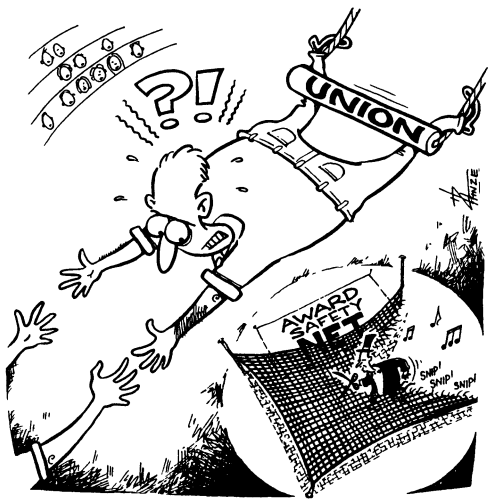
NOT DOWN and NOT OUT

Linda Rubinstein

The effect of the Workplace Relations and Other Legislation Act 1996 on the union movement.



In seeking to reform Australia's industrial relations system, the Federal Government has made it clear that its objective is a freer, more flexible labour market. This is promoted as being the key to addressing unemployment and achieving the nation's competitive potential. In that world view, the union movement is an obstruction, an anachronistic relic of former times.

I believe that the *Workplace Relations and Other Legislation Act 1996* (the Act) was designed by the Government and its advisers to achieve two goals:

- to weaken the powers of the Industrial Relations Commission in relation to awards and agreements so as to, over time, reduce employee entitlements in the interests of 'flexibility', particularly penalty rates and loadings. The Government seemed to believe that a significant factor in the relevance of the union movement was its ability to obtain award coverage for employees, and establish improvements in wages and conditions, whether or not those employees were union members, and so reduction in union involvement was a key element of the legislation. Another string in the bow was the introduction of individual Australian Workplace Agreements (AWAs) to further tip the bargaining power balance towards employers.
- break the power of unions in traditionally strong areas, such as the wharves, the coal industry, the building industry and the meat processing industry. This was to be done by supplying employers with a formidable array of legal avenues to deal with industrial action, together with limiting the arbitral powers of the Commission, and providing for individual agreements through which employees could be induced away from collective bargaining.

While the Government's primary objective is no doubt economically based, there is an underlying ideological dislike, even hatred, of unions and a desire for revenge for wrongs of the past. No doubt, in the hearts of some influential government members, such as Treasurer Peter Costello, there burns a romantic hankering to relive and expand the glory of their purported victories over unions at Mudginberri and Dollar Sweets (although it is worth noting that the relevant unions are in better shape today than those employers).

In addition to the initiatives described above, the anti-union thrust can be seen in:

- legislative restrictions on the right of unions to enter workplaces to speak to employees and to organise;
- the prohibition of award provisions giving preference to trade union members in employment; and
- alterations to the rules governing union registration and coverage.

For instance, the provisions allowing parts of unions to 'disamalgamate' are designed to encourage unions into in-fighting and costly litigation.

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The views expressed are those of the author.

The first flies in the Government's ointment took the form of the Democrat Senators, whose support was required to pass the legislation. Following protracted negotiations, a number of significant amendments were made to enable the Bill's passage with Democrat support. Some of these amendments have clearly impacted on the Government's ability to achieve its objectives through the legislation. The changes negotiated with the Democrats included:

- increased emphasis in the objects of the Act on the safety net role of awards;
- retention of the Commission's jurisidiction over issues such as rostering, skill-based classification structures, outworkers and superannuation;
- including, as an object of the Act, assisting in giving effect to Australia's international obligations in relation to labour standards;
- providing for third party scrutiny of individual AWAs;
- enabling the Commission to make an order for a non-allowable, but 'exceptional' matter, which could not otherwise be included in an award;
- providing some protection for employment conditions of workers employed under paid rates awards, generally in the public sector; and
- a requirement that agreements be measured against a 'no disadvantage' test to ensure employees are not worse off than under the award.

The Democrats' deal was greeted with accusations of treachery by the Labor Party, which predicted wholesale stripping back of awards and vicious restrictions on workers rights.

The ACTU's response was more muted: the changes initiated by the Democrats were welcomed while the legislation itself was condemned. Nevertheless, the ACTU maintained that the union movement was not a legislative creation, and that although the legislation would make life harder for workers and unions, the movement would face the new challenges without being weakened or destroyed.

More than a year after the legislation came into operation, the dust has had time to settle and the Act is beginning to be tested. A number of large disputes have occurred in major industries, and the Commission has commenced its task of reviewing awards.

So far, it does not seem that the Act has been an outstanding success for the Government measured against its own objectives.

The award system

While the Act does not require radical reductions in entitlements or removal of conditions, great hope was held by some employer groups and the Government that the 'award simplification' process would significantly reduce award entitlements.

The review process involves two elements:

- removal of provisions which are neither allowable matters under the Act, nor incidental to such matters and necessary for the effective operation of the award; and
- review against a set of criteria aimed at making awards less detailed and concerned with process, more focused on achieving efficiency and productivity at the workplace and containing facilitative provisions allowing the method of implementation of award entitlements to be determined by agreement between the employer and employees at the workplace.

The first decision in relation to this process concerned the Hospitality Award[1] and was handed down late last year by a Commission Full Bench headed by Justice Guidice, recently appointed as Commission President by the Government to replace Labor's appointment, Deirdre O'Connor, who had resigned her position. Prior to his appointment, the new President was a conservative barrister, whose clients had included such violently anti-union companies as Rio Tinto (CRA). Some in the union movement feared that he was the Government's hatchet man, sent in to demolish the award system and the Commission itself.

The reality of the decision was very different. Certainly, the Hospitality Award was modified in the ways required under the Act, but the Commission took a position on two issues which must have gravely disappointed many employer groups. The first of these was to make it clear that award entitlements which were allowable would not be reduced unless a proper case had been made out for doing so. The second was to determine that the Act did not preclude a role for unions under awards.

In particular, the Commission determined that workers had the right to be represented by their union as part of the disputes settlement procedure, and that unions with members at a workplace were entitled to be notified of an employer intention to make use of a facilitative provision, with the unions to be given a reasonable opportunity to participate in negotiations about use of the provision.

Facilitative provisions are seen by some employer groups as a crucial means of varying working conditions without union involvement or the need for Commission scrutiny. In the important area of working hours, for instance, employers in the metal industry sought to provide for ordinary time to be worked on the weekend (that is, not at overtime rates as currently applies) and outside the prescribed spread of hours, by agreement at the workplace between the employer and either a majority of employees or individual employees.

This proposition would allow employers to make significant changes to working conditions, including to workers' incomes through reduced penalty rates, with union involvement only at the specific request of the employee involved.

In the Hospitality Award decision, the Commission made it clear that care needed to be taken in relation to facilitative provisions, precisely because of the lack of Commission scrutiny, and that the bargaining capacity of employees was a factor to be taken into account in determining the degree of flexibility which should be available at the workplace level.

The Government and most employer groups formally welcomed the decision. Their real response, however, was to be found in the announcement only days later by Workplace Relations and Small Business Minister Peter Reith that the Government would be seeking a mandate at the next election for more substantial deregulation of the industrial relations system, with a further reduction in the role of the Commission.

From the point of view of unions and their members, although some provisions have been removed from awards — primarily issues such as consultation, termination of employment, part-time work, preference to unionists, amenities and some discrimination issues — in the main these make up only a small proportion of overall award

provisions, and in some cases are covered by other legislation.

It is clear, at this point, that under the current legislation, awards will remain as comprehensively regulating terms and conditions of employment and maintaining for unions a continuing role in the processes occurring under those awards.

Agreement making under the Act

The Act introduced two substantial changes to agreement-making provisions which have the potential to substantially change the role of unions. The first was to make it easier to certify collective agreements made directly with employees, without union involvement. The second was to introduce a system of individual AWAs, where unions could be involved only if authorised as bargaining agent by the individual worker.

The new non-union collective agreement stream was promoted by Minister Reith as a vast improvement over its equivalent under the former legislation, the Enterprise Flexibility Agreements (EFAs), primarily because it put an end to allegedly uninvited and unwanted union intervention.

This was a response to a number of cases under the former legislation, such as that concerning the Tweed Valley EFA,[2] where unions were successful in persuading the Commission that non-union agreements should not be approved because they disadvantaged workers, or because other procedural or substantive requirements of the Act had not been met.

The Government's belief was that employers were discouraged from pursuing non-union agreements because of a fear that this could bring unwanted union attention. Consequently, an important change under the Act was to remove the automatic right of a union with rules and award coverage of the employees to intervene in the approval proceedings before the Commission. The current position is that a union may only intervene if it has been requested by a member to represent him or her in meeting and conferring with the employer about the agreement.

If the expectation was that this change would increase the number of non-union agreements, the reality has been quite different. The number of these agreements is relatively small, and the proportion of non-union to union agreements is similar to that which applied to the old EFAs.

Higher hopes, perhaps, were placed by the Government on the new system of individual AWAs. Previously, although common law contracts exist between employers and each employee, individual arrangements could not be inconsistent with awards or certified collective agreements.

In his Second Reading Speech on the original Bill, Minister Reith described AWAs as having an emphasis on 'flexibility and self-regulation', unvetted by a third party and confidential. These objectives were partly overturned as a result of the agreement with the Democrats, which instituted a degree of regulation and scrutiny by the Employment Advocate (EA) and, in some circumstances, the Commission.

In spite of a number of exhortations to employers to make use of the new provisions, and a clear level of frustration by the Government that this has not been the case, the take-up rate for AWAs has not been great. As at 22 January 1998, 4754 AWAs have been approved, invôlving 241 employers.[3] This is a tiny proportion of the Australian workforce of 8.5 million,[4] 1.74 million of whom are covered by certified agreements.[5]

From the union movement's point of view, although experience has been limited, a number of different types of scenarios can be identified:

- A number of employers, particularly in newly-opened establishments, have used AWAs to bypass award provisions in relation to loadings and penalty rates. While on the face of the documents it would appear employees were severely disadvantaged, which would be a breach of the Act, the EA maintains that in all such cases undertakings are sought from the employer about implementation of the agreements so as to ensure that this is not the case. In the absence of publicly available information, it is impossible to ascertain whether or not this is correct.
- In one case, AWAs were used to avoid union involvement and the application of previous agreements on the reopening of a plant under new management. It was made clear to prospective employees, most of them union members, that employment was contingent on signing an AWA which provided terms and conditions substantially less than those under the agreement which had applied previously to the plant. Given the lack of employment opportunities in this country area, the workers signed, and although later attempts were made by some to involve the union and overturn the AWA, these were not successful.
- In some other cases, employer attempts to introduce AWAs to an existing workforce have led to employees contacting the union and asking for representation, with the subsequent achievement of either better AWAs negotiated by the union as bargaining agent, or substitution by a collective agreement.
- A few employers have used AWAs, or the threat of them, to deunionise or to achieve changes in working conditions. Again, the results have been mixed. In some cases, employers have succeeded in obtaining employee agreement to the AWA; in others, the issue has operated to strengthen resistance and increase support for the union. It is interesting to note that it is proposed that employees to be employed by the National Farmers' Federation (NFF) stevedoring enterprise at Melbourne's Webb Dock will be expected to sign AWAs.

In summary, it cannot be said that the changes in agreement-making under the Act have been markedly successful in altering employment conditions, or relationships between employees and unions. It is clear that the primary avenue for agreement-making remains collective certified agreements with unions. In the first nine months of 1997 (since the commencement of the new Act) 1859 agreements with unions have been certified, compared with 63 non-union agreements.

This is hardly surprising. In the non-union sector of the economy, awards either don't apply, are ignored, are surpassed by over-award conditions or are supplemented with informal agreements.

In the unionised sector, workers are unlikely to be attracted to non-union deals, when the evidence shows that non-union agreements involve longer working hours and lower pay rises.[6]

Overall, employers have made it clear that they are not interested in disrupting productive, co-operative relationships with unions in order to advance the Government's ideological campaign. Some evidence for this comes from

the overwhelming positive response by major companies to union demands in late 1996, for commitments to maintain collective bargaining irrespective of changes to the legislation.

Industrial action

The second key plank in the Government's armoury was to be a set of new legal avenues for employers to deal with industrial action. In particular, this involved:

- transfer of the prohibitions on secondary boycotts from the *Workplace Relations Act* to the *Trade Practices Act*, in effect a re-enactment of the old 45D provisions; and
- a new provision, in s.127 of the Act, empowering the Commission to make orders requiring industrial action to stop, or not to occur, with these orders capable of enforcement through Federal Court injunctions.

In its original draft legislation, the Government had proposed deleting the restrictions in the Act on taking action in tort in relation to industrial action unless the Commission had been notified, and either issued a certificate stating that it was not likely to be able to stop the action or 72 hours had passed.

As part of the agreement with the Democrats, however, these provisions have been retained in the Act.

The expectation was that easier avenues to the courts would enable employers to force through work practice and employment changes in key industries, and break the perceived union stranglehold in areas such as the waterfront and the coal industry.

The early experiences were shaky for the Government, with Mr Reith working hard to recruit employers prepared to go to war with their employees in these industries. In general, employers take the view that it is better to negotiate incremental change with unions, than go for a risky 'big bang' strategy, in which they fear they will be the losers, at least in the short term.

In the coal industry, the Government gave strong support to Rio Tinto in its ultimately successful efforts to prevent the Commission from arbitrating a bitter dispute at the Hunter Valley No. 1 mine. Although industrial action has ceased, the company has not succeeded in de-unionising its workforce or attracting more than a handful to individual contracts.

On the waterfront, the stakes are very high, given that a lengthy dispute damages not only the direct parties, but all those whose income or employment is dependent on international trade. The Government's recruitment of Patrick Stevedores, run by the self-proclaimed 'desperate' Chris Corrigan, was a coup, although the ill-fated Dubai training venture foundered under international union pressure.

At time of writing, Patrick had sacked its entire waterfront workforce, having restructured its organisation so as to ensure that the employing companies were left without assets to continue business or pay the employees their entitlements. Union members have been replaced by new trainees employed under individual contracts. It is clear that this was the result of a careful plan developed together with Mr Reith and the National Farmers' Federation, which played a role in training the new employees.

With large picket lines at each of the company's docks, complicated legal proceedings brought by the union in the Federal Court and considerable public unease at the tactics used by Patrick in dismissing the workers and removing them from the premises, the Government's gleeful claims of victory may have come too soon.

Whether or not the new legal sanctions will prevent significant widening of the waterfront dispute remains to be seen. The new provisions, including those in relation to secondary boycotts, are obviously a consideration in the development of union strategies; however, the economic consequences of the dispute are being felt after little more than a week, and the outcome is far from certain.

It needs to be understood, at this point, that virtually all industrial action has traditionally been illegal at common law, in addition to the various statutory restrictions and prohibitions which applied. It was only with the passage of the *Industrial Relations Reform Act 1993* that a limited form of legal protection was introduced for industrial action connected with enterprise bargaining.

Legal proceedings against unions and their members for engaging in industrial action has always been part of Australian industrial relations, as a glance at the law reports will confirm. Common law actions, together with prohibitions on secondary boycotts were features of Labor's *Industrial Relations Reform Act*.

Legal action is occasionally associated with resolution of a dispute, generally as a circuit breaker. In other cases, it exacerbates the dispute, obscuring the original issues. In most cases, the dispute is resolved independent of any recourse to the courts. Most industrial disputes are resolved on the basis of compromise, and legal sanctions play little part in this process, except as a bit of a sideshow. There is no simple link that can be made between the use of legal sanctions and the incidence of industrial disputes. Given that disputes are generally resolved, it is not possible to show any causal relationship.

Union organisation and rights

Unions have adapted themselves to the new right of entry provisions, which involve requirements to obtain a permit, and give employers 24 hours notice of their intention to enter the premises. It would appear that most employers are not taking advantage of the overriding of award provisions giving union officials access to meal rooms or otherwise restricting the ability to talk to employees. In general, previous practice is being adhered to. In one dispute, the Commission has determined that the union official could have access to the meal room during the meal break.

Although the Act now prohibits the inclusion of preference clauses in awards or agreements — that is, provisions requiring employers to give preference to union members in hiring — the Act does not prevent employers from reaching agreement with unions to deduct union dues and to encourage employees to become and remain members of the union, a common provision in enterprise agreements. Although union membership has been declining for some years, there is no evidence that the so-called end of the closed shop has contributed to any acceleration of that process.

What has it all meant for unions?

Unions are operating in a more challenging environment than was the case before the last election, although, paradoxically, the new situation overcomes some of the problems during the Accord period, when there was a perception that unions were too close to Government and not focused sufficiently on members.

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- union agreements are far more likely to deal with provisions that ensure that there is some procedural fairness in the treatment of employees.

The evidence suggests that management interest in non-union bargaining has little to do with introducing innovative approaches to employment relations and more to do with the classic industrial relations issues: wages and hours. If this pattern continues, we are likely to witness significantly divergent outcomes in wages and employment entitlements for different segments of the workforce, with one of the major factors determining difference being the level of union activity at the workplace.

To what extent the differences that are now emerging between union and non-union agreements are a result of changes in the federal industrial laws that limit the role of unions before and during proceedings before the AIRC in non-union agreements is unclear. It may be argued a more limited role for unions in the certification process of non-union agreements has given employers the confidence and incentive to pursue changes in wages and hours of work that are different to outcomes that result from collective negotiations that involve unions. The results highlight, however, that a system of collective bargaining where employees are unrepresented and where there is no active involvement of a third party may result in industrial relations that are seen to have more to do with the relative bargaining powers of the parties and less to do with ensuring that there is some perceived fairness in the industrial relations outcomes of our system.

References

1. Australian Centre for Industrial Relations Research and Training (ACIRRT), *The ADAM Report*, University of Sydney.
2. Morehead, A, Steele.M, Alexander. M, Stephen. K & Duffin. L. *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, Longman Addison Wesley, 1997, p.608.
3. Morehead, A, and others above.

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The new legislation has pressured unions to speed up developments already taking place in shifting emphasis to the workplace and to the development of an organising culture.

The Government's legislative changes to the industrial relations system have not, so far, succeeded in achieving either of its key goals — destroying the award system or weakening union influence in key industries.

Whether that remains the case is something of an unknown, particularly if the Liberal–National coalition is returned at the next election and is in a position to obtain Senate support for more drastic reductions in the power of the Commission and the ability of unions to function.

Nevertheless, Australian unions have demonstrated a capacity to adapt and survive which should stand them in good stead regardless of the legal system.

References

1. Award Simplification Decision, Print P7500.
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4. ABS, *Labour Force*, Cat 6202.0, December 1997.
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6. Australian Centre for Industrial Relations Research and Training survey of agreements, reported in the *Australian*, 18 December 1997.

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Re-modelling trade unions

The WR Act has a rather strange view of trade unions. These bodies are registered under the WR Act and they play a significant role in our system, both in the areas of award making and enterprise bargaining. However, the WR Act has also established an extremely strong freedom of association regime whereby virtually all forms of discriminatory conduct and treatment of persons because they are or are not unionists has been forbidden.

Unions play a significant role in federal industrial relations and the legislation gives them the capacity to seek award variations, to enter into certified agreements and to bargain on behalf of employees who are seeking to conclude certified agreements and/or AWAs. Yet, the capacity of trade unions to look after their own members is circumscribed by the freedom of association provisions of the WRA. While trade unions can seek 'members only' awards, and while it is arguable that in some circumstances they may obtain 'members only' certified agreements, they are required to carry free rider non-members along with them. This is because where employers do not extend the same benefits to non-unionists, it is strongly arguable that they will be in breach of the freedom of association provisions.

It does appear that the public is generally in favour of freedom of association principles in industrial relations legislation. Yet, in my view, these principles should not limit the capacity of trade unions to seek awards and to make agreements on behalf of their members only. Freedom of association provisions should not limit the freedom of unions from legitimately obtaining benefits for their members where they do so in accordance with the processes laid down in our bargaining laws. This is another instance where the rigidities of the WR Act impede smooth industrial relations.

Conclusion

I have tried to expose some of the legal and industrial relations tensions which have been exacerbated by the enactment of the WR Act.

In large part, these tensions are due to the rigidities in many of the provisions of the WR Act. These include those concerning individual bargaining; single business agreement making; award downsizing; narrowing the powers of the AIRC. I have endeavoured to explain how these rigidities have impeded rather than strengthened industrial relations reform.

Minister Peter Reith deserves much credit for negotiating the passage of the WR Act in 1996. It was a hurriedly put together package of provisions whose speedy drafting and cobbling together leaves much to be desired. Now that the WR Act is 15 months old, it is time to take stock and to regroup.

In my view, the preferred method of industrial relations reform is through the adoption of a citizen-based approach to employment where the needs and aspirations of citizen workers are at the forefront of any legislative package. Just after Christmas 1997, Minister Peter Reith announced that efforts would be made to re-draft the WR Act in plain and more comprehensible English and I welcome this venture. If in this process some of the rigidities of the WR Act can be lessened, the long-term cause of the WR Act will be strengthened.