They are often ignored, pitied, isolated and sometimes bullied.
- 58 Yet based on data from the National Mental Health Survey, half a million full work days are lost every month and workers cut down their activity on another one million days in one month due to depression. In turn, the annual cost to the economy is over 6 million full days lost, and over 12 million days of reduced productivity at work each year.⁹
- 59 Depression is ranked by the World Health Organisation and the World Bank as the fourth leading cause of death and disability, and is the leading cause of non-fatal disability.¹⁰
- 60 Depression and anxiety now accounts for approximately one third of all claims for income protection insurance and almost 50% of associated costs. With the right awareness and support in place to remove the stigma

⁹ *It's Our Problem? – Managing depression in the workplace* Professor Ian Hickie, Clinical Advisor & Dr Nicole Highet, Deputy CEO *beyondblue: the national depression initiative*

¹⁰ *Ibid*

associated with depression, the expense from both a financial and emotional perspective could potentially be avoided.¹¹

61 *Beyondblue* has recommended that the delivery of training and education to workplaces should be supported and widely implemented. A national strategy addressing depression and mental illness in the workplace, under an occupational health and safety framework, should be developed to advance equal employment opportunities for people with mental illness.

62 I think a strong case exists for implementing such a national strategy. The recent boost to mental health funding would appear to be a welcome initiative.

Occupational health and safety

63 A matter that has attracted some attention in recent weeks is occupational health and safety.

64 It is well known that the Commonwealth has developed a model workplace health and safety bill to be implemented by each state and territory by the end of 2011.

65 In New South Wales there are presently two bills before the parliament, the Workplace Health and Safety bill and the Occupational Health and Safety (Amendment) bill. The former seeks to adopt the model bill to the extent the government considered it appropriate. The new laws will take effect from 1 January 2012. It is proposed that the Industrial Court's jurisdiction to deal with prosecutions will be transferred mainly to the District Court but the category 1 offence of reckless conduct exposing an individual to a risk of death or serious injury will be heard as an indictable offence by the Supreme Court. The latter seeks to introduce a number of immediate changes to the current legislation, those changes being to alter the onus of proof in relation to the general duty provisions of the Act,

¹¹ Ibid

significantly alter the current provisions regarding the obligations of directors and managers for occupational health and safety and remove the right of unions to prosecute.

- 66 There is no question that the NSW parliament has every right to enact the proposed legislation. My concern was the fact that I was advised in April that with the exception of the category 1 offence the jurisdiction was not going to be transferred, there was a public statement that the Commission's role in relation to OHS would continue, only to find the government did just the opposite and without extending to the head of jurisdiction the courtesy of advising him of the change of heart. I found the need for such secrecy puzzling.
- 67 In any event, there is ongoing debate about the new laws. On the one hand, it is contended that nationally consistent laws will avoid confusion complexity and duplication for business, increase efficiency and in fact make workplaces safer. On the other hand, it is argued that 95 per cent of employers do not cross state boundaries, that in NSW workplace fatalities are fewer than in Victoria on which the national model is based and that in 2010 NSW had the lowest rate of workplace injuries since the WorkCover scheme commenced in 1987. Unions generally see the proposed laws as a weakening of the current laws. Thus it is argued, key features of the NSW system should be retained.
- 68 Principal amongst the features that it is argued should be retained is that the offence should remain an absolute liability offence, that is, it is an offence in which *mens rea* plays no part and guilt is established by proof of the elements of the offence subject to statutory defences which enable a defendant to argue that it was not reasonably practicable to comply with the absolute obligation to ensure safety or the offence was due to causes over which the defendant had no control.
- 69 The bill to amend the *Occupational Health and Safety Act* provides the general duties under the OHS Act to ensure health, safety and welfare

(and the duties under the regulations) will be qualified by the inclusion of “so far as is reasonably practicable” (thereby requiring the prosecution to prove what was reasonably practicable and removing the need for the defendant to establish that it was not reasonably practicable to comply with the duty).

- 70 Further, the provision in the current Act that deems directors and managers to have committed the same offence as the corporation subject to the defences available, is to be replaced by a provision that places a duty on officers of a corporation to exercise due diligence to ensure that the corporation complies with health, safety and welfare duties.
- 71 The amendments will not apply to contraventions occurring before the enactment of the proposed Act.
- 72 As one of the judges of the Court said in a recent decision¹²:

Much has been said in recent times about how best to address workplace safety and informed debate will accept that there is no simple or single system that will promote safe work practices and act as a deterrent against safety shortcuts that arise from workplace pressures, economic difficulties, incompetence or inattention. After many years of the operation of safety laws, no employer can be ignorant of the dangers in their workplace and what they have to do to address those dangers in order to protect their workers and others who may be in the work area. Workplace safety is not a mere add-on or an optional extra: employees and non-employees alike are entitled to attend their workplaces without fear of injury and to expect to be able to return in good health to their families and communities at the end of each working day. Any system that strives to ensure that simple human right should not be rejected because in some quarters it is thought to represent a "Rolls Royce" system or is a system that is not economically viable. Industry is not more profitable, productivity is not increased and society is not advanced by workplace accidents or fatalities.

- 73 I sincerely hope the new laws deliver what is promised, that is, safer workplaces, fewer deaths and serious injuries. The proposed new laws

¹² *Inspector Hall v Everwilling Cranes Pty Ltd* [2011] NSWIRComm 52

have some good features, but whether they live up to the rhetoric remains to be seen.

- 74 Let me return to the issue of the transfer of the jurisdiction.
- 75 The rationale for its transfer has not been explained to me and I have not seen any satisfactory explanation. The jurisdiction has been with the Commission since 1987 when it was transferred from the Supreme Court. It is a criminal jurisdiction and in many ways a special jurisdiction, the jurisprudence of which has been developed over a quarter of a century.
- 76 It is now proposed that the jurisdiction will go to the so-called mainstream courts that are not only overloaded, but which have no background, body of law or expertise in occupational health and safety law. It seems from the government's point of view that it is necessary to retain WorkCover as the prosecuting authority because it has the necessary expertise in this specialist area, but not the court that has the necessary experience and expertise in dealing with the prosecutions.
- 77 One wonders what influenced the government in arriving at its decision to transfer the jurisdiction. There were comments of a solicitor reported some weeks ago (The Australian, 11 March 2011) in a daily newspaper to the effect that leaving prosecutions with the Industrial Court would "infect" workplace safety law nationally and that because certain appointments in the court are from union backgrounds this has had a negative influence upon the development of occupational health and safety case law in NSW.
- 78 Is that the reason for the transfer, offensive as that might be to the judges of the Industrial Court and to myself as head of the jurisdiction?
- 79 Having said all that, I should address the elephant in the room. The transfer of the OHS jurisdiction will remove a large proportion of the Court's work. After 31 December 2011, unless the government takes steps to fill the gap, the workload of judges will fall off significantly.

- 80 Nothing has been said to me about replacement work. It has been stated publicly that the government will retain the Industrial Relations Commission. But then again, I was advised that the OHS jurisdiction would remain with the Court.
- 81 On one view of it, the transfer of the Court's OHS jurisdiction weakens the Commission to such a degree that it becomes vulnerable to being abolished. I do not know whether that is the agenda or not, but thus far the Commission has been treated quite shabbily.

Concluding statement

- 82 There are other matters I would have liked to address in the context of fairness in the workplace, including the recent focus on bullying and the issue of social networking and its impact on employer/employee relations. However, time does not permit.
- 83 It is safe to conclude that despite some of the rhetoric the introduction of the *Fair Work Act*, whilst it addressed a range of contemporary concerns, did not signal the end of the debate about fairness in the workplace. That debate will continue, not only in respect of the small collection of issues I have identified, but other matters including those that the federal Opposition regards as skewing the system against the interests of employers.
- 84 For my part, if the Commonwealth had adopted the NSW model for regulating workplace relations, there would be little need to be any debate about fairness. Fairness in the system is a given.
