SUBMISSION TO SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES COMMITTEE INQUIRY INTO WORKPLACE AGREEMENTS

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On 26 May 2005, the Prime Minister announced to Parliament a package of industrial relations proposals the federal government would seek to enact after gaining control of the Senate in July. In addition, a number of measures rejected by the Senate over the preceding six years were to be reintroduced and enacted. Drawing on the limited information that is available on the legislative package, and the relevant research that exists, this submission seeks to explain, summarise and analyse the package and the consequences of individual contracting, particularly through Australian Workplace Agreements. It will consider: the background to the legislation, employee coverage by type of agreement, the impact of individual contracts and the abolition of the "no disadvantage" test on workers' pay, the impact of individual contracting on productivity, and the implications of the proposed federal government changes.

BACKGROUND

For most of the twentieth century Australia had an industrial relations system that was almost unique in the industrialised world. Whereas most developed nations had industrial relations systems that could be characterised as being based on a 'bargaining model' of industrial relations, in which industrial relations outcomes were bargained between the parties subject to various procedural requirements and minimum standards set by state institutions, Australia and New Zealand operated an 'arbitral model' of industrial relations in which arbitral institutions of the state played a central role in determining outcomes where the parties were unable to determine them themselves or where the outcomes determined by the parties would be against the public interest.

During the 1990s governments in both Australia and New Zealand introduced changes which had the intention and effect of moving those countries towards the bargaining models that operate elsewhere. Thus the role of arbitral institutions was diminished (or, as in the case of New Zealand and Victoria, abolished altogether) and greater emphasis placed on the parties handling their own industrial relations and making arrangements that best suit their own interests. The presumption was that reduced interference by the state would improve productivity and through it national welfare.

This, however, has not been the only element in industrial relations reform. Along with the shift from the arbitral model to the bargaining model, public policy in some cases has also been aimed at shifting the balance of power in industrial relations between the interests of employees and the interests of employers, through individualisation of employment relations. The legislative agenda of individualisation commenced across the Tasman, with New Zealand's *Employment Contracts Act 1991* (ECA). The ECA abolished industrial awards, ended official recognition of unions, prohibited compulsory unionism, and installed a system for the creation and enforcement of "individual contracts" and "collective contracts". It did not take long for the effects to be felt in Australia. Six weeks after being elected in 1992, the Kennett Government in Victoria passed an Employee Relations Act which effectively abolished awards for many workers and replaced them with individual contracts. In Western Australia, the new Court Liberal government in 1993 did not go quite as far, but permitted registered "Work Place Agreements" (WPAs) which could be "collective" or individual. These only had to satisfy a small number of minimum standards,

including a minimum wage that was well below the lowest award rate. Liberal governments elected in other states also enabled registered non-union agreements inconsistent with awards.

The federal coalition Opposition parties amended their industrial relations policies for the 1996 election, promising to maintain awards and test registered individual contracts, to be known as Australian Workplace Agreements (AWAs) against more generous standards. They won the election and, following some minor amendments agreed with the Australian Democrats in the Senate, secured passage of the *Workplace Relations Act 1996* (WR Act). It was law in the federal jurisdiction – by far the largest single jurisdiction in Australia – from 1 January 1997.

The WR Act enabled the introduction of AWAs subject to the 'no disadvantage' test, restricted awards to twenty allowable matters, narrowed the circumstances in which industrial action was legal (including by prohibiting secondary boycotts), introduced stern sanctions for unions breaching restrictions on industrial action (but not on corporations breaching agreements), abolished the limited "good faith" bargaining provisions that existed, prohibited compulsory unionism and union preference, and encouraged non-union certified agreements (referred to as "section 170LK agreements") by restricting potential union involvement in certification hearings.

At the state level in Australia, and in New Zealand, the systems of individual contracting gradually unwound after 1997, as conservative governments were defeated and replaced by Labo(u)r governments that reversed or rewrote provisions for non-union agreements. Before being defeated, the conservative Victorian government handed the remnants of its private sector industrial relations system to the Federal government in 1996, and a specific section of the WR Act (Schedule 1A) was created to accommodate those employees with a set of minimum standards and rights that were, until 2005, much weaker than those applying to other employees in the federal jurisdiction.

COVERAGE

Despite the WR Act, the growth of formalised individual contracting has been slow. Registered individual contracts have grown from 1.8 per cent of employees in 2000 to 2.0 per cent in 2002 (about 157,000 workers) and 2.4 per cent in 2004 (195,000 workers).[1] The latter is equivalent to about 38,000 more people on registered individual contracts over two years (Table 1). The number of people on AWAs grew more rapidly – it doubled from 1.2 per cent in 2002 to 2.4 per cent in 2004. This overstated underlying growth in AWAs, because more than half of it was due simply to the demise of the state agreements, mostly Western Australian WPAs. Most of the workers formerly covered by WPAs went onto AWAs,[2] with some going onto section 170LK non-union federal agreements and some others having contracts that would be unable to be registered in any jurisdiction.

Back in 1998 the Employment Advocate predicted that AWAs would cover six to seven per cent of the workforce.[3] Clearly the growth of AWA coverage has been below expectations, and it is possible that this is a factor in attempts to force some employers (such as universities) to offer AWAs to employees on threat of financial penalty if they do not comply. It is likely that AWA coverage is now above the mere 2.4 per cent indicated for May 2004, as data from the Office of the Employment Advocate (OEA) indicate a higher rate of lodgements in the period since then. However, it is important not to misinterpret cumulative OEA lodgement data as providing any measurement of actual coverage, as there is substantial potential for double and triple counting of AWA employees who leave and are replaced by new AWA employees or who sign replacement AWAs. Note that in the past year the most rapid growth in AWA coverage has been in the hospitality sector with its high labour turnover, and the highly casualised accommodation, cafes and restaurants and retail industries account for over 38 per cent of the growth in AWA lodgements between 2003-04 and 2004-05.[4] The OEA estimate that 5.4 per cent of the Australian population was "covered" by AWAs in June 2005[5] is implausible, given that only 2.4 per cent were covered in May 2004, only 217,000 AWAs (equivalent to about 2.7 per cent of employees) were approved in 2004-05, and many of the workers covered by AWAs in May 2004 (and some who signed AWAs since then) would have either left their jobs or been covered by replacement AWAs. Although over 240,000 new AWAs were signed in 2002-03 and 2003-04, the number of employees covered by AWAs grew by less than 101,000 between May 2002 and May 2004.

ABS data also show that the use of unregistered individual contracts has declined while that of collective agreements has grown – from 3.0 million workers in 2002 to 3.3 million in 2004 – despite roughly stable trend union membership and declining union density (Peetz 2005). This growth of 300,000 in collective agreements over two years is several times the numerical growth in use of registered individual contracts.

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[1] ABS Cat No 6306.0
[2] Todd & Eveline 2004:65
[3] IRM 1998
[4] Calculated from OEAc 2005:8 (Table 2).
[5] OEA 2005c:13-14.

Table 1 Change in coverage by selected types of instrument, Australia, 2002-2004

	proportion of employees (%)			approximate no of employees		
	2002	2004	change	2002	2004	change
Collective agreements	38.3	40.9	+ 2.6	3,012,000	3,320,000	+ 308,000
- registered collective agreements	36.1	38.3	+ 2.2	2,839,000	3,108,000	+ 269,000
o union	33.8	35.6	+ 1.8	2,658,000	2,886,000	+ 228,000
o non-union (s170KL)	2.3	2.7	+ 0.4	181,000	223,000	+ 42,000
Individual arrangements	41.3	39.1	- 2.2	3,248,000	3,170,000	- 78,000
- registered individual contracts	2	2.4	+ 0.4	157,000	195,000	+ 38,000
o AWAs	1.2	2.4	+ 1.2	94,000	< 195,000	+<101,000
o state-registered individual contracts	0.8	<0.05	- 0.8	63,000	< 4,000	- >59,000
Award-only	20.5	20	- 0.5	1,612,000	1,623,000	+ 11,000
Total	100	100	0	7,865,000	8,117,000	+ 252,000

Sources: ABS Cat Nos 6306.0, 6310.0 and 6202.0, DEWR (2004). Notes: Coverage proportions for most instruments from ABS 6306.0. Coverage estimates of s170LK agreements calculated from DEWR (2004), inflated for expired agreements by ratio of total federal agreement coverage in ABS 6306.0 and DEWR (2004). Employee estimates calculated as a proportion of estimated total employment. Total number of employees estimated from ABS 6310.0 for August, extrapolated to May by employment growth estimates in ABS 6202.0. 'Union' collective agreements comprise federal excluding s170LK collective agreements, plus state collective agreements. Note that in 2002 the ABS did not differentiate between owner-managers of unincorporated enterprises and other unregistered individual arrangements.

THE IMPACT ON WORKERS OF AUSTRALIAN WORKPLACE AGREEMENTS AND THE ABOLITION OF THE 'NO DISADVANTAGE' TEST

A number of claims have been made about the earnings of people on individual contracts and the impact that individual contracts have on workers' pay and conditions. For example, on several occasions last year the Minister for Employment and Workplace Relations said:

> Workers on AWAs **earn on average 29 per cent more** than their colleagues on collective agreements. Female workers on AWAs **earn 32 per cent more**[6]

Recent government advertising claims:

> Workers on AWAs currently earn 13% more than workers on certified agreements, and 100% more than workers on award rates.[7]

This section analyses the data on earnings and conditions of workers on individual contracts, particularly by comparison to workers on collective agreements, to assess the current relevance of such statements and the consequent implications for workers of the abolition of the 'no disadvantage' test.

Individual contracting regimes

There have been several different regimes of individual contracting – including in New Zealand, Victoria, Western Australia, Queensland and the Australian federal jurisdiction – with different rules applying to them. There is a common theme throughout individual contracting regimes however, and it is this: where the law permits, individual contracts affect pay by changing the ways in which workers are paid for the time they work. This is often referred to as increasing the "flexibility of working hours". That is, they focus on reducing or abolishing overtime pay for working more than 38 hours a week, increasing the standard hours in a week from 38 to 40 or higher, reducing or abolishing penalty rates for working at nights or on weekends or reducing the range of hours when penalty rates may apply, or even shifting from wages to "annualised salaries" – code for abolishing hourly wages, overtime and penalty rates.[8] In some regimes, including AWAs, workers have been meant to receive an increase in base rates of pay to offset the loss of income from these changes to how hours are paid. This section focuses on the evidence regarding Australian Workplace Agreements (AWAs), though the experiences are similar under earlier individual contracting regimes in Queensland,[9] Victoria[10] and Western Australia,[11] and under New Zealand's former Employment Contracts Act 1991.[12]

[6] eg Andrews 2004a, 2004b, 2004c, 2004d; ABC 2004. Emphasis in original.
[7] Australian Government 2005
[8] eg Hearn Mackinnon 1996:289
[9] DETIR 1998 cited in Workforce, 28 August 1998; ACIRRT 2000
[10] Watson 2001:143-4
[11] CWA 1996, 1999

We will mention just one of these jurisdictions, because of its relevance to later discussion. In Western Australia, the Commissioner of Workplace Agreements, whose job it was to register these agreements, published data on registered workplace agreements (WPAs), based on two official analyses of agreements published in 1996 and 1999. In 1994-96 some five per cent of employees had agreements that provided for an ordinary rate of pay that was below the award rate. This later rose sharply, so that by 1998 a quarter of agreements had an ordinary rate of pay that was below the award. In both periods the *majority* of agreements provided for inferior penalty rates and overtime rates than in the award. Indeed, in most cases where overtime or penalty rates had been reduced, they were abolished altogether. That is, in the first and second periods, penalty rates were abolished altogether in 54 per cent and 44 per cent of cases respectively, and overtime rates were abolished in 40 and 44 per cent of cases respectively.[13]

Content of AWAs

An analysis of AWAs showed they provided for longer working hours than other agreements, but these were usually paid at the single ordinary-time rate, not overtime rates.[14] Content analysis of 381 AWAs by Mark Cole, Ron Callus and Kristin Van Barneveld[15] found that many AWAs focused on hours, some solely on that issue. A more extensive analysis by Richard Mitchell and Joel Fetter[16] of 500 AWAs found almost all increased the "flexibility" of working hours, and that the "overwhelming majority" of AWAs followed a managerial approach of boosting profitability through "cost reductions", rather than productivity enhancement.

Detailed case research on AWAs has been done by Kristin Van Barneveld. In one major work, she undertook four detailed case studies of organisations introducing AWAs in the hospitality sector. She found that all four organisations introduced annualised salaries – in three cases at rates below the award rate. Some of the AWAs had provisions for a "wage audit" (after a year, you could request a comparison of what you would have got under the award with what you received under the AWA, and if you were underpaid then the difference would be made up). Most employees in one workplace felt they were worse off and two out of six audits showed workers had been underpaid. But few employees requested an audit, because they were unaware of the provision, left before the year was up, had not recorded their hours worked or thought a request might jeopardise their career path.[17] Analysing agreements across the hospitality sector Van Barneveld found that "most of the benefits which had been achieved through the

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[12] Peetz et al 1993; Oxenbridge 1999:243; Rasmussen & Deeks 1997:283-4; Dannin 1997:240; Gilson & Wagar 1997:228.

[13] CWA 1996,1999. A separate study by ACIRRT (1999) found that, compared to WA collective agreements, WPAs provided for fewer wage increases, were more likely to absorb penalty rates and other allowances, had longer spans of weekly and daily hours and were more likely to provide the same rates of pay for all seven days a week.

[14] ACIRRT 2001

[15] Cole et al 2001

[16] Mitchell & Fetter 2003

[17] van Barneveld 2004:457-8

introduction of AWAs are one-sided, with employers achieving wages and hours flexibility at the expense of employee entitlements."[18]

Wage increases under collective bargaining and individual contracts

Individual contracts are much more likely than collective agreements to reduce or abolish payments for working overtime, nights or weekends. So if workers on individual contracts were as well off as those on collective agreements, then to make up for this disadvantage they would need to have higher base wages, and higher wage increases, than workers on collective agreements. Do the data show this? Unfortunately, detailed information on registered individual agreements is limited, mainly because they are usually meant to be "confidential". Nonetheless, there are enough data to make some trends clear.

The federal government does not publish statistics on wage increases under individual contracts. But we can gain some idea of the difference between negotiating without unions (as occurs under AWAs) and negotiating with unions (as occurs under most collective agreements) by comparing wage increases under the two types of collective agreements for which data are published: union agreements certified under s170LJ of the WR Act, and the minority of non-union agreements, certified under s170LK. Government data show that, in the Australian Federal jurisdiction since the passage of the Workplace Relations Act, employees covered by union-negotiated collective agreements have consistently received higher wage increases than those employees under non-union group agreements. Since the introduction of the Workplace Relations Act, wage increases under non-union (section 170LK) enterprise agreements have been, on average, 0.5 percentage points lower than union collective agreements (made under section 170LJ of the Act).[19] Although the gap has varied, at no time in the period since non-union enterprise agreements were introduced have they shown higher wage increases than union-negotiated collective agreements current at the same time. The cumulative affect of this difference is shown in Figure 1. By March 2005, the total disadvantage to workers on s170LK non-union agreements was 4.3 per cent – this being the amount by which cumulative wage increases under non-union agreements had fallen behind those in union agreements.[20]

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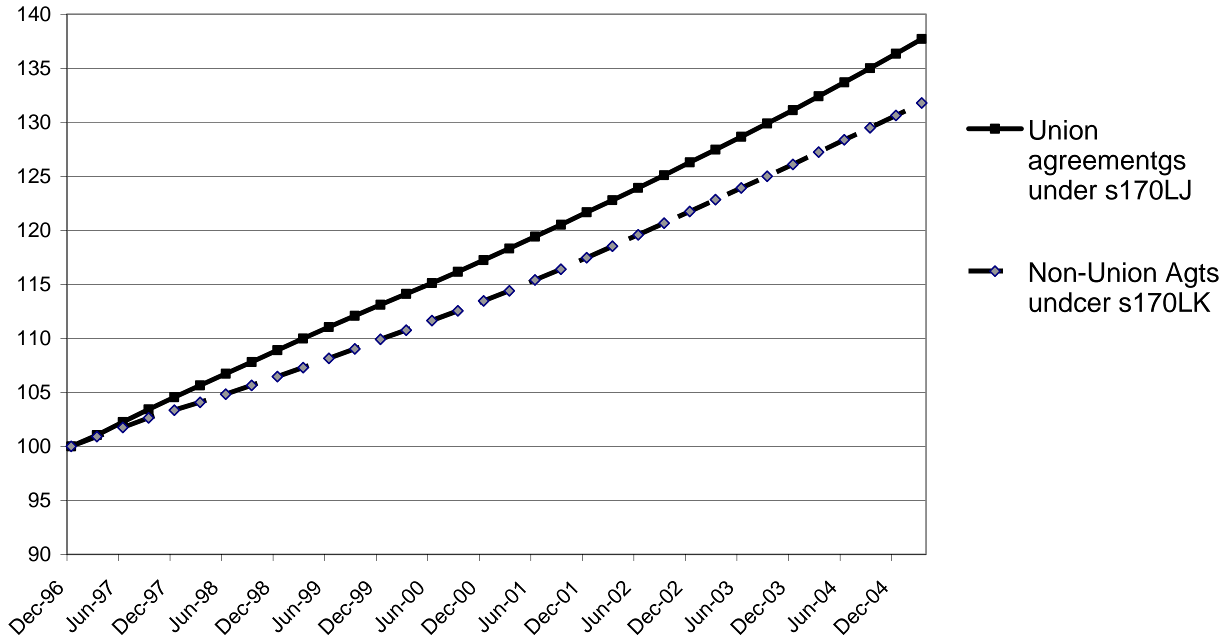
[18] van Barneveld 2004:266

[19] calculated from quarterly data on current agreements published in DEWR 2004 and White, Steele & Haddrick 2001:25.

[20] Note that this index measures how a workers wages would have increased if they had received the average level of increases under current s170LK and s170LJ agreements since 1997. It does not measure the actual wages of people under s170LK and s170LJ agreements as some workplaces may have been covered by agreements for only part of this period, and some people may of course have moved between jobs.

Figure 1
Cumulative wage increases under current 170LJ and 170LK agreements, 1997-2005 (index Dec 1996=100)

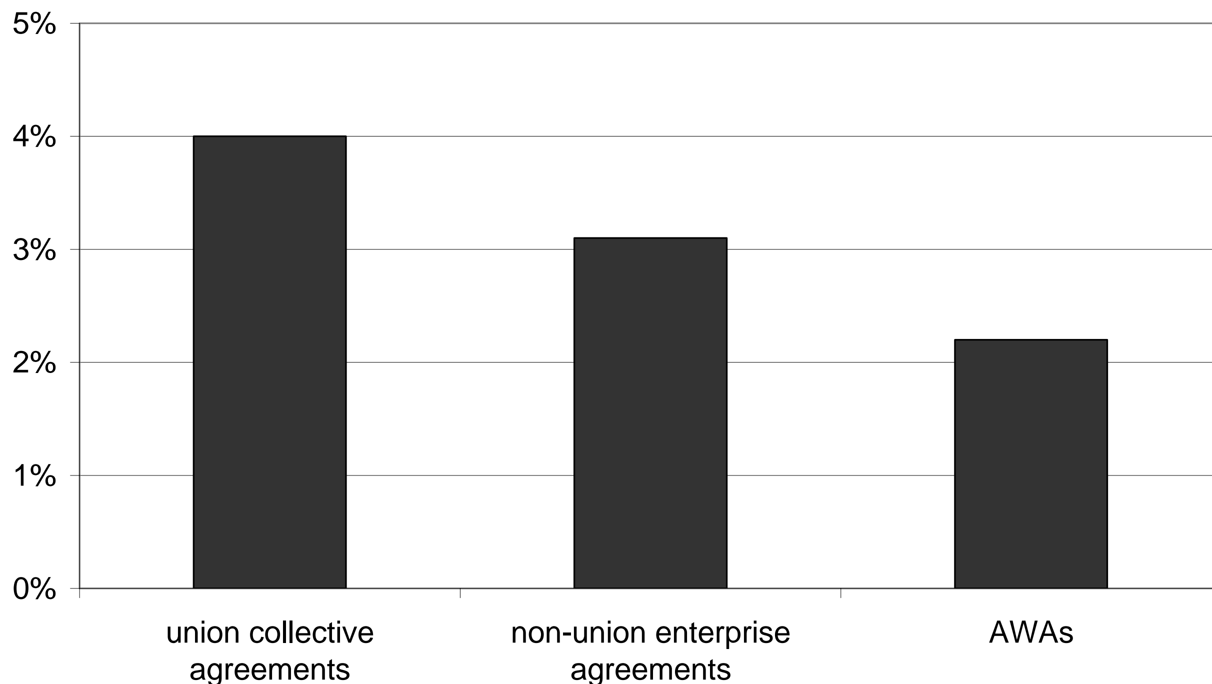


Source: DEWR (2004) and earlier editions, and in White, Steele & Haddrick 2001:25

For a while, the Australian Centre for Industrial Relations Research and Training (ACIRRT) was able to publish data on wage increases under AWAs based on samples of AWAs provided by the OEA. Its database showed that union collective agreements were consistently generating wage increases on average close to 1 per cent higher than non-union agreements and AWAs,[21] the only exception having been in June quarter 2000. For example, as shown in Figure 2, for the December quarter 2001, average wage increases under currently operating union collective agreements (4.0%) were well above non-union enterprise agreements (3.1%) and AWAs (2.2%).[22] After that, the OEA stopped providing AWAs to ACIRRT, preventing further analysis of wage increases under AWAs.

[21] Buchanan et al 2000:116; ACIRRT 2001:9
[22] ACIRRT 2001; van Barneveld 2003

Figure 2
Annualised wage increases under currently operating agreements, December 2001



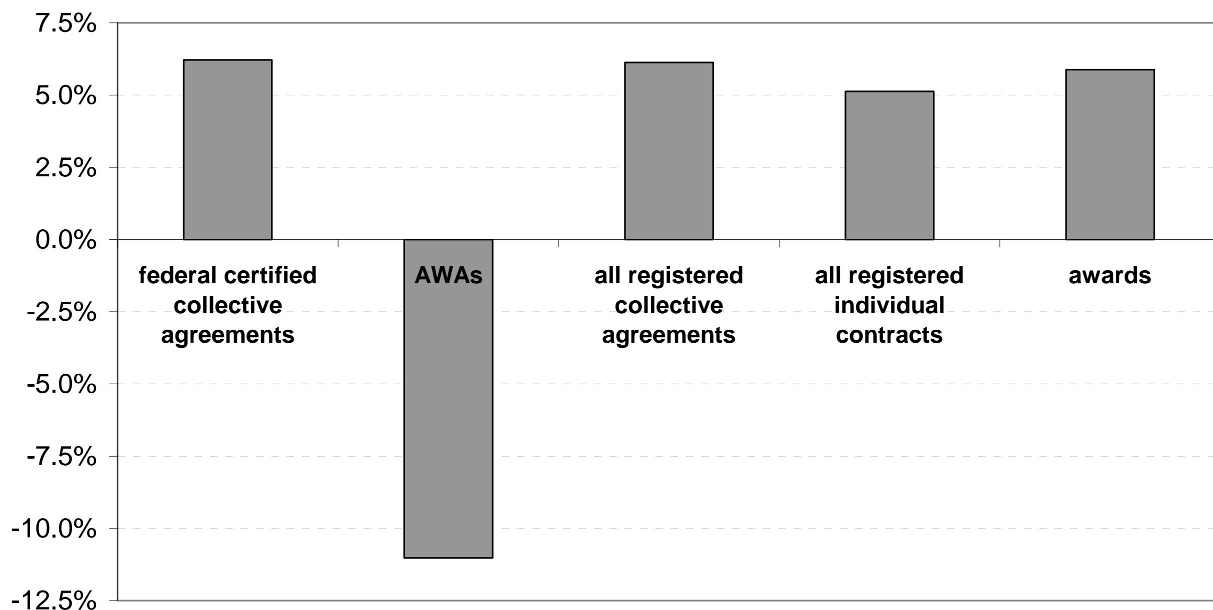
Source: ACIRRT 2001; van Barneveld 2003
Note: These were the last data on AWAs made available to ACIRRT.

The ABS conducted surveys of employers in May 2002 and May 2004, and these can be used to imply changes in average weekly earnings for different types of agreements. There are several problems with the data, some of which are discussed later. However, the major weakness of these data are that they are not directly comparing the same people in the same workplaces at two points in time, and so (like national level data showing an increase in real earnings since 1997) are affected by compositional change. With these cautions in mind, Figure 3 shows the changes in weekly earnings for AWAs and federal certified agreements, and for all forms of formalised agreements and awards, between May 2002 and May 2004. The chart shows that while average weekly earnings of employees on federal collective agreements were 6.2 per cent higher in May 2004 than in May 2002, average weekly earnings of employees on AWAs were 11 per cent lower in May 2004 than they were in May 2002. This is partly influenced by changes in the composition of people on AWAs, including shifts between state and federal jurisdictions – though even in Victoria, where there could be no shifts between jurisdictions, average earnings of workers on federal certified agreements were 6.9 per cent higher in May 2004 than in May 2002, but average earnings of workers on AWAs were 1.3 per cent lower in May 2004 than in May 2002.[23] Looking at registered individual contracts as a whole (by also including data from state jurisdictions), the chart also shows that average earnings on workers on all registered individual contracts was 5.1 per cent higher in 2004 than in 2002, but this was weaker than the

[23] ABS Cat No 6306.0, table 28 (2002), table 19 (2004).

6.1 per cent growth among workers on registered collective agreements[24] (and indeed was lower than the growth amongst workers on awards only). The data provide no support for any suggestion that earnings of employees on AWAs would be increasing at a faster rate than those on collective agreements. They also suggest the limited usefulness of aggregated data on average weekly earnings, which are also subject to compositional and distributional effects – for example, a 14 per cent increase in real earnings over a nine year period[25] can disguise very different outcomes for workers on collective agreements and those on AWAs.

Figure 3
Change in average weekly earnings, by agreement type, 2002-2004



Source: ABS Cat No 6306.0.

The Employment Advocate claims that "ABS data on Average Weekly Total Earnings is the best indicator of real outcomes for AWA employees".[26] It is on this basis that it claims (as do government advertisements) that AWA employees "are paid 13 per cent more than their counterparts of federal collective agreements" and double what workers on awards are paid. For reasons that have been alluded to already and are referred to below, this is a misleading comparison to make. However, if such bodies are to assert that the average weekly total earnings is the best indicator of outcomes for AWA employees, and that AWA workers were previously paid 29 per cent more than collective agreement employees and are now paid 13 per cent more, then they must also accept the logical consequence: that the 11 per cent fall in average weekly

[24] Note that the level of wage increases under federal certified agreements understates growth in *union* collective agreements, because the ABS figures do not differentiate between s170LK non-union agreements and union agreements, and s170LK agreements have lower wage increases.
[25] asserted in Howard 2005
[26] OEA 2005d

total earnings of workers on AWAs is the best indicator of changes in outcomes for AWA employees. The fact that this statistic is disclosed on no part of the OEA website or in government material is, itself, revealing.

Importantly, AWAs are much less likely than collective agreements to provide for wage increases during the course of the agreement, even though AWAs are much more likely to have a duration of three or more years.[27] In fact, most AWAs fix pay for the duration of the agreement.[28] Moreover, when wage increases do occur in AWAs they are usually based on individual performance and are at the discretion of management.[29]

Hourly wage levels on AWAs and collective agreements

This section examines data on the levels of earnings under AWAs and collective agreements. What should we expect from the figures? For one thing, it should be noted that a number of corporations, for example in mining, pay a "contact premium" to persuade workers to sign AWAs and purchase a transfer of power from the worker to the corporation.[30] So, even if AWAs normally have no direct impact on wages one way or the other, we would expect these contract premiums to lead the statistics to show that, on average, AWA workers have higher earnings.

For another thing, the official statistics do not necessarily compare like with like, they just compare averages, and are affected by the compositions of the different groups. First, AWA employees include a disproportionate number of managerial workers. This is the biggest single factor boosting the average pay of AWA workers. Second, the average hours worked by workers on AWAs are longer than those on collective agreements. This is partly because there seemed to be fewer part-time workers on AWAs,[31] and partly because full-time workers on AWAs have longer hours than full-timers on collective agreements – they work about an hour longer per week (equivalent to nearly twice as many overtime hours, based on a 38 hour ordinary-time week),[32] but (including managerial employees) receive 26 per cent less in total overtime pay, due to the high rate of reduction, absorption or abolition of overtime pay. Fortunately, some figures published by the ABS enable these two data problems to be dealt with, and where possible we refer to them. But other problems cannot be avoided in the data.

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[27] ACIRRT 2000b:10
[28] Mitchell & Fetter 2003:312
[29] ACIRRT 2000b:11, 2001; van Barneveld & Arsovska 2001; Mitchell & Fetter 2003:312
[30] Hearn Mackinnon 1996:289; Waring 2000:47; Peetz 2002
[31] DEWR/OEA 2003:88
[32] In May 2004, full-time permanent employees on registered individual contracts worked an average of 40.5 hours, compared to 39.3 hours for full-time permanent employees on registered collective agreements. Assuming a 38 hour ordinary-time week, this is equivalent to 2.5 and 1.3 hours overtime respectively. ABS Cat No 6306.0.

The third factor is that, the average earnings of employees on AWAs are exaggerated by their being disproportionately concentrated in industries with high average earnings (especially mining, but also electricity gas and water, communications and finance). This is not *because* they have a high incidence of individual contracts: for example, mining workers on collective agreements have weekly earnings actually eight per cent higher than mining workers on individual arrangements. Within an occupational group, higher paid workers are probably more likely to be on AWAs than the people beneath them.[33] These things make AWA earnings appear relatively higher than a true like-with-like comparison would show.

Fourth, at the time of the May 2004 survey there would still have been a tiny number of workers on registered individual contracts who were covered by state systems rather than the federal system. With one exception (seen already), the ABS does not publish data that separately distinguish the pay of workers on AWAs and state contracts. Because state contracts represent only about one per cent of the total number of people on registered individual contracts, we can still refer to the data on registered individual contracts as if they referred to people on AWAs, provided we bear in mind that state agreements actually paid more than AWAs, meaning that the figures for registered individual contracts overstate what AWA workers earned by about half a per cent on average.

Fifth, the apparent average pay of workers on registered collective agreements is depressed by the fact that some of them (about 7 per cent) are actually covered by s170LK non-union enterprise agreements which, as we have seen, have inferior wage increases to union collective agreements (and are in reality much more like individual contracts than collective agreements). Sixth, some two fifths of workers on collective agreements are not union members but free ride on the gains achieved by unionists. In a workplace with a large number of free riders, their existence reduces the bargaining power of the unionists and in turn holds down the benefits achieved in collective agreements. All these things have to be borne in mind when comparing the pay of workers on collective and individual arrangements. Taken together, they mean that, if AWAs normally have no effect on employee power and earnings, we should expect the statistics to show the average earnings of AWA employees as being above the average of workers on collective agreements. Alternatively, if there were a disadvantage facing AWA employees, the statistics would understate it.

There are two sources of official data on employee earnings. One, from a survey of employers, tells us about differences between awards and collective and individual agreements.[34] The second, from a survey of employees, tells us about differences between union members and non-members.[35]

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[33] For example, supervisors in Telstra are more likely to be on AWAs than their subordinates (WCP 1999).
[34] ABS Cat No 6306.0
[35] ABS Cat No 6310.0

We will focus on the employer survey. It contains data on hourly earnings for non-managerial employees and this is what I discuss here. This survey shows that in May 2004, non-managerial workers on registered individual contracts received an average of $23.40 per hour, which was 2 per cent *less* than workers on registered collective agreements ($23.90 per hour). As mentioned, considering 99 per cent of workers on registered individual contracts were on AWAs in 2004, we can say that registered collective agreements paid about 2 per cent more than AWAs.[36]

For men, the difference between earnings under the two systems was not significant, but women on AWAs had hourly earnings some 11 per cent less than women on registered collective agreements. This is a noteworthy figure, considering Minister Andrews' earlier claim that women earned nearly a third more on *AWAs* than on collective agreements. The gender pay gap was worse on AWAs: whereas women on registered collective agreements received 90 per cent of the hourly pay of men on such agreements, women on AWAs received only 80 per cent of the hourly pay of men on AWAs.

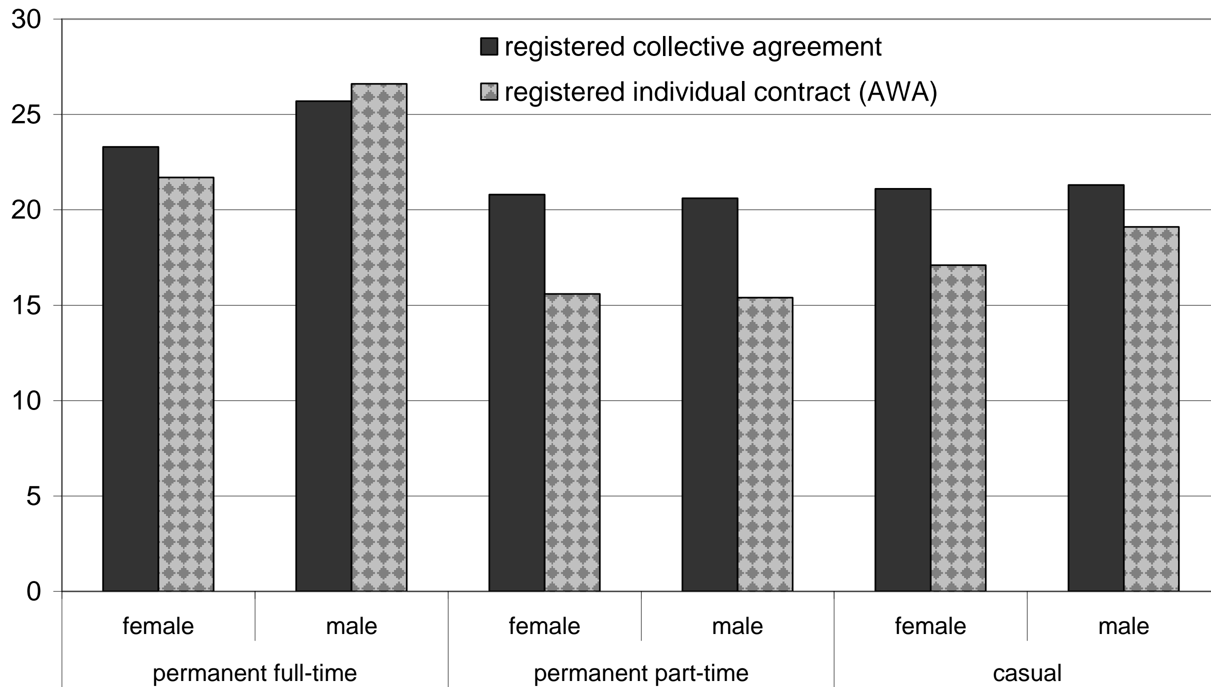
For casual workers, AWAs paid 15 per cent less that registered collective agreements. For permanent part-time workers AWAs paid 25 per cent less. Indeed, amongst permanent part-time employees even "award only" workers (those who received exactly the award rate) were earning an average of 8 per cent more than AWA workers.

For female permanent full-time workers, AWAs paid 7 per cent less than collective agreements. Only for male permanent full-time workers did AWAs have higher average hourly earnings than registered collective agreements (by just 4 per cent), and the number is quite small considering the factors that push up the apparent relative pay of AWA workers that I mentioned at the start of this section. These patterns are illustrated in Figure 4.

[36] The figure may be up to 3 per cent once we allow for the overstatement of AWA earnings arising from the inclusion of a small number of state individual contracts, mentioned earlier.

Figure 4

Average hourly earnings, non-managerial employees by method of setting pay, May 2004



Source: ABS Cat No 6306.0

When the advocates of individual contracting cite higher wages from AWAs than from collective agreements, they are careful to choose the figure that is most favourable to individual contracting – but which is also the least valid comparison of like with like. For example, they will typically use weekly rather than hourly earnings (because AWA employees work 6 per cent more hours, though they have an hourly rate of pay 2 per cent lower, the total *weekly* earnings of AWA employees are 4 per cent more than workers on registered collective agreements) and include managerial employees (which makes AWA employees appear to receive 12 per cent more per week than workers on registered collective agreements).

This is what Minister Andrews was doing last year, using weekly wages that included high-paid managers in the AWA figures – being compared with part-time waitresses in the "award" figures. The figures used this year in government advertising are not those, but they are based on an update of the same data, and they show a much weaker "advantage" for workers on collective agreements. The relative position of AWA workers has deteriorated since 2002 (the year upon which Minister Andrews based his claims last year), particularly for women. In 2002 average earnings for women on all registered individual contracts were $20.70 per hour, but by 2004 they were only $20.00. While this fall could easily be due to the normal variability of surveys (an explanation suggested by the fact that the gender pay gap in 2002 was unusually small, and so the seemingly better figures for women may have been an aberration) or changes in the

composition of women on individual contracts (coverage of public sector women by registered individual contracts almost halved between 2002 and 2004), there is certainly no sign that the position of women on AWAs has improved. That said, the main factor distorting the figures cited by federal Ministers was that many of the low-wage individual contracts were in the Western Australian state jurisdiction in 2002. By 2004, most of those employees were covered by AWAs.[37] (The remainder would mostly have been covered by s170LK non-union enterprise agreements.) The exclusion of Western Australian agreements from the 2002 figures meant that that year's AWA figures exaggerated the incomes of people on individual contracts. After the Western Australian agreements were included, the average weekly earnings of AWA employees were 11 per cent lower in 2004 than in 2002, as mentioned in the previous section. Their inclusion at last in the AWA statistics means that the numbers now give a clearer indication of what individual contracts mean for workers' wages.

Finally, we can do a reality check using the data from the ABS employee survey undertaken in August each year. It is limited by dealing only with weekly rather than hourly earnings. Nonetheless, the pattern is broadly similar, showing that, in August 2004, the average weekly earnings of union members were 17 per cent higher than for non-members, and the union wage benefit was greatest amongst part-time employees, females and casual workers.[38]

Overall, the ABS data confirm the conclusions from numerous other sources and studies: unions, and union-based collective bargaining, create higher wages and better conditions for workers; individual contracting creates poorer pay and conditions and does this most effectively for those with weaker positions in the labour market.

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[37] Todd & Eveline 2004.
[38] ABS Cat NO 6310.0

IS INDIVIDUAL CONTRACTING MORE PRODUCTIVE?

Many of the claims about the benefits of individual contracts ride, as we will see, on the proposition that individual contracts deliver higher productivity.[39] This section seeks to assess those claims. Public policy changes since 1996 have sought to discourage union-related collective bargaining and promote individual contracting. This section therefore examines the effects of individual contracting on productivity by reference to the effects of union–related collective bargaining.

National level effects

At a macro level, a simple way of testing the impact of individual contracting on productivity is to examine the New Zealand experience in the 1990s under the now-repealed *Employment Contracts Act 1991* (ECA). From 1991 to 1996, New Zealand had a national government favouring individualism in employment relations, while Australia had one that favoured collectivism and promoted collective enterprise bargaining. Easton examined national level data on New Zealand productivity growth from 1978 to 1996 and reported that he was "astonished by the ECA's failure to have a perceptible impact on productivity since it was implemented."[40] Similarly, Rasmussen and Deeks, after reviewing several studies, commented that "[a]lthough there are some variations in the estimates, the expected increase in productivity argued by the proponents of the Act remains to be seen."[41] Indeed, for the period when Australia had a collectivist national government and New Zealand an individualistic one, productivity growth was substantially higher in Australia – and, as shown in Figure 5, this was after the two countries had possessed similar rates of productivity for the previous 14 years.[42]

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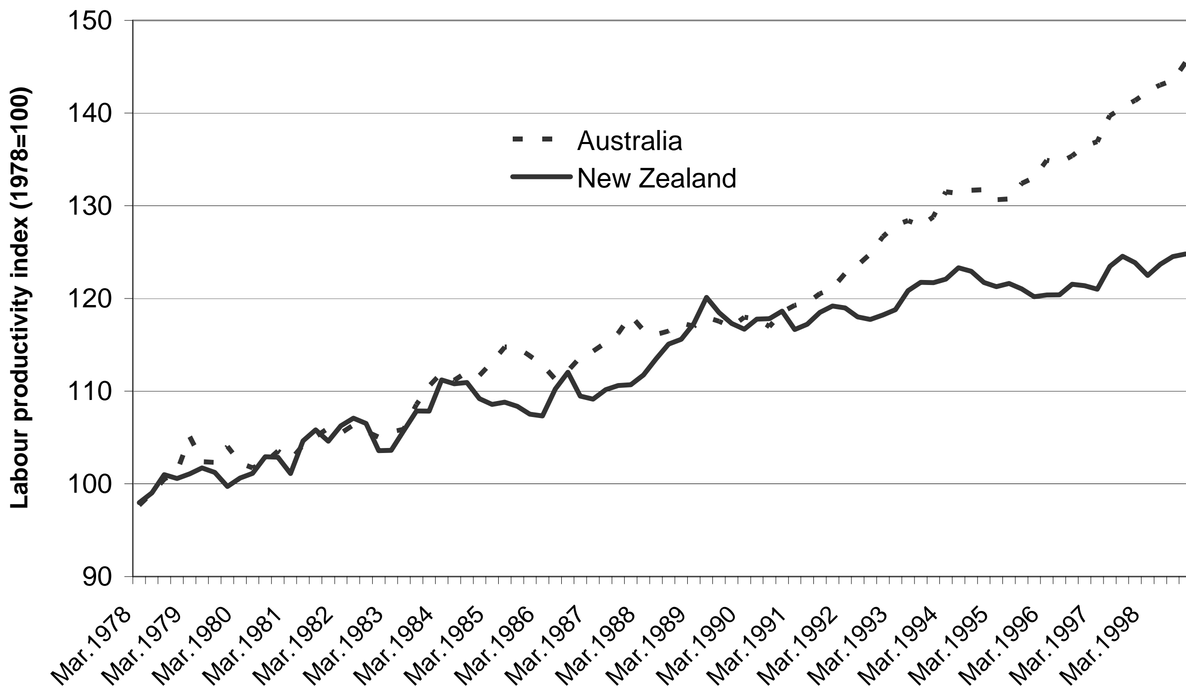
[39] eg BCA 2005:12; ACCI 2004:1; Langoulant 2004; Morgan in quoted in Andrews 2004b; OEA 2004a; Howard & Andrews 2005:3
[40] Easton 1997:215
[41] Rasmussen & Deeks 1997:289
[42] Dalziel 2002:33

Figure 5 Labour Productivity, Australia and New Zealand, 1978-1998



Source: Dalziel (2002:41).

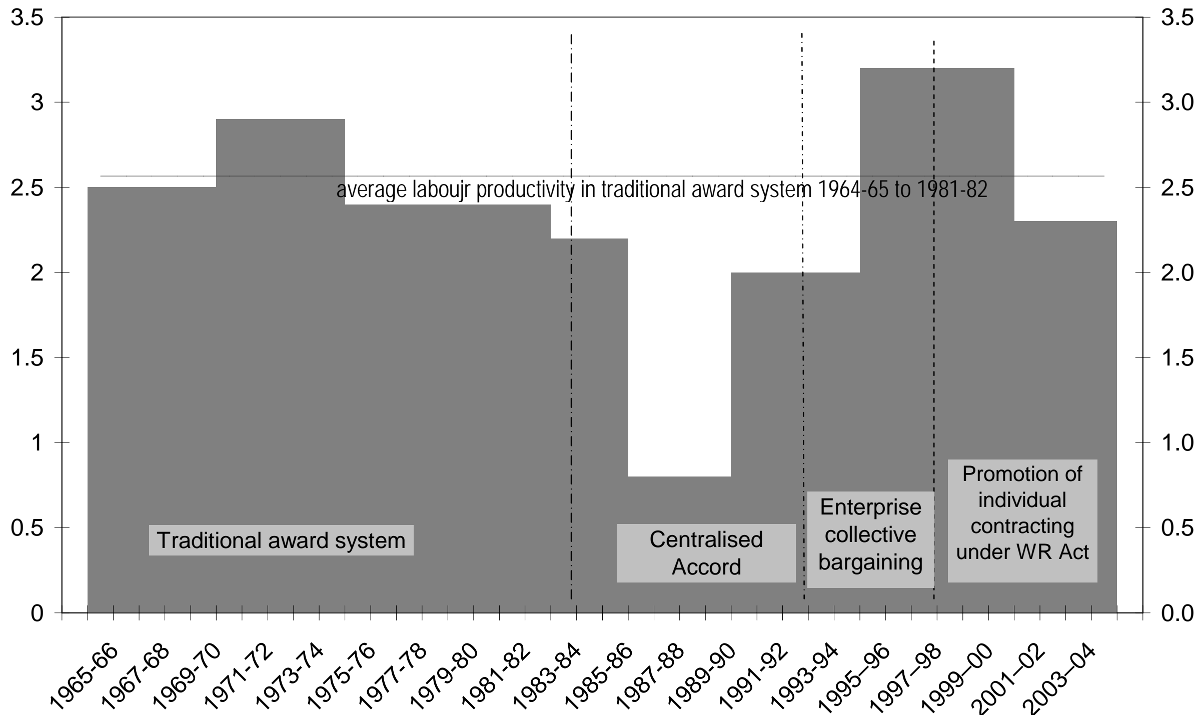
Do Australian productivity data show a surge in productivity under Workplace Relations Act? Productivity growth fluctuates significantly, heavily influenced by the business cycle, so while the ABS publishes quarterly and annual labour productivity data, it also publishes estimates of productivity growth averaged over productivity cycles. Figure 6 depicts how Australian labour productivity has grown over the various productivity cycles[43] since 1964-65, and compares it to the institutional arrangements that applied at the time, as well as the level of union density (union membership as a proportion of employees). It shows that, under the traditional award system that operated prior to the prices and incomes accord of the 1980s, productivity growth was between 2.4 and 2.9 per cent per annum (averaging 2.6 per cent per annum, as shown by the horizontal dashed line). In 1983 the centralised accord was introduced, the incentive on employers to introduce labour saving technology and innovate was reduced, and annual labour productivity growth fell to 0.8 per cent in the mid cycle, until the award restructuring process commenced. With the shift to enterprise bargaining, the next productivity cycle saw productivity growth peak at 3.2 per cent. About half way through this cycle, the Workplace Relations Act was implemented, though it was some time before there was much growth seen in AWAs. Bear in mind that all institutional changes take some time before they take full effect, and have a significant effect on economic outcomes.

[43] shown as blocks of years with the same productivity growth rate. Thus the eight blocks in Figure 2 represent eight productivity cycles.

The next and current productivity cycle commenced in 1999-2000. The WR Act has been in effect for the full period of this cycle. It has seen a fall in annual productivity growth, to just 2.3 per cent per annum. This is even below the rate of labour productivity growth that applied during the traditional award period. It is despite the fact that average union density, at 53 per cent, was over twice the rate of union density that has applied in the current cycle (24 per cent).

The current productivity cycle has not officially finished yet, and productivity figures, like all national accounts data, are subject to revision. However, it is not obvious that the figures will be revised upwards. The data used in the chart are based on annual financial year data up to 2003-04, published. Since then, quarterly national accounts have been released to December 2004.[44] They indicate, as the Reserve Bank noted in its most recent Statement on Monetary Policy, that labour productivity fell by 0.4 per cent over 2004, a decline which seems "unusually pronounced."[45]

Figure 6
Labour productivity growth and wage fixing institutions, 1964-65 to 2003-04



Source: ABS Cat No 5204.0.

The story on multi factor productivity[46] is not much different, and is shown in Table 3. Again, the most recent cycle, all of which has taken place under the Workplace Relations Act, is

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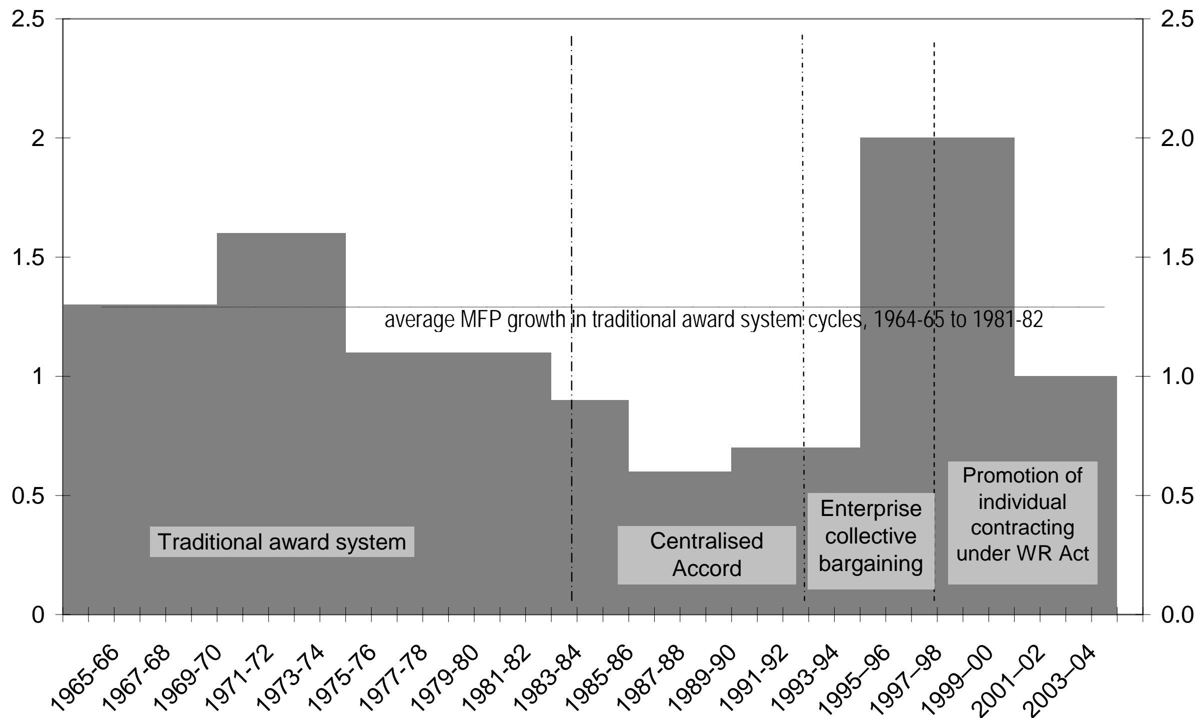
[44] ABS Cat No 5206.0
[45] Reserve Bank 2005:34
[46] There are two broad ways of measuring productivity. Often, people measure productivity in terms of just labour inputs (as in the above example, where person-hours of labour were used). But there are many inputs that go into the production process, such as the machinery and computer equipment that is used. So a more thorough measure of

exhibiting rates of multi-factor productivity growth that are below the average that applied during the traditional award period.

Figure 7
Multi-factor productivity growth and wage fixing institutions, 1964-65 to 2003-04



Source: ABS Cat No 5204.0.

Workplace effects

Another way of testing for systematic productivity effects is to look at the micro level, using surveys of workplaces or organisations. Gilson and Wagar[47] reported from their survey of New Zealand employers that "we cannot find a single statistically significant or reliable relationship between organizations pursuing individual contracts and our exhaustive measures of firm performance".

What of Australian micro evidence? Tseng and Wooden[48] looked at enterprise bargaining and productivity levels in Australian firms using the business longitudinal survey, and found that productivity levels in firms with individual contracts were 4 to 10 per cent higher than those with

productivity looks at the amount of input divided by *all* inputs. This is referred to as multi-factor productivity. Sometimes corporations increase measured labour productivity just by replacing people with machines ("capital deepening"), but this does not necessarily mean that overall efficiency and productivity are any higher and it does not increase multi-factor productivity.

[47] Gilson & Wagar 1997:230
[48] Tseng & Wooden 2001

award-only coverage, but productivity was also higher by a similar amount (5 to 9 per cent) in firms with registered collective agreements, when controlling for union membership. In addition, firms with high rates of union membership were 5 to 7 per cent more productive than firms with no union members.[49] Collective agreements are, of course, normally negotiated where there are union members, so the combined positive "effects"[50] of high union membership and collective agreement coverage on productivity were higher than the combined effects of individual contracting and non-unionism.[51]

The BCA co-funded three large academic studies of Australian workplaces and organisations, amongst other things to look for this relationship. The first project[52] involved analysis of data from the Australian Workplace Industrial Relations Survey (AWIRS). The study did not test the relationship between individual contracts and productivity in AWIRS, but did find a *positive* relationship between unionism and productivity in certain circumstances: "unions apparently are good for productivity, but only at workplaces where unions are active."[53]

Another study[54] partly funded by the BCA involved, amongst other things, a survey of 281 of Australia's largest corporations in which they were asked to rate their own productivity levels against those of their competitors. There was no negative relationship between unionism and productivity, but collective bargaining coverage was associated with *higher* levels of self-claimed productivity.[55]

The purpose of the BCA's third[56] project was to identify excellent workplaces and "analyse the basis for their outstanding performance". It identified fifteen "key drivers" for excellence but "working arrangements and representation" (collective or individual arrangements) were not among them – indeed they were "points of indifference". The researchers found that high

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[49] Tseng and Wooden 2001:25,29.

[50] I put "effects" in quotation marks because the study was unable to conclude a causal relationship, as it measured productivity levels, not changes over time. As the authors point out, the results are "also consistent with the possibility that high productivity firms may have been both more likely and more able to introduce enterprise agreements. Of course, if the benefits of enterprise agreements are most attractive to poor performers, as suggested in Wooden (2000, p. 165), then only one inference could be drawn – enterprise bargaining must have been productivity enhancing." (Tseng & Wooden 2001:30). On the other hand, the positive "effect" related to individual contracts "could simply reflect a preference by higher productivity workers for individual-based employment arrangements." (Tseng & Wooden 2001:26) The combined effect of these two contingencies is likely, if anything, to understate and productivity advantage union collective bargaining has over individual contracting.

[51] For example, in the "medium-/large firms" subsample, dropping the unionisation variables from the specification raises the estimated size of the coefficient on the registered agreements variable increase, by an amount at least equal to the size of the coefficient on the variable indicating majority union membership (Tseng & Wooden 2001:28-29)

[52] "The Transformation of Australian Industrial Relations", at the National Institute of Labour Studies (NILS) in Adelaide.

[53] Wooden 2000a:173

[54] "The Impact of Enterprise and Workplace Focused Industrial Relations on Employee Attitudes and Enterprise Performance", at the Melbourne Institute for Applied Economic and Social Research.

[55] Fry, Jarvis & Loundes 2002. The finding was consistent with other data from AWIRS positively linking collective agreement coverage and productivity improvements: DIR 1995:166, 173

[56] "Simply the Best: Workplaces in Australia", undertaken in 2001 by Daryll Hull and Vivienne Read from the University of New South Wales.

performing workplaces "had a variety of arrangements, both collective and individual" and that "both union and non-union workplaces were excellent."[57]

The evidence of the BCA and its consultant

In 1989, when the BCA launched the first stage of its campaign to remake industrial relations, it issued a large "research" report to back up its policy agenda[58] which included substantial research commissioned from NILS. Evidence in the report did not support the headline claim, that Australian productivity would be increased by 25 per cent if we moved to the BCA's preferred model of industrial relations, and indeed the data did not support a lot of the policy conclusions,[59] but at least on that occasion the BCA presented some empirical evidence. This can be contrasted with the BCA's February 2005 release of its *Workplace Relations Action Plan,* which did not refer to evidence from the three academic studies that it had jointly funded. What evidence did it instead rely on?

The mining case study

In its *Action Plan* the BCA presented nothing more substantive than a series of observations (a "case study") on the mining industry, most importantly the observation that labour productivity growth from 1994 to 2002 was higher than in other industries. There are several things to note about this.

First, there is nothing remarkable about that mining having a high rate of productivity growth over the period – for example, labour productivity in the Canadian mining industry also outstripped that in the rest of that economy.[60] Indeed, in the highly unionised Australian coal industry[61], labour productivity also grew by 6 per cent per year between 1993 and 2003,[62] the same rate quoted for the mining sector as a whole.

Second, the story is incomplete because, as the Productivity Commission (PC) pointed out, the mining industry's period of strong *multi-factor* productivity growth was from 1982-83 to 1992-93. [63] From 1992-93 to 2001-02, the period of rapid expansion of individual contracts in the mining sector, *multi-factor* productivity growth was "low".[64]

But third, the BCA ignored the most recent data, despite their public availability, which present a very different picture. On 10 November 2004 (over three months before the BCA issued its *Action Plan* on 15 February 2005), the ABS released data for the eight years to 2003-04.[65] They

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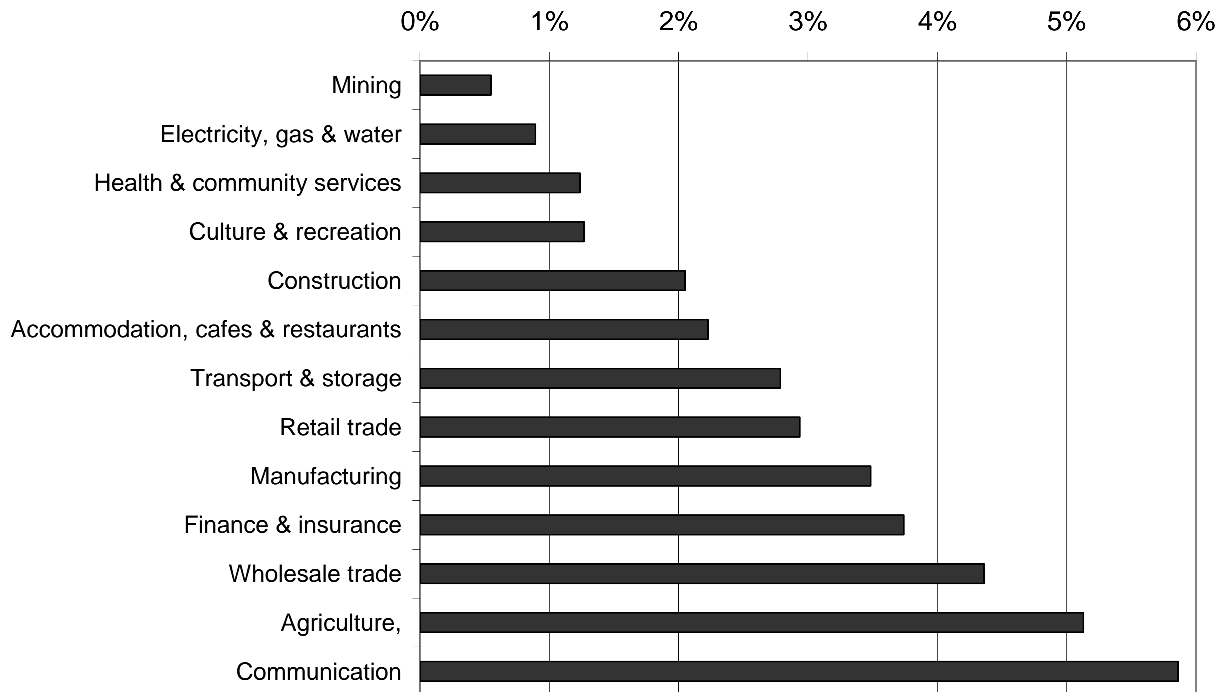
[57] Hull & Read 2001:8
[58] BCA 1989
[59] Frenkel & Peetz 1990
[60] Ontario Mining Association 2004
[61] Union density in coal mining in 2003 was 61 per cent, compared to 18 per cent in the rest of the mining sector. ABS Cat No 6310.0.
[62] Coal Services Pty Ltd & Qld Dept of Natural Resources and Mines 2004, cited in CFMEU 2004:5
[63] Cobbold & Kulys 2003:21
[64] Cobbold & Kulys 2003:21
[65] ABS Cat No 5204.0

showed that mining, far from having the highest rate of labour productivity growth of all industries, now had the *lowest* rate of productivity growth over the most recent eight years, one that was only a quarter of the national average growth rate over the period. The data are shown graphically in Figure 8.[66] Now, there is no reason to believe that this represents a permanent, terminal state of affairs for the mining industry. The point is, however, that even the modicum of evidence that is used to support the claim that individual contracting leads to great productivity gains has been presented in what could politely be called a misleading manner, suggesting the very limited value of these industry comparisons.

Figure 8
Average annual productivity growth by industry, Australia, 1995-96 to 2003-04



Source; ABS Cat No 5204.0

The consultant's report

The BCA sought to give authoritative basis for its latest claims by co-releasing a report it paid private consultancy firm Access Economics to produce. But this report, also dated as February 2005, was dominated by sweeping generalisations about productivity, with only three notable pieces of hard evidence.

One chart compared productivity growth between many industries over 1994-2002, claiming to show a "simple but compelling relationship": that labour productivity was positively related to

[66] I have used an eight year period because that is the length of time used by the BCA, and it is also the period for which the ABS published industry data in November.

"flexibility",[67] a theme taken up by the government[68] (which has not presented independent evidence to support its case). The measure of "flexibility" they used was the proportion of workers in each industry covered by federal union collective agreements, federal non-union group agreements and AWAs added together. But by far the largest single component of this was *union collective* agreements. In substance, labour productivity growth was, on average, higher in industries with more union collective agreements!

But policy is not aimed at promoting union collective agreements, it is aimed at discouraging them and promoting AWAs. What was the pattern for AWAs, then? If the thirteen industries were divided into two groups according to their AWA penetration, based on data from the OEA used by the consultants,[69] labour productivity growth in the seven industries with the most AWAs was, on average, 0.2 percentage points *less* than in the six industries with the fewest AWAs for the years in which the consultants had depicted productivity.[70] Using the more accurate measure of registered individual agreement coverage collected by the ABS, there is no correlation between registered individual agreements and productivity growth over the eight years to 2003-04.[71]

An adjacent chart in the consultant's report showed that labour productivity growth was lower in industries with a high proportion of workers who were only paid the award rate and nothing more.[72] However, using the more recent ABS productivity data published three months earlier[73] than the consultant's report would have generated a very different result – instead of there being a "compelling relationship", there was *no significant relationship* between productivity growth over the eight years to 2003-04 and award-only coverage.[74]

The other notable evidence was a chart showing productivity growth from 1964-65 to 2003-04 – one that largely mirrors figures 6 and 7 above. In its commentary on the chart, the consultant failed to mention the more impressive data on productivity growth during the traditional award period. In conceding that the data on the current cycle "suggest a slowing down" of productivity growth, it commented that "we need to be alert to signs that the benefits of past reform are

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[67] Access Economics 2005:20
[68] Andrews 2005b
[69] in effect, the same methodology used by the consultant. Access Economics' estimates of AWA penetration (included in its index of flexibility) was based on data collected by the Office of the Employment Advocate on the number of employees who signed AWAs in the preceding three years. This measure overstates AWA coverage as it counts employees who have left their jobs since signing an AWA.
[70] The margin is the same if the more recent productivity data published by the ABS in November 2004 are used instead of the outdated figures data used by the consultant.
[71] r=0.01. Data on registered individual agreement from DEWR/OEA 2003.
[72] Access Economics 2005: 22, figure 5.
[73] There is no reason to believe that the consultant (or therefore the BCA) was unaware of these more recent data – the consultant used data from a table just two pages earlier in the same ABS publication to generate the chart referred to in the preceding paragraph. See Access Economics 2005:17, Figure 2; ABS Cat No 5204.0, 2003-04:47,49.
[74] Using 2002 award coverage data (as used by Access economics) and change in labour productivity from ABS Cat No 5204.0, the regression equation is productivity growth = 2.86 – 0.014 x award coverage, $r^2 = 0.02$, significance of equation (by F statistic) and of coefficient on award coverage (by t value) = .633. Using 2004 award coverage produces a similar equation: productivity growth = 2.82 – 0.012 x award coverage, $r^2 = 0.02$, significance of equation and of coefficient on award coverage = .704.

beginning to wane",[75] rather than questioning if the proclaimed benefits of current reforms may not have been there in the first place.

In short, there is no "compelling" evidence presented by or on behalf of the BCA to support the claim that individual contracting leads to higher productivity, and what evidence is presented is shallow and dependent on either misinterpretation or failure to use current data that had been available for some time.

Why does it not work out the way that it is claimed to?

This lack of a smoking gun should not surprise. It is consistent with the academically rigorous British case studies on individualisation undertaken by Brown and others,[76] and it is consistent with a number of studies, starting with Richard Freeman and James Medoff's path-breaking study *What Do Unions Do?,* showing a positive relationship between unionism and productivity, arising from greater worker voice.[77] The academic literature is not unanimous in concluding that unions raise productivity,[78] so the most appropriate conclusion to draw from the quantitative studies appears to be that there is no consistent relationship between unionism and productivity, but that unionism can raise productivity. Equally, there is no consistent relationship between individual contracting and productivity.

Now, all this evidence does not rule out the possibility that, in particular workplaces, productivity might increase following the introduction of individual contracts, nor that one workplace covered by individual contracts might have higher productivity than another covered by collective agreements. It appears that, for each workplace that experiences higher productivity as a result of individual contracting – and there are plenty of managers that claim to[79] – there is another one somewhere else that ends up with lower productivity than it would have got if it had not gone down the individual contacting path.[80] Equally there are many instances where productivity is high under collective bargaining relationships.[81] Productivity can end up lower if corporations reduce labour costs, and therefore have less incentive to introduce new processes or technologies that will enhance productivity. Alternatively it can happen if firms blemish relations with their workforce – amongst the fifteen "key drivers" of excellence identified in a BCA-funded study were the quality of working relationships, good pay and conditions, employee participation in decisions, and workplace leadership.[82]

Several studies have been undertaken of the content of AWAs. Perhaps the most broad-ranging

[75] Access Economics 2005:18
[76] Brown et al 1998:ii
[77] Freeman & Medoff 1984; see also Belman 1991; Phipps & Sheen 1994 .
[78] eg Edwards 1987
[79] Moore & Gardner 2004
[80] Easton 1997:215
[81] Peetz et al 1993. Cooperation between management and workers, through unions, has a positive effect on workplace performance: Alexander & Green 1992.
[82] Hull & Read 2001:3

was by Richard Mitchell and Joel Fenner,[83] who looked at the content of 500 AWAs. Their finding: AWA strategies are not producing "in any systematic way" employment systems of the "high trust", "high commitment workplace" or "high performance work system" variety. Mitchell and Fenner's findings were broadly consistent with earlier content analyses.[84]

While corporate strategies for promoting individual contracts (and discouraging unionism) may be outwardly aimed at increasing commitment to the organization and increasing productivity, it is doubtful that this consistently occurs. For one thing, an organisational commitment strategy reliant on individual contracts assumes that commitment to an organization is negatively related to commitment to a union – an assumption that flies in the face of a series of studies over many decades.[85] For example, a study of commitment in a large Australian bank found that "branch performance was clearly higher when employees displayed loyalty to their union"[86]

Case studies of employees show outcomes may not be what managers expected. [87] Managers in workplaces with individual contracts will say they increase productivity, just as managers in workplaces with collective agreements will say the same thing.[88] But as Wooden and his colleagues say, these responses must be treated with much scepticism. Managers overstate the benefits of agreements – any other response "might be viewed as an admission that the decision to introduce agreements was a mistake."[89] Many managers may genuinely think that individual contracts have brought them closer to their workers. As with employers using individual contracts in New Zealand, most employers using AWAs (surveyed for the Employment Advocate) claimed that AWAs had led to improvements in employee commitment, management-employee relations and hence labour productivity.[90] The trouble is, such perceptions may in part be the triumph of belief over fact. After the Employment Contracts Act came in, 42 per cent of managers in organisations with new contracts claimed employee trust of management had increased, only 4 per cent said it decreased. Workers reported it very differently – only 12 per cent thought trust of management had increased, while 30 per cent reported a decline in trust.[91] The discrepancy was much worse in corporations with individual contracts than in those without.[92] If the research question is whether employee trust of management has actually increased, it only makes sense to listen to what the employees say. There is no doubt that there

[83] Mitchell & Fenner 2003:317
[84]Roan et al 2001; Cole et al 2001. While the OEA published a survey of employees purporting to refute these findings and show that AWA workplaces had the characteristics of high performance workplaces, and that AWA employees were doing better than other employees in terms of control over their working hours and balancing their work with other aspects of their lives, closer analysis of the survey revealed that amongst "ordinary" employees (those not in managerial/professional occupations) workers on AWAs were less satisfied with their pay and control over working hours more likely than control employees to report their work and family balance had become more difficult. See Gollan 2001; Hamberger in Workplaceinfo 2002; Peetz 2004.
[85]Rose 1952; Sayles and Strauss 1953; Dean 1954; Purcell 1954; Gallagher 1984; Fukami and Larson 1984; Angle and Perry 1986; Conlon and Gallagher 1986; Magenau, Martin and Peterson 1988; Gallagher and Clark 1989; Guest and Dewe 1991; Deery & Iverson 1998:7.
[86] Deery & Iverson 1998:8
[87] van Barneveld 2004:452
[88]Wooden et al 2002:28-29; Moore & Gardner 2004
[89]Wooden et al 2002:30; see also Wooden 2000:175
[90] Gollan 2000
[91] Large discrepancies were also recorded in whether cooperation and communication had improved.
[92] Peetz et al 1993:290-91

was an element of self-delusion in what managers said about the impact of individual contracting. It helps explain why the aggregate figures on productivity growth were so disappointing.

Solving the skills shortage?

There is one other way in which individual contracting and industrial relations reform are said to lead to increased productivity: by repairing the current shortage of skilled labour. The argument appears to be that industrial relations reforms will address the skills shortage and encourage women back into the workforce. For example, according to the Prime Minister, "the best thing that we can do (to get skilled mothers back to work) is to provide an industrial relations system that gives people the maximum opportunities."[93]

The purpose of changing how minimum wages are set is to bring them more in line with government policy. As will be discussed in the next section, the AIRC has consistently awarded higher wage increases than the government recommended, so clearly the result of reform will be lower minimum wages than would otherwise have been the case. As discussed in the previous section, the promotion of individual contracts (such as Australian Workplace Agreements) will also lead to lower wages, particularly for women.

What impact will lower wages have on the skills shortage? Lower wages mean fewer people want to enter the labour market. As AWAs have an especially negative impact on women's wages, it will mean that women in particular will not think it worthwhile getting a job when the wages are so low. In short, it will make labour shortages worse.

It could be argued, however, that individual contracts will create more flexibility in working hours, and that this will bring more women into the labour market. As we have seen, individual contracts increase flexibility in how working hours are paid for. They focus on reducing or abolishing overtime pay, increasing the standard hours in a week and reducing or abolishing penalty rates for working at nights or on weekends. This increases flexibility for the employer, but not for the employee. AWAs mainly use flexibility in hours to achieve cost reductions for the employer. As one worker on an AWA said on national television last year:

> we have to be available seven days a week, at any time that they choose to roster us. So in that way, being a single mum, I would much prefer to have certain set days so that I could plan things that I needed to do with my children. [94]

So more AWAs are not going to help skills shortages. If anything, they would worsen them. I return to this topic of skills shortages briefly in the next section.

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[93] SMH 2005
[94] ABC 2004 .

Productivity or profits?

There is no inherent relationship between the form of coverage and growth of productivity.[95] But *productivity* is not what corporations seek – it is *profitability* they seek. Profits can be raised by increasing productivity but they can also be raised by cutting what workers are paid. This is often dressed up as productivity[96] through changes in the payment of penalty rates or overtime rates (often through their abolition), which are common in registered individual contracts.[97]

In 2004, the profit share of national income was at its highest level since the ABS started publishing a consistent series on the profit share in 1959.[98] Figure 9 shows the ABS "trend" share of profits in national income since 1959. It also shows four lines representing linear trends in the level of profits, based on ordinary least squares (OLS) equations, over four key periods – the operation of the traditional award system, the centralised accord, enterprise collective bargaining, and the promotion of individual contracting under the WR Act.[99] In linear trend terms, the profit share was relatively flat during the period of the traditional award system, there being a slight downward slope due to the wages explosion of the early 1970s which was gradually wound back through the 1970s and early 1980s. The centralised accord saw a notable trend towards an increasing share of national income going to profits. This was halted with the shift to collective enterprise bargaining through the early to mid 1990s, during which time workers recovered some of the real wages that had been lost. Since the passage of the Workplace Relations Act, however, there has been a marked and continuing increase in the profit share. The rate at which the profit share is increasing (as measured by the slope of the OLS trend line) is twice that under the accord. The increasing share going to profits reflects the changed institutional arrangements in the labour market, including the promotion of individual contracting and tighter constraints on union collective bargaining, that have weakened the bargaining power of many employees and enabled employers to obtain greater profits.

This growth in profits has not delivered any greater reduction in unemployment than was already under way, however. The rate at which unemployment falls has been no greater during the seven years of the Workplace Relations Act (0.4 per cent per annum) than during the five years of collective enterprise bargaining (0.5 percent per annum). Indeed unemployment, presently at 5.1 per cent, is above the average that prevailed during the 1960s and early 1970s of around 2 per cent, despite the much lower profit share then.

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[95] eg Rimmer & Watts 1994:75-6

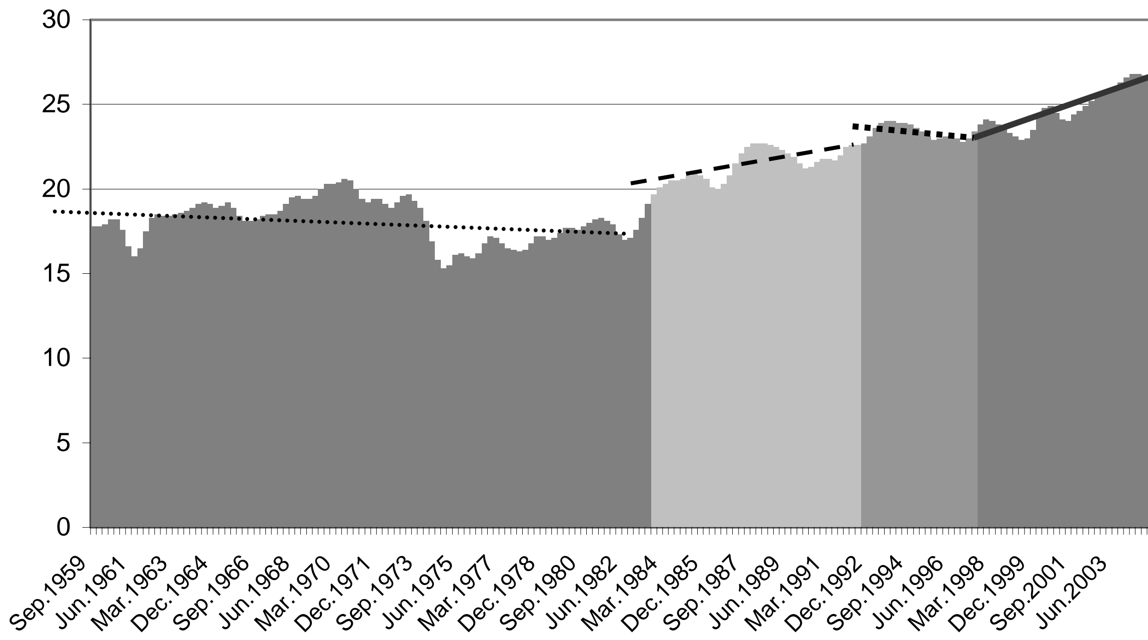
[96] Productivity is the amount of output per unit of input – for example, the number of tonnes of steel produced per person-hour of labour used. It is *not* a measure of the cost (wages) of that labour.

[97] Rasmussen & Deeks 1997:283-4; Cole et al 2001; Mitchell & Fetter 2003

[98] ABS Cat No 5206.0

[99] It is the slopes of these "lines of best fit" that matter, not their intercepts. Apparent "jumps" in lines from one period to the next are of no moment, but differences in the slopes of the lines matter.

Figure 9
Profit share of total factor income, trend, 1959-2004



Source: ABS Cat No 5206.0.

IMPLICATIONS OF ASPECTS OF THE LEGISLATIVE REFORM PACKAGE ANNOUNCED ON 26 MAY 2005

In this section I consider the implications of various aspects of the legislative reform package announced in May 2005.

Abolishing the no-disadvantage test

One of the most important proposed changes is the abolition of the no disadvantage test, whereby agreements are meant to leave employees no worse off than they would be under the award, and its replacement with a "fair pay and conditions standard". This minimum standard will comprise the relevant "award" wage and legislated minima for annual leave, personal/carer's leave and parental leave (including maternity leave). At time of writing we do not know at what levels those leave standards will be set. (There will also be an as yet unspecified "maximum hours of work", which the government briefly toyed with setting at 40 hours before political reality showed its hand, but in the absence of any right to overtime pay it is questionable whether this has much significance.) The schema is very like that which was to apply under the 1993 *Jobsback!* proposal (minimum hourly wages, four weeks annual leave, two weeks sick leave and twelve months unpaid maternity leave) and is similar to those which applied in the 1990s in New Zealand (a minimum wage, annual leave, sick/bereavement/carer's leave, and public holidays) and, less closely, Western Australia (a minimum wage, annual leave, sick leave, bereavement leave, public holidays, a standard 40-hour week, plus three procedural rights including protection against unfair dismissal).[100] In addition, the procedural requirements for lodging AWAs are to be changed, with their taking effect from the date of lodgement rather than the date of approval. Non-union s170LK agreements will now be approved by the Employment Advocate and also take effect from date of lodgement (as will also be the case for union agreements).

Two major consequences stand out. First, there will be widespread potential for reductions in employee weekly pay, arising from the scope for cuts in penalty rates, overtime rates, leave loading, shift allowances and all other items of remuneration not covered by the "fair" standard. If history (and the present) is any guide, then this potential will probably, in significant ways, be realised. Exactly how much, and where, this is the case will depend on how tight the labour market is. Skills shortages might protect some higher paid workers, but the New Zealand experience tells us some low paid workers will be worst affected by cuts in penalty rates and overtime pay. As we have seen, even with the no-disadvantage test in place there is substantial evidence that AWAs focus on reducing costs to employers by changing the ways in which working time is paid for, principally by cutting or abolishing overtime rates and/or penalty rates, widening the spread of "standard" hours or replacing wages with "annualised salaries".[101] There are major concessions on hours in many AWAs but very little in the way of offsetting wage increases, leaving Mitchell et al[102] to wonder, after analysing many such agreements, whether

[100] Bailey & Horstmann 2000
[101] ACIRRT 2001; Cole et al 2001; Mitchell & Fetter 2003; van Barneveld 2004
[102] Mitchell et al 2003:62

there was "sufficient value to the employee for the agreement to have passed" the no disadvantage test. There was growing evidence that the Office of the Employment Advocate (OEA) has already been approving agreements that lead to below-award wages – even the chief executive officer of the Western Australian Retailers Association complained about the "lax interpretation" of the no disadvantage test.[103] For example, the OEA[104] promoted the non-payment of overtime rates when employees "volunteer" to work overtime hours, a concept that is rather dubious when employees have little bargaining power.

The recent revelations concerning the approval of 50 AWAs submitted by a South Australian Bakers Delight outlet, in which employees appear to have been paid well below the award in clear breach of the 'no disadvantage' test,[105] is a clear indication of chronic failure with approval processes in the OEA. One employee obtained redress and repayment of her 25 per cent underpayment because the procedural requirements were not fully observed by the employer, that is, the employer had not obtained a filing receipt from the OEA. However, it should be noted that it is unclear whether, even if the OEA could be reformed to do its job properly, this AWA would have been rejected under the proposed new provisions. The failure to pay penalty rates and overtime rates specified in the award, and the payment of weekly wages 25 per cent less than those required by the award, would not in themselves be reasons to reject the AWA under the reform proposals. The only reasons to reject the AWA would be if the ordinary wage rate was below that specified in the award or if the AWA did not meet minimum entitlements in regard to certain forms of leave. The Bakers Delight AWA had no provision for annual leave, instead specifying:

> The above rate incorporates a component for annual leave, annual leave loading and sick leave, and as such, those provisions do not apply.[106]

Whether employers would be able to contract out of their legal obligations to provide for annual and sick leave, simply by specifying that the base rate in the AWA "incorporates a component" for them, is as yet unclear.

The experiences of Western Australia and New Zealand tell us more about the future under the industrial relations reforms. In New Zealand, cuts in penalty rates and overtime rates were particularly likely amongst those in low-wage areas.[107] In Western Australia, the Commissioner of Workplace Agreements, whose job it was to register these agreements, published data on WPAs, based on two official analyses of agreements published in 1996 and 1999. In 1994-96 some five per cent of employees had agreements that provided for an ordinary rate of pay that was below the award rate. This later rose sharply, so that by 1998 a quarter of agreements had an ordinary rate of pay that was below the award. In both periods the *majority* of agreements provided for inferior penalty rates and overtime rates than in the award. Indeed, in most cases where overtime or penalty rates had been reduced, they were abolished altogether. That is, in the first and second periods, penalty rates were abolished altogether in 54 per cent and 44 per cent of

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[103] Todd & Eveline 2004:66
[104] OEA 2003c
[105] Yurong Holdings Pty Ltd v Renella [2005] SAIRC 60
[106] quoted in Yurong Holdings Pty Ltd v Renella [2005] SAIRC 60
[107] Rasmussen & Deeks 1997

cases respectively, and overtime rates were abolished in 40 and 44 per cent of cases respectively.[108] Under the no-disadvantage test that has (in theory) applied in the federal jurisdiction, these changes to overtime and penalty rates should be offset by increases in the base wage rate, but under the new "fair" standards to apply federally, there will be no need for increases in base wage rates, and without such increases overall earnings of these workers would fall. Hence the Prime Minister has been careful to avoid repeating the former guarantee that "no worker will be worse off", instead saying "my guarantee is my record", referring to rising real average wages.[109] Of course, rising average wages disguise distributional and compositional differences, and we can expect average real wages to continue to rise, driven by growth in strongly unionised sectors and managerial/professional employees, notwithstanding the declining relative position of many workers on AWAs. We can also expect the share of wages in national income to fall, and that of profits to rise, as they have done in trend terms since 1997.[110]

If the Western Australian experience is anything to go by, we may also anticipate some problems with the gender pay gap. Amongst those on WPAs, two in ten male employees, but three in ten female employees, had ordinary time wages below the award rate.[111] In 2002, average hourly earnings under formalised individual contracts in Western Australia were 26 per cent lower for women than for men – the highest gender gap for any type of agreement in any state jurisdiction.[112] So it was not surprising that an independent review into the gender pay gap in Western Australia endorsed "the importance of collective bargaining, in preference to individual agreements, in wage determination for the achievement of a narrowing of the gender pay gap".[113]

The second effect of the abolition of the "no disadvantage" test is that we will finally see the surge in registered individual agreement-making that the government and the Employment Advocate have long failed to achieve. Some currently unregistered individual agreements may be registered because of the lower transaction costs, but the main mechanism for AWA growth will probably be a drop in award-only coverage, as the new requirements and processes will make it so much easier for employers to undercut award conditions on payment for working time. Indeed, for employers who wish to make it so, the award will become irrelevant. Hence the Minister anticipates that few people will remain on awards in five to ten years.[114] While many employers will still find the award to be a handy guide to appropriate conditions, many others will find AWAs so much more convenient than in the past, since will probably only have to require all new employees to sign a simple document that specifies a single wage rate – Minister Andrews envisages future AWAs to be just one or two pages,[115] with all else presumably set by managerial prerogative. Such AWAs will be downloadable from the OEA's

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[108] CWA 1996,1999
[109] Howard 2005b
[110] ABS Cat No 5306.0
[111] CWA 1999
[112] ABS Cat No 6306.0
[113] Todd & Eveline 2004:66
[114] Workplace Express 2005
[115] Workplace Express 2005

website, as indeed template AWAs already are, but they are longer and more detailed now than they soon will be because they currently reflect the 'no disadvantage' test.

Changing minimum wage fixation

The award system of fixing minimum wages sets the benchmark for the 'no disadvantage' test and, under proposed changes to the federal system, the minimum wage fixing system will set the floor for wages under AWAs. So it is necessary to consider changes in minimum wage fixing.

Throughout its term of office the federal government has been dissatisfied with the size of annual safety net adjustments to award minimum wages by the AIRC. On each occasion the Commission has granted a higher increase than was submitted by the Commonwealth and employers – though it has always been lower than that sought by the ACTU, mostly closer to the Commonwealth's position, and on average (particularly for skilled workers on award rates) well below the growth in average weekly ordinary-time earnings.[116] The government's solution to this independently minded behaviour is to take wage fixing away from the AIRC, and give it to a new body, to be named the "Australian Fair Pay Commission". Minister Andrews states that the body is to be modelled on the UK Low Pay Commission, but with "greater economic rigour" than the AIRC and taking account of "the impact of any decisions on the low paid and the unemployed".[117] The implication that the AIRC does not take account of these things would startle anyone who has sat through a safety net case, as "the levels of productivity and inflation and the employment effects of minimum wages are discussed at great length" in these cases.[118] Something like 27,000 words of the Commission's 2005 Decision dealt with such issues.[119] It is difficult to know how much credence to attach to analogies with the Low Pay Commission. The Minister has opined that the UK Commission appears to "have been striking the right balance between the needs of the low paid and unemployed" adding that "since 1999 the minimum wage in the United Kingdom has increased by over 30 per cent." However, it is almost impossible to reconcile this with the Government's persistent view that the AIRC has been too generous in safety net cases, bearing in mind that the AIRC increased minimum wages by only 18 per cent between 1999 and the time of the Minister's statement. Much more instructive is the Minister's determination that the new body would "recognise" that the tax transfer system has displaced wages as the "primary lever of social protection".[120] While some, in the light of increasingly restrictive criteria for transfer payments, would dispute that the tax transfer system has become more generous for the low paid in recent years, the suggestion that minimum wages no longer need to perform a significant role of social protection clearly implies that minimum wages will grow at a lower rate than they otherwise would. But how would this occur?

One possibility is that the new Commission may freeze or virtually freeze nominal minimum wages (ie, reduce real minimum wages) in an ostensible attempt to increase employment amongst the low paid, as suggested by "the five economists".[121] The effects of minimum wages

[116] AIRC 2005:106
[117] Andrews 2005
[118] Alley et al 2005
[119] AIRC 2005
[120] Workplace Express 2005
[121] (Dawkins 1999; cf Nevile 2001).

on employment are highly controversial in the literature [122] and so the efficacy of such a policy is equally contentious. However, it may also be politically improbable: the government has shown little inclination to undertake the expenditure on tax-transfers, labour programs education and training that would be necessary to supplement and offset falling real wages and test the "five economists'" plan.

It seems more likely that the Government's interest goes beyond the size of minimum wage increases to the structure of award wages. No promises have been made that award wages above the minimum wage will increase in nominal terms – only that they "will not fall below the level set after inclusion of any increase determined by the 2005 Safety Net Review".[123] A plausible scenario is that, while the minimum wage may be adjusted at a rate consistent with government submissions to previous AIRC cases (around 2 per cent per annum) award rates above the minimum wage may rise by little or nothing, until such times as, one by one, they are absorbed by the minimum wage, thereby achieving over a long period the effective abolition of award classifications while maintaining the guarantee, repeated in seemingly all government brochures, that the reforms will "**not** cut minimum and award classification wages".[124] Of course, all this depends on the wording of the instructions given the "Fair Pay Commission" in the legislation and, much more importantly, on the individuals appointed to it.

Freedom of association and the right to collectively bargain

The use of various forms of agreement making is influenced by the frameworks for collective bargaining and freedom of association, so it is necessary to consider these too.

Several proposals previously rejected by the Senate aimed at reducing union power and the scope for collective bargaining will be reintroduced and enacted. The government plans to "provide tougher laws in relation to industrial action." Chief amongst these will be a requirement for secret ballots before protected industrial action can be taken. A previously rejected bill proposed that all protected industrial action must be preceded by a secret ballot in which at least half of eligible members must vote and set out detailed procedural requirements which would in effect introduce a delay of at least two weeks before employee action could take place. Secret ballot requirements are uncommon in bargaining jurisdictions, existing in the UK, Ireland, Greece, Iceland (where union membership is compulsory), some Canadian provinces, Fiji and Brazil.

Two stated objectives of secret ballots are to curtail industrial action; and to improve the accountability of the union to its members and strengthen union-member links.[125] The first of these objectives might not be achieved. In the UK, most researchers do not attribute the decline in working days lost in the 1980s to ballots.[126] Overall, there is no evidence of reduced militancy. By 1992, union recommendations (mostly to strike) were accepted in 95 per cent of ballots. The

[122] eg Card and Krueger 1995,1997; Nevile 1996,2001; Neumark & Wascher 1995; AIRC 2005
[123] Howard 2005a
[124] Howard and Andrews 2005, emphasis in original; DEWR 2005a,b,c
[125] Reith 1998b
[126] eg Martin et al 1991, Dunn & Metcalf 1993

campaign to achieve a significant majority often ‘raised expectations that could not simply be discounted later’, leading to a raising of the stakes, and possibly of strike duration. It was ‘difficult to justify calling off action without a ballot’ (Martin et al 1991). Hence some employers or groups sympathetic to employers (eg the Institute of Economic Affairs) argued that pre-strike ballots encourage or prolonged industrial disruption. About 30 per cent of unions in a study[127] indicated ballots increased the willingness of members to strike by legitimising the process of decision making. Researchers identified a “tiny fraction” of instances where balloting led to a clearly different outcome (usually a non-strike instead of a strike). What we do not know is how many times unions do not propose a strike that they otherwise would have been able to run. However, one effect was that employers often caved in to union demands after a ballot was held - less than half of ballots led to action being taken. UK unions adapted to the procedures by improving internal communication but also by increasing the central control of industrial campaigns to avoid litigation.[128] This may decrease the prospect of ‘disputes being resolved at local level’, contrary to expectations,[129] and would have a mixed impact on union democracy, since local control is an important element of union democracy. The main effect, however, is to give a tactical advantage to employers, by introducing a lag into employee behaviour that is not matched by a lag on the employer side.

The proposals for "better bargaining" appear to involve: prohibitions on industrial action during the course of an agreement, even when the matter at issue is not covered by the agreement (for example, an employer's decision during an agreement to undertake retrenchments); enabling the AIRC to terminate a bargaining period (during which industrial action is protected from tort and common law liabilities) at the request of one of the parties or a third party indirectly affected by the industrial action; preventing unions from engaging against action against more than one employer even where they are related corporations; and deeming that industrial action not be protected if the union organises it in concert with people who are not employees of the employer proposed to be covered or officials of the union, or if people other than those people engage in the action. Each of these proposals is aimed not so much at improving bargaining as at changing the balance of power in bargaining. Some are directly inconsistent with the bargaining model (as industrial action is aimed at making the other party concede by causing inconvenience to them, it hardly makes sense in a bargaining model to terminate it simply because it is having its desired effect). The last proposal appears to imply, for example, that if a union peak council were assisting in advising on protected industrial action, and if that were construed to be assisting in ‘organising’ it, the action could be declared unprotected. Likewise if a union in a regional area obtained support from a community group or an environmental group in a campaign (eg to improve occupational health in a new agreement) the latter might be construed as assisting in ‘organising’ the action and render the action unprotected and all parties liable to claims under common law. As unions may seek assistance in difficult disputes the aim appears to be to weaken the power of employees by reducing the resources that they can call upon to assist them during an industrial dispute.

The government also plans to "discourage pattern bargaining." Earlier bills proposed that the AIRC must terminate a bargaining period where the union has engaged in ‘pattern bargaining’,

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[127] Martin et al 1991
[128] Dunn & Metcalf 1993:83-4; Martin et al 1991:205
[129] Reith 1998b:20

and would prohibit the AIRC from approving secret ballots if the union is engaging in "pattern bargaining". The concept of pattern bargaining was so difficult to operationalise that it was not defined in previous Bills, though there was some attempt to specify what it was not. In making a decision on the appropriateness of proposed terms and conditions, the Commission was to have particular regard to the views of the employer who is affected by the bargaining period and potentially by industrial action. This proposal would offend the principles of the bargaining model by taking away from the parties the opportunity to decide how they conduct their bargaining or at what level they bargain and requiring the AIRC (rather than the parties) to determine what terms and conditions of employment are appropriate to be included in an agreement for a single employer. This is an area where asymmetry in policy is most stark, as 'pattern bargaining' by employers is not only permitted but encouraged by the government. Through the Office of the Employment Advocate (OEA), the government actively promotes the inclusion in AWAs of provisions that change the way working time is paid for, including by publishing and disseminating "template" and "framework" agreements which corporations can download and apply to their staff. For example, corporations running call centres can download from the OEA website a 21 page AWA which includes wage rates to apply when employees "ordinary hours of work" are Monday to Sunday all hours – that is, with no penalty rates for night or weekend work.[130] Under its "Specified Partners Program", bodies the OEA recognises as "specified partners" pre-check AWAs and promote pattern bargaining. One such partner, the "Small Business Union", announces on the OEA website that it has "developed a template that is both effective and simple to understand" and "offers workers a flat hourly rate of pay, which is applicable twenty-four hours a day, seven days a week" and which "cashes up contingencies and includes components for holiday pay and loading, long service leave, sick pay, meal and travel allowances, redundancy and severance".[131] This asymmetry in the treatment of pattern bargaining suggests that the principal purpose is again to shift the balance of power.

The government also proposes to "provide a single right of entry regime". This would be aimed at supplanting state laws and tightening the federal law, making union right of entry into workplaces to see current or potential members more difficult. Under the proposals, union officials must have reasonable grounds for suspecting a breach of an award or agreement, can only access the records of their members, and can only visit a workplace twice a year for recruitment purposes. They also have to meet more stringent documentary requirements. Such measures do not sit easily alongside the concept of "freedom of association" and again appear aimed at altering the balance of power away from employees.

The protection of employees from discrimination in relation to their choice of industrial agreement is in part dependent on unfair dismissal laws. Therefore it is also necessary to consider proposals here.

Unfair dismissal provisions were introduced into federal legislation by the Labor Government, under Minister Laurie Brereton, with effect from 1994. The WR Act watered them down significantly. On over 40 occasions since 1997 the government introduced legislation seeking to remove this protection for employees in firms with less than 20 employees, but it was always

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[130] OEA 2005a
[131] OEA 2005b

rejected by the Senate. While the Brereton legislation is still referred to as "job-destroying",[132] and many claims about the employment gains from removing them have been made,[133] the growth of 7.6 per cent in employment and 8.0 per cent in hours worked during the three years of the Brereton laws (1994-96) have not yet been surpassed in any three year period of the WR Act. So it seems unlikely that employment gains from the new exemption, if they exist at all, will be dramatic. Analysis by Rowena Barrett suggests the gains are minimal or non-existent.[134]

Under the proposals, protection against dismissal for "unlawful" (discriminatory) reasons will remain, but in practice this is considerably harder to argue. For example, when the AIRC reinstated fifteen workers sacked from Rio Tinto's Blair Athol mine after management, in a "conspiratorial allegiance", created a "black list" of union members who had declined to sign AWAs and who were "singled out for termination",[135] the union's argument and the Commission's decision were based on the fact that the decisions were "harsh, unjust and unreasonable" (that is, unfair), rather than for unlawful reasons. Apart from leading to an increase in the number of harsh, unjust and unreasonable dismissals (assuming the existing law had some impact, which judging by the number of cases it must have), the increased cost and burden of proof will also make it easier for employers to engage in discriminatory dismissals, such as sacking people with family responsibilities or who choose not to sign an individual contract.

Unilateral national industrial relations system

The proposed changes to the framework for agreement making are dependent on a major change in the constitutional head of power used for industrial relations legislation, so it is necessary to consider these.

The proposals envisage the Commonwealth using the corporations power and other related powers of the constitution to take over most of the states' systems of industrial regulation. This would cover four fifths or so of employees, leaving the states with regulation of the remainder (unincorporated enterprises, and state government employees). The Commonwealth hopes that the states will then voluntarily cede their powers to it. The problems engendered by the federalist system have been well rehearsed. The system promotes inefficiencies and inequities. An individual employer can have some employees covered by a federal award or agreement and others covered by a state award or agreement.[136] There may be inconsistencies in the pay, entitlements and rights of employees under the two jurisdictions, particularly for award-covered employees. The system has promoted factional conflict within unions.[137] That said, there is little in the way of empirical evidence to suggest that productivity effects are large. For example, the 1995 Australian Workplace Industrial Relations Survey identified approximately 19 per cent of workplaces with 20 or more employees had both federal and state awards operating together. Amongst workplaces with both state and federal awards, 75 per cent reported an increase in

[132] Howard 2005a
[133] Reith 1998a
[134] Barrett 2005
[135] *R D Smith and others and Pacific Coal Pty Ltd,* AIRC, 9 April 2001, Print PR902679.
[136] DWRSB 2000
[137] Mourell 1995

productivity over the previous two years, whereas the figure was 73 per cent amongst workplaces with only one jurisdiction. The differences were not statistically significant (AWIRS dataset). If the existence of concurrent state and federal jurisdictions has any effect on workplace productivity, it is relatively small and much less important than factors such as employee involvement, gender equity, capital investment, training, work organisation and gender equity in shaping productivity.[138] In the meantime, there may be transitional costs as firms move between jurisdictions or, worse, are uncertain of their jurisdiction because of possible High Court challenges.

The most important aspect of the use of the corporations power is that it enables the government to all but abolish industrial tribunals. Governments of both sides have long complained, publicly or privately, when tribunal decisions have not favoured their case, but until now they have had to be content with trying to guide what they do by constraining legislation, careful appointments and the logic of the Commonwealth's arguments, never a reliable trio. The constitutional restrictions of section 51(xxxv) of the constitution (the conciliation and arbitration power) prevented it from directing tribunals to come up with certain decisions. Use of the corporations power circumvents this problem, as it purportedly enables the government to directly regulate industrial relations without recourse to tribunals. Hence through the corporations power the AIRC's responsibility for certifying agreements (one of its most frequent activities) is handed to the OEA, as is its role in approving those few AWAs that the OEA admits are too difficult to adjudicate. The AIRC's responsibility for setting minimum wages (arguably its most important role) is handed to the "Fair Pay Commission". Its other most common activity is determining unfair dismissals, and this is largely abolished. Its role in interest arbitration has long since virtually disappeared with the shift to enterprise bargaining. The regulation of the building and construction industry is handed to government agencies. The AIRC is left to focus on "resolving legitimate disputes" and "further simplification of awards". The state tribunals will be similarly gutted, except in relation to the minority of employees they will still cover if the state governments retain separate systems. Departmental brochures are able to announce that the proposals "**retain** a role for the AIRC" and do "**NOT** abolish awards",[139] but both the AIRC and awards are very severely diminished.

A century earlier, section 51(xxxv) of the constitution "put the major issue of social rights on a national scale – the relations between capital and labour – into the hands of a court," an independent arbiter.[140] Both sides would complain at various times that the tribunals' decisions favoured the other, but few doubted that the tribunal acted with integrity and, on the whole, impartiality. Now the power of the arbiter is being transferred to government agencies, which either currently act under direction from the Minister, or (in the case of the "Fair Pay Commission") could be easily made to act under instruction from the Minister or the Cabinet with a few select words of legislation. The corporations power is not readily suited to the balanced regulation of employment relations. It is, as McCallum[141] points out, akin to having a paragraph in the constitution that enabled the Commonwealth Parliament to legislate with respect to men, and then using this platform to enact laws enabling men to enter into or to

[138] eg Alexander & Green 1992; Drago & Wooden 1992; Peetz et al 1999
[139] DEWR 2005a,b,c, emphasis in original
[140] Davidson 1997:56, quoted in McCallum 2005
[141] McCallum 2005:18

dissolve marriages with women: "women and men would cry out about the imbalance of such laws that treated women as little more than appendages of men." If the corporations power is to be the prime source of labour regulation then:

> our labour laws would become a sub-set of corporations' law and employees would be regarded as little more than actors in the economic enhancement of corporations. For our labour laws to pass the test of "justice and fairness at work", they must focus equally upon the rights, duties and obligations of employees and of employers.[142]

As it is, there are numerous complaints that the OEA, and the various bodies involved in regulating the building industry (the Cole Royal Commission, the Building Industry Task Force) are highly partisan, complaints that are difficult to refute and in some cases come from both sides of politics.[143] The OEA brought a case against a union official based on evidence by two witnesses whom the Federal Court found had lied in an attempt to 'set up' a union delegate – and then, with approval of the Minister, paid the $96,000 in costs that the Court had ordered the discredited witnesses personally pay.[144] Incidents of behaviour by any of the tribunals that approached this degree of partisanship do not immediately come to mind. Coercive powers, beyond those available to police, have already been given to the Minister's Building Industry Task Force to compel union members in that industry to answer questions and provide self-incriminating documents, with penalties up to six months jail for non-compliance. This body will shortly be transformed into a permanent Building and Construction Commission with even stronger powers. The enabling legislation contains heavy retrospective penalties, against individuals and unions engaged in broadly-defined "illegal" industrial action – penalties that can be instigated by the new agency even if employers demur.[145] It is a form of state micro-management of industry.

Amongst the industrialised nations, Australia has had one of the more highly regulated systems of industrial relations. Overall the distributional consequences of the award-dominated system up until the 1990s were minor, particularly between capital and labour. It probably led to a reduction in wage dispersion compared to the UK and USA, at least up until the 1990s, and almost certainly led to a reduction in the gender wage gap below that existing in most other industrialised countries, but otherwise the aggregate effects reflect the broad operation of market forces that would have operated in more orthodox collective bargaining systems anyway.[146] The new system that will follow from 2006 will not be a deregulated system, such as New Zealand's under the ECA (a mere wisp of a pamphlet by comparison with the size of the amended WR Act). It will be a highly regulated system but one in which partisan regulation, through the corporations power, has replaced independent regulation through the conciliation and arbitration power, and in which a partisan state takes a highly activist role. Two further examples of state activism will suffice: the 1998 Waterfront dispute, in which the Government and a key waterfront corporation, Patrick Stevedores, engaged in an alleged "conspiracy" to replace Patrick's fully unionised workforce with non-union workers trained and employed by a labour

[142] McCallum 2005:18
[143] Marr 2004; Jones 2002
[144] Workplaceinfo 2002
[145] Roberts 2005
[146] Rowe 1982; Norris 1980,1983; Brown et al 1978; Burgess 2004

hire corporation;[147] and the current Higher Education Workplace Relations Requirements, through which the government intervenes in the internal employment relations of universities in a manner unknown in other industrialised countries, requiring that universities, amongst other things, offer AWAs to all staff and remove union facilities from campuses.[148] Across the industrialised world, it would be hard to find a combination of complexity and active partisanship to match that of Australia. Even the Thatcher government, widely seen as introducing laws that disadvantaged unions and reduced union membership,[149] largely kept away from day to day involvement in industrial relations between the parties once the mining and printing battles were over.

Concluding remarks

There is no "compelling" evidence to back assertions that individual contracting is necessary to promote higher productivity growth. While the "success stories" receive much publicity, for each success it seems there is an untold "failure story", of individual contracting leading to lower productivity growth than would have occurred under collective bargaining. Workplace data show no gains in terms of productivity for individual contracting over union collective bargaining. If anything the reverse is the case. National productivity data show no sustained productivity benefits from the promotion of individual contracting under the Workplace Relations Act. The initial seemingly high rates of productivity growth that were seen in the 1990s owed as much, probably more, to the system of enterprise collective bargaining – and to the product market reforms of the 1980s and early 1990s – as they did to the Workplace Relations Act. As the Workplace Relations Act has settled in, productivity growth has slowed, to the point where it now appears to be below the rate that applied under the traditional award system in the 1960s and 1970s. Indeed, in recent quarters growth in productivity has been negative. Soon the advocates of reform will have to start changing their argument, and stop saying "reforms have brought great benefits. We need to build on these gains with more of the same". Instead they will probably need to say "reforms have not gone far enough. We need to address these problems with more of the same." Perhaps a more sensible approach, however, would be to question whether more of the same will do any good at all. While productivity is not systematically influenced by individual contracting, the same cannot be said for profits. Individual contracting appears to raise profits, though this does not inherently reduce unemployment.

The New Zealand legislation of the 1990s is closer to the proposals outlined in May 2005 than to the current Workplace Relations Act. The no-disadvantage test, which has provided an award-related floor under AWAs, is to be replaced by a statutory benchmark of a classification-related minimum wage and three statutory leave provisions. It takes no account of penalty rates, overtime rates and most other aspects of remuneration encompassed in an award. This model has many similarities to the New Zealand benchmark established under the Employment Contracts Act and provides substantially greater opportunities for employers to reduce labour incomes than the present system. The New Zealand experiences indicates that any impact of the May 2005 proposals on productivity will be to slow down, not increase, productivity growth.

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[147] Lee 1998; Trinca & Davies 2000
[148] Nelson & Andrews 2005; Giglio 2003
[149] Freeman & Pelletier 1990

There will also be widespread potential for reductions in employee weekly pay, arising from the scope for cuts in penalty rates, overtime rates, leave loading, shift allowances and all other items of remuneration not covered by the "fair" standard. If history (and the present) is any guide, then this potential will probably, in significant ways, be realised. Just how much and where this occurs will depend on how tight the labour market is. Skills shortages might protect some higher paid workers, but the New Zealand experience tells us some low paid workers will be worst affected by cuts in penalty rates and overtime pay. Studies of AWAs and individual contracting in other jurisdictions have shown that these are the areas that employers focus on changing, to achieve cost savings and higher profits. Analysis of agreements, and analysis of the publicly available data, suggest that already these are not being offset by adequate increases in hourly base pay, at least not at a level that matches developments in collective agreements. The abolition of the 'no disadvantage' test is likely to exacerbate these trends. Indeed, for employers who wish to make it so, the award will become irrelevant. While many employers will still find the award to be a handy guide to appropriate conditions, many others will find AWAs so much more convenient than in the past, since they will probably only have to require all new employees to sign a simple document that specifies a single wage rate. If the Western Australian experience is anything to go by, we may also anticipate some worsening problems with the gender pay gap. Average real wages would continue to rise, driven by growth in strongly unionised sectors and among managerial and professional employees, but this would disguise the declining relative position of many workers on Australian Workplace Agreements (AWAs).

The framework for agreement making includes a number of elements including the floor set by minimum wage fixing system, the framework for collective bargaining and the constitutional head of power used. Changes to award wage fixing, taking responsibility from the Industrial Relations Commission and giving it to a new government agency, would lead to slower growth in minimum wages. It is also possible that skill-based wages in awards would eventually disappear. The abolition of unfair dismissal protection in most workplaces can be expected to lead to an increase in the number of harsh, unjust and unreasonable dismissals, while the increased cost and burden of proof in demonstrating "unlawful" sackings will also make it easier for employers to engage in discriminatory dismissals or threatened dismissals, such as sacking people with family responsibilities or for declining to sign individual contracts. A number of changes would reduce the scope for collective bargaining and do not sit easily with freedom of association. For example, "pattern bargaining" by unions would be prohibited, while it is encouraged amongst employers. Australia would continue to have a highly regulated industrial relations system. However, it would be one in which partisan regulation, through the corporations power, replaces independent regulation through the conciliation and arbitration power.

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