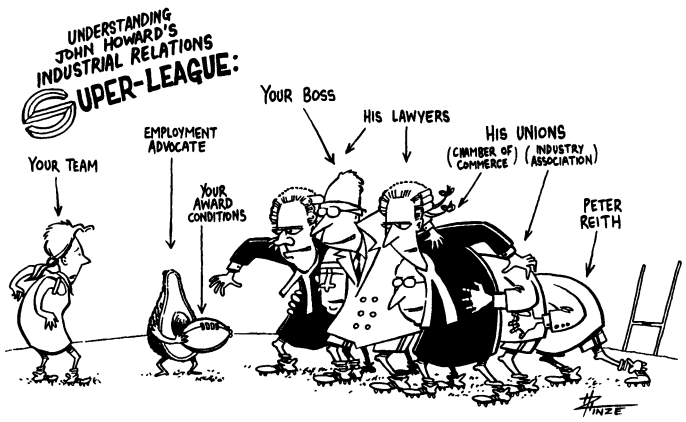
FAIR AND JUST OUTCOMES?



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The Workplace Relations Act and non-union collective agreements.

After over one year of operation it is timely to review aspects of the *Workplace Relations Act 1996* and what impact it may be having on industrial relations outcomes in Australia. This article examines outcomes that have been achieved in non-union agreements in Australia and the extent to which these may be the result of legislative changes that limit the role of unions in certification hearings before the Australian Industrial Relations Commission (AIRC).

The new industrial relations system

The changes to our industrial relations system that are reflected in the *Workplace Relations Act 1996* are as much about making changes to our core value systems as they are about 'deregulating' or decentralising industrial relations rule making in Australia.

No longer is rule making through collective organisations, be they employer associations or unions, the cornerstone of our industrial relations framework. The legislation allows the parties or, more commonly, employers to move from a system of collective rule making to an individual employee–employer bargaining regime. This reflects a dominant ideology that asserts that in a globalised economy, in striving for a more efficient deployment of labour, employees take charge of their own lives and achieve the best outcomes they can. Work of the future, we are being told, will be undertaken largely by subcontractors. Permanent or ongoing employment with the same organisation will be rare and skills will have to be constantly upgraded (increasingly in workers' own time and at their own cost). Increasingly it will be the responsibility of individual employees to exercise or protect their rights through the civil courts by way of litigation. The work week will be ill defined and workers will essentially be on call as required. Workers will have lawyers not unions looking after their welfare and negotiating their 'contracts'.

This model of industrial society is based on a belief that there should be fairness in opportunities not necessarily fairness in outcomes. Despite the fact that even if there is some equity in opportunities, this does not mean fairness in outcomes. It was for exactly this reason that the concept of comparative wage justice was such a cornerstone in wages policy in Australia for so long. This concept recognised that there is something grossly unfair if people, with similar skills and experience, receive significantly different wages for doing essentially the same thing.

The reform of industrial relations has been as much about changing our value system as about making our organisations more efficient or internationally competitive. The move to further decentralise industrial relations is about downgrading the values of fairness and justice in outcomes and convincing us that the outcomes we get under an individual-based system are economically sound and efficient, and of course necessary.

Is the new decentralised system that encourages non-union collective and individual bargaining producing fair and just outcomes? Is

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there evidence that the flexibility, innovation and new management practices that employers supposedly have been unable to implement through a rigid, third party dominated, rule-making system such as awards are now being codified in new non-union agreements?

An examination of what has happened with non-union agreements over a number of years and under different conditions provides some tentative answers to these questions. To begin, we need to keep this sector of industrial rule making in perspective. The non-union bargaining sector is still relatively small. According to the most recent comprehensive survey of Australian industrial relations, the 1995 Australian Workplace Industrial Relations Survey, only 11% of non-unionised workplaces with five or more employees had a written collective agreement, and not all of these were registered with the relevant tribunal. But as will be seen, not all written agreements provide for similar outcomes, as may be expected under a more decentralised system. These differences may reflect the emergence of a new industrial relations system that sees a significant divergence between outcomes for different groups; differences that may widen as unions continue to be marginalised and the influence of the AIRC is further circumscribed.

The data informing this article comes from the Agreements Database And Monitor (ADAM) which is maintained by the Australian Centre for Industrial Relations Research & Training (ACIRRT) at the University of Sydney. This contains information on 4300 registered agreements from State and federal jurisdictions. Information from this database is used to produce the quarterly *ADAM Report*.[1] Among other things, the Report monitors changes in the issues dealt with in registered agreements over time.

The December 1995 *ADAM Report* concluded that non-union bargaining in the federal jurisdiction was not altering substantive conditions of employment to any greater extent than was occurring in unionised agreements. In fact, when specific clauses on wages and hours of work issues were examined there was little difference between non-union and union agreements. The real impact of non-union agreements appeared to be in the differences in bargaining arrangements and the individualisation of remuneration systems.

Changes to working time arrangements have been one of the most common issues being addressed in enterprise agreements over the past five years. Changes to working time arrangements are seen as an indicator of management's desire to introduce more flexibility into the workplace. In 1995, 5% of non-union agreements (compared to 10% of union agreements), contained provisions to increase the flexibility of overtime payments. This included the payment of overtime at single rates, time off in lieu of overtime at ordinary rates or including overtime rates into the base wage. Union agreements were also more likely to average hours of work over four weeks or 52 weeks than non-union agreements. Non-union employers did not have significantly more discretion to vary hours of work than those with union agreements.

In the earlier generation of agreements there was also little difference in the level of annual wage increases in different kinds of agreements. The average annual wage increases in non-union agreements was 3.8% compared to 3.9% for union agreements. There were, however, significant differences in the systems used for determining wage increases. Non-union agreements were more likely to use individualised remuneration systems to reward employees with wage increases. For example 17% of non-union agreements used merit or performance-based payment systems compared to 10% of union agreements. Similarly, salary packaging was a provision found in a higher proportion of non-union agreements (11%) than union agreements (1.0%).

Non-union agreements 1996-97

The *Workplace Relations Act 1996* effectively changed the rules for non-union bargaining at the federal level. In addition to providing a new stream of individual agreements (Australian Workplace Agreements — AWAs) the legislation changed some basic rules relating to the non-union collective certified agreements. The previous legislation provided for unions to be notified if a non-union agreement was lodged and provided for unions to intervene. The circumstances under which unions were entitled to be involved under the previous *Industrial Relations Act 1988* were:

- where a union was authorised by employees who were members to bargain on its behalf;
- where a union had members in an enterprise seeking a non-union Enterprise Flexibility Agreement (EFA). The union had to be notified of negotiations as soon as possible and given the opportunity to participate in the negotiations;
- where a union was party to an award that covered an enterprise seeking an EFA but had no members at the enterprise, the union was entitled to be heard at the proceedings pertaining to the EFA. In this case the union had no right to be involved in negotiations (s.170NB).

As well, the Commission (s.170NC) had to be satisfied that the EFA did not 'disadvantage' or 'discriminate' against employees and the EFA was not contrary to the 'public interest'.

The current legislation removes the notification and intervention role and effectively locks unions out of non-union bargaining where there is no call by employees for their participation. It is arguable as to what difference the new legislation has made to the role of the AIRC in the certification process for non-union agreements. Non-union collective certified agreements bind an individual employer and employees as a collective. Under the *Workplace Relations Act 1996*, such agreements can be reached after 'a valid majority' of the employees that would be covered by the agreements have voted in favour of the agreement. Employees must be given 14 days notice of the intention to make the agreement and the agreement cannot be made within this period. The employer must explain the agreement and inform union members of their right to union representation in agreement negotiations. Unions, if requested by a member to be involved, must be given reasonable opportunity to negotiate. There is, however, no longer any requirement to notify the union of the intention to negotiate a non-union certified agreement and the union has no rights to intervene unless invited by members.

The extent of non-union collective agreements

While there has been significant growth in the number of agreements of this nature since 1996 it is important to keep these developments in perspective. Only 11% of non-unionised workplaces with five or more employees have written collective agreements, and not all of these are registered.[2] This is a lot lower than unionised workplaces where up to half have such agreements.

Keeping this in mind, the recent growth in non-union collective agreements has, however, been impressive at the federal level. As at 31 October 1997 there were 181 such agreements. This compares more than favourably with the take up of non-union agreements under the previous Federal Labor Government's Enterprise Flexibility Agreements (non-union EFAs) provisions of the *Industrial Relations Act 1988*. By July 1996 only 196 such agreements had been settled. In other words there are nearly as many 'new look' non-union collective agreements after 10 months of the new Act as there were after two and half years under the old Act. Clearly, agreements of this nature are growing at a far faster rate in the federal jurisdiction than they have in the past.

For the purposes of this article 317 non-union collective federal and State agreements registered in either 1996-1997 have been examined.

Industry coverage

The distribution of non-union agreements by industry is similar to union agreements. This is clearly evident in *Table 1*.

Table 1: Proportion of union and non-union agreements by industry: 1996–97

Industry	Distribution of non-union agreements (N = 317) (%)	Distribution of union agreements (N = 1518) (%)
Mining/construction	11	13
Metal manufacturing	9	8
Food, beverage tobacco manufacturing	8	7
Other manufacturing	8	12
Electricity, gas & water	4	2
Wholesale/retail trade	11	7
Transport & storage	10	10
Communication services	0	1
Finance & insurance	8	7
Government administration	4	12
Health & community services	13	15
Cultural, recreational and personal services	14	6
Total	100	100

Source: ADAM Database, 1997 reported in *ADAM Report* 15.

Not surprisingly, of the non-union agreements, 80% were from the private sector and of the unionised agreements, 75% were from the private sector. The comparable industry and sector distribution is important because it indicates that the spread of these agreements is broadly based and not concentrated in a limited number of industries.

The content of union and non-union collective agreements: emerging differences

As indicated, previous analysis revealed few differences between the former EFA (non-union) and union certified agreements, the major ones concerning greater individualisation of salary arrangements in the non-union deals.

Analysis of the most recently registered non-union collective agreements reveals a different story. While on many issues there is much similarity, on three key matters fundamental differences appear to be emerging. These concern wages, hours entitlements and approaches to procedural fairness and change at the workplace.

An initial comparison of the provisions contained in both union and non-union collective agreements reveals that both generally lack innovative clauses. An indication of just how limited most agreements are is provided in *Table 2*.

Table 2: Similarities in the limited incidence of 'innovative' clauses in union and non-union collective agreements, 1996–97

Provision	% of non-union agreements	% of union agreements
Wages annualised	7	10
Allowances absorbed	10	10
Leave loading absorbed	10	4
Wage increases based on productivity increase	10	17
Gain/profit scheme	4	6
Bonus payment	5	7
Individual performance/ piecework	7	4
Quality assurance	4	7
Just in time (JIT)	0	1
Unlimited sick leave	1	1
Additional sick leave may be given	3	2
Family leave provisions	25	27
Employees may be asked to do a range of tasks	9	8
Teamwork provision	5	10
Employees to carry out task as required	6	5
Employer may direct employees within skills	15	18
EEO/AA clauses	10	12
Work from home provisions	2	2
Other flexibility provisions	11	17

Source: ADAM Database, 1997 quoted in *ADAM Report* 15.

The lack of innovative clauses in agreements should not be taken to mean that innovation is not occurring at workplace level. Much change is happening, but not through

enterprise agreements.[3] The decentralisation and deregulation of industrial relations has, however, been promoted to facilitate greater innovation at workplace level. If managers, workers and unions have not been taking up the issues noted in *Table 2,* what have they been doing through agreements?

The most obvious issue that has dominated agreements has been wages. *Table 3* reveals, however, that wage outcomes (in the form of average annual wage increases — AAWI) appear to differ quite dramatically depending on whether unions are involved in the bargaining or not.

Table 3: Differences in average annual wage increases between union and non-union collective agreements, by industry 1996-97

Industry	Non-union agreements AAWI (%)	Union agreements AAWI (%)
Mining/construction	4.0	6.5
Food beverage tobacco manufacturing	4.2	5.8
Metal manufacturing	3.9	5.4
Other manufacturing	3.8	5.5
Wholesale/retail trade	5.1	5.3
Transport and storage	5.5	5.8
Health & community services	5.0	5.5
All industries	4.54	5.52

Source: ADAM Database, 1997 in *ADAM Report* 15.

On average, union-based agreements deliver wage increases 1% higher than their non-union counterparts. The difference is even greater in those sectors where unions are particularly well organised: mining, construction and all areas of manufacturing. Differences between union and non-union wages outcomes in the services sector are not as pronounced.

In addition to wages, clauses dealing with hours of work have been particularly popular in agreements. *Table 4* shows how the incidence of such provisions varies between recent union and non-union collective agreements.

Table 4: Working time provisions in agreements in union and non-union collective agreements 1996–97

Provision	% of non-union agreements	% of union agreements
Any flexible hours provision	85	71
Hours greater than 38 hrs	24	7
Ordinary hours Mon-Sat	7	10
Ordinary hours Mon-Sun	18	6
Average of hours (wk/yr)	38	17
Overtime at single rate	14	1
Time off in lieu at ord rate	16	9

Source: ADAM Database, 1997 in *ADAM Report* 15.

The differences here are dramatic. Overall, nearly all (85%) of non-union agreements deal with some aspect of working time entitlements. This is compared with just over 70% of union agreements. Of greater significance is the incidence of particular types of working time clauses:

- standard hours longer than 38 are more common in non-union (24%) as opposed to union agreements (7%);
- averaging of hours over a week, month or year is more common in non-union (38%) compared to union agreements (17%);
- overtime paid at a single rate is present in 14% of non-union agreements and virtually absent (1%) in union agreements.

These findings suggest that where management can negotiate without unions in settling enterprise agreements it achieves major changes to working time entitlements.

Differences between union and non-union agreements are also apparent when we examine provisions dealing with procedural fairness and consultative approaches to workplace change. The findings are summarised in *Table 5.*

Table 5: Incidence of clauses dealing with procedural fairness and consultation in union and non-union collective agreements, 1996–97

Provision	% non-union agreements	% union agreements
Grievance procedure	73	84
Performance indicators to be developed	10	20
Implementing performance indicators	11	23
OHS provision	30	41
Consultative provisions	29	55
Change provisions	11	18
Training provisions	38	58

Source: ADAM Database, 1997 in *ADAM Report* 15.

Table 5 indicates that unionised agreements are likely to include provisions concerning the fair treatment and entitlements of employees. This is particularly evident in the incidence of clauses dealing with grievance procedures, training, approaches to consultation, occupational health and safety and the development and implementation of performance indicators.

Conclusions

While the earlier generation of non-union agreements were not significantly different in content to union-negotiated agreements, this situation has changed in more recent agreements. The analysis shows that:

- there are differences emerging between union and non-union agreements in the granting of average annual wage increases;
- non-union agreements are more likely to have a range of working hours provisions than union agreements, with a significantly higher proportion of non-union agreements providing for a working week of 38 hours or more, the averaging of hours of periods greater than one week and overtime paid at a single rate;

- 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

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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.

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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.