Lockout Law in Australia: Into the Mainstream?

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Introduction

A lockout occurs when an employer temporarily withdraws paid work for its employees, refusing to allow their employees to enter the workplace to exert economic pressure on them to yield in a labour dispute. Lockouts were once regarded as historical curios of an era long-gone, found only in the 1890s when unions were struggling to establish themselves or the crisis years of the Great Depression. But lockouts have resurfaced in a series of disputes since the landmark *Industrial Relations Reform Act (1993)* and the shift to enterprise bargaining. In the second half-decade of enterprise bargaining (1998-2003), lockouts accounted for just under one-tenth of working days lost to disputes and over half of the 'long' disputes (longer than a month) – which is especially significant because the economic, social and personal fall-out from long disputes can be irreparable.

How lockouts should be legally treated is a small but important question. Lockouts are by their nature relatively infrequent but the way in which they are legally regulated influences matters which are central to the functioning of labour law and employment relations – the ability of employees to freely associate, bargain collectively and take strike action to pursue their interests in disputes with their employers. Should employers be allowed to utilise lockouts or does their existence undermine the ability of employees to use

industrial action to equalise bargaining power and therefore bargain effectively? If employers are allowed to use lockouts, under what circumstances should they be able to use lockouts?

Australian labour law is distinctive in the virtual absence of limitations on lockouts which are commonplace throughout the OECD. Some OECD nations prohibit lockouts. Most OECD nations permit lockouts but limit them to circumstances under which employers are considered to suffer from an imbalance of bargaining power – excluding for instance 'offensive' lockouts (lockouts which precede industrial action by employees), lockouts outside the context of collective bargaining against non-union employees or which undermine collective bargaining and freedom of association. Lockouts internationally are only available to employers to 'equalise' bargaining power under exceptional circumstances where well-organised employees are using industrial action. Conversely, lockouts in Australia can be:

- used offensively (between one-fifth and one-quarter of lockouts precede any industrial action);
- applied against individuals and non-union employees (in one case an individual worker was locked out for 2 ½ months to pressure him into signing an AWA [AIRC 2003a])

. used to reconfigure power relations by coercing employees into signing individual agreements and eroding or removing the union as a bargaining representative through an 'AWA Lockout' (some AWA lockouts have run for as long as 6-9 months).

These cases are rare. They are not typical. But so long as employers are free to lockout their employees for months and months to coerce them into signing individual agreements if they have the resources and will the Act fails to properly uphold freedom of association. Allowing employers to lockout employees to pressure them into signing AWA's clearly runs counter to the promise of the Liberal-National Party that their legislation would ensure individual agreements were always voluntarily entered into by employees.

Australian lockout law is the most 'liberal' or 'de-regulated' in the OECD. It is consequently in need of reform to bring Australian into the international mainstream. When the Australian Labor Party (ALP) reoriented the legislative framework to enterprise bargaining in 1993 (the *Industrial Relations Reform Act*), the right to lockout was introduced as a simple parallel to the right to the strike and was then further liberalised by the Liberal-National Party in 1996 (the *Workplace Relations Act*), primarily by allowing for AWA lockouts. Solicitors and employer representatives deny any need for change

or argue that any changes to the Workplace Relations Act should be applied equally to strikes and lockouts. The notion that strikes and lockouts should be treated equally is intuitively appealing but ultimately misguided. Other nations have rejected equal treatment of lockouts and strikes because an equal right to lockout is inconsistent with other legal principles such as freedom of association, the right to collective bargaining and strike. Australian employers, it will be argued, have been given too much freedom by policy-makers at federal level to use lockouts.

As a minimum, Australian lockout law should be reformed to:

. Prohibit AWA lockouts, lockouts against non-union employees and offensive lockouts;

. Enhance the capacity of the AIRC to settle disputes involving long-running lockouts;

. Introduce some notion of 'proportionality' to govern the usage of lockouts as a response to industrial action

Lockouts should be legally reserved as a genuine weapon of 'last resort' as in other more established bargaining systems.

1.0 Lockouts in Australia: Historical Background

Australia and New Zealand are distinctive as the only two advanced market economies to develop systems of compulsory conciliation and arbitration throughout most of the twentieth century. Both nations overlaid systems of conciliation and arbitration which outlawed all forms of industrial action on top of British Common Law inherited as a legacy of their colonial origins. Under Common Law, lockouts (as well as strikes) are illegal as breaches of the contract of the employment insofar as an employer has not satisfied their contractual obligation to provide work. Statutes to prevent, penalise and compensate for industrial action were enacted in both nations rendering all forms of industrial action unlawful (Anderson 1994: 24; Creighton & Stewart 1990: 5). The logic behind the prohibition of industrial action was best summarised by one of the pioneers of the conciliation and arbitration system, Henry Bourne Higgins, when he said the *Conciliation and Arbitration Act (1904)* signaled:

> a province for law and order … (in which) the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous process of strike and lockout. Reason is to displace force; the might of the state is to enforce peace between industrial combatants … and all in the interests of the public.

Lockouts, like strikes, were legally prohibited because the state reasoned in establishing the conciliation and arbitration tribunals it had established a

mechanism for alternative dispute resolution. In practice, Australia and New Zealand were characterised by high numbers of very short strikes (often to instigate proceedings in the conciliation and arbitration tribunals) whilst lockouts were extremely rare.

A statutory right for employers to lock out their employees was introduced as a parallel to the right to strike in the Federal jurisdiction by the Australian Labor Party (ALP) in the *Industrial Relations Reform Act (1993)*. With the decentralisation of bargaining and the retreat of the industrial tribunals to the 'shadow' of enterprise bargaining (Gardner & Ronfeldt 1996: 163), there was recognition of the need to create a legal space within which industrial action could occur as part of the bargaining process (The Parliament of the Commonwealth of Australia 1993: 73). A limited immunity from civil liabilities for lockouts used to exert pressure during the bargaining process was consequently introduced.

Under the *Workplace Relations Act (1996)*, a lockout is 'protected action' so long as:

. the lockout occurs during a bargaining period for the purpose of supporting or advancing claims for an enterprise agreement (s.170ML);

- the employer has given 3 days written notice (unless they are responding to industrial action in which case no written notice is required) (s.170MO);
- the employer has 'genuinely tried to reach agreement' before using a lockout (s.170MP);
- the lockout does not affect the employee's continuity of employment or effect a termination of employment (s.170ML).

Lockouts are available to employers trying to negotiate agreements in all three streams - the union, certified agreement stream (s.170LJ), the collective, non-union stream (s.170LK) and also in relation to individual, Australian Workplace Agreements (AWA's). Under s.170WB (1) (b) of the Act, lockouts 'for the purpose of compelling or inducing the employee to make an AWA, on particular terms and conditions, with the employer' are explicitly defined as a form of protected action under 'AWA Industrial Action' provisions.

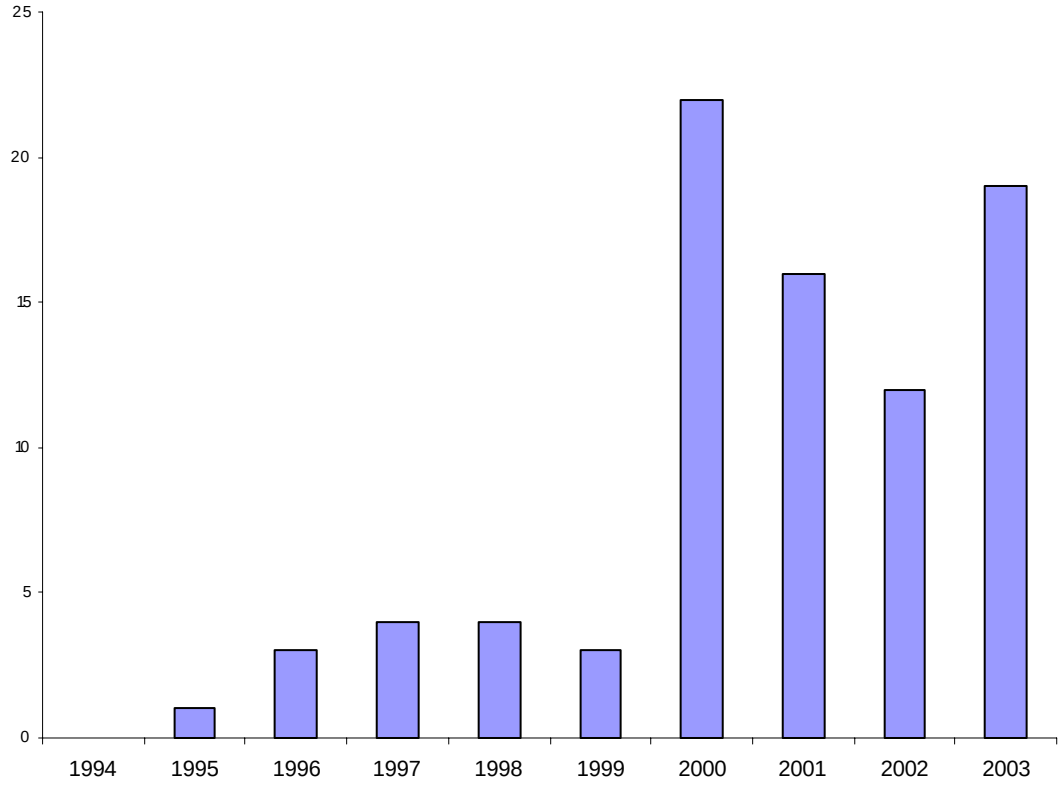
Only in the federal jurisdiction has the decentralisation of bargaining been accompanied by legislation expressly permitting lockouts as a form of 'protected' industrial action immune from common law sanctions. In the Tasmanian jurisdiction, lockouts are illegal whilst in other state

jurisdictions they essentially constitute an industrial dispute for legislative purposes much like strikes and other forms of industrial action.

2.0 Lockouts in Australia: a Quick Profile

Although the statutory right to use lockouts was introduced by the 1993 *Industrial Relations Reform Act*, lockouts were still barely used while the ALP was in government. In fact, there was just one single lockout in 1995. Lockouts were used in just a handful of disputes each year following the election of the Howard Government in 1996 until the year 2000 when there was surge in the number of lockouts - as illustrated in Figure 1:

Figure 1: Number of Lockouts, 1994-2003



Source: Lockouts in Australia Database (LAD).[2]

Lockouts have increased at a time when the number of strikes and days lost to strikes have been in decline. Consequently, as Table 1 illustrates, lockouts account for a growing proportion of disputes and working days lost to disputes.

[2] A database of lockouts since the commencement of the *Industrial Relations Reform Act* in 1994 was constructed using funding from the School of Business, University of Sydney. See Briggs (2004) for methodology.

Table 1: Strikes and Lockouts Compared, 1994-2003

	1994-98	**1999-03**
WDL to Lockouts as a Proportion of all Disputes	1.6%	9.3%
Lockouts as a proportion of all disputes	0.3%	2.0%
'Long' Disputes (i.e. greater than 20 days) comprised by Lockouts	7.7%	57.5%
Proportion of WDL to Lockouts, Manufacturing	3.0%	26.6%

Source: ABS (1994-2002), *Industrial Disputes*, Cat. No. 6321.0; LAD.

Note: The figures are divided into two five-year time-periods (1994-98, 1999-2003) for two reasons. Firstly, the figures gyrate from year-to-year and a periodisation gives a more accurate picture of the overall trend. Secondly, the two time-periods essentially correspond to before and after a pathbreaking lockout (the 0' Connors lockout) which established the major legal precedents or guidelines for their usage under the *Workplace Relations Act (1996)*.

Table 1 confirms that lockouts are still relatively rare but on an upwards trend. Only 2 per cent of disputes between 1999-2003 involved a lockout but the proportion of working days lost to disputes involving lockouts has almost increased six-fold. This reflects a four-fold increase in the number of working days lost to industrial disputes involving a lockout during the second half-

decade of enterprise bargaining as the working days lost to labour disputes in total fell by around one-third. It should also be noted that lockouts are just one way in which employers withdraw work as an industrial tactic to exert pressure on their employees – the ABS (2002) definition used here excludes other ways in which employers withdraw work as a bargaining tactic such as mass dismissals and stand-downs (see Appendix one). Consequently, the working days lost as a consequence of employer withdrawal of labour is significantly greater than those lost to lockouts.[3]

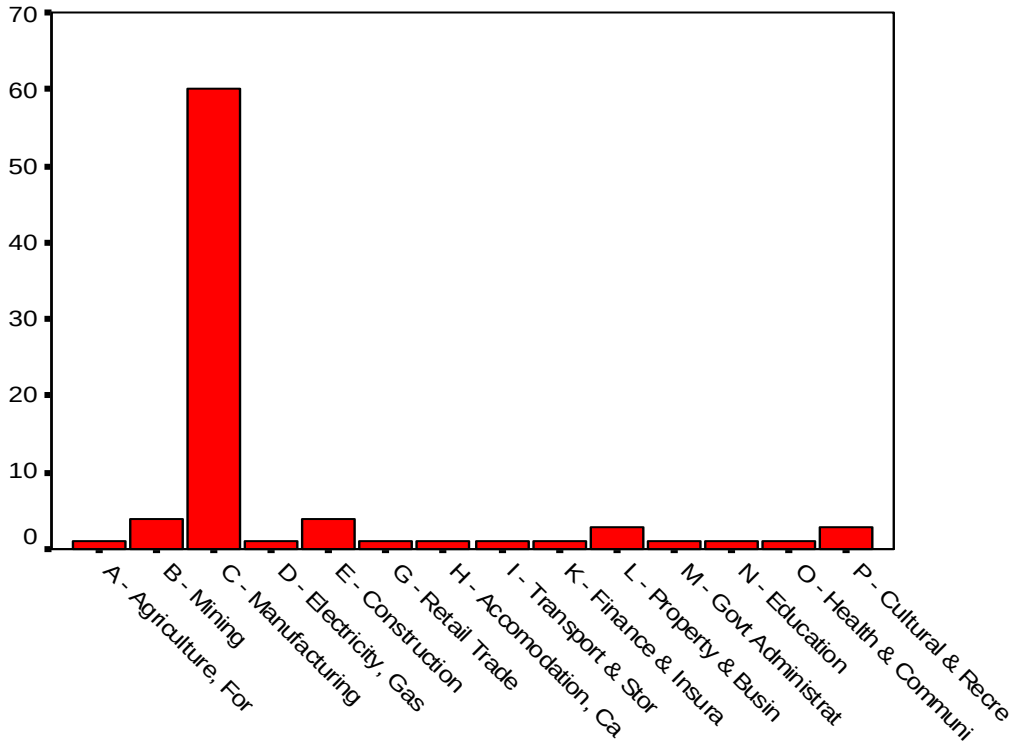
Even more noteworthy, just over half of 'long' industrial disputes (disputes which last longer than a month) between 1999-2003 were lockouts. Employer lockouts, not strikes by unions, were responsible for most of the long disputes in the second half-decade of enterprise bargaining. Lockouts still comprise a relatively small proportion of disputes but they are a significantly more likely to evolve into drawn-out stand-offs with high economic, social and personal costs.

Table 1 also illustrates the growth in lockouts is primarily driven by manufacturing employers. Workings day lost to disputes involving a lockout grew from just 3% between 1994-98 to an astonishing 26% between 1999-2003.

[3] Without systematically searching for these other types of withdrawal of work by employers, in the course of my research into lockouts around 30% of the disputes investigated were excluded on the basis that they fell into one of these four other categories.

Working days lost overall to industrial disputes grew in manufacturing but this reflects the growth in lockouts which more than offset a fall in days lost to strikes. Figure two graphically illustrates the concentration of lockouts in manufacturing although it is interesting to note that 14 of the 16 major industry categories have had at least one lockout:

Figure 2: Lockouts by Industry, 1994-2003



Source: LAD

Outside the blue-collar, manufacturing union heartlands, a surprisingly diverse range of occupations have been subject to lockouts including academics, medical scientists and casino gaming dealers.

Where do lockouts occur? They are most likely to occur in Victoria (the location of approximately half the lockouts), which has 4-5 times the number of lockouts in NSW, Queensland or South Australia. Notably, lockouts are also disproportionately likely to occur in regional areas - the location of just under half the lockouts. The typical lockout, if one were to develop a identikit profile, occurs in a manufacturing site in a regional area in Victoria.

3.0 Why Have Lockouts Returned?

3.1 The Influence of Government and Legislative Reform

Lockouts are first and foremost the product of legislative reform. This is unusually easy to test and prove in the case of lockouts. Table 2 (overleaf) illustrates that lockouts are almost entirely concentrated in the one jurisdiction, the Federal Jurisdiction, in which there is an explicit legal right to lockout:

Table 2: Lockouts by Jurisdiction, Federal and State, 1994-2003

Jurisdiction	Percentage
Federal	91
State	7
Don't Know	2

Note: In a small number of cases (2%), it was not possible to identify the jurisdiction from available sources or subsequent enquiries.
Source: LAD.

Lockouts remain virtually unheard of in the other seven state jurisdictions. Both Federal and State Legislatures have enterprise-level bargaining systems so the level of bargaining is not a factor in differences between the jurisdictions. Lockouts simply would not have reappeared without government intervention and legislative change at the Federal level.

3.2 Why Do (Some) Employers Use Lockouts?

If the role of legislation and politics is clear, there is still a second-order question: why do some employers, and not others, choose to use lockouts – to avail themselves of the opportunity created by state intervention? The usage of lockouts, after all, carries significant actual and potential risks and costs for employers including:

. Lost work-time;

. Lost sales from negative publicity. As one solicitor[4] who represents employers in disputes commented: 'they don't want to be on the front page of the newspaper or on the news as being the company that locked out its workers. They do get a lot of publicity. It is the type of thing that makes it on the Today Show … It is normally not reported in the scheme of why or how the lockouts are in place. It is just about the images of a group of employees standing outside a gate.'

. An escalation of the dispute leading to a lengthy stoppage and expensive legal proceedings; and

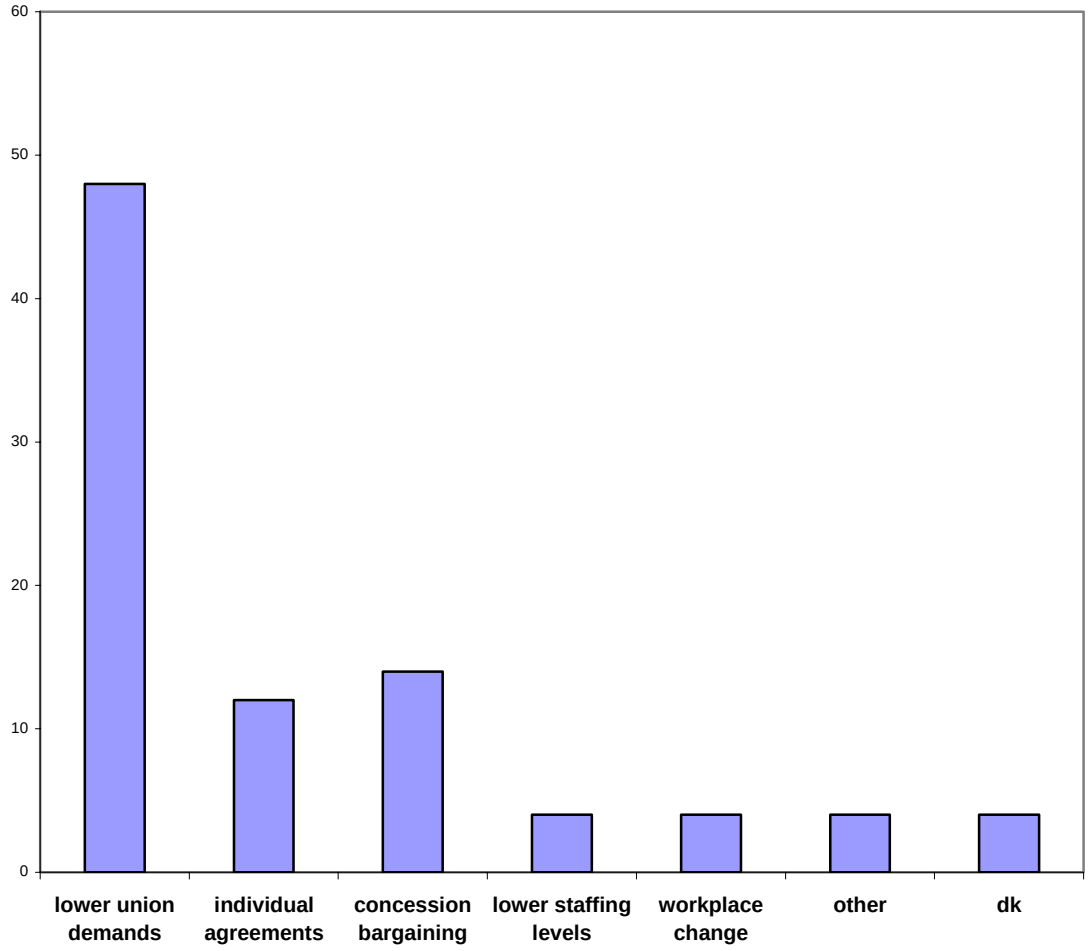
. A deterioration in workplace relationships which could lead to lower productivity, resistance to change and 'pay-back' industrial action sometime in the future.

These risks and costs are enough to dissuade a significant number of employers who consider lockouts as an option during disputes according to solicitors interviewed who act for employers.

[4] Three solicitors from two leading firms who represent employers were interviewed for this project. They are not cited directly to preserve anonymity.

Figure 3 illustrates the objectives of employers who use lockouts.

Figure 3: Number of Lockouts, by Objective, 1994-2003



Source: LAD.

Note: multiple objectives were recorded for some disputes e.g. concession bargaining and individual agreement.

Some lockouts are unclassifiable, the product of anomalous circumstances or disputes, but there are two primary types of lockouts.

3.2.1 'Big Bang' Lockouts

'Big Bang' lockouts are long lockouts, lockouts which run for months and months, in which the firm is using a lockout to coerce their unionised workforce into signing individual agreements and/or acquiescing to cuts in their wages and conditions. Typically, unionised production workers are locked out indefinitely with an ultimatum they won't return to work until they sign an AWA. The unionised production workforce is locked out initially for a couple of months with an ultimatum they won't return to work until they sign an AWA. After a few months, part of the workforce breaks ranks and returns to work and the lockout is renewed for the remainder of the workforce. Three and sometimes four lockouts occur until the entire workforce has ultimately signed an AWA, including an extraordinary case where a single worker was locked for a further 10 weeks after the rest of the workforce had finally signed AWAs following a 9-month lockout (AIRC 2003a).[5]

[5] The lockout was ultimately terminated by SDP O'Callaghan because it appeared likely to terminate his employment and was therefore not a lockout within the meaning of the Act. However, SDP O'Callaghan framed his decision in such a way as to deliberately avoid creating a precedent against the lockout of an individual: 'The only conclusion the AMIEU could logically draw from such a decision is that when the last employee who refuses to endorse an AWA is locked out with absolutely no prospect of agreement with that employee being reached, the Commission may take action to resolve the matter.'

The best-known lockout of this type occurred at G & K O'Connors Abattoir which locked out its 334 employees for 8 months. It had been one of the leading abattoirs but, amidst a major downturn in the export beef market which had led to the closure of beef processing lines at other abattoirs in Victoria and other states, G & K O'Connors claimed that the business was unviable without radical changes to labour costs and work practices. O'Connors opened negotiations for a new enterprise agreement with a demand for wage cuts of between 10-17 per cent, changes to work practices and reductions to a wide range of other employment conditions which would have the effect of reducing take-home pay by as much as 25-30 per cent for some of the workforce. After a stand-off ensued, O' Connors initiated an offensive lockout. After five months, O'Connors switched from a 'collective' to an 'individual' lockout, mailing offers of AWAs to its employees on identical terms to the collective agreement. Eight months after the lockout had commenced, the AIRC ruled that 'enough is enough' and ordered the lockout finish (AIRC 1999). Many of its employees had by now resigned, some employees returned to work on the AWAs. Others, who still wished to negotiate a collective agreement through the AMIEU, returned to work on the minimum award rates which meant even larger wage cuts of up to fifty per cent.[6]

[6] G & K' O'Connors succeeded in dramatically slashing its labour costs but the dispute had other ramifications. The company continued to find themselves embroiled in expensive legal

Big bang lockouts are typically undertaken by firms with competitive difficulties, located in markets where business is in any case slow, who decide to gamble on a long lockout to restructure the business and effectively remove the union from the workplace. The worksites are also usually in regional locations with few alternative employment options for matured-aged production workers in declining sectors with excess capacity and third-world wage competition.

3.2.2 'Bargaining' Lockouts

The second, more common type is a bargaining lockout – usually a shorter lockout which aims to achieve a quicker, better agreement outcome for the employer by pressuring a union to compromise its bargaining goals. Bargaining lockouts are often used by firms as a counter to well-organised unionised workforces using rolling campaigns of selective work bans, go-slows and/or quick stoppages. Rolling campaigns are particularly effective at

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proceedings for over two years, there was continuing strife in the workplace and chronic labour turnover. Legal proceedings continued in the aftermath of the dispute, mostly as a consequence of a series of unfair dismissal hearings, including one case in which a former employee confessed he had been hired to spy on fellow employees, goad them into stealing and start fights with key individuals such as the union delegate (Bachelard 2001a). As a consequence of the workplace environment and what were now very low wage rates by industry standards, G & K O' Connors experienced difficulties attracting and retaining labour. As Managing Director, Kevin O' Connor, acknowledged on television, 'long-term employees really no longer exist in this company' (Ibid). According to newspaper reports, O' Connors responded to their labour supply difficulties by engaging 180 low-wage trainees and between 50 and 90 Afghan refugees recently released from a mandatory detention centre on temporary work visas (Bachelard 2001b).

building pressure on firms by lowering production volumes, disrupting schedules and continuity of supply without losing (much) pay. Firms regain an element of control over the dispute by simply locking their employees out, exerting pressure for a quick(er) resolution by also inflicting losses on their employees. One of the solicitors interviewed argued:

> In that situation, if the union does that, the best way of dealing with it … is a lockout in response and bring it to a head. If you are going to suffer the damage you might as well ensure that those who are causing it are also suffering some damage so that they have an interest in resolution … it is a means of evening up the situation in response to a union-led workforce with organisers using industrial action quite cleverly to that they cause damage to the employer without damage to themselves.

Lockouts are therefore argued to be a legitimate tactic used to counter union bargaining demands, especially in global market contexts where employers are sometimes acutely vulnerable to extended stoppages as they can permanent lose contracts to other firms or find head offices relocate investment and work to other national branches in multi-national organisations.

4.0 How Australia Compares: Lockout Law in the OECD

It is instructive to examine how legal systems in other nations approach lockouts when considering the merits of the Australian system. There appear to be three approaches used across the OECD: lockouts are prohibited in Southern Europe, legally permitted but limited to circumstances under which employers are considered to suffer from an imbalance in bargaining within collective bargaining across the majority of OECD nations, and established as the formal equal of strikes in Australia (and until recently New Zealand): Australian employers have freedoms to use lockouts not found throughout the rest of the OECD.

4.1 Southern Europe: Prohibition

In most of Southern Europe, lockouts are illegal. Under corporatist and fascist regimes in Southern Europe which operated variously across the region from the 1920s until the 1970s, all forms of industrial action were illegal. The prohibition on lockouts was part of state suppression of civil society, autonomous organisations and interest conflicts. As these nations emerged from the shadows of these regimes, the right to strike was enshrined constitutionally or by statute whilst lockouts were prohibited – sometimes constitutionally (e.g. Portugal), sometimes by statute (e.g. Greece).

The logic underlying the prohibition of lockouts in contemporary Southern European nations is straightforward. The capacity to withdraw labour, or the implied threat it could be withdrawn effectively, underpins the bargaining power of a union and employees. Without an effective right to strike, employees are placed in a state of dependence, inferiority and unable to bargain effectively. It is the implicit threat or explicit strike weapon which restores equilibrium between labour and capital. If an employer, which already has superior organisation, financial and legal resources, also has recourse to lockouts to countermand industrial action then fundamental principles such as collective bargaining, freedom of association and the right to strike are violated and compromised (Ibid; Jacobs 2001: 588). Consequently, 'in these countries (Southern European) the doctrine of parallelism between strike and lockout is rejected' (Jacobs 2001: 619).

4.2 OECD Mainstream: Lockouts in Exceptional Circumstances

In most OECD nations, lockouts are permitted but limited so as to also sanctify competing legal rights for labour to freedom of association, collective bargaining and strike. Whilst the parties must be free to exert coercive pressure as part of the bargaining process, effective, fair agreement-making requires a broad equilibrium of power. Strikes and lockouts have to be treated differently in order to maintain or reconstruct such an equilibrium.

Whereas at least the possibility of strike action underpins the capacity of workers and unions to bargain effectively, the reverse is not generally true for employers; that is, lockouts are not generally necessary for employers to bargain effectively and should be reserved for circumstances where a union has exceptional bargaining power. The archetypal circumstance is the use of lockouts as a counter to what the Germans call a 'pinprick strike' (targeting a strategically located site which will substantially affect the rest of the sector) or the Americans call 'whipsaw bargaining' (striking against a particularly vulnerable site to set a new standard to then be flowed onto other sites in the bargaining unit).

Exactly how the relationships between lockouts and the rights of labour are conceived, and therefore under what circumstances lockouts are permitted or not permitted, varies significantly from nations with relatively liberal arrangements for lockouts (e.g. United States) to those with carefully detailed regulations (e.g. Germany). Lockouts in Germany, for example, are subject to the rule of 'proportionality' (which governs all forms of industrial action) whereby as a response they cannot be so excessive as to be out of proportion to the strike action (Lange 1987: 314; Weiss 1994: 68). In a landmark ruling in 1980, the Federal Labour Court ruled:

> Only defensive lockouts can be considered suitable, necessary and proportional which aim at the restoration of parity in collective bargaining. With these criteria, the legal boundaries for the permissibility of defensive lockouts have been determined (cited by Lange 1987: 299).

The United States, by contrast, also allows 'anticipatory' lockouts i.e. a lockout in anticipation of strike action where it can be proven the union is stalling in bargaining and holding back a strike until a moment of extreme vulnerability for the employer. But universal to all these nations throughout the OECD (Northern & Western Europe, North America, Japan) are legal principles which only recognise and permit lockouts which are 'defensive' (i.e. undertaken after and in response to industrial action by a union), used in accordance with legal guidelines as a 'last resort' and do not in any way undermine the ability of employees to freely associate and combine, union representation and collective bargaining (Ben-Israel 1994; Blanpain 1994; Jacobs 2001: 619-20).

4.3 *The Antipodes: Formal Equality Between Strikes/Lockouts*

Lockouts have been established as the formal equal of strikes in Australia, and until recently New Zealand, which has delivered extensive freedom to use lockouts. To begin with, lockouts can be used offensively as well as

defensively (before the employees have engaged in industrial action). But the major deviation from international norms relating to lockout law is that the role of lockouts has been extended beyond collective bargaining; lockouts can be used to de-collectivise bargaining by coercing employees into signing individual agreements and applied against non-union employees. Where most OECD nations limit lockouts to 're-balance' power within the context of collective bargaining, lockouts can be used to reconfigure power relations by de-collectivising bargaining.

The key innovation of the *Workplace Relations Act* was legislative recognition of individual agreements (AWAs) for the first time. At the time the *Workplace Relations Act* was passed, the Liberal-National Party (L-NP) pointed to statutory protections for employees against 'duress' and 'coercion' in the process of making AWAs as a guarantee AWAs would be voluntarily entered into by employees. The Hon. Peter Reith (1996), in the Second Reading Speech accompanying the bill, said:

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

But simultaneously, the L-NP legislated to allow for AWA lockouts. The *Workplace Relations Act* therefore contains what amounts to legislated gaps in protection from coercion and duress in the making of individual agreements.[7] Employers can use lockouts to pressure employees to sign an AWA from the outset of the bargaining process but also switch to an AWA lockout after bargaining has commenced. It is also legal to use lockouts against non-union employees in the process of making a collective, non-union agreement (s.170LK) though no cases were unearthed in the course of researching lockouts.

New Zealand employers did however use lockouts against non-union employees under the *Employment Contracts Act (1991) (ECA)*. The ECA abolished all vestiges of the arbitral model including the industrial tribunals, multi-employer regulation and the promotion of collective bargaining – in fact, there was not so much as a single reference to trade unions in the entire Act. Lockouts could be applied in the making of a collective employment contract (cec) but as the group of employees could be unorganised and number as few as two the lockout was 'divorced from the context of collective bargaining' (Anderson 1994: 132). Employers could define small groups of unionised employees as a bargaining unit, apply a lockout to which these

[7] There are other gaps. AWAs can also be offered as a condition of employment for new employees or new positions for existing employees.

employees who could not even use industrial action with other employees in the same workplace because that would constitute an illegal secondary strike. With the end of multi-employer wage regulation and the scope to use replacement labour, employers could engage temporary employees on lesser terms and conditions during the lockout. As lockouts were defined as 'a breach of the employment contract', for a period of time New Zealand employers could even use 'partial lockouts'; 'locking' out employees from some element(s) of their contracts, whilst they were still working, thereby effectively unilaterally altering contractual terms until the employees agreed to having the contractual terms removed. In New Zealand, the lockout evolved from a 'defensive weapon' to counter industrial action to an 'offensive weapon' in collective bargaining to 'become an addition to the general managerial and economic power' taking 'the lockout into a realm well beyond that envisaged in most legal systems' (Anderson & Thompson n.d.).

Lockouts have subsequently receded somewhat following a Court ruling outlawing 'partial lockouts', the election of a Labor Government and a new Act (the *Employment Relations Act*) in 2000 which partially reversed some of these freedoms to lockout (notably re-confining lockouts to the context of collective bargaining and preventing the use of temporary replacements during lockouts). Lockouts and strikes are no longer viewed as equals under

New Zealand labour law which has consequently moved back into the mainstream. Australia therefore has the most 'liberal' or 'de-regulated' lockout law in the OECD.

5.0 Should Australian Lockout Law be Reformed?

It is generally accepted by local practitioners that there are very few legal obstacles for employers who wish to use lockouts. So long as appropriate notice is given to the affected parties by the employer, there are rarely any legal complications.[8] The question naturally arises: should Australian employers have such easy access to lockouts or should the *Workplace Relations Act* be reformed to tighten access to lockouts?

International comparison, prima facie, presents a strong case for reforming lockout law. Establishing further guidelines to regulate access to lockouts would do no more than bring Australia into the OECD mainstream. However, employer representatives and solicitors who act for employers mount a spirited defence of lockouts based on local circumstances in the context of the *Workplace Relations Act*.

[8] As one of the solicitors interviewed said: 'at the end of the day, if you're a practitioner, it's really all about the notice – what's in the notice. That's where the attention is focused. If you get your notice right, there won't be issues that follow thereafter.'

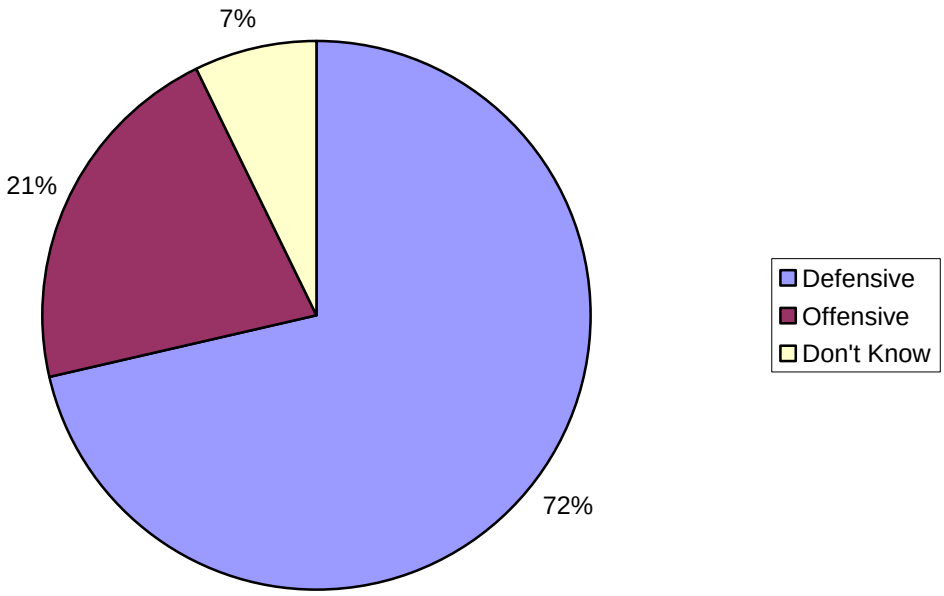
Employers argue lockouts are used moderately as a 'last resort' (Bob Herbert, AIG in Hughes 1998), that they are reserved for circumstances when employers have no other option and that any changes to the Act should be applied equally to strikes. The AIG and solicitors interviewed claim that lockouts are 'almost always' used by firms as a 'defensive' counter to unionised workforces using rolling industrial campaigns including tactics such as selective work bans, go-slows and/or quick stoppages. In such circumstances, the AIG's Peter Nolan (2003) says the choice is between 'dieing a death of a thousand cuts' or 'doing something to focus the minds.'

> If it is protected action, your recourse to the Industrial Relations Commission is limited … You don't have an open right to go and stand people down, (because) the award is quite specific about the circumstances. In some circumstances you can apply no-work-as-directed, no-pay but because that is a common law issue, it is about the contractual relationship between 'you and me' … That can be a very unwieldy process because you have to approach every employee. … You can put a dispute application to the commission and hope some of the systems in conciliation is going to fix it. Bearing in mind the slow bleeding to death is occurring. I think companies will say 'well, we need to bring this matter to conclusion fairly quickly' … In most cases where a lockout has been applied, that is the option they have gone to because it is all that they have really in the guise of protected action for employers (Nolan 2003).

Lockouts, argue employers, are used as a defensive counter to union campaigns when employers have no other option.

Lockouts are usually defensive but there are significant numbers of offensive lockouts - as illustrated by Figure 4:

Figure 4: Offensive and Defensive Lockouts, 1994-2003



Source: LAD.

Just over 20% of lockouts are clearly offensive lockouts, just over 70% are clearly defensive lockouts. In the other disputes, the instigator of industrial action could not be conclusively identified although it appeared likely in several cases they were offensive lockouts. It is therefore probably fairest to say between one-fifth and one-quarter of lockouts are offensive in character.

Additionally, there are lockouts which although technically defensive insofar as the union was the first to take industrial action are offensive in intent and purpose. It has already been illustrated lockouts have been used to coerce employees into signing individual agreements and de-collectivising bargaining, sometimes before and sometimes after industrial action. Quick stoppages (up to a day) have been met sometimes with immediate lockouts lasting between 2-4 weeks.[9] These lockouts are not being used as a defensive counter to 'bring disputes to a head'. Instead, they are escalating the dispute, using lockouts as a display of power and intent to send an overt, warning signal.

Furthermore, in the sector (manufacturing) driving the growth of lockouts, lockouts have been growing as strikes have been receding as illustrated by Table 3:

Table 3: Strikes and Lockouts, Manufacturing 1994-1998 & 1999-2003

[9] Unions, not without justification, claim matching lockouts are becoming a 'pattern tactic' used by AIG members. Stopwork meetings, for instance are met with 'tit-for-tat' lockouts for the rest of the shift. At Rheem (a manufacturer of water heaters), 300 workers were locked out for 24-hours after holding a 45-minute stop-work meeting to discuss EBA negotiations. Rheem still met orders through inventories. Prior to the stop-work meeting, Rheem had sent a letter to its employees saying 'as of today any employee who engages in any form of industrial action will be locked out for the entire next shift. This action will be standard response to all further industrial action' (AAP 2003).

Working Days Lost	1994-98 ('000)	1999-2003 ('000)
Lockouts	18.7	194.5
Strikes	609.1	536.4
Total Disputes	627.8	730.9

Source: ABS (1994-2003), Industrial Disputes, Cat. No. 6321.0; LAD.

Indeed, but for the growth in lockouts, working days lost to disputes in manufacturing would have fallen significantly in the second half-decade of enterprise bargaining.

Employer options for legally terminating industrial action or settling disputes *are* limited but it should be recognised this is substantially a situation of their own making. Employers in other nations who traditionally have used bargaining lockouts, notably Germany, have turned away from lockouts because of the potential for losing markets during stoppages to global competitors (Thelen & Van Wijnbergen 2003). Instead, they have turned to alternative options such as multi-employer, coordinated bargaining and/or framework agreements to shape decentralised bargaining; minimising the risks of an isolated firm being exposed to a stoppage, establishing rules and processes for workplace bargaining and settling some of the more contentious issues across the sector whilst retaining scope for workplace bargaining and flexible application of central agreements. Substantially at the behest of

employer representatives, the *Workplace Relations Act* does not recognise industry-level agreements whilst the Federal Government has made the eradication of 'pattern bargaining' a key policy objective, discouraging not only unions but also employers in sectors generally inclined to coordinated bargaining solutions internationally such as automobile producers. Additionally, as the dispute-settling powers of the AIRC have been largely removed by the *Workplace Relations Act* (again, substantially at the behest of employer representatives), if a union is undertaking industrial action which is within the limits of the Act and therefore 'protected' from civil liability, the legal remedies available to employers are indeed quite limited.

Employer representatives do not wish to loosen these legislative restrictions, to enable choice between industry-level and enterprise-bargaining or enhance the dispute-settling powers of the AIRC, because the bargaining regime of *Workplace Relations Act* has worked extremely well on the whole for Australian employers. It has undoubtedly contributed significantly to declining union membership, the lowest disputation levels in recorded history and enhanced managerial prerogatives. Paradoxically, although there is a legal 'right to strike' for the first time, legal remedies and constraints against industrial action are more effective than when all industrial action was illegal. The blanket prohibition of industrial action was unenforceable but by defining circumstances under which industrial action is 'protected'

and 'unprotected', limiting industrial action to bargaining periods every few years (notwithstanding the *Emwest* ruling)[10] and enhancing the role of the Common Law courts, the legal restraints on industrial action have been strengthened considerably. Some firms are still casualties of this legal regime, caught between well-organised workforces using protected action effectively and competitive market pressures, but they are ultimately the product of an Act which broadly reflects employer preferences. They are also too far and few between to generate a constituency for multi-employer coordination as has occurred in some nations such as Sweden following the decentralisation of bargaining (Sheldon & Thornthwaite 1999). Instead, employer associations lobby for further legislative restrictions on industrial action and use options such as lockouts and litigation for isolated employers exposed to industrial action because they prefer not to allow alternatives available in other bargaining systems.

A further line of defence is that any change to the Act should be applied equally to strikes and lockouts. It may be, as one solicitor mused, that a 'failing of the Act' is the 'public interest' requirement to trigger AIRC

[10] In the Emwest ruling, the Federal Court found unions could take protected action during the life of an agreement around issues not covered by the agreement. However, standard clauses for a blanket no-extra claims provision to be inserted into certified agreements have been drafted by employer representatives in response.

intervention is 'too high' but if the Act were to be changed, the ability of both unions and employers to apply economic pressure should be curtailed:

> It's nakedly an issue of power. Where unions have the power, the way this Act is structured, they use it and use it effectively. On the odd occasion, it can be used effectively the other way … it allows both parties to play hardball … it's open-slather both ways … if you're going to have a structure that recognises the fact that these are disputes relating to the exercise of power I don't see anything wrong with it (using lockouts) … the real issue is whether you control power exercised by either side.

The question of how lockouts should be regulated is best approached by unpacking lockouts type-by-type.

5.1 AWA Lockouts

There is clearly no equality or 'parity of arms' in relation to AWA industrial action. Individual employees have no capacity to effectively withdraw their labour. Only employers have the capacity to access AWA industrial action. Lockouts should have no role in the making of individual agreements (or more broadly agreement-making with groups of non-union employees).

Nor should AWA lockouts be available to employers as a means of coercing employees who prefer union representation and collective bargaining into

signing individual agreements. Australia has few of the protections to the rights of employees to freedom of association and collective bargaining commonplace throughout the OECD. There is no legal mechanism for union recognition in the Workplace Relations Act as exists in other decentralised bargaining regimes; that is, a legal process through which employers can be mandated to recognise and bargain with a trade union which legitimately represents a group of employees.[11] Instead, the *Workplace Relations Act* contains provisions for freedom of association which aim to simultaneously protect the right of individuals to associate or to not associate. Under Part XA, an employee cannot be 'victimised, injured, dismissed or discriminated' on the basis of union membership or non-membership and an employer cannot induce an employee to leave a union 'by threats or promises or otherwise.'

Whilst this would appear to constitute an effective protection of an employee's right to associate in line with international standards, judicial authorities have developed narrow, individualistic constructions of the Act so as to almost empty the provisions of effective meaning (Coulthard 2001; Noakes & Cardell-Rae 2001; Quinn 2004). In BHPIO v AWU, the Federal Court (2001) separated membership from the purpose and activities of trade

[11] It is notable that statutes introducing union recognition procedures have recently been passed in other English-speaking nations with decentralised bargaining systems: namely, the UK (Employment Relations Act, 1999), New Zealand (The Employment Relations Act, 2000) and Ireland (Industrial Relations (Amendment) Act 2001).

unionism such as collective bargaining. Offering individual agreements on superior terms and conditions whilst effectively refusing to negotiate a collective agreement was not found to have prejudicially altered the position of employees on the basis of union membership or induced them to leave the union. The Federal Court ruled the position of its employees was not prejudiced on the basis of union membership because they were not individually 'singled out' (the offer was to all employees), those who did not sign remained on the same wages and conditions and there was no inducement to leave the union because individual employees could still remain a member of a trade union after signing an individual agreement (Federal Court of Australia 2001). The mere act of offering individual agreements to employees represented by a union engaging in collective bargaining is considered an inherent violation of freedom of association in most national legal systems. Under the *Workplace Relations Act*, employers can also freely lockout employees to impose their will, irrespective of the preference of employees for union representation and collective bargaining: AWA lockouts are unfair and inconsistent with freedom of association.

5.2. Long Lockouts

The inequality in power and resources between employers and employees is especially pronounced in relation to long lockouts. Firms in these disputes

have the resources and will to maintain site closures for months and months. Long lockouts typically occur in depressed markets, where slow business conditions lowers the losses sustained. Firms are clearly more sophisticated in their preparations for disputes to soften the impact of the stoppage including stockpiling inventories, relocating work to other sites and using managerial and salaried staff during disputes. The legality of using temporary replacements has not been settled as of yet but employers have sometimes used replacement employees to perform the work which would have been undertaken by the locked out employees.[12] In one case (the O' Connors lockout) the firm took the opportunity to invest in a refurbished plant.

The target of lockouts is usually blue-collar production workers who often have limited savings and few alternative employment options. Employees who are locked out cannot claim unemployment benefits. In high-profile disputes, unions fund-raise and distribute some monies and food-parcels but they do not have the strike funds of some overseas union movements because there is no real tradition of long disputes in Australia. It does appear legal for employees to gain alternative employment during the lockout (see FCA 2000)

[12] A perusal of cases involving lockouts reveals two instances in which temporary replacements have been used. In one case, the legality of temporary replacements was not tested. In the second case, Commissioner Smith (AIRC 2000b) observed their legality was a 'vexed question', concluding that: 'Whilst it is always a matter of fact and degree, I take the view that the use of replacement employees may well give rise to a conclusion that an employer is not bargaining in good faith.' The use of temporary replacements, in conjunction with other facts, led to a s127 order terminating the lockout but clearly this ruling was far from conclusive.

but in practice this is rare.[13] A Federal Court Judge described the financial devastation, personal and psychological impacts of a long-running lockout following the resumption of work in the following terms:

- the personal applicants are receiving substantially inferior wages and conditions to those accorded to them prior to the lockout;
    - most of the personal applicants are experiencing stress as a consequence of being paid substantially less than other employees working alongside them
    - most of the personal applicants are in precarious financial circumstances and are experiencing further stress because of that
    - many of the personal applicants have mounting unpaid bills and are struggling to survive financially; and
    - some of the personal applicants are experiencing poor mental health as a consequence of the situation in which they have been placed (Federal Court of Australia 2000).

Unions have supplied testimony in lockout cases of workers having to sell their house, marriage breakdowns, children unable to get needed medications

[13] As one of the employees in the O'Connors lockout explained: 'I went for jobs, but when you tell an employer that you could be going back to work at any moment they won't have a bar of you' (The Age 2002).

and financial ruin. Journalists reported workers in the midst of a lockout 'hunting rabbits' in 'a scene reminiscent of the Great Depression' (Bachelard 1999).[14] The consequences for individuals who have to endure long lockouts can be devastating.

The AIRC does have a discretionary power under s.127 to terminate AWA lockouts. But as a matter of principle, the AIRC is 'reluctant' to exercise this power for it is make unprotected what would otherwise be protected industrial action. As a Commissioner observed in a case relating to a lockout:

> The Act makes it perfectly clear that the Parties have the option of engaging in protracted, but protected, industrial action (AIRC 2003b).

S.127 has only been used three times, each in relation to lockouts lasting over six months, each involving other circumstances which added to the resolve of the Commissioner to terminate the lockout.

There has been some public controversy about the ALP's election policy commitment to empower the AIRC to settle 'intractable disputes'. One alarmist commentary suggested enabling the AIRC to settle 'intractable

[14] Bachelard (1999) further reported: "In a scene reminiscent of the Great Depression, one worker, Billy Anderson, resorted to hunting rabbits and trying to sell them to supplement his meagre income … he also dug up thistles, or shoveled horse and cow dung on farms to supplement it. Even so, he can barely support his pensioner parents, cannot pay his rates bill and is on the verge of losing his house".

disputes' by arbitrating market wage rates was going to return Australian industrial relations to the era of comparative wage justice, wage 'leap-frogging' and (implicitly) wage explosions (Edwards 2004). However, most 'long' disputes in Australia are not strikes – they are lockouts. In this context, it is important that the AIRC can arbitrate wage rates because currently there is no incentive for employers in long lockouts - the party prosecuting these disputes - to settle the dispute. At the end of these protracted lockouts, the employer can re-engage their employee(s) on the minimum award rate whilst hiring other employees who signed the individual agreements on higher rates. The worst-case scenario for an employer is the employees will be re-engaged on the award at substantially inferior rates and conditions. In the O'Connors abattoir lockout, this meant cuts in earnings of around 50 per cent for some employees. The prospect of the AIRC settling the dispute by arbitrating wage rates is necessary to encourage such employers to bargain constructively.

To allow employers to financially break their employees through months and months of lockout action as a way of forcing them to sign individual agreements on a take-it-or-leave-it basis is a throw–back to some of the worst excesses of 19th century labour relations. These types of disputes are rare – they are extreme cases – but there should be no room for this type of lockout in a modern labour relations system.

5.3 Offensive Lockouts

The other type of lockout which should be reconsidered is the offensive lockout. The longer-term effects on workplace relations, labour productivity and disputation are at this stage unknown and highly contested. Peter Nolan (AIG) disputes claims lockouts have a negative impact on workplace relationships:

> If you think about it, the employees know that the action they are taking is designed to damage the business … If a company says, 'understand fellas, you're crippling this business and therefore we have to look at what legal options we've got to counter this', I don't think there is too much backlash … it doesn't create long-term damage in relationships.

One of the solicitors interviewed goes one step further to claim lockouts actually improve workplace relations and cooperation:

> I think in many cases … it (the impact of lockouts) is very positive in the sense that it has shown employees that 'hang on a second. We are not calling all the shots here' … you get the guys on the job saying 'no, we are not going to support a strike, we saw what happened last time' etc. … this leads to more agreement down the track. This leads to more cooperation and … improved workplace relations.

A lockout, by this logic, emboldens the 'silent majority' against the militant minority.

There is no reliable evidence to substantiate or refute these claims but it is not difficult to think of reasons or circumstances in which they would not apply. Firstly, these observations relate solely to defensive lockouts – not offensive lockouts. The logic that employees grudgingly accept it as part of a tough bargaining round, or a lockout turns a 'silent majority' away from industrial action, obviously doesn't apply to offensive lockouts. A similar objection applies to 'defensive' lockouts which are a disproportionate response to industrial action. Secondly, a lockout may lead to a group of employees being more strike-adverse, but equally it may lead to polarisation and increased likelihood of industrial action in the next bargaining round – which is the argument of union officials:

> A classic example would be (site name), where historically they have engaged in very little industrial disputation and there was this fairly strong relationship between the employer and the employees. We got it to the stage where the workforce had agreed to put bans and limitations in place and before they could even implement the bans the employer locked out their workforce for a week … the loyalty that existed in the workplace is dead … It's not just people going 'oh yeah, this is all part of the bargaining process' … the best way to describe it was a state of shock. They couldn't believe that the company had done this to them … they are already talking about it

> (the next bargaining round) now, let's set up a fighting fund .. if we know they are going to do it to us, this time we are going to be geared up for it (Oliver 2003).

Thirdly, just because a workforce is more strike-adverse does not mean improved workplace relations on a day-to-day basis. Even if it doesn't lead to industrial militancy, the lockout may damage the trust and commitment of employees, manifesting itself day-to-day in employee performance. Again, union officials argue they are a 'short-term fix' with 'long-term consequences':

> No dispute we've ever had has been resolved by lockout. It has been resolved by people sitting around the table negotiating an outcome at the end of the day. People have got to realise that and at the end of the dispute everyone has to continue living with each other. Employers think that it is a short-term fix to get them over this current bargaining situation but there are long-term consequences. People remember.

Most nations prohibit offensive lockouts on the basis that they tilt bargaining power too far towards employers but it may also be in the longer-term interests of employers to legally reserve lockouts as a genuine option of 'last resort'. Even on the most optimistic reading, the risks and costs associated with lockouts for employers as well as employees can be substantial.

Conclusion: Reforming Australian Lockout Law

Lockouts have emerged as a significant feature of labour disputes under Australia's fledgling bargaining system. Most other nations addressed the question of how to legally treat lockouts quite some time ago. At the time Australia's legislative framework was reoriented to a decentralised bargaining system, the right to lockout was established as a simple parallel to the right to strike. The freedom to lockout was further liberalised under the *Workplace Relations Act* to include non-union agreement-making.

A decade later, as it becomes clearer now how lockouts can and are being used, legal arrangements for lockouts in Australia should be revisited. None of the arguments mounted by employers constitute an effective defence for Australian exceptionalism on lockouts. The notion that strikes and lockouts should be treated equally may be intuitively appealing but it is ultimately misguided. Other nations have rejected equal treatment of lockouts and strikes because an equal right to lockout is inconsistent with other legal principles such as freedom of association, the right to collective bargaining and strike. Australian cases clearly illustrate this truth. The effects of lockouts are not yet clear but it is also questionable whether they are in the longer-term interests of the employers who use them.

Australian lockout law should be modernised to bring Australia into line with OECD conventions. As a minimum, Australian lockout law should be reformed to:

. prohibit AWA lockouts, lockouts against non-union employees and offensive lockouts;

. enhance the capacity of the AIRC to terminate long-running lockouts and settle these entrenched disputes equitably;

. introduce some notion of 'proportionality' to govern the usage of lockouts

Lockouts should be legally reserved as a true weapon of 'last weapon' as in other more established bargaining systems.

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Appendix One: Employer Options for Withdrawing Work

The ABS (2002) defines a lockout as a 'total or partial temporary closure of one or more places of employment … by one or more employers with a view to enforcing or resisting demands or expressing grievances, or supporting other employers in their demands or grievances.' Excluded from this definition are other types of withdrawal of work by employers which are sometimes popularly identified as lockouts including:

. *Mass dismissals*. lockouts temporarily suspend the employment contract whereas a dismissal effects a permanent severing of the contract. The most famous example of such a dispute was the 1998 Waterfront dispute. Although popularly referred to as a lockout, technically it was not a lockout because the employer, Patricks Stevedores, terminated contracts with a shell-company it had established as a supplier of labour as a tactic to dismiss and replace its entire workforce. The ABS did not include this dispute within its industrial disputation figures (which highlights a flaw in the categories used to classify disputes as this *was* quite obviously an industrial dispute);

. *Stand-downs (or 'lay-off').* A stand-down suspends the contractual obligation to supply paid employment because of a lack of available work whereas a lockout denies employees otherwise available work to exert coercive pressure. As stand-downs are permitted as a response to industrial action under certain circumstances, the effect in practice may be identical. However, so long as the withdrawal of work was applied through stand-down provisions it is not technically and legally a lockout;

. *Common-law actions.* Under the Common law, employers are entitled to refuse to pay employees who are not working as directed (for example, due to the imposition of selected bans),

. *Refusal to bargain*. Sometimes, when employers refuse to bargain (especially when accompanied by demands that employees sign individual agreements) and strike action is initiated, these disputes are reported as lockouts. Whilst the effect is much the same, these are not technically lockouts