When individual contracts and AWAs are not the answer

Ronald C McCallum

On 25 November 1996, Royal Assent was given to the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). After six months and two days incubation in the processes of the Australian Parliament, this controversial statute finally became law. This Act heavily amended the *Industrial Relations Act 1988* (Cth), and in fact changed its name to the *Workplace Relations Act 1996* (Cth) (WR Act).

Most of the provisions of the WR Act did not come into force until New Year's Eve 1996, and not until 30 June 1998 will its full vigour be felt. On that date, its allowable award matters mechanism will come fully into operation. Its provisions enabling the making of Australian Workplace Agreements (AWAs) did not commence until last March, so this measure has been with us for less than a full calendar year. However, sufficient time has elapsed to make a critical appraisal of this statute. In my judgment, it is not possible to discern how well the WR Act has been travelling without analysing the philosophy which underpins it. Once this has been done, it is possible to see how this Act has reshaped Australian industrial relations over the last year and a quarter.

In this article I aim to show that some of the initiatives of the WR Act have been useful and will likely remain in our system of industrial regulation. A pertinent example is the concept of some form of individual agreement between an employer and an employee. However, most of my focus will be on the shortcomings of the WR Act. It is my objective to give food for thought about the current state of play in our system of federal industrial relations.

The philosophical underpinnings of the WR Act

The proponents of the WR Act have endeavoured to alter for all time the values and assumptions that have upheld federal industrial relations law for most of this century. They have not only sought to build on the deregulatory measures of the Hawke and Keating Governments, but have endeavoured to take the first steps to move Australian federal industrial law from a compulsory conciliation and arbitration regime to a contractualist model. Within this contractual paradigm, individual employer/employee relations should trump collective methods of regulation.

In its purest form, the philosophy that underpins the WR Act can be stated in the following propositions:

Individual and collective agreement making

Employers and employees should be free to make their own binding workplace arrangements — whether on an individual or collective basis — free from uncalled for interference by industrial tribunals and/or trade unions.

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The single business approach

Where possible, agreements between employees and employers must be confined to single businesses. Broader arrangements entrench collectivism and limit individual initiative.

Stripping back awards

Awards have been the major impediment to change and so they should be stripped back to their basics, thus forcing employees to make agreements with their employers.

Downsizing the Commission

Where possible, the operations of the Australian Industrial Relations Commission (the AIRC) should be downsized. It may provide a safety net of minimum terms and conditions of employment, but its powers over agreement making should be tightly circumscribed. Its powers to resolve industrial disputation through arbitrated settlements should be severely restricted. It is these settlements which impede change and necessary labour flexibility.

Re-modelling trade unions

Trade unions should be neither more nor less than bargaining agents for those employees who request their services. To this end, a rigid freedom of association mechanism must be enacted to keep these bodies in line.

To sum up, the Howard Government wished to create an industrial relations environment that is overwhelmingly contractualist. In the view of the Government, single business collective and/or individual agreements arrived at without third party interference will enhance labour flexibility and will increase national productivity. If the wages of the more productive rise faster than those who have given less, then this is the price to be paid for social and industrial advancement.

Our hybrid industrial relations mechanism

In endeavouring to enact into law this contractualist model, the Government had to grapple not only with the aspirations of the general public and the demands of the Australian Democrats, but it had to place its mechanism within a highly controlled federal polity.

In my opinion, these political and constitutional limitations greatly restricted the Government in this field. The enactment of only some of its reforms have meant that the WR Act has added to the hybrid nature of our federal industrial relations mechanism. It is the tensions within this mechanism which will lead, in my opinion, to a growing disenchantment with this legislation.

Most people in the industrial relations field have a surface knowledge of the limitations that have surrounded the enactment of federal reformist industrial relations legislation. However, it seems to me that this surface knowledge has not penetrated into most people's thought processes. Although many are aware of the constitutional limitations, insufficient attention has been paid to the values, concerns and aspirations of the electors; and at the end of the day it is these values which shape industrial regulation.

Constitutional issues

In framing its workplace relations legislation, the Howard Government downplayed the labour power which is set out in s.51(xxxv) of the Australian Constitution. After all, this power relates to the prevention and settlement of interstate industrial disputes through the establishment of an independent tribunal that possesses the powers of compulsory conciliation and arbitration. This has been the embodiment of Australian collectivist philosophy.

Nor did the Government wish to rely very much on International Labour Organisation Conventions.

Leaving aside the trade and commerce power for the moment (found in s.51(i) of the Constitution), the only other head of constitutional power which could bring about change is that over corporations. Under the corporations power in s.51(xx) of the Constitution, the Parliament may make laws concerning trading and financial corporations. While laws can be enacted to control incorporated employers and their employees, the Parliament does not have a blanket power to prescribe general employment rules. Unlike the United States, our Parliament cannot enact laws providing for minimum wage rates and/or maximum hours etc. Given that the Australian Parliament had control of slightly more than one-third of the Australian workforce under federal awards, AIRC regulation was necessary for the prescription of minimum terms and conditions of employment.

While the corporations power coupled with other ancillary powers could re-mould much federal industrial law, the WR Act could do, and has done little for unincorporated employers who are under federal awards.

It is a little ironic that one of the Government's so-called preferred interest groups — small business — has gained so little from the WR Act, because most small businesses are not under federal awards and many of those under federal regulation are not incorporated.

The values and assumptions of the voters

While the Australian voters gave the Howard Government an overwhelming victory in March 1996, they still possess a high level of insecurity, especially about employment issues. They had grown up with a network of independent tribunals that had tried to ensure that the weaker bargaining powers of most employees did not lead to the exploitation that occurs in many countries. While the community remained suspicious of trade union power, they did not wish to see unbridled employer powers become dominant without a Commission in place to ensure fair play.

This is why, in my view, some of the more extreme provisions of the original *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth) did not make their way onto the statute book. Under the original bill, awards were to be downsized to a rigid set of allowable award matters. Certified agreements and AWAs were not to be directly measured against existing award conditions. Instead, agreements were to be measured against a set of core minimum conditions where only award wage rates would be relevant. In relation to AWAs, no recourse could be had to the AIRC as the Office of the Employment Advocate was to have entire responsibility for their approval.

When the Australian Democrats forced the Government to give ground on these matters, in my judgment they tapped into strong community feelings on these issues. Australian voters did see awards promulgated by independent tribunals as their safety nets. To this end, the Australian Democrats were successful in arguing for a more flexible approach to the downsizing of awards through a broader concept of incidental matters and the addition of an exceptional matters category. While the voters saw the need to increase agreement making, they wanted those agreements to be vetted by the Commission. They also recognised that most employers

possess greater bargaining power than do most employees, and so in the agreement registration process they wished for some form of no-disadvantage test to operate to give them protection. Similarly, further safeguards were placed on the AWAs mechanism.

The WR Act: a balance sheet after 15 months

Turning my attention to the WR Act as it has operated for the past 15 months, I shall take as my guide the five key issues listed above which spell out the philosophy underpinning the WR Act.

Individual and collective agreement making

While the WR Act does give incorporated and some other categories of employers the capacities to enter into AWAs and into certified agreements directly with their workers, these new avenues have not had great use. As of 31 January this year, approximately 4776 AWAs covering 243 employers had commenced operation. As I understand the position, the Employment Advocate referred 100 of these agreements covering six employers to the AIRC which approved them. While we may see increases in the take up rate of AWAs throughout 1998, these forms of agreement are unlikely to be adopted by more than 3%–4% of the workforce.

In relation to enterprise bargaining, some 4413 agreements were registered by the end of September 1997, but as I understand the figures, only 181 of these agreements have been made directly with workers without trade union involvement.

It does appear then that neither individual nor non-union bargaining has yet been of enormous significance. Despite the expenditure of money and resources in this field, suspicion of these types of bargaining arrangements remains high.

The single business approach

One surprise for me after pondering the WR Act for the past year, is its many rigidities. For example, in some industries like construction, the WR Act makes it virtually impossible for multi-employer agreements to operate. So strong is the single business ideology, that much necessary pragmatism has been thrown out of the window. To promote bargaining and workplace change in some industries like construction, greater flexibility is needed. Agreements for multi-employer endeavours and for specific projects ought to be allowed. Again, this rigidity has been a disappointment for some employer groups who would otherwise support the Government's reforms.

Stripping back awards

A key policy of the Government as embodied in the WR Act is to strip back awards to some 20 allowable matters, and to ensure that all of these matters represent minima only. These matters concern wages, hours, allowances, leave, redundancy pay and superannuation. Just before last Christmas on 23 December 1997, the AIRC handed down its Award Simplification or allowable award matters case (Print P7500, 23 December 1997). There were no real surprises in this decision, but one point of significance is that the Full Bench stated that in determining what matters are incidental to allowable award matters, the Commission will have regard to the industry or industries covered by the award.

It is true that the deadline for the move from non-allowable to allowable award matters will not fully occur until 30 June this year, but already I sense some disenchantment with this process. In its original bill, the Government tried to strip back awards in one fell swoop. This prompted community reaction which led to a relaxation in this approach. Many employers and industry groups have already spent an inordinate amount of time gazing at their awards and trying to guess within this flexible allowable matters framework which clauses will fall on one side of the line and which on the other.

It is true — and something which the trade union movement should be worried about — that until 1994 there were many awards in the federal system which had not been modernised. In fact some were virtually defunct. However, it is one thing to modernise awards, but it is quite another to do so having regard to the allowable/non-allowable concept.

Downsizing the AIRC

The worst vice of the WR Act, in my view, is that it unnecessarily circumscribes the powers of the Commission. Here it is not the only guilty party, for in some ways it has merely overlaid its provisions on top of the Keating Government's *Industrial Relations Reform Act 1993* (Cth) which did so much to truncate the operations of the AIRC.

Underpinning the bargaining provisions of the WR Act is the view that the parties should be entitled to use the weapons of the strike and the lock-out — albeit for trade unions in a highly circumscribed and stylised manner — until one or other gives up and acquiesces in an agreement.

Again this is a product of rather poor ideology which pervades both the WR Act and the former *Industrial Relations Reform Act*. I surmise that the proponents of enterprise bargaining both under the Reform Act and the WR Act really believe that this is the way collective bargaining is carried on in other countries, and especially in the United States. This 'romantic' view of bargaining does not have any reality about it at all. United States collective bargaining has grown out of the forces which gave rise to its labour legislation. For example, the parties may only bargain to impasse, that is, resort to strike action on a very narrow range of matters which are known as mandatory bargaining issues. The Americans would be shocked by the wide range of matters which may be bargained about in our system. The limitations in the American process have been put in place because their congress recognised that open slather bargaining with accompanying industrial action would be a recipe for unproductive industrial disputation.

There is provision for the AIRC to end bargaining periods in the public interest — and from time to time (especially in the public sector) this has occurred. However, in the recent Hunter Valley case of last January, a Full Bench of the AIRC made it clear that the powers of the Commission to end bargaining periods are very tightly circumscribed *(Re Coal and Allied Operations Pty Ltd,* print P6557, 29 January 1998). From my experience this entire process is too rigid. What is needed is less ideology about bargaining and more pragmatism in the public interest.

In my view, enterprise bargaining can be carried on only where the parties may resort to industrial action to back their demands. However, where the law allows this, the law should also safeguard the public interest by equipping a tribunal with the necessary powers to resolve outstanding issues by replacing industrial action with an arbitrated settlement of outstanding issues.

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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.

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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.

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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.