Undermining the Right to Collective Bargaining

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The *Workplace Relations Act* broke from 100 years of tradition by introducing scope for individual agreements in the industrial relations system. The Coalition claims its IR policies enhance the choices and flexibility available in the workplace. The reality is something else: the systematic undermining of collective bargaining.

The right for employees to choose to bargain collectively, and requiring employers to recognise this choice, is legally protected in all other OECD nations – even in the Liberal's pin-up nation, the United States. The effect of the WRA has been to allow employers to evade and undermine bargaining collectively and force employees onto individual agreements – and the new reforms will significantly worsen the situation. In practice, the effect of the Coalition's policies on employees is less choice, less voice on workplace issues and worse outcomes.

1. Why Collective Bargaining Matters

Collective bargaining is viewed as a fundamental human right under international law by the United Nations and the International Labour Organisation (a tripartite body which might be described as the United Nations of labour relations). The right for employees to join a union and to have their wages and conditions collectively negotiated, if they so choose, holds a special place in the ILO's standards (see Haworth and Hughes 1997). Convention 87 *Freedom of Association and Protection of the Right to Organise* (1948) sets out workers' fundamental right to form and join independent union organisations and argues that it is a responsibility of states to facilitate this. Convention 98 on the *Right to Organise and Collective Bargaining* (1949) sets out the rights of employees to collective bargaining and encourages governments to establish mechanisms to allow for the process and to ensure that workers are protected against anti-union employer activities. Both of these conventions were ratified by the Australian government in 1973 however thirty two years later, the Howard government's legislation, policies and practices have rendered the rights that the ILO Conventions confer meaningless.

Collective bargaining arises from the obvious and enduring truth – which no amount of spin can obscure for long – that most employees, most of the time, confront a power imbalance at work in dealing with their employer. The exact way in which this imbalance plays out varies from time to time, place to place, occupation to occupation. But exist it necessarily does. Employees can sometimes sort out issues individually with their employers but overall they face the imbalance of bargaining power at all stages of their working lives: when they seek employment, start a job, establish conditions, when there are changes at work, when they have a grievance with the way their supervisors treat them, when they are retrenched. It is precisely for these reasons that the ILO has sought to ensure that employees can have access to union representation and engage in meaningful collective bargaining without fear of retribution from government or employers.

Much the same as the ILO's position, our defence of the merits of collective bargaining is not simply a matter of ideology. Collective bargaining does matter. It does make a real difference to the experience of work for employees and so is a necessary precondition for social justice. There is ample evidence from scores of countries over many decades that employees do better collectively than individually (Compa 2004; Oxenbridge 1999; Peetz 2002; Fantasia and Voss 2004). In Australia, today, studies clearly illustrate:

- **Collective bargaining delivers better wages increases** than individual agreements for ordinary workers. Recent ABS data suggest that non-managerial workers on registered individual contracts (largely AWAs) receive an average of 2% less per hour than workers on registered collective agreements. For women the wage effect is even greater. Women covered by collective agreements have an hourly wage rate 11% above women on registered individual contracts (See Peetz 2005).

- **AWAs offer a one-sided flexibility**. In a number of industries AWA's have used to give employers 'flexibility' in scheduling employees by removing loadings and penalties leaving employees with less saying in their working hours and lower pay (van Barneveld 2004; Waring and Burgess 2005).

- **Ordinary workers on AWA's report less satisfaction** than ordinary workers on other types of agreements with a range of workplace issues. They are less satisfied with their pay and working conditions than workers covered by other agreements. Ordinary AWA employees report having less control over their working hours, they find the intensity of work more difficult to deal with and they report greater

difficulties in balancing work and family commitments than do other workers (Peetz 2004)

It is clear that collective bargaining delivers better wages, conditions and 'say' in the workplace than do individual agreements. The available evidence suggests that the gains from AWAs have been of greater benefit to employers than employees and have been used specifically to reduce the ability of trade unions to effectively regulate work and to represent employees. In short, it is precisely because collective bargaining delivers practical gains that the Commonwealth government wants to undermine it. It is the very virulence of the attack on collective bargaining that tells us that this is so.

2. How Australia Compares – or Why Australia Does Not Meet International Standards on Collective Bargaining

The Coalition and sympathetic media commentators sometimes claim that collective bargaining is 'outdated' and that reforms to encourage individual contracts are necessary for our economy to compete internationally.

The reality is quite the opposite. In other nations with decentralised bargaining systems like ours - the United States, United Kingdom, Ireland and Canada - there is a ballot process to allow employees a genuine choice as to whether they wish to be represented by a union. If the ballot verdict is affirmative, the employer is required by law to respect their wishes and bargain with their chosen union representative. A legal guarantee of an employee's right to collective bargaining where that is their preference is standard practice internationally.

In Australia, by contrast, the *Workplace Relations Act* is based on the principle that individual and collective agreements should be 'treated equally' with no preference for either. The *Workplace Relations Act* overturned a hundred years of labour law on its head, which said the law should encourage collective bargaining to modify the imbalance in bargaining power to give employees a voice in the workplace. Collective agreements were retained but the Act eased the way for employers to introduce individual Australian Workplace Agreements (AWAs).

This may sound fair but in practice this means that unscrupulous employers can bully, frustrate and evade the preference of their employees for collective representation. Take for instance the case of gaming employees at a Gold Coast Casino. They spent 6 years trying to get their employer to negotiate an agreement. Their take-home income actually declined as minimum wage increases were less than the loss of conditions under 'award simplification'.

The employees did not go on strike but started wearing badges in protest. The response of Casino management was to escort the gaming employees from the workplace, many of whom were long-serving employees, and to lock them out without pay. In the absence of legal processes to direct unreasonable employers to respect the wishes of their employees to bargain collectively, there is little that employees without bargaining power, like these gaming workers, can do in these circumstances.

At the time they were introduced, the Liberal-National Party responded to extensive criticisms of the fairness of AWAs by claiming they had instituted statutory protections which would prevent managers unfairly pressuring employees into signing individual contracts. The Hon. Peter Reith, in the Second Reading Speech accompanying the bill, said:

> The government accepts that greater emphasis on flexibility and self-regulation under AWAs must be accompanied by appropriate employee protections and sanctions against those who abuse the flexibility we are providing ... the use of duress to obtain an AWA will, where complaint is upheld, lead to its invalidation (Reith 1996).

Simultaneously, however, they legislated to create loopholes in the protection against duress.

The first loophole was allowing take-it-or-leave-it AWA's. Employers can legally make signing an AWA a condition of employment when they start a job. Sign the AWA, agree to this wage and conditions and sign away any right to collective bargaining - or you don't get the job. This practice is well established in the Australian Public Service (APS) and there is no better illustration of this than the treatment of ex-Commonwealth Employment Service employees upon the establishment of Employment National after the election of the Howard government in 1996. Here workers were compelled to sign an AWA as a condition of employment (Ranald 2000). What's more, if the employee changes jobs within the organisation, the employer can also make continued employment contingent on signing an AWA. Telstra, for instance, denied employees transfers or promotions if they were not willing to sign an AWA (Barton 2002).

However, perhaps the most obvious breach of their promise that AWAs would be voluntary was legislating for 'AWA Lockouts'. Other OECD nations either prohibit lockouts or permit lockouts only under exceptional circumstances where an employers is considered to suffer from an imbalance in bargaining power. In no other OECD nation are employers allowed to

lockout their employees to coerce them into signing an individual agreement and undermine their preference for collective bargaining.

AWAs are meant to be voluntary agreements between employers and individual employees but a series of long lockouts, some running for as long as 6-9 months, have occurred in regional areas to force employees to sign AWAs. In another case, one individual worker was locked out for 2 ½ months to try and force him to sign an AWA.

The target of lockouts are usually blue-collar production workers who often have limited savings and few alternative employment options. Employees who are locked out cannot claim unemployment benefits. A Federal Court Judge described the financial devastation, personal and psychological impacts of a long-running lockout following the resumption of work. He noted they were in 'precarious financial circumstances' leading to 'mounting unpaid bills' and 'struggling to survive financially'. They were 'experiencing stress' because of being paid 'substantially less' than other employees and their financial circumstances leading some into 'poor mental health as a consequence of the situation in which they have been placed' (Federal Court of Australia 2000). Unions have supplied testimony in lockout cases of workers having to sell their house, marriage breakdowns, children unable to get needed medications and financial ruin. Journalists reported workers in the midst of a lockout 'hunting rabbits' in 'a scene reminiscent of the Great Depression' (Bachelard 2001).[1] The consequences for the individuals and the families who have to endure protracted lockouts can be devastating.

These cases are rare. But so long as employers are free to lockout their employees for months and months to coerce them into signing individual agreements, ultimately there is no right to collective bargaining in Australia.

Some commentators might point to freedom of association provisions in the *Workplace Relations Act*. Part XA of the Act says individuals are free to associate or to not associate. No employee cannot be 'victimised, injured, dismissed or discriminated' on the basis of union membership or non-membership and an employer cannot induce an employee to leave a union 'by threats or promises or otherwise.'

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[1] Bachelard (2001) further reported: "In a scene reminiscent of the Great Depression, one worker, Billy Anderson, resorted to hunting rabbits and trying to sell them to supplement his meagre income ... he also dug up thistles, or shoveled horse and cow dung on farms to supplement it. Even so, he can barely support his pensioner parents, cannot pay his rates bill and is on the verge of losing his house".

At first sight this seems to constitute an effective protection of an employee's right to associate in line with international standards. And the resolution of the highest profile fight over unionism in the Howard years thus far – the waterfront dispute of 1998 – seemed to confirm it. The Federal Court found that there was an arguable case that Patrick Stevedores had conspired to thwart the freedom of association clauses in the Act.

However, since then, the hope which this decision inspired among unionists has proved as groundless as employer and government fears it provoked (Dabscheck 2001, Wiseman 1998). The judicial authorities have developed narrow, individualistic constructions of the Act so as to almost empty the provisions of effective meaning (Coulthard 2001; Noakes & Cardell-Rae 2001; Quinn 2004). These decisions are quite at odds with a common sense reading of the clauses.

Nowhere was this clearer than in the dispute which followed the offer of contracts by BHP to its iron ore workers in Western Australia's Pilbara.

The unions argued that the company was 'injuring' workers in their employment because they were members of a union and was offering 'inducements' to resign from a union. The Federal Court ruled the position of its employees was not prejudiced on the basis of union membership because they were not individually 'singled out' (the offer was to all employees), those who did not sign remained on the same wages and conditions and there was no inducement to leave the union because individual employees could still remain a member of a union after signing an individual agreement (Federal Court of Australia 2001).

In this case, the Federal Court (2001) separated membership of a union from the purpose and activities of a union. Central to these activities of course is collective bargaining. The response of the ACTU was that this was like saying you could belong to golf club – but not use the course (Ellem 2004).

The freedom of association clauses remain in the Act – but they have been rendered almost meaningless in the absence of obligations on employers to recognise collective bargaining rights.

Since the Federal Court's decision, the full impact of individualisation has become quite clear right across the Pilbara's iron ore sites. Initially, the weapon of choice in this assault on collective bargaining was the Western Australian version of the AWA, the Workplace Agreement, or woppa as it became known. Like most such contracts, the woppas gave management direct control over work and removed effective collective representation from

the workplace. At BHP it was no secret that this was the intention. Company executives had told the Federal Court in 2000 that if they 'could exclude third parties, ie the unions, there was the prospect of getting better flexibilities and therefore greater productivity'.

Rio Tinto, the other company mining the Pilbara, 'offered' its workers AWAs after the State Labor Government repealed the woppa legislation. Offering is one thing; acceptance another. At first employees were very wary and indeed had voted down a non-union collective agreement. The company was in a strong position. New starts of course had no choice about this, while existing employees were ceaselessly 'consulted' and 'informed' about the gains which AWAs would bring their way. The company added to the pressure and the uncertainty that surrounds these complex matters of work regulation by insisting that employees had to sign up right away. For their part, activists trying to re-unionise Rio had their own plan – and that was to seek to bargain collectively with the resource giant while arguing there was no reason to sign up so quickly. Although there are, of course, no requirements to bargain in good faith under the Workplace Relations Act, there are such provisions under the Western Australian legislation so the unions sought to have a state agreement or award made. Such escapes from enforced individual arrangements will no longer be possible if the Commonwealth takes over the States' powers. In this case the unions were thwarted by strategic uncertainties on their own side but the underlying problem, as it si for so many employees, was the pressure the company was able to mount by arguing that employees had to sign AWAs to be part of the 'team' – and, critically, that they had to sign them promptly.

Finally, it must also be remembered, and the Pilbara story makes this very clear, that making an AWA a condition of employment puts ongoing and relentless pressure on unions as their membership is likely to dwindle, regardless of how well they are doing their job, as labour turns over and new starts come in. It is the 'Chinese water torture' of industrial relations.

3. The Coalition's 2005 'Reforms'

If the past decade has seen a dilution in the ability of Australian workers to bargain collectively, the coalition's recently announced industrial relations package will only make matter worse.

Firstly, the government is using funding to coerce employers and state governments into taking up AWAs. In higher education, the government has made $280 million in future funding for the already cash-starved institutions

contingent upon meeting the so called Higher Education Workplace Relations Requirements. In order to access Commonwealth Grants Scheme funding, universities must offer, and actively promote, AWAs to all current and future staff as well as put in place a number of other measures which would undermine union presence on campuses across the country. Despite the fact that the package is actively opposed by the AVCC (Aitkin 2005), the government has signalled that it will push ahead with the changes. This fits neatly with the activist approach of the government as it has intervened in well-organised industries to force employers to break union bargaining and to undermine union rights and effectiveness (see Briggs and Buchanan 2005, Cooper 2002, 2003, 2004; Ellem 1999, Howe 2005). It is also threatening to link funding for roads and water funding for the states to the take-up of its 'reforms' for the building industry.

Secondly, awards will no longer be used as a benchmark for AWAs. AWA's will only have to meet five legislative minimum standards - the minimum wage, some leave entitlements (personal, parental, annual) and maximum ordinary working hours (how many is unspecified at this stage). Common award conditions which could now be stripped out include overtime rates, shift penalties, casual loadings, leave loadings, on-call allowances, payments for dangerous work, redundancy pay, long service leave, study leave and lunch/tea breaks. The gains for employers to try and move their employees off awards and collective agreements onto AWAs will be enormous. Furthermore, once some employers get a competitive advantage, others will be under even greater pressure to follow suit to survive in the marketplace.

Thirdly, bargaining power will be tilted towards employers to assist them in moving their employees onto AWAs. Further restrictions will be placed on unions taking industrial action whilst lockouts are explicitly exempt from these changes. Unions, for instance, will have to undertake a bureaucratic secret ballot process which could take months to complete whilst employers will remain free to lockout their employees with three-days notice, no questions asked. Placing constraints on unions whilst still allowing employers to deploy AWA lockouts obviously tilts bargaining power.

Fourthly, the process for making an AWA will be greatly simplified. Previously they were scrutinised by the OEA to ensure they met the no-disadvantage test – that is, workers were not overall worse off than they would be under the award. As the award safety net is no longer the benchmark, there is no scrutiny as the agreement merely has to have the five minimum standards.

The effect of these reforms will be to cajole, empower and facilitate employers into moving their employees onto individual agreements irrespective of whether this is the preference of their employees.

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