INDUSTRIAL RELATIONS POLICY DEVELOPMENTS 1977-1998: A CRITICAL REVIEW

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The 1996 election of a federal Coalition government and the introduction of the *Workplace Relations Act* have been widely seen as constituting a turning point in Australian industrial relations. This paper critically assesses the Coalition's reform agenda and its ramifications. It places these reforms within the broader context of Australia's distinctive model of labour law, challenges to this model which commenced at state level in the 1970s, and changes to industrial relations framework made under the previous federal Labor government (1983-96). Looking at the evidence on productivity, union organisation and recourse to arbitration, minimum standards and equity, it appears that in many respects the Workplace Relations Act has served to accentuate problematic outcomes of the Labor reforms. At the same time, Coalition policy has introduced some new dimensions and has the capacity to fundamentally shift the character of Australian industrial relations.

The Australian Arbitration Model and Legislative Reform 1977-96

In order to assess the significance of the 1996 *Workplace Relations Act* it is essential to place this legislation and subsequent developments in the context of the arbitral model and changes made to this under the preceding federal Labor government (1983-96).

For most of the 20th century Australia possessed a distinctive framework for regulating industrial relations, known as compulsory arbitration. Operating at both state and federal level, it entailed a high level of centralisation and state regulation of unions, wages and working conditions. In return for being closely regulated under state and federal arbitration laws, unions enjoyed legal recognition (the right to recruit workers, enter workplaces and bargain with employers) and some encouragement (through provisions affording limited forms of preference to union members). Where parties could not reach agreement, or where an employer refused to deal with a registered union, the relevant arbitration tribunal could intervene and deliver a binding ruling. This discouraged outright union avoidance by all but the most determined employers. Wages and a large number of other employment conditions (hours of work, shift breaks, overtime penalties, permanent/casual ratios, crib times, etc.) were regulated by a system of predominantly occupational or industry-based awards. Unions were also able to negotiate superior conditions on a industry/occupation or specific workplace basis. The award system established a pervasive set of employment standards (covering over 80% of all workers) which were enforceable by either unions or government inspectorates. In practice, unions did the bulk of enforcement and while this process was never unproblematic the limited number of awards and relatively unfettered entry rights gave Australian unions an advantage over those in countries with more decentralised systems. Most disputes between workers and employers were resolved without recourse to arbitration but access to tribunals clearly influenced the behaviour of the parties. While the industrial relations frameworks of most industrialised countries contain a mixture of compulsion and voluntarism, the Australian system placed greater emphasis on compulsion than its counterparts in the United States and Britain.

Arbitration enjoyed broad community support, and several attempts to gut the federal system (in 1919 and the late 1920s) failed conspicuously. However, from the late 1970s onwards the system came under increasing challenge. Aided by a group of lawyers and consultants, some employer groups (especially the National Farmers' Federation) and conservative state and federal governments began to explore non-arbitral avenues for challenging union activity. These challenges took three forms.

First, interlocutory injunctions and damages claims under common law or sections 45D,E&F of the federal *Trade Practices Act* (inserted by treasurer John Howard in 1977-80) were use to defeat secondary boycotts and win substantial victories over unions at Robe Rive, Dollar Sweets and the Mudginberri abattoir (Bennett, 1994a:84-90,188-90). The use of corporate laws to regulate industrial relations set a precedent that was to be significantly extended in the 1990s.

Second, a number of states introduced essential service legislation and other legislation that enabled the government to bypass arbitral tribunals, effectively ban some forms of union activity and directly intervene in disputes. The most dramatic example of this occurred in 1985 when the Queensland government defeated a strike over contractors at SEQEB by sacking 800 workers and introducing legislation establishing a perpetual state of emergency in the industry.

Third, from 1988 onwards incoming conservative state governments began to modify central features of the arbitration system under the banner of eliminating rigidities, introducing greater flexibility/choice in workplace negotiations and enhancing enterprise-based productivity. Key changes entailed reducing the role of awards (Victoria abolished them altogether), removing preference provisions, restricting unions entry and bargaining rights, curbing tribunal powers and establishing non-union bargaining streams including (in some jurisdictions) individual agreements (Quinlan, 1996a:6-8). Evidence that non-union and individual agreements were drawn up by employers (often assisted by consultants), involved little if any real bargaining, and almost always entailed a significant reduction in employment conditions (see Goodwin & Maconachie, 1990) was beside the point. These legislative changes were an extension of the neo-liberal policy agenda being pursued in other areas.

Although the federal Labor government (1983-96) introduced neo-liberal 'competition' policies in a number of areas (such as banking and finance), it initially resisted making similar changes to industrial relations, preferring instead to consolidate the existing system along the lines recommended in the 1985 Hancock report. This included measures to rationalise union structure, something in keeping with the ACTU's ambitious plans to merge 300 unions into 25 industry-based unions. The

corporatist Accord between the ACTU and Labor government involved an explicit trade-off of wage restraint in return for job creation and the social wage (medicare, superannuation and improved occupational health and safety). Prior to 1987 wage movements were determined in a centralised fashion reminiscent of the Wage Indexation policy a decade earlier. However, in the late 1980s a strange alliance of microeconomic reformers and powerful unions seeking negotiating flexibility led to the introduction of the Second Tier and later Structural Efficiency Principles (award restructuring). These involved a mixture of pattern bargaining and negotiated efficiency trade-offs in return for additional wage increases. This dual system of regulated decentralism was short-lived, forming an interim step to a more decentralised system of enterprise bargaining whereby the award system was retained as a residual (though comprehensive) safety net.

Changes to federal industrial relations law made in 1988 and 1992 had facilitated this shift by providing for stand-alone and single union agreements on greenfield sites and restricting the role of the Australian Industrial Relations Commission (AIRC). Although the AIRC was less than enthusiastic about a general shift in wage fixing to productivity-based enterprise bargaining (and some employer groups, notably the Metal Trade Industry Association (MTIA), shared its misgivings) it had little option but to succumb to the combined pressure of the government and ACTU.. Vehement criticism of the Commission stance by ACTU Secretary Bill Kelty masked important divisions within the union movement, especially amongst weaker unions who feared they would not fare well under enterprise bargaining. These divisions were papered over.

For its part, by the early 1990s the federal Coalition was advocating a radical refashioning of industrial laws along the same lines as those introduced in Victoria and New Zealand plus some additional features such as enterprise unionism (see *Jobsback!* 1992). During the 1993 election campaign Labor sharply distinguished its commitment to arbitration and the award system and the Coalition's policies. However, immediately after being returned to office Prime Minister Paul Keating responded to criticism led by the Business Council of Australia (BCA) by introducing significant changes to the system. These included a separate bargaining stream with provision for both union-based

enterprise agreements (called Certified Agreements) and non-union agreements (called Enterprise Flexibility Agreements or EFAs). The AIRC's role in the bargaining process was reduced but the award safety net was retained (coverage by an existing award was a precondition for establishing an agreement). Provision was made for those workers unable to secure wage increases through bargaining. All agreements were subject to a no net disadvantage test (i.e. agreements should not lead to an overall fall in existing wages and conditions). In return for accepting these concessions unions obtained stronger provisions on unfair dismissal and a provision overriding state laws containing standards inferior to federal law. Employer access to s45D,E&F of the *Trade Practices Act* was also inhibited by inserting the AIRC into the process.

The changes represented a significant departure from previous Labor policy and blurred the formally sharp distinction with Coalition industrial relations policies. The Coalition enhanced the impression of convergence by modifying several stark aspects of *Jobsback* (1992) in the run up to the 1996 federal election. Substantial differences remained but they were now buried in detail or ambiguities in the mechanics of how Coalition policy was to operate.

The federal Labor government's enterprise bargaining push received strong support from ACTU secretary Bill Kelty. Kelty had grown increasingly critical of the AIRC and argued it was necessary to prepare unions for the tougher environment that would follow the election of a conservative government. The Australian Manufacturing Workers' Union (AMWU) and others who believed they would do better under a decentralised system supported Kelty. More militant unions in the construction, mining and transport were also the major beneficiaries of reduced access to s45D,E&F. On the other hand, unions like the Textile Clothing and Footwear Union, with limited bargaining power, were not enthusiastic. These changes posed a threat to their membership, already weakened in the clothing industry by tariff cuts and growing numbers of outworkers (Mayhew and Quinlan, 1998). The ACTU leadership managed to stymie criticism from within apart from its largest branch, the Labor Council of NSW. Several prominent feminists and women's policy advocates like Quentin Bryce also expressed grave concerns that the move away from awards would disadvantage women and pay equity

gains made over the preceding decade. In July 1994 then ACTU assistant secretary (now president) Jennie George (1994:15) rejected this criticism, arguing that the jury was still out. George had come from one of the few relatively powerful unions with a female-dominated membership (teachers) and the jury was not out for long.

The Coalition Reform Package

In March 1996 a federal Coalition government was elected with a strong commitment to reforming industrial relations. It rapidly introduced the *Workplace Relations and Other Legislation Amendment Bill.* Labor's 1993 reforms enabled the Coalition to simultaneously portray the Bill as a bold new step and as an incremental shift to existing laws. In reality the changes were far from incremental. To grasp the government's reform agenda and future plans it is essential to examine both the Bill and the final legislation.

First, the Bill proposed to reduce the scope of devices designed to maintain a broad set of minimum standards and to protect more vulnerable sets of workers such as women, immigrants and young workers. In particular, the Bill proposed:

- that awards no longer to be 'maintained at a relevant level' but only at fair minimum wages. In making a safety net award the Commission would only be able deal with 18 specified matters and would, for instance, be precluded from setting quotas or minimum/maximum hours for different categories of employees (e.g. part-timers);
- to abolish the 'no disadvantage' test along with the Commission's power to intervene to ensure equal remuneration for work of equal value;
- to extend the range of reasons under which the AIRC could refrain from hearing a dispute or establishing an award;
- to give primacy to state awards, agreements or regulations over federal awards even where the former entailed inferior standards; and

- to remove the right of independent contractors to apply to the AIRC to review their contract on the grounds that it was harsh or unfair.

Second, the Bill proposed to circumscribe the powers of the AIRC and established a new body, the Office of Employment Advocate (OEA). The proposed constraints on the AIRC were more significant than the 1993 amendments and would amount to a re-orientation of the system. In particular, the Bill proposed that:

- the Commission's arbitral powers were to be exercised as a 'last resort' rather than 'where necessary';
- limits be placed on the Commission's ability to hear matters where workers were covered under state awards or agreements or to intervene in matters addressed by a state tribunal.
- the OEA be responsible for informing employees and employers (especially small business) of their rights/obligations under the Act; registering Australian Workplace Agreements (AWAs); and investigating alleged breaches of AWAs or freedom of association provisions;

Third, the Bill proposed a number of significant changes to the types of agreements that could be entered into by:

- replacing the single stream of certified agreements with several streams that no longer required a union and could be made between an employer and their employees as a group. This now redundant EFA provisions were repealed;
- introducing a new stream of non-union individual agreements known as Australian Workplace Agreements (AWA). This was the first time the federal system would include individual agreement provisions along Victorian/New Zealand lines. An AWA was to be individually signed and filed with the Employment Advocate. Both parties could use bargaining agents (for employees this included unions, consultants or consultative committees). AWAs would override federal awards or state agreements but not a federal certified agreement (to the extent of any inconsistency); and

- retaining enterprise flexibility clauses in awards but providing that unions would only be heard if at least one member's employment would be altered.

Fourth and finally, the Bill proposed significant changes to union rights to recruit members, monitor compliance with minimum standards, bargain or take action on behalf of employees, including members of other unions. In particular, the Bill proposed to:

- restrict the right of union officials to enter the workplace to ensure observance of an award. Union entry was not listed as an allowable award matter and union officials would only be able to enter a workplace 24 hours after notifying an employer they had received a written invitation by an employee who was a union member;
- place new restrictions on union rights to be heard or bargain (see types of agreement);
- remove the power of the AIRC to insert preference provisions to unionists in awards and insert a new provision on freedom of association;
- repeal the 'conveniently belong' rule that sought to minimise and rationalise union representation. This change would facilitate the registration of multiple unions with similar eligibility rules, including enterprise unions;
- require union rules to provide for establishing independent enterprise branches;
- include a provision enabling the disamalgamation of amalgamated unions; and
- reinstitute unfettered employer access to s45D,E&F of the *Trade Practices Act.*

The Bill was held up for six months while the Senate undertook an inquiry into the reform measures. The Inquiry committee - with a majority of Opposition and minor party members was inundated with submissions. The Senate (1996) report made scathing criticisms of many aspects of the Bill, especially the weakening of the AIRC's role and the likely effects on workers with little bargaining power, especially women and non-Anglophone migrants. After intense negotiations, the

government garnered Democrat support for an amended Bill that was passed by the Senate in late November 1996.

The major concessions won by the Democrats were to restore some powers to the AIRC, including the ability to vet problematic AWAs referred to it by the Employment Advocate. Paid rates awards were retained where customary and consent awards could be converted into certified agreements. Two items were added (superannuation and outworkers) to the original 18 'allowable matters' in awards (s89A), a compromise that still drastically reduced the scope of awards. It excluded issues like occupational health and safety as well as areas of traditional award coverage such as casual/permanent and part-time/full-time ratios that were especially critical in a context of labour market change. The Democrats agreed to the use of 'junior rates' subject to an inquiry (Workplace Relations Minister Peter Reith has subsequently sought to pre-empt its findings). Federal awards were to retain their pre-eminence over state agreements/regulations. The government also responded to joint employer/Democrat concerns over removing the 'conveniently belong' rule by retaining an amended version that shifted the onus of proof onto the union with existing coverage (*Agreement*, October 1996).

A new 'no disadvantage' test applied to certified agreements and AWAs. The AIRC had to be satisfied that a certified agreement met the test, was agreed to by a majority of employees (except on greenfield sites), and had been appropriately explained to them. Where an agreement covered part of a business, the Commission also had to be satisfied it did not unfairly exclude some employees (s 170LT). Finally, the Commission had to be satisfied the agreement was not discriminatory on the grounds of sex, colour, disability, pregnancy, religion, political opinion, age, marital status, sexual preference and national extraction (s 170LU). For their part, AWAs had to be approved by the Employment Advocate located in the Department of Workplace Relations. This required passing the no disadvantage test (s 170VPB (1)(a)), being agreed to by employees (s 170VPA) and incorporating provisions concerning discrimination, dispute resolution and disclosure (s 170VPB(1)(b) & s 170VPA). When in doubt, the Employment Advocate could suggest that parties amend the AWA, require an undertaking the agreement will not disadvantage the employee (s 170VPC(2), or refer the matter to the

AIRC (s 170VPC(3)). In December 1996 the government appointed Mr Alan Rowe (a lawyer with extensive experience in public administration and former principal adviser to the Business Council's Industrial Relations Study Commission, 1987-9) as Employment Advocate. Vetting by the Office of Employment Advocate proved to be far more time consuming than originally anticipated, initially averaging one agreement per officer per day even using a standardised procedure.

While not insignificant these concessions failed to restore the AIRC's role or modify critical elements of the reform package, including the weakening of awards and union rights. The *Workplace Relations Act* 1996 did introduce the concept of 'protected' strike or lockout action during the bargaining period subject to notice requirements, intervention by the AIRC and protection of property and personal safety (see ss 170 WC and 170WD). But this had to be balanced against the widened array of limits on union activity. Notably, the Act introduced the concept of enterprise associations that could compete with existing unions in negotiating certified agreements. To obtain registration an enterprise association had to cover persons employed at a business (or one or more operationally distinct parts of such a business (s188(1)(c) & s187B) and have 50 members (up from 20 in the original Bill s189(4)(c)). The Act also facilitated fracturing of existing unions by providing a mechanisms to de-amalgamate those amalgamated under the Labor government's super union legislation (ss. 253ZH - 253ZU). Coalition legislation replaced the stress on effective organisation designed to redress inequalities in bargaining power with a right for workers to bargain individually and in enterprise unions. Historically, company/enterprise unions are not new to Australia. But the Act marked an abrupt policy shift by formally promoting small bodies with limited resources, unable to undertake industry-wide campaigns, or exert political pressure. As airline pilots discovered almost a decade earlier, even highly skilled workers occupying a strategic position in the labour process can be replaced.

In sum, the *Workplace Relations Act* significantly widened the scope for employers to make non-union agreements. Like laws in several states, the Act introduced a regulated form of individual employment contract - a concept whose closest parallels are the pre-collectivist master and

servant laws of the 19th century. Further, the Act placed significant restrictions on union recognition, entry and bargaining rights as well as curbing the role of awards, arbitration and the AIRC. The anti-collectivist philosophy underpinning the legislation extended to terminology. The substitution of the term 'workplace relations' for 'industrial relations' was symbolic of a desire to expunge the macro and pluralist connotations of the latter with the micro-unitarist vision preferred by the Business Council of Australia (1989) and neo-liberal policy advocates (see Hilmer *et al*, 1991). In this respect, the Act represented an ideological reinterpretation of the employment relationship as well as a practical attempt to reshape capital/labour relations.

Notwithstanding this, assessing the impact of the *Workplace Relations Act* faces a number of obstacles. First, the changes are complicated by the fact that legislation built on earlier state-level developments as well as federal reforms made under Labor, especially those after 1988. In some areas Labor initiated trends (like a non-union bargaining stream and reducing the role of AIRC) that the *Workplace Relations Act* served to accentuate; while in other areas (like the role of awards and the introduction of individual contracts) a more decisive break has occurred. Second, relatively little time has elapsed since the passage of the Workplace Relations Act and the Coalition government has mooted further policy changes following its re-election in October 1998. Moreover, policy changes made in the area of employment/unemployment and social security are also likely to impact on industrial relations. Third, over the past 20 years the Australian labour market has undergone a number of significant changes, including a substantial growth in temporary and part-time employment, increase use of outsourcing/franchising and growth of small business employment, self-employment, home-based and telework (for a summary see Quinlan, 1998). The role of regulatory changes in facilitating these shifts remains ambiguous but it does appear that regulatory forms can influence the impact of these trends on wage levels, hours of work and other employment standards. Given this, the remainder of this paper will not try to examine the *Workplace Relations Act* in isolation. Rather, it will examine how Coalition policy has effected existing trends and identify

new and critical developments, amplified where possible by research on similar arrangements in other countries.

The Impact of Recent Industrial Relations Reforms

Industrial relations systems have been seen to play a critical role in determining both productive efficiency and social equity (by affecting the distribution of rewards across the community). As Bennett (1994b) has observed, the legal and institutional framework under which enterprise bargaining is carried out affects not only bargaining processes but also outcomes. Critical issues here include the role of unions, the capacity of workers to bargain without unions, the determination of minimum standards as a floor for bargaining and reflection of community interests, avenues for third party intervention and the impact of a more decentralised system on different groups of workers.

Before turning to these issues, it is worth referring briefly to the impact of enterprise bargaining and associated changes on labour productivity and economic efficiency more generally. Arguments that a more decentralised and 'flexible' system was essential for Australia's global competitiveness formed a touchstone for the neo-liberal think-tanks, business groups and politicians advocating reform. However, frequent repetition often amounted to a mantra since the accompanying evidence (gleaned from Australia and overseas) was never that convincing, often ignoring a host of critical mediating factors (Tasman Asia Pacific, 1997). Burgess and McDonald (1990) argue international research has established no clear causal relationship between different systems of industrial relations, labour market organisation/flexibility and productivity growth. At best, the findings are equivocal. A study undertaken by Dowrick (1993) found that fully centralised or fully decentralised systems performed best in terms of productivity growth, with the latter slightly outperforming the former. On the other hand, a Reserve Bank study (Coelli et al, 1994) queried the alleged labour market rigidities of the Australian arbitration system relative to other OECD countries including the USA. Further, advocates of reform conspicuously ignored the growth of especially flexible, sometimes clandestine and outright exploitative work arrangements over the past

decade. This includes growing numbers of casual workers, independent contractors, multiple-job holders, those working unpaid overtime, home-based workers and even working children (Lafferty *et al* 1997; Quinlan, 1998; and *Sydney Morning Herald*, 21 March 1998:6). Finally, evidence on the respective relationships between arbitration, enterprise bargaining or individual contracts and productivity is equally problematic. No clear pattern of findings has emerged from studies using aggregate data, individual case studies or comparing the effect of the *Employment Contracts Act* in New Zealand. (See SERC, 1996; ACIRRT, 1998; Drago *et al*, 1998; Quinlan, 1996a&b; Boxall, 1996; Philpott, 1996, Rasmussen and Lamm, 1997).

There are two reasons for making these points. First, the absence of compelling evidence, nor much desire to accumulate it, suggests that the reform push is driven more by ideology than economic necessity. Second, when we turn to the social and industrial impacts of reform the findings are rather more compelling, something that should be counter-posed against the first observation.

Minimum Standards and the Award/Bargaining Safety Net

Unlike some other countries, until recently the issue of minimum standards attracted little attention in Australia. One reason for this was that the award system established a relatively effective baseline on wages and other employment conditions that were regularly updated. Overseas experience indicates that minimum wages established by direct legislation can be progressively eroded by inflation and irregular updating (in the USA for example the current federal statutory minimum wage is around 60% of the lowest adult base-rate in Australian awards). At the same time, awards were far more than a minimal regulatory safety net. Even very basic awards contained elaborate set of conditions relating to wages and allowances, hours of work, shift breaks, holiday leave loadings, sick leave entitlements and a host of other matters built up over many years. This important observation is too often overlooked in the current debate.

The 1993 Labor amendments retained awards as a baseline for enterprise bargaining, although it does appear that the resource demands of bargaining caused unions to neglect updating awards protecting their weaker members. Lower paid workers unable to secure enterprise agreements were covered by periodic across-the-board safety net increases. The last measure was retained by the Coalition although it made submissions opposing significant increase. The government's stance had some effect in 1997 but was noticeably less influential in the April 1998 decision by the AIRC which granted a $10-14 per week increase affecting about 30% of wage and salary earners (*Workforce*, Issue 1160, 1 May 1998:1). The new government vigorously opposed the ACTU's Living Wage claim which sought substantial wage increases for the low paid (Harcourt, 1997). Perhaps more critical was the winding back of awards to 20 specified employment conditions. Retirement; misconduct, performance, occupational health and safety (OHS), casual/fractional conversions, appointments, permanent/casual ratios, and supervisor training were amongst the matters precluded from being the subject of minimum award conditions.

These limits, and the loss of award coverage altogether amongst workers like subcontract drivers, have important implications for minimum standards. A number of unions tried to counter this by transferring all previous award conditions into an enterprise agreement. (see for instance *Industrial Relations and Management Letter*, 14(8), September 1997). This required a degree of industrial leverage that many unions did not possess. Further, even retention as an award matter did not entail complete protection. Many awards specified minimum as well as maximum hours to ensure workers on shift or on-call arrangements were guaranteed a level of work. In January 1997 the AIRC approved an agreement at a WA Private hospital which sets no minimum hours for theatre nurses (*Workforce* Issue 1105, 28 February 1997:1,4 and AIRC Print N7834, 6 January 1997). Outworkers pay rates are included under the 20 allowable award conditions but the protection this affords is ambiguous. The federal Clothing Trades Award clause specifying outworkers receive the same wage rates and hour limits as factory-based workers 'survived' but two other clauses giving effect to this (by requiring registration of outworkers, work records and union access to information) were referred to a full-bench hearing in December 1998.

Some employer associations like the Australian Hotels Association (AHA) and the Australian Chamber of Commerce and Industry (ACCI) were quick to adopt an aggressive approach to stripping back awards. The AIRC has not proved to be entirely acquiescent. In March 1998 a full bench of the Commission rejected an AHA attempt to slash holiday penalty rates in the hotel industry (*Workforce* No1157 3 April 1998:3 and AIRC Print P9677, 23 March 1998). The Commission faces a number of dilemmas in terms of the severe consequences of award stripping for some groups of workers as well as a recognition that facilitating the process will only hasten its own demise. In NSW an activist commission contributed to the failure of that state's experiment with enterprise bargaining (O'Donnell and Pragnell, 1997). However, a similar outcome in the federal sphere is unlikely. The award simplification process is gaining momentum, egged on by a government prepared to intervene in award outcomes it believed have not gone far enough. Additional award simplification has been flagged by Minister Reith as a key part of the government's post 1998 election reform agenda (*Workforce* Issue 1186, 30 October 1998:4)..

Overall, the likely result of these changes is a system that is bifurcated in terms of the scope of collective negotiation and in terms of a widening remuneration gap even within the same industry. There is evidence this had already begun to occur as a result of changes under Labor. A study of the construction industry by Burgess *et al* (1997) found that a dual workforce was emerging that could be measured in terms of conditions, overtime, earnings and non-wage benefits. The majority of workers who remained dependent on awards were falling progressively further behind the wage gains obtained by those covered by enterprise agreements. The ACTU's recent concern for the low paid represents a belated recognition of the implications of policies which its current leadership helped to initiate.

There is also evidence that the enterprise bargaining process is undermining award protection. Under Labor, the post-1988 framework permitted trading off of award conditions (usually in return for a wage increase) subject to a no (net) disadvantage test administered by the AIRC. In practice, the protection afforded by the test proved less than complete. It took time for the AIRC to develop appropriate guidelines

and there was less scope for it to intervene than under the public interest test of the previous system. Further, implementation of the test was by no means vigorous. Where some groups within an enterprise gained but others lost out (e.g. women, casuals) the parties to the agreement had a vested interest in not identifying this to the AIRC. By agreeing to wage outcomes which advantaged full-timers over casual/part-time staff, some unions risked encouraging a shift to the very workers they found most difficult to recruit (recent ABS earnings surveys reveal a widening wage gap between full-time and casual/part-time workers: *Workforce* Issue 1102, 7 February 1997). Despite requirements to adhere to Anti-Discrimination legislation, some bargaining outcomes disadvantaged women (Bennett, 1994b:200 and Foster, 1995:96-7). It also became apparent that basic award conditions like sick leave were being traded off not only in EFAs (for a less than commensurate wage increase in the case of Tweed Valley Fruit Processors) but also in union negotiated agreements (Quinlan, 1996a:12-3). Some problematic cases were remedied but without a systematic review of all agreements it is almost certain many others escaped detection.

Under the *Workplace Relations Act* the demonstrably inadequate no disadvantage test protection was further weakened. For example, AIRC Deputy President Anne Harrison approved a non-union agreement (covering Chubb Security employees at Darling Harbour) that cut overtime rates (to a 15% casual loading), required employees to work 7 days without a break, and allowed accrued annual leave to be paid out, arguing that:

> ...it is possible that certification of an agreement may not, because of its content, be in the public interest but nonetheless its certification may not be contrary to the public interest. This agreement provides such an example (AIRC Print Q3596. 16/7/1998 cited in *Workforce Issue* 1171 17 July 1998:6).

The most problematic situation relates to AWAs. By October 31 1997 3,350 AWAs had been approved by the OEA, 1,602 were still under consideration, 127 had been rejected (several due to lack of genuine consent) and 198 had been referred to the AIRC (*Workforce* Issue 1141 14 November 1997:2). Problems with the revised no disadvantage test soon became apparent. In September 1997 AIRC Deputy President

David Duncan found three agreements at one worksite failed the test 'fairly comprehensively' by enabling employees to be rostered for work at any time, with no limit on hours and no entitlement to shift or overtime penalties. Nevertheless, Duncan approved the AWAs because an explanatory note in the legislation stated agreements could be approved where they were part of a short-term survival strategy for a financially struggling firm (*Sydney Morning Herald*, 10 October 1997). Duncan stated the one-year duration of the AWAs meant workers were not locked into inferior conditions but how they would retrieve these losses was not explained. Duncan appears to have extended these grounds even further in approving AWAs covering 150 workers at a South Grafton abattoir that set a tally rate above the award (*Workforce* Issue 1187, 6 November 1998:1&6 and AIRC Print Q7881, 23 October 1998). Unlike awards, AWAs remain secret and are not open to public scrutiny or the intervention by interested parties that may flow from this.

While evidence is still limited it appears that, like the VEA experiment in Queensland, AWAs are associated with a deterioration of wages and working conditions below pre-existing minimum standards. The AWA option has been used as a threat to secure significant changes to collective agreements (for a case involving a shoe store chain see *Workforce* Issue 1122, 4 July 1997). If experience under the last years of Labor is any guide, even collective bargaining processes can entail trading off basic conditions or discrimination, especially where workers are vulnerable (such as young casual workers in hospitality or migrant women cleaners) and union organisation is weak. The new regulatory regime further increases the role of market factors in the determination of minimum standards, something international evidence shows will result in growing earnings inequality (Burgess *et al* 1997:16).

Union Voice and Recourse to Arbitration

Changes to industrial relations laws are also having significant implications for unions. The more decentralised system placed additional challenges on unions in terms of recruitment, bargaining and monitoring agreements across hundreds if not thousands of workplaces. It also posed challenges to union survival. Declining union membership in Australia

since the early 1980s was the result of an array of factors, including sectoral employment shifts, the growth of precarious employment and problematic recruitment strategies (Peetz, 1995 and Griffin and Svenson, 1996). Recent regulatory changes have made union recruitment even more difficult. In New Zealand the introduction of similar measures under the *Employment Contracts Act* was followed by a significant drop in union density and the collapse of some unions (Bray and Walsh, 1998).

Once again, in Australia these problems began under Labor and were compounded by the *Workplace Relations Act*. Prior to 1993 enterprise bargaining was firmly linked to unions although the option of single union site agreements introduced in 1988 increased the scope for unproductive forms of inter-union competition based on lowest common denominator conditions and employer preferences. While some unions, like the Australian Workers' Union (AWU) benefited from this, the struggle expended scarce union resources and arguably alienated some groups of workers, setting the scene for de-unionisation campaigns. The union-free enterprise bargaining stream of EFAs established in 1993 marked a dramatic break with 80 years of industrial relations policy. Ostensibly aimed at facilitating enterprise bargaining in the non-unionised sector, the ACTU soon complained it was being used by employers to de-unionise workplaces. EFAs were initially limited to small firms but unions were alarmed at the potential for the practice to spread. They also feared the legitimacy the change leant to growing attempts by some large employers, such as CRA, Optus and Toys R Us, to avoid union representation using a variety of devices including individual contracts (Quinlan, 1996a:14-18 and 1996b:98-99).

The *Workplace Relations Act* compounded these problems by making non-union agreements a central not residual option, curtailing union entry and recruitment rights, weakening the unfair dismissal power (an important recruitment issue), and inserting freedom of association provisions. Like the ill-fated Industrial Relations Bureau (IRB) of the 1970s, the OEA is charged with 'protecting' workers from being pressured to join unions. In May 1998 the Employment Advocate, Alan Rowe, instituted proceedings in the AIRC to have preference provisions removed from over 1,000 certified agreements (*Workforce* Issue 1164, 29

May 1998:4). By the beginning of the previous month the OEA had received 234 freedom of association complaints and had initiated two Federal Court actions (*Workforce* Issue 1162, 15 May 1998:6). The Office also used s170NC anti coercion provisions to remove a blacklist imposed by the NSW CFMEU construction division on crane companies refusing to sign an enterprise agreement (*Workforce* Issue 1171, 11 July 1998:3). These measures seem to be having some effect although the OEA, like the IRB before it, has not proved invulnerable. One of its first attempts to investigate freedom of association at a Sydney transport company led to protests not only from the Transport Workers Union but also the NSW Attorney General because the workplace fell under state jurisdiction (*Sydney Morning Herald*, 14 February 1998:7).

New anti-union powers have been used by a number of employers to deal with strategic and well-organised unions in key export industries. While the laws have not guaranteed success, they have tipped the balance more firmly in management's favour. This is illustrated by a number of recent disputes. Rio Tinto, for example, turned its attention to the powerful CFMEU, seeking to introduce individual contracts at the Hunter Valley No.1 mine and successfully opposing efforts to have the matter referred to arbitration. While a worker ballot decisively rejected AWAs the union is fighting a desperate defensive action. Similarly, in Queensland mining giant ARCO sacked the unionised workforce (CFMEU) at its Gordonstone mine and tried to replace them with workers hired under AWAs. Thus far the AIRC has blocked these attempts but the company has secured significant reductions in working conditions (*Workforce* Issue 1177, 28 August 1998:1). In April 1998 Patrick Stevedores, acting in collaboration with the National Farmers Federation (NFF), used a reshuffling of its corporate legal personalities to try and replace its unionised workforce (1400) with non-union workers supplied by the NFF. Large scale pickets, international boycotts and a complex web of legal action followed which ultimately saw the Maritime Union of Australia (MUA) retain unionisation of the docks but at the cost of accepting substantial job losses and changes to work practices. The dispute also marked the growing subordination of labour law to corporate law which is of itself tilting the battle more firmly against unions (Glasbeek, 1998). Notably, in these cases the federal government adopted an overtly partisan stance, egging on the employers involved,

arguing against AIRC intervention, and criticising companies who dared to advocate a more collaborative approach to unions.

The Rio Tinto, ARCO and maritime disputes represent extreme cases but less publicised attempts to bypass unions have occurred in retailing, railways, the public sector and footwear/clothing (*Workforce*, No.1139, 31 October 1997:1; 1141, 14 November 1997:1; 1145, 12 December 1997:2; and 1155, 6 March 1998:1). The new legislation also makes it much harder for unions to establish a presence in the workplaces. A study of bargaining in non-union firms (Campling, 1998) found employers were using the legislation to marginalise worker and union input in the determination of employment conditions.

The non-union stream of agreements is small but growing. In March 1998 only 3.5% of certified agreements were non-union with a further 5,000 workers under AWAs (*Workforce*, No.1153, 6 March 1998:2). In the year to July 1998 21,304 AWAs were approved, with 53% being public sector employees – a clear indication of the federal government's determination to promote this type of arrangement (*Workforce* Issue 1187, 6 November 1998:2). Further evidence of the government's determination to push the non-collective stream can be found in the respective budgets of the OEA and AIRC. The 1998-9 budget allocation of the OEA was $13.476 million and 100 staff to administer AWAs while the AIRC had a budget of $39.982 million and 290 staff administering awards and agreements covering 2.8 million workers (*Workforce* Issue 1170, 10 July 1998:4 and 1171, 17 July 1998:3).

There are other symptoms of the problems the *Workplace Relations Act* poses for unions. Threatened and actual proceedings against unions using the *Trade Practices Act* appear to be on the rise. Further, the first instances of fragmentation and beak-away unions have occurred, mostly in predictable areas. In February 1997 a staff association, formed amidst the introduction of VEAs in Queensland's Metway Bank during the 1980s, announced plans to register as an enterprise union covering the merged Suncorp-Metway-QIDC Bank. Six months later 300 workers at the ICI (now Orica) Botany plant resigned from the AWU and formed their own enterprise union, the ICI Botany Employees Association (*Sydney Morning Herald*, 27 September 1997; *Workforce* No.1143, 28 November 1997:1). In October 1997 a union was established to challenge

the construction division of the CFMEU, and in December the Ansett Pilots Association became the first of the new enterprise unions to be registered. (*Workforce*, Issue 1138, 24 October 1997:1 and.1144 5 December 1997:2). While resistance to these moves by existing unions has not been without effect (the battle to register the Orica union was still before the AIRC in November 1998: *Workforce* Issue 1189, 20 November 1998:4) it has consumed union resources that might have been spent elsewhere.

Inter-union competition also appears to be on the rise. For the federal government, one perverse outcome of this is that militant and better-organised unions may spread their influence. The CFMEU, for example, is posing a serious challenge to AWU representation of workers in metalliferous mining/smelting, civil construction, engineering and labour hire (*Workforce*, No.1115, 16 May 1997:1; 1154, 13 March 1998:1&3 1184, 16 October 1998:1&6; *Industrial Relations and Management Letter*, 14(8), September 1997). From a union perspective any gains from increased inter-union competition need to be balanced against the logistical limits of small enterprise unions and the scarce resources expended fighting over existing union members rather than attracting new union recruits (especially those in precarious forms of employment). Finally, the Act strengthens the ability of employers to resist union attempts to cover contractors and thereby address the threat posed by these types of arrangement (see a case involving the Australian Colliery Staff Association, *Workforce* Issue 1103, 14 February 1997).

The diminished role of unions raises important public policy issues, including their contribution to informed debate, their role in enforcing minimum employment standards, and the representation of otherwise powerless groups in the community. In the reform debate these issue have seldom been acknowledged let alone considered (for an exception see SERC, 1996). There are already cases demonstrating that basic questions need to be asked about due process and meaningful bargaining where contracts are individual, secret or non-union. These include instances where workers have only belatedly recognised problems posed by giving management an unfettered power to redeploy staff or alter shift arrangements (see for example, *Workforce* Issue 1161, 8 May 1998:3 and 1172, 24 July 1998:6). As non-unionised individuals, the great majority

of workers are in a weak bargaining position relative to their employer. In practice, what is termed bargaining may amount to little more than acceptance or rejection of a contract drawn up by the employer (often aided by a consultant). A recent survey found a strong association between non-union agreements and inferior work-time arrangements (longer hours, averaging of hours and single-rate overtime (*ADAM* No.15 1997:4)).

Employer intimidation of employees is also more likely. In a recent state case a supermarket manager was fined for intimidating two young employees into signing a Western Australian workplace agreement (*CCH Enterprise Bargaining Update Newsletter* No.18A, 30 June 1997). Reported cases represent the tip of an iceberg. Although the federal Act requires the Employment Advocate to assure there is employee consensus with AWAs, this is unlikely to offset worker fears of retribution. Problems of workers being pressured by short response times (of one day rather than the 14 days required under s170LK[8]) have also occurred with regard to non-union enterprise agreements monitored by the AIRC (see *Workforce* No.1152, 27 February 1998:3 and 1157, 3 April 1998:3). Unions like the Transport Workers' Union have sought secret IRC-run ballots for all non-union EAs in an effort to counter intimidation (*Workforce* No.1139, 31 October 1997:1). Those working as cleaners, shop assistants or nurses/nursing aides in private nursing homes are most likely to find themselves shifted onto individual or non-union contracts. This occurred in New Zealand under the *Employment Contracts Act* where Hammond and Harbridge (1995) found a growing gender disparity in earnings, with men having far more success retaining unions and multi-employer collective agreements.

Enforcement is another critical issue. It is much easier for unions than individual workers to enforce legal entitlements. Casual/part-time workers, outworkers, teleworkers, hairdressers and women in small business were already vulnerable under the award system, especially given the unenthusiastic enforcement policies of federal governments over the past decade or more (Bennett, 1994a; Mayhew and Quinlan, 1998). A recent survey of 100 clothing outworkers found that not one received even half the minimum award rate to which they were entitled (Mayhew and Quinlan, 1998). In a number of industries, such as

building, clothing and road transport, unions (rather than government inspectors) have done the bulk of enforcement, utilising their relatively unfettered entry rights and the public nature of awards. Restrictions on union entry, and a myriad of employment agreements not open to public scrutiny, are liable to increase evasion of minimum employment standards. Workers making complaints risk dismissal. Others may be dismissed to remove evidence of illegal employment practices if a union does get access to an employer's time and wage records (See for example AIRC Print Q6782, 23 September 1998). It is worth noting that workers dismissed for this and other reasons have little real prospect of reinstatement. Despite ongoing government criticism of the unfair dismissal provisions, it is revealing that the AIRC ordered reinstatement in only 17 of 774 termination cases heard in 1997-8 (compensation was awarded in 403 cases, no order was made in 43, and 311 were dismissed: AIRC Annual Report cited in *Workforce* Issue 1186, 30 October 1998:2).

With regard to recourse to arbitration, the *Workplace Relations Act* restricted the role of the AIRC in quite fundamental ways. The Act severely restricted the matters for determination in awards, extended the grounds upon which the AIRC could refrain from hearing a case, and made it clear arbitral powers were to be exercised as a last resort. The OEA exercised powers previously handled by the Commission. Independent contractors lost their right to have their contracts reviewed by the AIRC and the categories of casual/probationary workers excluded from taking an action for unfair dismissal was extended. The implications of these changes are only starting to emerge. One effect has been to curtail the Commission's capacity to intervene in major disputes. Reduced access to arbitration and awards is also likely to undermine the employment conditions of workers lacking strategic bargaining power. For groups like clothing outworkers (see Mayhew and Quinlan, 1998) awards represent the only viable form of regulation, but one dependant on union involvement (itself inhibited by recent legislation) and inspectoral activity (wound back in the last years of Labor and unlikely to be revived under the Coalition).

Gender Equity, Work Intensification and Occupational Health and Safety

There is growing evidence that changes to industrial relations laws are affecting gender equity, hours/work effort and occupational health and safety. Again, these trends emerged under Labor but there is reason to believe they will be reinforced under the *Workplace Relations Act.*

More decentralised systems devolve to a law of the strong and the weak. Workers lacking strategic bargaining power – including most women, those in small business, non Anglophone migrants and the young – will lose out while powerfully organised workers may do better (at least in the short term). In relation to gender there is clear evidence that the gender wage gap has been narrowest in countries with centralised industrial relations systems like Sweden (and until recently Australia) and widest in countries with decentralised systems such as Japan and the USA (Whitehouse, 1990). In New Zealand decentralisation brought with it a growing gender wage gap (Hammond and Harbidge, 1995). Similarly, the shift away from the arbitration/award system in Australia reversed the previously narrowing gender wage gap. Annual reviews of enterprise bargaining undertaken by the federal Department of Industrial Relations (1995:242-3 and 1996a:157) in 1994-5 revealed that the average earnings of male workers was growing significantly faster than the corresponding figure for women. More recent surveys confirm the trend is continuing (Department of Workplace Relations, 1998). Unless reversed, the result will be a significant widening of the gender pay gap.

The issue is not simply one of equal pay. Bennett (1994b) cites examples where change to penalty rates, working hours, shift arrangements and other conditions in enterprise agreements adversely affected women (see also Charlesworth, 1997). A survey of state and federal enterprise agreements in Queensland by Boreham *et al* (1996) found that, despite Labor government rhetoric, enterprise bargaining did not contribute to gender equity via childcare, EEO or special leave provisions. Other surveys have reached similar conclusions (see *ADAM* No.16 1998:4,30-8 and Strachan and Burgess, 1998:336-43), supporting the contention that the spread of enterprise bargaining will actually reverse gains made under the abritral framework. A federal government survey of 11000

employees working under post-1993 enterprise agreements found that workers reporting a change in conditions were far more likely to report adverse (rather than positive) shifts in terms of promotion prospects, job security, family/work balances and job satisfaction (Department of Industrial Relations, 1995:376). Similarly, a survey the following year found that over 40% of male and female employees were less satisfied with the work/family balance as a result of work intensification - three times the number who expressed a positive outcome (the residual was unchanged. Department of Industrial Relations, 1996a:325). Concerns that circumstances would worsen under the *Workplace Relations Act* were reinforced by evidence presented to the 1996 Senate inquiry (see also Charlesworth, 1997 and Strachan and Burgess, 1998).

Aside from differential bargaining strength, there are procedural features of enterprise bargaining which disadvantage women and other vulnerable groups of workers. Under Labor the ACTU-sponsored certified agreements procedure lacked the public scrutiny or AIRC control that moderated the behaviour of dominant interests and thereby facilitated more equitable outcomes (Bennett, 1994b:197). Bennett (1994b:205) argues that, where agreements are secret, discrimination and inequities are liable to flourish unchecked. As already noted, the *Workplace Relations Act* will also exacerbate enforcement problems and this will impact most on already vulnerable groups of young, female or immigrants workers in hospitality, retailing, cleaning and home-based garment making.

The new industrial relations framework is not gender-neutral. Reforms initiated by Labor created a more inequitable and gender-biased regime that has been considerably bolstered under the *Workplace Relations Act.* Conservative politicians and employer organisations have been silent on the issue and until recently their silence was aided by an equally mute response from the ACTU leadership. The ACTU and ALP took a strong gender equity stand during the 1996 Senate inquiry and have since targeted their attention to the manifest failings of the *Workplace Relations Act.* While understandable, in a policy sense the labour movement needs to acknowledge that the rot began after 1988 when a cabal of senior union officials and ALP politicians promoted policies that only suited powerful and generally male-dominated unions.

Growing gender imbalances are not the only outcome of recent changes to Australian labour law. Mention has already been made of the association between enterprise bargaining and work intensification. Rather than being a vehicle for new productive forms of multi-skilled team-based work, enterprise bargaining has entailed increasing the span of ordinary hours (e.g. 12 hours shifts), removing/reducing breaks or call-back times, outsourcing/casualisation and the introduction of incentive payment systems (ACIRRT, 1998:101-25). The second AWIRS survey (Moorehead *et al*, 1997) identified a significant increase in average (full-time) weekly working hours combined with higher levels of unpaid overtime and moonlighting. A significant proportion of workers also reported working harder (58%) and experiencing increased stress (49%). (See AWIRS 95 data cited in ACIRRT, 1998:106).

In addition to their impact on work/family balances there is evidence that these changes effect occupational health and safety (OHS). A study by Heiler (1995) found enterprise bargaining led to a worsening of OHS standards, including the introduction of hazardous work and shift arrangements (Heiler, 1995). There is mounting evidence on the adverse OHS effects of outsourcing and casualisation (Mayhew and Quinlan, 1997,1998 and Quinlan, 1999). The commodification of risk via hazard allowances/danger money has also re-emerged after AIRC attempts to discourage this practice in the decade after 1975. While many enterprise agreements refer to OHS (Department of Industrial Relations, 1996b:7), these provisions generally failed to address key health and safety concerns, including the use of contractors, workloads and the need to re-calibrate hazardous substance exposure limits when adopting longer shifts. OHS issues have been largely overlooked in the bargaining process and those most at risk, including non-Anglophone migrants and part-time workers, are unlikely to be consulted about workplace change (Department of Industrial Relations, 1996a:280-82). Again, these problems emerged under Labor but have deteriorated under the *Workplace Relations Act*. Awards can no longer be used to regulate work practices (like casual/full-time ratios, staffing level requirements and shift breaks) with an OHS dimension. Diminished union input will also make it more difficult for workers to raise or resolve OHS complaints.

Conclusion

The legislative and policy initiatives of the Coalition government led by Prime Minister John Howard have the potential to mark a fundamental shift in Australian industrial relations. After its re-election in October 1998, the federal government mooted further changes to reinforce those made under the *Workplace Relations Act,* 1996. These include legislation preserving junior wage rates, renewed efforts to exempt small business from unfair dismissal claims (and further reducing access by extending the probationary period for new employees), tighter entry requirements for unions and new limits on industrial action (via cooling off periods and secret ballots). Following its partial victory over the MUA, the federal government has turned its attention to the meat industry and the tally system in particular (*Workforce* Issue 1185, 23 October 1998:3 and Issue 1187, 6 November 1998:1). Further victories against other powerful unions such as the CFMEU would have long-term ramifications for the union movement as a whole.

This shift originated partly in a group committed to this agenda within the Liberal party (especially Howard); pressure from influential business groups (notably the BCA while the MTIA representing another fragment of capital remained less enthusiastic); free-market think-tanks; as well as legislative initiatives in the USA, UK and New Zealand. More controversially perhaps, the foundations for the Howard reforms were also laid during the last half of the previous Labor government with the active involvement of senior ACTU officials, notably Bill Kelty. It is now clear that Labor's amendments to the arbitration system widened labour market inequalities and were, from a labour movement perspective, a strategic error that must now be papered over to avoid embarrassing senior ACTU officials or fracturing the union movement.

Under both Labor and the Coalition the reform push relied heavily on the benefits in terms of enhanced productivity and labour market flexibility, benefits more apparent in the rhetoric than the evidence. The major addition to reform rhetoric under the Howard government have been references to individual choice and a down-playing of collective rights so important to Australia's model of arbitration. It is, in essence, an ideological agenda where the language of individual economic

exchanges overrides any recognition of fundamental power imbalances in the employment relationship. The *Workplace Relations Act*, by restricting the scope for arbitral tribunal or union involvement in determining employment conditions, vests more control with management. Prime Minister John Howard is also well aware that a weakened union movement will have important consequences for the ALP.

Recent reforms to Australian industrial relations laws are beginning to have significant socio-economic impacts on Australian society. Decentralisation of industrial relations under Labor had adverse effects on already vulnerable groups of workers, including most women and immigrants. Though evidence is still fragmentary, it seems clear that changes under the Coalition are accentuating these trends by inhibiting union-based bargaining, pushing more workers into individual or non-union bargaining streams, reducing public scrutiny of outcomes and making enforcement more difficult. These effects will flow on to even well-organised and strategically placed unions. This occurred in the USA, and recent maritime and mining disputes are harbingers of a similar trend. Nevertheless, despite suggestions to the contrary, this regime is neither inevitable nor as yet sufficiently entrenched to prevent a reversion to the arbitration model which, with all its faults, has arguably served Australian society far better.

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