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ACTU counts on Shorten to change the rules, AER on Turnbull

HENRY ERGAS THE AUSTRALIAN 12:00AM July 27, 2018

Were there a prize for the slogan that best captures the spirit of the age, it would surely go to the ACTU's "Change the Rules!"

Stingy bosses? "Change the Rules!" Mean-minded bankers? "Change the Rules!" Spiking electricity prices? "Change the Rules!"

After all, whatever the problem, it can hardly be one's own fault. On the contrary, it must be an injustice that cries to heaven for correction — or, in the ACTU's case, to its earthly equivalent, a Shorten Labor government.

Sally McManus's opening speech to last week's ACTU congress made the point all too well.

Why is union membership down from 46 per cent of the labour force in 1986 to 13 per cent in 2016? Nothing to do with the unions themselves, said McManus. Nor are they to blame for the fact that the proportion of Australians who place a high level of trust in unions has fallen from 40 per cent in 2011 to 25 per cent today, leaving unions just above political parties at the bottom of the "trust in institutions" pile.

Rather, those trends are the work of the forces of darkness that, "driven by maximising profits", focused on "breaking organised workers that stood in their way".

As for the solution, it lies not in making unions more trustworthy and accountable, as the Heydon royal commission recommended, but in giving them even greater privileges than they obtained under Julia Gillard's Fair Work Act, while shielding their officials yet more fully from legal scrutiny.

But that would not be enough to address the "serious, serious, structural problem" that denies workers "the power they need" to "demand and win their fair share".

To correct that problem, the Shorten Labor government must ensure, by legislation, that the unions get precisely the outcomes they want: from the pay increase Australians apparently "deserve", regardless of their productivity, through to permanently high penalty rates.

That those outcomes, which Bill Shorten immediately endorsed, would cost jobs doesn't need to be said. But what is truly objectionable is the use of legislation to grant to one side a result it could not convince an independent tribunal to deliver.

For decades, the supporters of our industrial relations system have told us that its purpose is not to skew the results in one direction or the other; rather, it establishes a framework within which disputes can be settled by a neutral arbitrator in the light of broadly accepted principles, allowing each side an equal chance to put its case.

Now, with the umpire having rejected their claims, Labor and the ACTU want to override its decisions. That ought to expose them to withering attack.

Unfortunately, the government has shown itself every bit as eager to "change the rules" when that advances its immediate objectives, even at the cost of undermining basic protections.

Nowhere is that clearer than in the laws governing electricity networks.

Those laws give the Australian Energy Regulator responsibility for regulating the prices the poles-and-wires businesses can charge; as electricity bills soared, the AER sought to stem the rise by playing fast and loose with its pricing methodology.

The regulated businesses appealed, as was their right, to the Australian Competition Tribunal — and the tribunal's assessment of the AER's determinations was scathing, finding, in a crucial decision, that the regulator relied on "flawed data", did not "adequately account" for relevant factors, applied analytical techniques that were "not statistically valid" and "failed to adopt a 'reasonableness' check" on the implausible results its incorrect methods generated.

One might have expected a Liberal government to hail that decision as highlighting the importance of checks and balances in preventing the abuse of regulatory power, all the more so as the AER recognised, in the wake of its tribunal losses, that "the regulator can make errors".

Instead, it has dismantled the safeguards that could stymie regulatory failure.

Appeals to the tribunal, which had already been restricted, have now been entirely abolished, flying in the face of every review of the issue since the Hilmer report in 1993.

As if that were not enough, the government has taken the unprecedented step of removing from the rules any clear guidance about how rates of return should be determined, thus granting the regulator an essentially unfettered discretion.

And to cap it off, the AER has been given the right to issue its decisions as "binding legislative instruments", impeding appeals to the courts against even grievous regulatory blunders.

That the AER has promptly put its new powers to use is unsurprising. What is startling, however, is how far it has been willing to go in ignoring both its own past findings and a decade of tribunal rulings so as to impose the sharpest single cut to the allowed returns on

equity in Australian regulatory history.

Of course, with electricity bills high on the political agenda, the government will view that cut, and the reduction in consumer charges, as vindicating its changes. But no country has ever expropriated its way to prosperity.

And the surest protection from expropriation — and from the ever-present risk of public power being used in a manner that is arbitrary, biased or simply wrong — remains the rule of law.

That term is, no doubt, capable of many interpretations.

However, former US Supreme Court judge Antonin Scalia was plainly right when he said the rule of law is a law of rules: that is, a law that takes the rules seriously.

And he was equally right in stressing that a rule that can be changed whenever it suits the public mood is no rule at all.

Yet that is where we are heading, and on both sides of politics. Losing out? Change the rules!

Just don’t get too used to the new ones: they won’t be there for long.