

**The *Fair Work Act* and “Flexibility” Clauses:
AWAs in another Guise?**

Zoe Hutchinson

Kali Yuan

The state of Australia's federal employment laws has been hotly contested and significantly altered within the short space of two election cycles. Industrial law and labour rights have been one of the determining factors of political success and drivers of grassroots activism in recent Australian political history. The Labor party under Kevin Rudd and Julia Gillard took to the 2007 election its 'Forward with Fairness' industrial relations policy. This policy was presented to electors as in sharp contrast to the *Work Choices* legislation of the Howard Liberal-National party coalition government.¹ It was repeatedly stated by Labor party spokespeople during the election campaign that *Work Choices* would be 'torn up' and 'buried'.²

In enacting the *Fair Work Act 2009* (Cth), the Rudd Gillard Labor government presented its new legislation as fairly and responsibly balancing the different and often conflicting interests of employers and employees so as to ensure economic productivity goals and the national interest. Yet, does such a presentation of the issues obscure the possibility that while the *Fair Work Act* has involved some significant changes, including a strengthening of the 'safety net' it perpetuate a number of the problematic aspects of the old legislation? One of these aspects is the mandatory inclusion of a flexibility clause in Modern Awards and Enterprise Agreements.

This paper will critically examine the operation and implications of the flexibility clause and the individual flexibility arrangements negotiated under such clauses through the prism of the international human rights framework. The latter framework recognises the fundamental importance of collective bargaining to the maintenance and promotion of workers' rights and conditions. Given the uncertain outcome as to the 2010 Australian federal election, this paper will argue that trade unions and labour activists must be ready to resist and minimise the potential negative impact of such provisions.

What are mandatory flexibility terms and individual flexibility arrangements?

Under the *Fair Work Act* an enterprise agreement is required to contain certain 'mandatory' terms. Each agreement must have a 'flexibility term' that allows for individual flexibility arrangements.³ This clause will be required, also, in modern awards.⁴ If an agreement fails to include such a clause, a 'model' term will apply.⁵ The *Fair Work Act* outlines the nature and application of a flexibility term and an individual flexibility arrangement in sections 144, 202, 203 and 204.

An individual flexibility arrangement is an agreement between an individual worker and the employer which derogates from the terms of the enterprise agreement or award.⁶ In the 'model' clause, the terms the employer and the individual employee may agree to vary include such wide ranging matters as when work is performed, overtime rates, penalty rates, allowances and leave loading.⁷

¹ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) 'Work Choices'.

² Andrew Stewart, 'A Question of Balance: Labour's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3, 3.

³ *Fair Work Act 2009* (Cth) s202.

⁴ *Fair Work Act 2009* (Cth) s144.

⁵ *Fair Work Act 2009* (Cth) ss145, 202(4).

⁶ *Fair Work Act 2009* (Cth) s202(1).

⁷ *Award Modernisation* [2008] AIRCFB 550, para 187.

An often cited example is where a worker may wish to vary the hours of work in order to accommodate other personal commitments. He or she may negotiate for an individual flexibility arrangement with the employer to change the hours of work without affecting penalty rates which would have otherwise applied. This arrangement would be legally valid because it is said to meet the genuine needs of the employee and employer. There is deemed to be a genuine agreement between the employee and employer and apparently, the employee is better off over all.

However, this example certainly does not acknowledge the possible unequal bargaining position of the employee in relation to the employer which can be significantly exploited as there are no mechanisms of review of individual flexibility arrangement. Instead, within such a policy framework work/life balance considerations are largely derogated to the individual worker to negotiate with her or his employer. Arguably, this regulatory passivity is built on myths that ignore or obscure systemic factors of gender-based and other social inequalities. These myths about the achievement of fairness in individually negotiated outcomes are premised on assumptions about a gender neutral level playing field between employer and employee who can achieve a fair 'balance' between their competing interests.

One-sided 'flexibility'

The *Fair Work Act* provides that individual flexibility arrangements must be the result of 'genuine' agreement between the employer and the employee, lead to the employee being better off over all, not related to unlawful or unpermitted matters and be in writing.⁸ However, these are largely procedural guarantees given the inequality that most employees are likely to experience in their relationship with their employer. In practice, these individual flexibility arrangements have often operated in a one-sided or unilateral fashion with employees receiving letters on mass, requesting that they sign and return it to their employers within a specified time period. Indeed there are no mechanisms for oversight or testing of whether an arrangement really leads to the individual employee being actually better off over all – an omission which makes *Work Choices* and its 'fairness test' at least superficially seem as if it provides more protection to workers, despite its well-documented shortcomings.⁹ If the arrangement reached between the worker and employer is in breach of any requirements under section 203 of the *Fair Work Act*, the arrangement can be terminated by mutual agreement or no more than 28 days notice.¹⁰

Implications for collective bargaining of an individual flexibility clause

So what does the legal provision for flexibility terms and individual flexibility terms all mean for collective bargaining and collectively bargained work conditions? Collective bargaining and the fruits of this activity (i.e. collectively bargained enterprise agreements) can be undermined in a myriad of ways. Specifically in the case of individual flexibility arrangements, collective bargaining can be undermined when an individual arrangement seeks to fundamentally change the content, the very terms, of the collectively bargained enterprise agreement. Of considerable concern from an international human rights law perspective, this is exactly what *Fair Work Australia* has interpreted to be the correct application of a flexibility term.

⁸ *Fair Work Act* 2009 (Cth) ss144(4), 203.

⁹ Ron McCallum, 'Australian Labour Law after the Work Choices Avalanche' (2007) *Journal of Industrial Relations* 436, 438-440.

¹⁰ *Fair Work Act* 2009 (Cth) s203(6).

Case law: The *TriMas* decisions

An enterprise agreement had been negotiated between TriMas Corporation Pty Ltd and the AMWU as bargaining representatives of TriMas employees. As part of this enterprise agreement, there was a flexibility term which imposed a range of preconditions before the employer could make an individual flexibility arrangement.

TriMas argued the enterprise agreement contained an invalid mandatory flexibility term because the flexibility term did not refer to the actual terms of the enterprise agreement that could be varied.¹¹ If TriMas' argument succeeded, the negotiated flexibility term would be invalid and replaced with the model flexibility term.¹²

A move to undermine collective bargaining?

The question arises why would TriMas want to have the negotiated flexibility term replaced by the model flexibility term? After all, the model flexibility term was not the term bargained for by either party during the negotiation of the enterprise agreement. The only difference between the model and negotiated flexibility terms is that the negotiated term required the employer to inform any union(s) covered by the enterprise agreement of its intention to enter into an individual flexibility arrangement seven days before it does so.¹³ If this is the reason why TriMas was seeking to rid itself of the negotiated flexibility term in favour of being bound by the model flexibility clause, then a reasonable conclusion could be that the model flexibility clause is understood by and being used by employers to sideline the role of unions and collective bargaining. That is, even an attempt to inform a union of a potential individual flexibility arrangement can be defeated if the model flexibility term is substituted for the negotiated but invalid flexibility term.

Interestingly, and unsurprisingly, the TriMas legal argument was silent on this key difference between the negotiated and model flexibility terms. Instead, its argument focused on whether the *Fair Work Act* required flexibility terms to specifically outline the particular terms of the enterprise agreement that can be varied in an individual flexibility arrangement.¹⁴ The AMWU argued that the language of the Act does not require valid flexibility terms to vary the actual terms of the enterprise agreement.¹⁵ The AMWU argued an alternative interpretation of the Act which was that the only requirement for a valid flexibility term is that it varied the effects of the terms in an enterprise agreement.¹⁶

In the first decision, Commissioner Ryan characterized the different arguments of TriMas and the AMWU as reflecting the different intentions expressed in then Minister for Workplace Relations Julia Gillard's Explanatory Memorandum¹⁷ and the plain language of the Parliament's Act.¹⁸ Commissioner Ryan recognized that while the Explanatory Memorandum expressed an intention for the flexibility term to be interpreted as requiring variation of

¹¹ *TriMas Corporation Pty Ltd* [2010] FWAA 1485, [10].

¹² *Ibid.*

¹³ *Ibid* [5].

¹⁴ *Ibid* [13].

¹⁵ *Ibid* [15].

¹⁶ *Ibid* [16].

¹⁷ *Ibid* [31]-[33].

¹⁸ *Ibid* [[68]-[74].

particular terms which fundamentally alters the collectively bargained agreement,¹⁹ the plain language and context of the Act and the Act's purpose and object indicated that Parliament intended a more liberal interpretation of the term as having to merely vary the effects of the agreement's terms.²⁰ Ultimately, Commissioner Ryan paid particular care to the words 'the effect'²¹ and concluded that a valid flexibility term must vary the effect of a term of the agreement, rather than vary the term itself and fundamentally, the collectively bargained agreement.²² Unfortunately for the AMWU, the flexibility term in contention did not explicitly indicate an intention to vary the effect the terms of the agreement.²³ Therefore, the negotiated flexibility term was still found to be invalid and replaced with the model term.²⁴

In response to the first decision, then Minister for Workplace Relations Julia Gillard requested that a Full Bench of Fair Work Australia review Commissioner Ryan's decision in the 'public interest'.²⁵ The Minister argued that the practical effect of an individual flexibility arrangement is the variation of the very terms of the agreement.²⁶ The Minister also argued that Commissioner Ryan's interpretation had constrained the intended scope of individual flexibility agreements.²⁷

The full bench of Fair Work Australia overturned the decision at first instance. The full bench of Fair Work Australia did not accept as legal argument that individual flexibility arrangements should be a variation of the very terms of the agreement merely because that may be the practical effect of an arrangement.²⁸ However, the full bench did criticize Commissioner Ryan's emphasis of the words 'the effect' that led to an interpretation of the *Fair Work Act* as requiring flexibility terms to vary the effect (i.e. the consequence) of the terms of the agreement rather than the terms themselves. The bench found this approach too technical and instead talked about the variation of individual workers' legal rights.²⁹

The bench concluded that while the terms of an agreement cannot be varied by individual flexibility arrangements, such arrangements can alter the function of the agreement's terms so that individual legal rights were varied.³⁰ This textual approach is a surprisingly similar approach to the criticized decision of Commission Ryan. That is, the bench ultimately decided that a term of an agreement cannot be varied by an individual flexibility arrangement but the arrangement can alter a function (i.e. a consequence) of a term.³¹ However, this is where the bench's decision suffers from the same criticism of being overly technical – how is it possible to alter someone's legal rights without altering the terms of the agreement that he or she is party to? So although the bench seemed to disagree with the Commissioner, the interpretive pitfalls of their reasoning are actually similar. Crucially, however, in overturning Commissioner Ryan's decision at first instance, the legal outcome of the bench's decision is that a flexibility term must facilitate the alteration of the collectively bargained agreement's

¹⁹ Ibid [31].

²⁰ Ibid [63].

²¹ Ibid [67].

²² Ibid [79].

²³ Ibid [82].

²⁴ Ibid [87].

²⁵ *Minister for Employment and Workplace Relations* [2010] FWAFB 3552, [2].

²⁶ Ibid [12].

²⁷ Ibid [13].

²⁸ Ibid [14].

²⁹ Ibid [20].

³⁰ Ibid.

³¹ Ibid.

very terms to be valid. This requirement undermines the very purpose and outcomes of collective bargaining.

The protection of the right to collective bargaining in international human rights law and the Australian industrial relations landscape

The right to collectively bargain is a key aspect of the right to freedom of association as protected in international human rights law. For many workers, unionists and commentators, the right to bargain collectively is seen as an essential means of ensuring other human rights are protected such as, for example, the right to a decent standard of living.³² The general principle behind the right to collectively bargain recognises that the relationship between individual workers and his or her employer is unequal and aims to enable workers to deal with employers on more equal terms.

The protection of the right to collectively bargain in international human rights law has its foundation in a number of treaties and conventions. A general right to freedom of association is protected as part of the *International Covenant on Civil and Political Rights* ('ICCPR')³³ and the *International Covenant on Economic Social and Cultural Rights* ('ICESCR').³⁴ It is significant that the UN Committee on Economic, Social and Cultural Rights and the UN Human Rights Committee have interpreted both these treaties as supporting collective bargaining as an aspect of the right to freedom of association.³⁵

The right to collectively bargain is further protected by major conventions that have emerged out of the International Labour Organization (ILO) system. A substantive function of the *Right to Organise and Collectively Bargain Convention (No 98)*³⁶ is to enable collective bargaining between employers and unions. Indeed, under article 4, state parties must take steps to encourage and promote voluntary negotiations with a view to the creation of collective agreements.³⁷

Australia has ratified the *ICCPR* and the *ICESCR* as well as the *Right to Organise and Collectively Bargain Convention (No 98)*. Consistent with these ratifications, Australia is required to give effect to the various treaties.³⁸ However, the ILO Committee of Experts has on a number of occasions indicated that Australia has failed to meet its obligations in relation to collective bargaining as an aspect of the right to freedom of association. Indeed, Australia has been explicitly criticised previously for giving primacy to individual over collective

³² Mark Irving 'Union Membership and Representation' in Mordy Bromberg and Mark Irving (eds) *Australian Charter of Employment Rights* (2007) 54.

³³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

³⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

³⁵ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Republic of Korea*, 26th mtg, UN Doc E/C.12/1/Add.59 (2001) para 39; UN Human Rights Committee, *Concluding observations of the Human Rights Committee, Chile*, 65th sess, UN Doc CCPR/C/79/Add.104 (1999) para 25.

³⁶ *Right to Organise and Collectively Bargain Convention (No 98)*, opened for signature 1 July 1949, C98, (entered into force 4 July 1951) ('Convention 98').

³⁷ *Right to Organise and Collectively Bargain Convention (No 98)*, opened for signature 1 July 1949, C98, art 4 (entered into force 4 July 1951).

³⁸ Lee Swepston, 'International Labour Law' in Roger Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (2006) 137, 156.

agreements through the incentives for employers to utilise statutory individual agreements or AWAs under its *Work Choices* legislation.³⁹

While the *Fair Work Act* gives more emphasis than its predecessor on collective bargaining at the enterprise level, the shift may be far less than implied by the rhetoric. The next section of this paper will critically examine the issue of whether the mandatory inclusion of flexibility terms is likely to be in accordance with Australia's obligations under international human rights law.

Does the inclusion of mandatory flexibility terms undermine the human right to collective bargaining?

Supervisory bodies have been highly critical of limitations in the bargaining process which do not leave parties free to reach their own settlement. For instance, the limitations on the level of collective bargaining and exclusions of certain matters from the scope of collective bargaining have been held to be problematic from the perspective of international human rights law.⁴⁰

As discussed above an enterprise agreement is required to contain certain 'mandatory' terms. Significantly each agreement must have a 'flexibility term' that allows for individual flexibility arrangements.⁴¹ This clause will be required, also, in modern awards. If an agreement fails to include such a clause, a 'model' term will apply.⁴²

At its worst, the requirement of this clause could potentially be used to undermine collective bargaining, while allowing for what is arguably a new and more covert form of individual agreement. Although there are some safeguards,⁴³ workers may still be placed in a position of vulnerability due to unequal power relations between individual workers and their employers.⁴⁴ Women workers in particular are likely to be more adversely affected in such situations. Based on what the treaty monitoring bodies have previously indicated, the mandatory inclusion of such a provision in enterprise agreements is in itself inconsistent with Australia's obligations under international human rights law.⁴⁵ This is especially so, as a 'flexibility clause' allows the negotiated terms of an enterprise agreement to be circumvented. Arguably this provision works against the effective promotion of collective bargaining and non-interference with bargaining outcomes as required by international human rights law. Accordingly, there are serious ongoing concerns about the protection of vulnerable workers under the *Fair Work Act* from the perspective international human rights law.

There are strong reasons for compliance with the right to collective bargaining not only from the perspective of legally binding obligations but from the perspective of human dignity. This

³⁹ ILO Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning the Right to Organise and Collective Bargaining Convention, 1949, (No.98) Australia (ratification: 1973)* ILO Doc 062008AUS098 (2008).

⁴⁰ Ibid 314; ILO Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Australia (ratification: 1973)*, ILO Doc 062009AUS098 (2009).

⁴¹ *Fair Work Act* 2009 (Cth) s202.

⁴² Andrew Stewart, above n 2, 30.

⁴³ *Fair Work Act* ss203-204.

⁴⁴ Jill Murray, Rosemary Owens 'The Safety Net: Labour Standards in the new era' in Anthony Forsyth and Andrew Stewart (eds) *Fair Work: the New Workplace Laws and the Work Choices Legacy* (2009) 60.

⁴⁵ ILO Committee on Freedom of Association, *General Survey*, ILO Doc 251994G10 (1994) [248]-[250].

is especially so, as access to other rights, such as the right to a decent standard of living relies to a significant extent on the power of collective bargaining. A relevant, critical question to be asked here is: How does the law operate from the perspective of the most vulnerable in our society? It invites examination as to whether the door to exploitation is expressly left ajar through the inclusion of mandatory flexibility clauses, notwithstanding rhetoric to the contrary.

Concluding remarks: where to from here

What emerges from the above discussion is that there are serious questions regarding the mandatory inclusion of flexibility clauses in enterprise agreements and modern awards from the perspective of international human rights law. The framework of international human rights law offers a way of critically reflecting on Australian labour law in a way that addresses some substantive issues of human dignity. It also provides an important tool for campaigning around issues of social justice in the law.

On the eve of an election where both major parties, if elected, have agreed to work within the framework of the *Fair Work Act* it is especially important that people working in labour law and for labour rights are alert to the potential use or misuse of provisions such as flexibility arrangements. Such arrangements have the potential to be a means of undermining rights and conditions that have been collectively bargained for. The leader of the Opposition Tony Abbott is on the record as saying that *Work Choices* is ‘dead,’ buried,’ and ‘cremated’ but there is no similar reassurance about a possible misuse of flexibility arrangements under the *Fair Work Act*. From the perspective of international human rights principles, there is clearly a need in the years ahead for ongoing critical research and engagement with issues concerning the impact of Australia’s industrial laws and policies especially for women and marginalised groups.