

# Decentralisation and ‘Deregulation’ of Labour Relations through ‘Ultra-Regulation’: Australia’s 2005 Labour Law Reforms

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## 1. Introduction and Background to the ‘Work Choices’ Act 2005

Over the last fifteen years, Australia’s labour relations system has been totally transformed – from a highly centralised system based primarily on the determination of wages and working conditions through industrial tribunals, to one centred on decentralised bargaining at the workplace or enterprise level.<sup>1</sup> In the early stages of this transition, ‘enterprise bargaining’ remained overwhelmingly *collective* in nature. Increasingly, however, it has taken on an *individualist* orientation. These changes, and the move away from Australia’s traditional approach to regulating employment relations through prescriptive ‘awards’ and the conciliation and arbitration of industrial disputes, have been facilitated by legislative reforms at both Federal and State levels. Conservative (or ‘Coalition’) and Labor governments alike have sponsored the reform process, although the Coalition has driven it more vigorously and more radically – especially since its election to Federal Government in 1996.

Through its ‘first wave’ of labour law changes – the *Workplace Relations Act 1996* (Cth) (‘1996 Act’) – the Howard Coalition Government implemented several key elements of its (notionally) deregulatory labour relations reform agenda.<sup>2</sup> These included:

- limits on the dispute-settlement powers of the Federal industrial tribunal, the Australian Industrial Relations Commission (‘AIRC’)
- restrictions on the scope and reach of award regulation
- encouraging the further development of enterprise bargaining and allowing, for the first time under Federal law, employers and employees to enter into individual agreements known as Australian Workplace Agreements (‘AWAs’)
- removing many of the institutional and legal supports traditionally provided to trade unions
- substantial new constraints on the right to strike.

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<sup>1</sup> For more detailed information about these developments, see the discussion and references in Anthony Forsyth, *Re-Regulatory Tendencies in Australian and New Zealand Labour Law*, Japan International Labour Law Forum Special Series No. 14, March 2001, pp. 2-4; see also Joe Isaac, ‘The Deregulation of the Australian Labour Market’ in Joe Isaac and Russell Lansbury (eds), *Labour Market Deregulation: Rewriting the Rules*, The Federation Press, Sydney, 2005, p. 1.

<sup>2</sup> For detail, see eg Richard Mitchell, ‘Juridification and Labour Law: A Legal response to the Flexibility Debate in Australia’ (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 113.

However, because it did not control the Senate (the Upper House of the Australian Parliament), the Government was forced to compromise on its originally more extreme reform proposals. Hence, while it secured passage of the 1996 Act, the Government's labour relations reform ambitions remained unfulfilled, and this dynamic continued over the following eight years. The Government repeatedly submitted further legislative proposals to the Parliament, and apart from the passage of several less controversial measures, the Senate rejected them. However, in October 2004, the Coalition Government was re-elected for a fourth successive term of office – and importantly, at that election, the Government finally obtained control of the Senate.

From late 2004, the Government very quickly embarked on formulating proposals for a major re-shaping of Australia's workplace relations framework, with a view to having these laws passed by Parliament after the Government's Senate majority took effect on 1 July 2005. The overall shape of the proposed reforms was announced by the Prime Minister in a Statement on 26 May 2005,<sup>3</sup> in which he outlined the Government's plans to create a new national labour law system that would largely override the industrial relations systems of the Australian States. The AIRC's traditional role in setting minimum wages would be transferred to a new body, the Australian Fair Pay Commission ('AFPC'). Collective and individual workplace agreements would need to contain only five basic employment conditions, rather than meeting the 'no disadvantage' test which had previously ensured fairness compared to relevant industrial awards. And workers in firms with less than 100 employees would no longer be able to bring 'unfair dismissal' claims.

There then followed several months of intense debate about the Government's proposals, including a concerted campaign of opposition by the Australian Council of Trade Unions ('ACTU'), and religious and community groups.<sup>4</sup> However, business lobby groups such as the Australian Chamber of Commerce and Industry and the Business Council of Australia continued to argue strongly for fundamental workplace relations changes of the type proposed by the Government. These and other proponents of the reform agenda claimed that Australia's future economic prosperity and international competitiveness depended on further 'deregulation' of the labour relations system, just as the shift to enterprise bargaining in the 1990s had brought significant economic benefits.<sup>5</sup>

Undeterred by mounting public concern about its proposals, the Government announced further details with the release of its 'Work Choices' document on 9 October 2005.<sup>6</sup> Then, on 2 November 2005, the *Workplace Relations Amendment (Work Choices) Bill 2005* was introduced into Federal Parliament. A short Senate Committee inquiry was held into the proposed legislation,<sup>7</sup> following which the Government introduced some (mostly minor) amendments to the Bill. Finally, the *Workplace Relations Amendment (Work Choices) Act*

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<sup>3</sup> Parliament of Australia, *Prime Ministerial Statement: Workplace Relations*, 26 May 2005, available at <http://www.workplace.gov.au/workplace/Category/PolicyReviews/WorkplaceRelationsReforms/>.

<sup>4</sup> See eg <http://www.rightsatwork.com.au/>; Neale Towart, 'Framing the Debate: The Unions' Campaign' (2005) 56 *Journal of Australian Political Economy* 269 (this article, and others from the special edition of the *Journal of Australian Political Economy* on the 2005 reforms, are available on-line at <http://www.jape.org/>).

<sup>5</sup> For a recent, critical assessment of enterprise bargaining at the Federal level, see Ron Callus, 'The Re-Regulation of Australian Industrial Relations: The Role of the Hancock Inquiry' in Isaac and Lansbury 2005, p. 111.

<sup>6</sup> Commonwealth of Australia, *WorkChoices: A New Workplace Relations System ('WorkChoices')*, 9 October 2005, available at <https://www.workchoices.gov.au/>.

<sup>7</sup> The Committee's Report, in which (predictably) Government Senators approved the passage of the controversial legislation with minor amendments while Opposition Senators strongly condemned it, is available at [http://www.aph.gov.au/Senate/committee/eet\\_ctte/wr\\_workchoices05/report/index.htm](http://www.aph.gov.au/Senate/committee/eet_ctte/wr_workchoices05/report/index.htm).

2005 (Cth) (2005 Act) was passed by Parliament on 7 December 2005.<sup>8</sup> Most of the provisions of the 2005 Act will take effect in March 2006, while the detail of many aspects of the new legislation will be implemented by regulations that have not yet been publicly released.

True to the Government's promise, the 2005 Act effects the most far-reaching changes to Australia's laws and institutions for regulating industrial relations, since the establishment of the conciliation and arbitration system in 1904.<sup>9</sup> Indeed, state-sponsored arbitration in Australia has been virtually extinguished by the passage of these new laws. However, it is important to appreciate that the 2005 Act, and the various other statutory and policy measures that preceded it, do *not* amount to the 'deregulation' of Australian labour relations. While the Coalition Government has drawn heavily on the rhetoric of 'freedom', 'choice', and removing 'unwarranted third party intervention' (in the form of unions and industrial tribunals), its initiatives since 1996 have left Australia with a more regulated – and certainly more complex – workplace relations system.<sup>10</sup> This remains so after the 2005 Act, which arguably takes the levels of detail and complexity in regulation to a whole new level.<sup>11</sup>

The remainder of this paper provides a general overview<sup>12</sup> of the main aspects of the new national workplace relations system introduced by the 2005 Act,<sup>13</sup> with particular attention to how these latest legislative changes will affect the role and influence of collective bargaining and trade unions.<sup>14</sup>

## 2. The Constitutional Basis and Coverage of the National Workplace Relations System

Traditionally, Australia's industrial laws have been based on the 'labour power' in the Australian Constitution, which supported a particular form of regulation – the establishment of machinery for the prevention and settlement of interstate industrial disputes through the processes of conciliation and arbitration (ie through the AIRC and its predecessors).<sup>15</sup> However, the constitutional labour power would not support the enactment of laws regulating employment or industrial relations generally, or setting minimum wages or other employment conditions. Therefore, in seeking to establish a general scheme of labour regulation under Federal law (including the statutory prescription of certain minimum employment standards), the Government has relied instead on the 'corporations' power in the Constitution. This head

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<sup>8</sup> The 2005 Act substantially amends the 1996 Act; a consolidation and re-numbering of the 1996 Act, consequent upon these amendments, is due to occur by mid-2006.

<sup>9</sup> For a recent appraisal, see Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, 2004.

<sup>10</sup> See eg Forsyth 2001, p. 1; Isaac 2005, p. 1; Callus 2005, pp. 113-114; John Howe, 'Deregulation' of Labour Relations in Australia: *Toward Command and Control*, Working Paper No. 34, Centre for Employment and Labour Relations Law, University of Melbourne, 2005.

<sup>11</sup> See Andrew Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210.

<sup>12</sup> For further discussion and analysis, see eg Stewart 2005; David Peetz, 'Coming Soon to a Workplace Near You – the New Industrial Relations Revolution' (2005) 31 *Australian Bulletin of Labour* 90; John Howe, Richard Mitchell, Jill Murray, Anthony O'Donnell and Glenn Patmore, 'The Coalition's Proposed Industrial Relations Changes: an Interim Assessment' (2005) 31 *Australian Bulletin of Labour* 189.

<sup>13</sup> Unless otherwise stated, legislative references in the discussion that follows are to the 1996 Act, as amended by the 2005 Act.

<sup>14</sup> Due to space and time constraints, it is not possible to cover the changes to unfair dismissal laws in this paper; see further Howe et al 2005, pp. 197-199; Benoit Freyens and Paul Oslington, 'The Likely Employment Impact of Removing Unfair Dismissal Protection' (2005) 56 *Journal of Australian Political Economy* 56.

<sup>15</sup> See generally Breen Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24 *Melbourne University Law Review* 839.

of power enables the Federal Government to pass laws regulating the activities of trading, financial and foreign corporations – including their employment and industrial relationships, although it remains to be seen how far the permissible scope of such regulation extends.<sup>16</sup>

The national workplace relations system introduced by the 2005 Act primarily covers employers that are ‘constitutional corporations’ (ie companies of the types mentioned above) and their employees; as well as employers and employees in the Federal public service, and those in the State of Victoria (which referred its industrial relations powers to the Federal Government in 1996), the Australian Capital Territory and the Northern Territory.<sup>17</sup> As a result, the Government estimates that around 85 per cent of Australian employees now fall within the coverage of the national system.<sup>18</sup> Importantly, these include many employees of constitutional corporations previously covered by State industrial relations systems in New South Wales, Queensland, Western Australia, South Australia and Tasmania, because the new national system overrides State industrial laws, awards and workplace agreements.<sup>19</sup> In future, therefore, the State systems will only cover unincorporated businesses (eg sole traders, partnerships) and their employees; and employees in State government departments and agencies.

In mounting a ‘hostile takeover’ of State laws through the 2005 Act, the Federal Government’s strategy is to render the State industrial relations systems effectively irrelevant, so that the State governments feel compelled to ‘refer’ their industrial relations powers to the Federal Government. However, this outcome remains unlikely for the foreseeable future. In fact, the Labor Governments of several States have already initiated constitutional challenges in the High Court of Australia, in which they will essentially argue that the corporations power does not permit the Federal Government to implement a comprehensive ‘code’ of labour regulation of the type introduced by the 2005 Act.

### 3. The Australian Fair Pay and Conditions Standard and the AFPC

The 2005 Act introduces, for the first time under Federal legislation, statutory minimum employment conditions for *all* employees of employers covered by the national workplace relations system. These minimum entitlements form the Australian Fair Pay and Conditions Standard (‘AFPCS’),<sup>20</sup> which acts as a ‘floor’ below which awards, workplace agreements, and employment contracts may not fall (ie employees must generally be accorded employment conditions that are equal to or better than the AFPCS). The AFPCS consists of the following minimum entitlements:

- *hourly rates of pay* based on either an ‘Australian Pay and Classifications Scale’ (ie the pay rate to which an employee was entitled under a previously applicable Federal or State award); or the new Federal Minimum Wage of A\$12.75 per hour<sup>21</sup>
- maximum *ordinary hours of work* of 38 hours per week (although this can be ‘averaged’ over a period of up to 12 months; and an employee can be required to work ‘reasonable additional hours’, determined by reference to factors including the worker’s personal circumstances/family responsibilities and the operational

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<sup>16</sup> See eg Stewart 2005, pp. 220-227; Peter Prince and Thomas John, *The Constitution and Industrial Relations: Is a Unitary System Achievable?* Parliament of Australia, Parliamentary Library, Research Brief, no. 8, 2005-06, 28 November 2005; Jeff Shaw and Monika Ciolek, ‘The Constitutional Question’ in *The State of Industrial Relations: The State of the States 2005*, Evatt Foundation, Sydney, 2005, p 45.

<sup>17</sup> 1996 Act, sections 4AA-4AB.

<sup>18</sup> See Stewart 2005, p. 224, suggesting that the true figure may be somewhat lower than the Government’s estimate.

<sup>19</sup> 1996 Act, sections 7C-7E.

<sup>20</sup> 1996 Act, Part VA.

<sup>21</sup> Wage rates are now to be set and adjusted by the AFPC, see further below.

requirements of the business)

- four weeks' paid *annual leave* (although employees may 'cash out' up to two weeks of their annual leave entitlement each year)
- 10 days' paid personal leave (ie sick leave or carer's leave) per year (and up to two additional days' unpaid carer's leave per year, and two days' paid compassionate leave per occasion)
- 52 weeks' unpaid *parental leave* at the time of birth or adoption of a child.

On one view, the introduction of a body of statutory minimum employment standards under Federal law is a welcome development – for example, it means that many award-free or contract-based employees now have a basic level of legal protection. However, for the majority of Australian workers who are engaged under awards and workplace agreements, the AFPCS has the potential to lead to a significant erosion of existing employment conditions.<sup>22</sup> Such an outcome is considered to be a likely consequence of the substitution of the five AFPCS conditions as the 'benchmark' for negotiating new individual and collective agreements, in place of the comprehensive no disadvantage test (see further Part 5 below).

The determination of minimum wages applicable under Federal awards in Australia has for many years been a primary function of the AIRC. However, as part of the Government's objective of marginalising the AIRC (see further Part 4 below), its wage-setting function has been transferred to the newly-created AFPC.<sup>23</sup> This independent regulatory body, made up of a Chair and four Commissioners, is responsible for setting and adjusting rates of pay to operate under the AFPCS. In doing so, the AFPC is required to give high priority to the effects of increases in minimum wages on economy-wide employment and competitiveness, and the desirability of ensuring that the unemployed and low paid workers can obtain and keep jobs.

An academic financial economist has been appointed as Chair of the AFPC, which has considerable freedom to determine the timing and frequency of its wage reviews, how they are to be conducted, and when its decisions will take effect. The Government wishes the new body to move away from the legalistic and adversarial approach to determining minimum wages adopted in the past by the AIRC, and instead to engage in consultative processes with a broad range of stakeholders.<sup>24</sup> In this and several other respects, the Government has sought to model the AFPC on the Low Pay Commission established by the Blair Labour Government in the UK. However, the UK comparison is strongly contested. For example, in May's view, the Low Pay Commission was set up to introduce a minimum wage system in the UK where none existed, whereas the legislative 'point of reference' for the AFPC is that 'wages at the lower end of the labour market must be set competitively ..., with the strong inference that they are already set too high.' On this basis, she argues that: '[I]t is reasonable to assume that the impact of the AFPC will be to *lower* the minimum wage over time, principally by holding the level constant ..., thus reducing its real value.'<sup>25</sup> Whether these concerns are realised will become clearer when the AFPC hands down its first minimum wage decision under the new legislation, scheduled for Spring 2006.

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<sup>22</sup> See Peter Waring, Alex de Ruyter and John Burgess, 'Advancing Australia Fair: The Australian Fair Pay and Conditions Standard' (2005) 56 *Journal of Australian Political Economy* 105.

<sup>23</sup> 1996 Act, Part IA.

<sup>24</sup> *WorkChoices*, p 14.

<sup>25</sup> Robyn May, 'The British Low Pay Commission and the Proposed Australian Fair Pay Commission' (2005) 56 *Journal of Australian Political Economy* 92, at p. 99 (emphasis added); see also Howe et al 2005, pp. 191-194; Workplace Express, 'FPC differs from UK model, may lower minimum wage, says academic', 25 January 2006, available at [www.workplaceexpress.com.au](http://www.workplaceexpress.com.au); Mark Wooden, 'Minimum Wage Setting and the Australian Fair Pay Commission' (2005) 56 *Journal of Australian Political Economy* 81.

#### 4. Awards and the AIRC

Having been the dominant instrument of Australian labour regulation for most of the last century, awards will play a far less influential role in the new national workplace relations system. The 2005 Act continues the shift, which commenced in the early 1990s, away from award regulation and towards workplace-level bargaining. Most importantly, employers will be able to utilise the various workplace agreement options under the legislation to oust the operation of awards, and undercut award terms and conditions (see further Part 5 below).

Awards setting down minimum wages and comprehensive terms and conditions of employment covered around 80 per cent of the Australian workforce in the early 1980s. Now, the wages and conditions of only 20 per cent of employees are determined solely by awards.<sup>26</sup> The original 1996 Act restricted the content of Federal awards to twenty ‘allowable matters’ (eg wages, hours of work, various types of leave, penalty rates, and allowances) and mandated a process of ‘simplifying’ awards to eliminate any non-allowable provisions (eg preferential treatment of trade union members, consultation over workplace change or redundancies, and health and safety issues). These limits are taken substantially further by the latest amendments,<sup>27</sup> which reduce the number of allowable award matters to thirteen, and designate a range of additional provisions as non-allowable matters (eg conditions governed by the AFPCS, and restrictions on an employer’s use of part-time, casual or labour-hire workers or independent contractors).

Over the next few years, awards will not only be far more limited in scope – the number of awards will also be reduced considerably, as a result of the ‘award rationalisation’ process to be undertaken by another new regulatory body, the Award Review Taskforce (‘ART’). The ART is made up of representatives from the fields of business, vocational training, and human resource management, along with a former union official. Its task is to recommend an approach for rationalising the more than 4,000 Federal and State awards, down to a much smaller number of awards that might possibly apply on an ‘industry sector’ basis (eg mining, manufacturing, construction, retail trade, financial and insurance services, public administration).<sup>28</sup> The ART must also review award ‘classification structures’ (ie job descriptions in existing awards that will be used to determine minimum wage rates for award-based employees under the AFPCS), to provide a more simplified structure of wage rates and classifications suited to modern workplaces.<sup>29</sup> Following a report to the Minister for Workplace Relations (due by the end of January 2006), the ART will share responsibility for implementation of the award rationalisation process with the AIRC.

This will be one of the very few functions to be performed by the AIRC, which has seen its role and standing greatly diminished by the workplace relations reform process over the last fifteen years<sup>30</sup> – and which has been denuded of most of its remaining powers by the 2005 Act. In addition to transferring its wage-setting function to the AFPC, the Government has removed the AIRC’s role in approving workplace agreements; significantly constrained its powers to make or vary awards (ie generally, this can only be done as part of the award rationalisation process); and done away with its powers to settle industrial disputes by conciliation and arbitration.

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<sup>26</sup> Isaac 2005, p. 2; note that most of the further 38 per cent of workers engaged under collective agreements are also covered by an ‘underpinning’ award, see further Part 5 below.

<sup>27</sup> See now 1996 Act, Part VI.

<sup>28</sup> See Award Review Taskforce Secretariat, *Award Rationalisation*, Award Review Taskforce Discussion Paper, December 2005.

<sup>29</sup> See *WorkChoices*, pp. 34-35, 61-62.

<sup>30</sup> For differing accounts, see Braham Dabscheck, ‘The Slow and Agonising Death of the Australian Experiment with Conciliation and Arbitration’ (2001) 43 *Journal of Industrial Relations* 277; Helen Forbes-Mewett, Gerry Griffin and Don McKenzie, ‘The Australian Industrial Relations Commission: Adapting or Dying?’ (2003) 11 *International Journal of Employment Studies* 1.

Instead, the AIRC's main role in future will be to provide 'voluntary dispute resolution' services, in competition with private providers of such services (eg accredited mediators and arbitrators).<sup>31</sup> Parties involved in workplace disputes – including disputes about employee entitlements under the AFPCS, disputes arising under the terms of workplace agreements, and bargaining disputes – will be able to choose whether to have the AIRC, or an alternative dispute resolution provider, assist them in settling the dispute. However, if the parties elect to involve the AIRC, its powers will generally be limited to those that the parties agree to confer on it. The AIRC will not be able to exercise any of the broad dispute-settling powers that it has continued to draw upon in recent years, despite the restrictions introduced by the original 1996 Act.<sup>32</sup>

Overall, it seems that the changes introduced by the 2005 Act are intended to achieve the abolition of the AIRC 'by stealth'. That is, while the Government has not abolished the institution outright, it has so extensively stripped the AIRC of any meaningful role as to render it, potentially, irrelevant. However, the ongoing 'dependency' of industrial relations parties on the AIRC,<sup>33</sup> and the determination of its members to preserve its independence and influence, may be the keys to its future survival.<sup>34</sup>

## 5. Collective Bargaining

The shift to enterprise bargaining under the Labor Federal Government in the early 1990s was a response to the sustained attack on Australia's centralised labour relations system from the mid-1980s, and the quest for greater labour flexibility and international economic competitiveness. While facilitating this departure from traditional award arrangements, Labor's reforms contained two important safeguards for workers: first, agreements were subject to close scrutiny by the AIRC, to ensure fair treatment of employees in both the making and content of agreements; and secondly, enterprise agreements could not result in any overall disadvantage to employees compared to their terms and conditions under relevant awards (ie the 'no disadvantage' test). Further, enterprise or 'certified agreements' had to be *collective* in nature: although, controversially, Labor's 1993 reform legislation permitted the making of non-union certified agreements, as well as those between employers and trade unions.

The Coalition Government's 1996 legislative changes contained several measures to enhance the take-up rate of enterprise bargaining, including the new option of *individual* agreements or AWAs.<sup>35</sup> While the Government also retained the union and non-union certified agreement streams, in various ways it has steered parties towards individualised bargaining – such as through the promotional activities of the Office of the Employment Advocate ('OEA'),<sup>36</sup> a regulatory agency created by the 1996 Act to approve AWAs and enforce the 'freedom of association' laws (see Part 6 below). In addition, the protections afforded to employees by the no disadvantage test were reduced, primarily by allowing the approval of 'sub-standard'

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<sup>31</sup> See 1996 Act, Part VIIA.

<sup>32</sup> See eg Anthony Forsyth, *The Revival of Arbitration? Recent Experience in the AIRC*, Paper for the Legal Edge Seminar Series, Centre for Commercial Law, Australian National University, Canberra, 5 August 2003; Andrew Stewart, 'The AIRC's Evolving Role in Policing Bargaining' (2004) 17 *Australian Journal of Labour Law*, 245; Carolyn Sutherland, 'By Invitation Only: The Role of the AIRC in Private Arbitration' (2005) 18 *Australian Journal of Labour Law* 53.

<sup>33</sup> See Helen Forbes-Mewett, Gerry Griffin, Jamie Griffin, and Don McKenzie, 'The Role and Usage of Conciliation and Mediation in the Australian Industrial Relations Commission' (2005) 31 *Australian Bulletin of Labour*, 171.

<sup>34</sup> See further Anthony Forsyth, 'Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission', (2006) 32 *Australian Bulletin of Labour* (forthcoming).

<sup>35</sup> For detail, see Marilyn Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62; Ron McCallum, 'Australian Workplace Agreements – An Analysis' (1997) 10 *Australian Journal of Labour Law* 50.

<sup>36</sup> See <http://www.oea.gov.au/graphics.asp?showdoc=/home/default.asp>.

agreements if this was necessary to ensure the survival of struggling businesses.<sup>37</sup>

Despite the Government's efforts to promote individual and non-union agreements over the last ten years, collective agreements with unions remain highly influential mechanisms for regulating the employment conditions of Australian workers. For example, 73% of the collective agreements certified by the AIRC in 2004-2005 were union agreements; the remaining 27% were non-union agreements.<sup>38</sup> As at May 2004, only 2.4% of Australian employees were covered by registered individual agreements (eg AWAs), while 38% had their pay and conditions determined by registered collective agreements.<sup>39</sup> Combined with the 20% of employees covered solely by awards, this puts the overall coverage of collectively-determined employment conditions in Australia at just under 60% of the workforce – a relatively high level, given the extent of the legislative assault on collectivism by Federal and State governments over the last fifteen years.

No doubt concerned by these data, the Government has implemented an array of measures (through the 2005 Act) aimed at simplifying the processes for making, lodging, varying and terminating workplace agreements.<sup>40</sup> The most significant of these changes are as follows:<sup>41</sup>

- Six different types of agreements are now available – AWAs, union collective agreements, employee (ie non-union) collective agreements, multiple-business agreements, and union or employer 'greenfields' agreements.<sup>42</sup> Most agreements can operate for periods of up to five years.
- Employees can be represented by a bargaining agent (eg a union) when negotiating employee collective agreements or AWAs with their employer. However, union rights of intervention in non-union agreements have been removed, and an employer is not obliged to recognise or bargain in good faith with a union representing employees in negotiations for employee or union collective agreements.
- All workplace agreements take effect upon lodgement with the OEA. There are no longer any formal processes for the approval of agreements, and in fact the OEA is not required to properly scrutinise agreements to ensure compliance with relevant statutory requirements.
- The no disadvantage test has been abolished, leaving employers free (at least, legally) to introduce workplace agreements that remove award entitlements to penalty rates, overtime and shift loadings, rest breaks, allowances and so on, without providing any wage increase or other benefits. As indicated in Part 3 above, workplace agreements need only contain the five minimum conditions set out in the AFPCS. A further seven specified award conditions are designated as 'protected', meaning that an employer must explicitly state that they are being modified or removed by a workplace agreement (although the 'protection' this offers to employees is clearly illusory).

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<sup>37</sup> The effectiveness of this test as a protective measure for employees has been increasingly questioned in recent years: see eg Omar Merlo, 'Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining' (2000) 13 AJLL 207; Richard Mitchell et al, 'What's Going On with the 'No Disadvantage Test'? An Analysis of Outcomes and Processes Under the *Workplace Relations Act 1996* (Cth)' (2005) 47 JIR 393; Waring et al 2005, pp. 107-110.

<sup>38</sup> AIRC, *Annual Report of President of the Australian Industrial Relations Commission, 2004/2005*, p. 12 (available at [www.airc.gov.au/](http://www.airc.gov.au/)).

<sup>39</sup> Australian Bureau of Statistics ('ABS'), *Employee Earnings and Hours, May 2004* (cat. no. 6306.0), cited in Mark Wooden, *Australia's Industrial Relations Reform Agenda*, Paper to the 34<sup>th</sup> Conference of Economists, University of Melbourne, 26-28 September 2005, pp. 3-4.

<sup>40</sup> See now 1996 Act, Part VB.

<sup>41</sup> For further detail, see Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* (forthcoming).

<sup>42</sup> The employer greenfields agreement is in fact not an 'agreement' at all, but rather a set of employment conditions unilaterally determined by an employer for a new business project or venture.



- Certain matters are to be designated as 'prohibited content' that may *not* be included in agreements, such as clauses preventing the use of AWAs, restrictions on the engagement of labour-hire or independent contractors, clauses providing remedies for unfair dismissal,<sup>43</sup> and various provisions for union support or encouragement. Further, civil penalties may be imposed on parties that seek to include prohibited content in agreements.
- Parties continue to have the right to take 'protected' industrial action in support of claims made in a 'bargaining period' when negotiating employee or union collective agreements. However, a range of new limits and detailed requirements for taking protected industrial action may substantially blunt the effectiveness of these 'rights' for trade unions and their members.<sup>44</sup>
- Workplace agreements may be terminated unilaterally by either party giving 90 days' written notice to the other party, after the nominal expiry date of the agreement. Thereafter, the working conditions of employees formerly covered by the agreement are the five AFPCS minimum conditions, and the seven 'protected' award conditions (see above). Importantly, the employees do *not* fall back onto the more comprehensive conditions in an award or agreement that may have previously operated in respect of their employment.

These new arrangements for workplace agreements – especially the abolition of the no disadvantage test, the lack of independent scrutiny of agreements, the prohibited content rules, and the ability of employers to unilaterally terminate expired agreements – will significantly strengthen the bargaining power of employers.<sup>45</sup> In particular, these provisions will make it much easier for employers to shift employees off collective agreements, and onto AWAs that provide inferior wages and conditions. Overall, the new statutory framework for agreement-making poses serious threats to the future role of collective bargaining in Australia's workplace relations system, raising significant concerns about the potential for diminution of workers' wages, employment conditions and living standards over time.<sup>46</sup>

## 6. Trade Unions and Non-Union Employee Representation Systems

Australian unions held a pivotal position under the conciliation and arbitration system from its inception in 1904. Under this system, registered unions were subjected to high levels of legal regulation, but they also obtained considerable legal rights and institutional support. This contributed greatly to the growth and organisational security of Australian unions over the course of the twentieth century – such that by 1953, trade union membership had reached 63% of the total labour force, and remained around 50% until the early 1980s.<sup>47</sup> Since then,

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<sup>43</sup> Here, the Government is determined to ensure that employees are not able to find alternative avenues for seeking redress against unfair dismissal, given the major limits on unfair dismissal claims introduced by the 2005 Act.

<sup>44</sup> See now 1996 Act, Part VC; for example, no protected action can be taken in support of claims for 'prohibited content' in agreements, and all protected action must now be approved in a secret ballot of employees; detailed discussion of the extensive provisions of the 2005 Act relating to industrial action is also beyond the scope of this paper, see further Chris White, 'Workchoices: Removing the Right to Strike' (2005) 56 *Journal of Australian Political Economy* 66.

<sup>45</sup> See further Chris Briggs, Rae Cooper and Bradon Ellem, 'What About Collective Bargaining?' in Evatt Foundation 2005, p. 66.

<sup>46</sup> On the implications of the 2005 Act more generally in these respects, see eg *Research Evidence about the Effects of the 'Work Choices' Bill*, Senate Inquiry Submission by A Group of One Hundred and Fifty Industrial Relations, Labour Market, and Legal Academics; C Briggs, *Federal IR Reform: The Shape of Things to Come*, ACIRRT, University of Sydney, November 2005.

<sup>47</sup> See Malcolm Rimmer, 'Unions and Arbitration' in Isaac and Macintyre 2004, p. 275; Michael Crosby, *Power at Work: Rebuilding the Australian Union Movement*, The Federation Press, Sydney, 2005, pp. 12, 42-43.

however, the level of trade union membership in Australia has fallen by almost 30%, as the following table illustrates:<sup>48</sup>

Year	1982	1986	1990	1994	1996	1998	2000	2001	2002	2003	2004
Union Density %	49.5	45.6	40.5	35.0	31.1	28.1	24.7	24.5	23.1	23.0	22.7

On the latest available figures, union density in the public sector is 46.4%, while in the private sector only 17.4% of the workforce are union members.<sup>49</sup> Factors contributing to the dramatic drop in union membership over the last twenty-five years include the massive reduction in highly-unionised manufacturing employment, arising from the economic reform process; the growth of casual, part-time and ‘contract’ labour arrangements; and (commencing in the early 1990s) the increasing adoption of aggressive ‘individualisation’ and ‘de-unionisation’ strategies by employers.<sup>50</sup> In addition, of course, the legal rights traditionally accorded to unions have been significantly wound back as part of the ‘de-collectivist’ labour laws that have been introduced around Australia.

The 1996 Act, in particular, contained various measures aimed at destabilising established union structures, encouraging competition between unions, and bolstering the rights of non-unionists.<sup>51</sup> These included provisions for the creation of new ‘enterprise unions’, and for disaffected union members to ‘disamalgamate’ from large industry unions. The monopoly representation rights of unions were weakened, and award and enterprise agreement provisions for ‘closed shops’ and other forms of union security were banned. Union ‘rights of entry’ for recruitment and award enforcement purposes were limited through the introduction of permit and notice requirements. And the concept of ‘freedom of association’ (including legal protections for union members from victimisation) was extended to *non*-members.

Union officials have also been subjected to increased levels of financial accountability through the new Registration and Accountability of Organisations Schedule (‘Schedule 1B’), inserted in the 1996 Act in 2002. Further, the Government has pursued a range of initiatives to break the strength of unions in specific industry sectors – such as the maritime industry,<sup>52</sup> the Federal public service,<sup>53</sup> higher education institutions,<sup>54</sup> and the building and construction industry (which now has its own specialist regulator, the Australian Building and Construction Commission (‘ABCC’)).<sup>55</sup>

<sup>48</sup> These figures are drawn from Rae Cooper, ‘Life in the Old Dog Yet? ‘Deregulation’ and Trade Unionism in Australia’ in Isaac and Lansbury 2005, p. 93 at 96; and ABS, *Employee Earnings, Benefits and Trade Union Membership, August 2004* (cat. no. 6310.0).

<sup>49</sup> ABS, *Employee Earnings, Benefits and Trade Union Membership, August 2004* (cat. no. 6310.0).

<sup>50</sup> See further Stephen Deery and Janet Walsh, ‘Unionism in Australian Workplaces: An Anatomy of Decline’ (1999) 12 *Australian Journal of Labour Law* 21; Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion – An International Study*, The Federation Press, Sydney, 1999; Crosby 2005.

<sup>51</sup> For detail, see Richard Naughton, ‘Sailing into Uncharted Seas: The Role of Unions Under the Workplace Relations Act 1996 (Cth)’ (1997) 10 *Australian Journal of Labour Law* 112.

<sup>52</sup> See Graeme Orr, ‘Conspiracy on the Waterfront’ (1998) 11 *Australian Journal of Labour Law* 159.

<sup>53</sup> See Phillipa Weeks, ‘Reconstituting the Employment Relationship in the Australian Public Service’ in Deery and Mitchell 1999, p. 69.

<sup>54</sup> See Stuart Rosewarne, ‘Workplace ‘Reform’ and the Restructuring of Higher Education’ (2005) 56 *Journal of Australian Political Economy* 186.

<sup>55</sup> See Howe 2005; Liz Ross, ‘Building Unions and Government ‘Reform’: The Challenge for Unions’ (2005) 56 *Journal of Australian Political Economy* 172.

Not surprisingly, the 2005 Act contains provisions aimed at further advancing the Government's ideological opposition to trade unionism. These new provisions<sup>56</sup> also seek to address certain aspects of the original 1996 Act that failed to fulfil the Government's intended purposes. The key provisions of the 2005 Act affecting trade unions are as follows:<sup>57</sup>

- As a result of the shift in constitutional support for the legislation from the labour power to the corporations power (see Part 2 above), significant changes have been made to the provisions regarding the types of representative organisations of employees and employers that may be or remain registered under Schedule 1B. Trade unions must now be '*federally registrable employee associations*', meaning that either (1) they are a constitutional corporation, or (2) the majority of their members are 'federal system employees' (ie primarily, employees of constitutional corporations). While many unions will satisfy the second requirement, several may not because the majority of their members are employed by State government departments or agencies. Whether unions can, legally, incorporate under Australian law (and so satisfy the first requirement) is unclear. To further complicate the situation, there is significant doubt as to whether the new registration provisions in Schedule 1B are constitutionally valid. The system for regulation of registered organisations was long considered 'incidental' to the establishment of the conciliation and arbitration system, but the same can not be said with any certainty in respect of the new workplace relations system founded on the corporations power.
- Substantial new restrictions have been imposed on the powers of union officials to enter workplaces for purposes of recruiting new members, and investigating breaches of employment legislation, awards and agreements (known in Australia as union '*right of entry*').<sup>58</sup> As before, union officials must hold a right of entry permit, and must give an employer at least 24 hours' notice of an intention to enter the employer's premises for the purposes stated above. Under the new provisions, union officials must satisfy a 'fit and proper person' test before obtaining a permit (eg the official must not have previously breached any Federal or State right of entry laws). Officials will have no right of entry for recruitment purposes in workplaces where all employees are engaged under AWAs. And the grounds on which an official's entry permit can be suspended or revoked have been expanded (eg this can occur when an official has 'misrepresented' his or her entry powers to an employer, or 'abused' entry rights by exercising them 'excessively').
- The introduction of protections for non-union members from discrimination or victimisation by unions or employers was a major feature of the 1996 legislative changes, forming part of the '*freedom of association*' rights also accorded to unionists. The aggressive 'policing' of the provisions on behalf of non-unionists by the OEA has no doubt led to a moderation of overt union tactics to enforce union membership in Australian workplaces. However, in practice, the freedom of association provisions have been more effectively utilised by unions over the last ten years, to thwart employer restructuring and individualisation strategies that could be shown to be 'tainted' by illegal anti-union or de-collectivist objectives.<sup>59</sup> Responding to these developments, the Government has amended the freedom of association provisions<sup>60</sup> to make it more difficult for unions to obtain interim injunctions against

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<sup>56</sup> Most of the provisions are found in Schedule 1B of the amended 1996 Act.

<sup>57</sup> For further detail, see Anthony Forsyth and Carolyn Sutherland, 'From 'Uncharted Seas' to 'Stormy Waters': How Will Trade Unions Fare under the Work Choices Legislation?' (2006) *Economic and Labour Relations Review* (forthcoming).

<sup>58</sup> See 1996 Act, Part IX.

<sup>59</sup> For a thorough discussion of the relevant statutory provisions and case law, and a more critical assessment of judicial approaches to the provisions, see David Quinn, 'To Be or Not to Be a Member – Is That the Only Question? Freedom of Association under the Workplace Relations Act', (2004) 17 *Australian Journal of Labour Law* 1.

<sup>60</sup> See now 1996 Act, Part XA.

employers for breaches of the provisions. The prohibitions on union conduct have also been expanded (eg unions and their members and officials must not pressure employees into joining in industrial action, or force employers to enter into union collective agreements). The prohibitions on employer conduct essentially remain the same – they must not engage in ‘prohibited conduct’ (eg dismissing an employee, or changing employment conditions), for a ‘prohibited reason’ or for reasons that include a prohibited reason (eg an employee’s membership or non-membership of a union; or the fact that an employee is covered by an award or workplace agreement, or has engaged in lawful industrial action). ‘Inducing’ an employee to join or (more likely) not to join a union, or to cease being a union member, also remain prohibited.

In summary, the provisions of the 2005 Act discussed above represent the most serious threat to Australian unions yet – especially when they are viewed alongside the agreement-making provisions, which seek to undermine union-based collective bargaining, and the extensive new restrictions on the right to strike. This latest legislative attack on the role and legitimacy of unions will clearly not assist them in their efforts to halt the membership decline of recent years. Interestingly, however, some unions have reported a surge in new memberships in the last six months, as the ACTU-led campaign against the Government’s new legislation has attracted increasing community support.

*Non-union employee representation systems* have not traditionally played a role in Australian labour relations. Although the 1970s and 1980s saw ‘bursts’ of interest in industrial democracy and employee participation schemes, there has been little experimentation in Australia with European-style works councils or ‘codetermination’ as a form of workplace decision-making.<sup>61</sup> This is explained by factors including the dominance of the conciliation and arbitration system; the strong attachment of unions to that system, and their suspicion of alternative employee representation structures and joint decision-making with management; and employer resistance to any intrusion on the strongly-entrenched notion of ‘managerial prerogative’.

In the last twenty years or so, workplace-based employee representative structures have emerged to deal with specific issues, such as ‘enterprise bargaining committees’<sup>62</sup> and ‘occupational health and safety committees’<sup>63</sup> – although these have generally been controlled by the trade unions. In addition, ‘joint consultation committees’ have become increasingly common workplace-based mechanisms for addressing issues arising under enterprise agreements and broader matters of business strategy.<sup>64</sup>

Since 1995, there has been increasing debate among Australian unions about the merits of works councils based on the German model, as vehicles for addressing two major issues: (1) the decline in union membership, with advocates of works councils suggesting that these

<sup>61</sup> See Department of Employment and Industrial Relations, *Industrial Democracy and Employee Participation – A Policy Discussion Paper*, Australian Government Publishing Service, Canberra, 1986.

<sup>62</sup> See eg Richard Mitchell, Richard Naughton and Rolf Sorensen, ‘The Law and Employee Participation – Evidence from the Federal Enterprise Agreements Process’ (1997) 39 *Journal of Industrial Relations* 196.

<sup>63</sup> These committees were found in 43% of workplaces in 1995: Alison Morehead et al, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, 1997, pp. 123, 453; more generally, see David Walters, ‘Workplace Arrangements for Worker Participation in OHS’ in Liz Bluff, Neil Gunningham and Richard Johnstone, *OHS Regulation for a Changing World of Work*, The Federation Press, Sydney, 2004, p. 68.

<sup>64</sup> 45% of Federal enterprise agreements over the period 1991–2003 made provision for the establishment of these committees: Shelley Marshall and Richard Mitchell, ‘Enterprise Bargaining, Managerial Prerogative and the Protection of Workers Rights: An Argument on the Role of Law and Regulatory Strategy in Australia under the *Workplace Relations Act 1996* (Cth)’, 2005, pp. 17–18. The latest figures on the *overall* incidence of joint consultative committees indicate that they were present in 33% of workplaces in 1995: Morehead et al 1997, pp. 188–189.

could provide a 'springboard' for union organisation in non-union workplaces;<sup>65</sup> and (2) a series of company collapses and restructures in which thousands of workers have lost their jobs with little warning, highlighting the general absence of legal rights for Australian employees to information or consultation about business restructuring issues.<sup>66</sup> The present ACTU leadership has led this debate and appears moderately supportive of the works councils concept – as long as such bodies are established only for information and consultation purposes, and do not intrude upon union-based collective bargaining.<sup>67</sup>

However, it is highly unlikely that an institutionalised system of workplace-based employee representation, along the lines of the German model, will take hold in Australia in the next few years – because several key unions remain strongly opposed to such an approach;<sup>68</sup> and because this would not fit with the Federal Coalition Government's workplace relations agenda. As indicated above, the Government introduced provisions in the original 1996 Act for employees to form small 'enterprise associations'. These were intended to entice employees away from the large industry unions that emerged from the union amalgamation process of the 1980s and 1990s. In practice, there has been very little interest in the formation of enterprise unions since 1996, with only a few applications (and even less that have succeeded) under the relevant statutory provisions. Therefore, the 2005 amendments lowered the minimum number of members required to form an enterprise association from 50 to 20. This may not lead to any significant increase in the number of enterprise unions. In any case, it is important to appreciate that the 'enterprise union' concept being promoted by the Government is very different from the strong form of enterprise unionism found in countries like Japan.

## 7. Conclusion

It should be evident from the discussion in this paper that the Federal Coalition Government's 2005 labour law reforms will '[engineer] a fundamental shift in power from labour to capital' in Australia.<sup>69</sup> It should also be clear that with these new laws continue the trend towards the highly prescriptive regulation of workplace relations in the name of 'deregulation'. In addition to the micro-regulation of specific sectors (eg the building industry, the public service, and universities), there is now a plethora of regulatory bodies in the workplace relations field (most of which have been discussed in this paper, eg AIRC, AFPC, ABCC, OEA and ART). What has in fact occurred is that the Government has simply replaced certain forms of regulation that it finds objectionable (eg industrial tribunals) with forms that are acceptable to it, or over which it can exercise greater control. In conclusion, it is indeed strange that a Government which extols the virtues of 'deregulation' and removing 'outside intervention' could have presided over the state of 'ultra-regulation' of Australian labour relations that has been attained with the passage of the 2005 Act.

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<sup>65</sup> See eg Martin Foley, 'Democratising the Workplace: Unions and Works Councils' in Paul Gollan, Ray Markey and Iain Ross, *Works Councils in Australia: Future Prospects and Possibilities*, The Federation Press, Sydney, 2002 p. 37.

<sup>66</sup> See eg Anthony Forsyth, 'Giving Employees a Voice over Business Restructuring: A Role for Works Councils in Australia' in Paul Gollan and Glenn Patmore, *Partnership at Work: The Challenge of Employee Democracy*, Pluto Press, 2003, p. 140.

<sup>67</sup> See eg Greg Combet, 'Employee Consultation in an Australian Context: The Works Council Debate and Trade Unions' in Gollan and Patmore 2003, p. 134. For a significant recent contribution to this debate, see Ron McCallum, 'Industrial Citizenship' in Isaac and Lansbury 2005, p. 15.

<sup>68</sup> See eg Doug Cameron, 'The Representation Gap in Australia' in Anthony Forsyth (ed), *Works Councils in the Australian Context*, RMIT Community Advocacy Unit, Melbourne, 2001, p. 81.

<sup>69</sup> Howe et al 2005, p. 206.