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Chapter Seven

Confronting the challenges for unions: freedom of association and union security

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The fall in union membership and influence in Australia over recent years has led a number of conservative politicians and other commentators to dismiss the industrial wing of the Labour movement as a relic of a rightly abandoned past. Unions are accused of being dinosaurs, protected by obsolete industrial relations law and deserted by workers in the new economy. This analysis ignores the effects of years of ideologically based attacks on union presence and activity in their businesses by some employers and, since 1996, substantial legislative amendment initiated by the Coalition Government, in particular the Workplace Relations and Other Legislation Amendment Act 1996 (Cth) (WROLA).

While unions are facing challenges, there is substantial evidence that employees, whether union members or not, value the role unions play in the workplace and in society. An annual survey commissioned by the Labor Council of NSW since 1996 shows gradually increasing support for unions (Labor Council of NSW 2001). Unions have met the challenges, in part, through modernising their activities and concentrating on recruitment. These efforts have been reflected in modest membership growth in the last year (ABS 2001) and will, no doubt, continue to be effective. However, change is needed to the traditional legislative framework to address the role of unions in the modern workplace: in particular, strengthening union collective bargaining rights and recognising that within the framework of freedom of association, provision must be made for union security.

Whether unionism has a future will depend on whether or

not the principle of collective workplace relationships regains its place at the core of the Australian industrial relations system. The decline in union membership and effectiveness over the last quarter century and, in particular, in the last decade, has occurred in tandem with the employer and government onslaught on the collective and organisational basis of the Australian system of conciliation and arbitration.

Griffith University's David Peetz has identified three factors responsible for the halving of the unionised proportion of the workforce from 51 per cent in 1976 to 25 per cent in 2000: structural change in the labour market; an 'institutional break' in employer and government attitudes to compulsory membership and the place of unions; and the inability of unions to respond to change and its associated challenges (Peetz 1998, p. 3).

Until the mid-1990s Australian unions were generally not forced to struggle for employer recognition, as is the case in North America and the UK. Union registration under the Workplace Relations Act brought with it an ability to take disputes (whether real or 'paper') to the Australian Industrial Relations Commission (and its precursors), resulting in the making of awards setting legally enforceable wages and conditions of employment (Creighton and Stewart 1990, p. 45). There was a relatively high degree of social consensus about the value of a system based on collective organisation and representation.

Two major signs of the changes to come appeared in the last years of the Labor Government. The first was the decision by mining giant Rio Tinto to refuse to negotiate with unions, even though most employees were union members, and to use individual contracts to induce employees to abandon collective representation. The second was legislation giving primacy to enterprise bargaining, the Industrial Relations Reform Act 1994 (Cth). The Rio Tinto dispute set the ideological basis for overturning the system, based on the role of organisations and the Australian Industrial Relations Commission, and replacing it with the principle of preventing these 'third parties' from intervening in the direct employer-employee relationship (Peetz 1998, p. 105).

It should be noted that Australian law has never required employers to negotiate with unions. Parties needed to deal with each other, in part, because they recognised that they were subject

to the powers of the Australian Industrial Relations Commission to order compulsory conciliation and, where this did not succeed, to arbitrate an outcome. The weakening of the Commission's arbitral powers has left a void in dispute resolution that the legislation tries to fill through legal sanctions for industrial action. This has led to the position where employers affected by an industrial dispute are likely to seek Commission orders, backed up by Federal Court injunctions, to stop the industrial action, without this being accompanied by conciliation and arbitration of the underlying issues (see the Workplace Relations Act 1996 (WRA) s.127).

The failure to legislate for compulsory collective bargaining is the key missing element of the enterprise bargaining system. Australia is the only country in the developed world where employers can simply refuse to negotiate with unions, even where the majority of employees wish to be represented collectively. In the United States, for example, employers must bargain with unions that have majority employee support (see Taft-Hartley Act 1947). In the United Kingdom, the Blair Government has legislated to require employers to recognise unions with majority support for the purposes of collective bargaining (see Trade Union and Labour Relations (Consolidation) Act 1992). In New Zealand, under the Employment Relations Act 2000, an employer must negotiate with any union with membership at the workplace. In Australia, the employer position became stronger after the election of the Coalition Government in 1996, with legislative facilitation of non-union collective agreements together with provision for individual Australian Workplace Agreements (AWAs) (see WRA ss170LK; Part VID).Under the legislation, employers can make collective agreements with a union, or directly with employees, without union involvement. Agreements can also be made with individual employees, to which unions cannot be party.

Meeting the challenges

In looking to rebuild their future, unions have identified the structural and attitudinal changes in the labour market which underlie the challenges to the established industrial relations system. The opening of Australia to internal competitive pressures in the 1980s led many employers to feel compelled to drive down costs, including employment costs. The result was widespread

outsourcing of non-core functions, with associated wage cuts, together with strong demands for flexibility in work practices. Similar trends occurred in the public sector through corporatisation and privatisation. There has been a marked employment shift from traditionally highly unionised industries in the public and private sectors, to the more lightly organised service sector (Peetz 1998, ch. 4).

Under attack from employers and government, and seeing their traditional industrial strategies restricted, unions have adopted three different but linked paths to fighting back. The first has been largely defensive: unions have succeeded in substantially maintaining their position in disputes, including those with Patrick Stevedore, BHP and the Commonwealth Bank, where employers, supported by the Federal Government, have launched campaigns to remove union representation from the workplace Workers at Rio Tinto, where it all started, have recently rejected their employer's attempt, in response to the election of a Labor government in Western Australia, to legally locate the individual employment system within a federal non-union agreement. Although it is early days, the vote shows that unionism is not dead at Rio Tinto.

The second strategy has been to refocus on recruitment and organisation at the workplace. The ACTU commenced the development of its 'organising model', significantly influenced by North American unions, in the mid-1990s. Further refinement occurred with the 1999 high-level union delegation to Europe and North America to study how unions had adapted to changing conditions. The delegation's report, unions@work, was a blueprint for the modernisation of unions. The report advocated a shift in union resources to recruitment, particularly in the new industries, and to the development and training of workplace delegates, along with the use of modern campaigning techniques and technology (ACTU 1999).

The third and least emphasised approach has been an attempt to attract members through value-for-money services, such as contract negotiation and training, and with access to discounted goods and services of various kinds (see *www.actu.asn.au/memberservices/benefits* and *www.sda.org.au/services.php3*).

It appears that these efforts have had some success, with a small increase in numbers in the last two years. In August 2001 there were 1,902,700 union members, 900 more than in the

previous 12 months. Although growth was slower than the general labour force increase, meaning that union density fell slightly, unions were successful in recruiting amongst part-time and casual workers, most of whom are female, and in the services sector (ABS 2001). While these strategies can and will continue, irrespective of the political environment, legislative change is required to address the key foundations for union effectiveness: union recognition in the workplace, including for collective bargaining, and union security.

In the past, union security was provided by the registration system, which gave unions close to exclusive areas of coverage and a monopoly on obtaining legally enforceable industrial instruments. Union security stemmed from this, with most employers and workers taking the role of the union, and the benefits of membership, virtually for granted. While legislation did not provide for closed shops, it was common for full membership to be enforced either by the employer at the point of engagement, or by the union's workplace representatives.

In practice, this meant that in many workplaces prospective employees were told by the employer that they were expected to join the union, with an application form included with initial employment paperwork. In other cases, delegates would sign up new employees, with it being clearly understood that membership was required. The change in employer attitude towards encouraging full union membership pre-dated changes in legislation purporting to provide for freedom of association, which, in itself, has not been a critical factor. Encouragement of union membership is not unlawful, although refusing to employ a person or otherwise discriminating on the basis of union membership would breach the WRA (ss298K-L).

Somewhat unexpectedly, the freedom of association provisions have been found to be a useful legal device to challenge employer efforts to weaken unionism. The most prominent union use of the WRA in this way occurred during the MUA dispute. Here, the High Court upheld findings of the Federal Court that there was an arguable case that Patrick Stevedores had breached the Act by restructuring related company arrangements to make it easier to dismiss its workforce, because they were union members (*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30 (30 May 1998)).

Employers today have an unprecedented ability to bypass unions entirely. The re-election of the Coalition Government has ruled out any possibility of changes to the legal framework to strengthen the institutional place of collective organisations, at least before 2005. Union efforts will be needed to lobby effectively to persuade the Australian Democrats to continue to reject Government legislation seeking further restrictions on collective bargaining and the role of unions. The Labor Party, while committed to an enhanced role for the Commission and an obligation on employers to bargain collectively in good faith, is currently undertaking a comprehensive policy review, including industrial relations. In this environment, there has been considerable debate around issues relating to questions of union representation, recognition and security.

Employee representation and union recognition

The resource-intensive character of enterprise bargaining means that it is simply impossible for unions with members in many enterprises to provide officials to lead and control all negotiations. Some unions find this harder than others; in retail or banking, for example, where union membership is concentrated in a few large companies, agreements can be made covering thousands of employees. 'Pattern bargaining', whether formal or informal, where unions and individual employers reach similar agreements across an industry, have provided some assistance, although this requires employer support or at least acquiescence.

The emphasis on delegate training, highlighted in the unions@work report (ACTU 1999) is one plank of a strategy for more effective bargaining in the workplace. However, training is not enough. There needs to be a mind shift amongst unions, where real power is given to members in the workplace, whether or not the union is happy with the result. Under the Coalition legislation the battle for members' hearts and minds is at the workplace: that is where the question of union-negotiated collective agreement *versus* non-union collective or individual agreements is determined. Workplace structures are taking on an importance greater than ever before, yet are woefully inadequate in many unionised workplaces. There is clear empirical evidence to link union membership and its maintenance with effective workplace representation through union delegates (Peetz 1998, p. 116).

Works councils

The ACTU has commenced a debate about alternative means of ensuring worker representation at the workplace level, including a variant of works councils, a concept developed in Western Europe and which has spread to the UK through the Directives of the European Union (Hall et al, 2002 pp. 9-11). The removal of award provisions requiring employers to consult with employees and unions about significant decisions, limited as these were in most cases, sent a clear signal about the lack of government support for co-operative relationships based on employee rights to information and consultation (Forsyth 2000).

Works councils are generally comprised of directly elected workplace representatives; in some cases the candidates are nominated by unions, while in others, unions are entitled to also sit on the councils. Their roles and functions differ from country to country, ranging from a right to formal consultation about the company's activities and future plans as they affect employee interests, to the right to 'co-determination' or joint decision-making about specified issues arising in the workplace (Barnard 1999 pp. 9-11; Bellace 1994; Hall et al 2002 pp. 20-1).

The restriction of bargaining to the enterprise level in Australia is more extensive than in other developed countries and, in particular, those with a works council system. Although there is a trend towards more decentralised bargaining in Europe, works councils largely operate in the context of relatively centralised bargaining over key issues, including wages and hours of work, with the resulting collective agreements applying throughout industry sectors. In Germany, formal co-determination rights mean works councils must approve management decisions on issues including organisation of working time and the administration of remuneration and benefit systems (Hall et al 2002, p. 19).

An analogy in the Australian context would be award facilitative provisions about the operation in practice of award entitlements, such as some working time and leave arrangements, which currently require either individual or collective worker agreement. Since 1996, award provisions which made such arrangements contingent on union agreement have been removed and replaced with a right for union members to be represented by their union in the process.

A possible model for Australia could be for workplace

implementation, together with general consultation, to be the role of workplace union representation where this exists, but delegated to an elected works council in non-unionised or unorganised enterprises. This is similar to the UK 'single channel' model which is used for negotiations around collective redundancies and transfers, and which is being considered for implementation in an EU Directive (Veale 2002).

The works councils idea has received a cool reception from some Australian trade unions, who express the traditional fears that they will operate to undermine their role and provide legitimacy to employer strategies to negotiate directly with workers. To the extent that there is support, it is mostly limited to the councils playing a purely consultative role, primarily about non-industrial issues (Cameron 2001; Combet 2001).

Against this is the need to consider how to broaden the means by which collective representation can work at the enterprise level in the context of declining union membership, particularly in the private sector. It is imperative that this be done, given the Australian government's vision, supported by significant employer forces, of a workplace relations system characterised by direct dealings between employers and individual employees rather than through any representative structures.

Before the Australian federal election in 2001, and with a view to a Labor victory, the ACTU considered pursuing the issue in two ways: first, by seeking the restoration of consultative provisions in awards, but with these going beyond the minimal standards established by the 1984 Termination, Change, Redundancy Test Case ([1984] 8 IR 34) and, second, by encouraging a Labor Government to initiate a program of examination of works councils, including possible funding for some initial practical projects.

In the longer term, legislative provision along the lines of some European models may be supported, so long as it is accompanied by a legally enforceable obligation on employers to negotiate with unions which represent employees in particular enterprises and industries. Under current legislation, there is no requirement for employers to negotiate with unions who are seeking a collective agreement, irrespective of the level of employee membership of and support for the union. The ability to negotiate a multi-employer or industry-wide agreement is severely restricted, most particularly

by the prohibition on the taking of legally protected industrial action in connection with such an agreement (WRA s170MI).

Unions will not accept displacement of their role in collective bargaining in cases where they have membership. A workable formula for union recognition for bargaining purposes would that the union have at least one member at the enterprise for whom it has coverage in its rules, already a precondition for a union wishing to make certain certified agreements (WRA s170LJ).

The position will be, as it is now, that if a union does not have a significant degree of membership and support it will not be able to negotiate with authority, even with formal employer recognition. Under current law, employers have the option of trying to reach agreement with a union, or entering into a collective non-union agreement, or individual Australian Workplace Agreements (AWAs). In some cases workplace representative structures are established, inevitably by the employer, to 'negotiate' non-union agreements, but more commonly, the employer brings the agreement to employees for a vote.

In these circumstances, and where there is no significant union membership, collective representation through some form of works councils could be more conducive to the development of a collective culture than individual agreements or non-union agreements concluded without any representative bargaining structure. The key issue for unions is whether or not works councils operating as *de facto* bargaining bodies would weaken union recruitment efforts.

Union security

The 'institutional break', identified by Peetz, has led to the decline, if not the abolition of the fully unionised workplace. The abandonment by employers of the previous practice of requiring union membership from all employees, together with deduction of union dues and forwarding these to the organisation, has had a significant impact in some industries, particularly the service sector and some areas of manufacturing.

Preference clauses, which required employers to give preference in employment (and sometimes in promotion, termination and other circumstances) to financial union members or to persons prepared to become members, have been removed from awards

and agreements. There is now a specific prohibition on failing to employ a person because the person is not or does not propose to become a union member or to discriminate against such a person in their employment.

With its 1996 'freedom of association' amendments to the *WRA*, the Coalition equated the right *not* to join a union with the right to join (s298K [prohibited conduct]; s298I [prohibited reasons]; s298U [remedies]). The government's efforts, through the Office of the Employment Advocate, one of whose functions is to enforce the freedom of association provisions of the WRA, have been focused on the negative right not to join. The office has directed its work in this way in spite of evidence that more employees wish to join a union, but feel they can't, than those who join against their will (Peetz 1998, p. 109).

The problem for unions is that the enterprise bargaining system requires significant resources to be put into negotiations at workplaces where it has members, even if these make up a minority of employees. The WRA prohibits the certification of agreements which cover only union members, as well as provision of differing wages and conditions based on membership. This means that unions must represent non-members if they are to represent their members.

In Canada and the United States, which also have decentralised bargaining systems, the law allows for non-members covered by a union-negotiated collective agreement to be required to pay a fee to the union in consideration for its representation. Australian unions have mixed views about these fees, fearing that they would be a disincentive to unions to recruit, especially if set at a lower level than full dues, as is generally the case in countries where these exist. However, support for bargaining fees is growing in the context of a debate fuelled by litigation and government legislative initiatives.

The inclusion of a provision for payment of a bargaining fee (which was set at a higher level than union dues) has been held by the Australian Industrial Relations Commission not to be inconsistent with the freedom of association provisions of the WRA, mainly because the agreement clause in question was expressed to apply to all employees, whether or not they were union members, although it was understood that the union would rebate the fee for its members (Employment Advocate PR910205). The Full Court of the Federal Court has recently confirmed the

ability of such a provision to be included in a certified agreement, with that decision under appeal to the High Court (*AFMEPKIU v Electrolux [2002] FCAFC 199).*

The inclusion of service fees for non-members covered by union-negotiated agreements has had an enthusiastic reaction from many union members who, understandably, resent 'free-loaders', particularly in the light of the increased general emphasis on 'user pays' in relation to many community services. The government has responded to this issue by re-introducing legislation prohibiting the charging of bargaining fees by unions (Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 (Cth)). The Australian Democrats are committed to the principle of allowing service fees to be charged by unions, and have introduced amendments to the Bill establishing the conditions under which such fees can be charged.

Conclusion

The last two decades have seen unions decline in membership and lose a part of their institutionalised representative role in the industrial relations system. The weakening of the powers of the Australian Industrial Relations Commission and the shift to enterprise-focused bargaining has forced unions to look to the workplace for the growth which is needed for survival. Rights for delegates, including leave for trade union training, together with union 'encouragement' clauses which commit employers to facilitate employees who wish to join the union, are increasingly the subject of bargaining, with provisions being included in certified agreements.

There is no single path for unions: legislative reform, workplace organisation and provision of member services are all required. What is clear, however, is that unions will need to move further away from 'business as usual' to meet the challenges posed by the collapse of traditional representational rights and their associated security.

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