

A VOICE FOR WHOM? EMPLOYEE REPRESENTATION AND LABOUR LEGISLATION IN AUSTRALIA

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The eminent US Labour historian, David Brody, noted in 1993 that a crucial difference between Australia and the US was the way in which labour law treated trade unions. The Australian arbitration system assumed that workers will 'be represented by unions: registration involves only the question of which union is appropriate for a given group of workers.'¹ By contrast the central thrust of US labour law 'is to determine whether or not workers want union representation.'² What a difference 13 years makes. The special legislative place of unions in representing Australian workers has been eroded.

While the US *National Labor Relations Act*³ did not assume that workers necessarily wanted to be represented by unions, section 8(a)(2) banned employee representation plans or company unions. These plans generally involved equal numbers of elected employee representatives and management representatives meeting to discuss wages and other conditions. Management paid for all the costs associated with the plans and held the right of veto over any recommendations. The US legislation placed an emphasis on trade unions as an independent voice of workers' concerns. It was not good enough to rely on the goodwill of employers. Management's enthusiasm for worker voice through employee representation plans varied according to the economic climate and the presence of sympathetic individuals in management's ranks. With the emphasis on individual bargaining and non-union collective bargaining in Australian labour law, the situation has deteriorated in regard to worker voice compared to US labour legislation.⁴

This article reviews the history of employee representation in Australian labour law. It reminds us of why unions were given a central role in the Australian compulsory arbitration system. It also notes that there have been alternative models of Australian industrial regulation that have not given this role

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1 David Brody, *In Labor's Cause: Main Themes on the History of the American Worker* (1993) 82.

2 Ibid.

3 29 USC 7 (1935).

4 Greg Patmore, 'An Employer Response to Workplace Democracy: A North American Perspective' in Paul Gollan and Glenn Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy* (2003) 178-186.

to trade unions or attempted to provide parallel forms of non-union representation at the workplace level. It concludes with a review of the shift away from the unions towards individual and non-union bargaining in Australian industrial legislation.

I UNIONS AS THE VOICE OF AUSTRALIAN WORKERS

The major industrial confrontations and economic depression during the 1890s prompted greater interest in conciliation and arbitration. Disputes such as the 1890 Maritime Strike, which was the largest confrontation between unions and employers in 19th century Australia, the pastoral disputes of 1891 and 1894, and the 1892 Broken Hill strike disrupted the economy and heightened tensions between capital and labour. The strikes occurred in key export sectors and there were fears that the conflict would discourage overseas investment. Employers had little difficulty in finding labour to fill the strikers' places during a period of economic downturn, and won the strikes. An important issue underlying the strikes was the refusal of employers to recognise unions in the determination of their employees' wages and conditions. Therefore one way of preventing a recurrence of these strikes was statutory provision for union recognition.⁵

A group of liberals were concerned with these issues and the exploitation of labour in an industrialising economy. This group included Alfred Deakin, Charles Cameron Kingston, Bernhard Ringrose Wise and Henry Bournes Higgins. They were lawyers who adopted the 'new Liberalism' and rejected the traditional liberal view that the role of the state should be restricted to maximise the freedom of the individual. Despite their opinions, liberal reformers did not support labour. They condemned union militants and several of them helped suppress the 1890 Maritime Strike. The liberals did not seek the end of the existing capitalist wage relationship, but wanted to eliminate abuses of that relationship. The major role played by the state in Australian economic development and labour discipline assisted the liberals' call for state intervention in labour relations.⁶

Kingston dictated the form of Australasian compulsory arbitration in a Bill he introduced into South Australian Parliament in December 1890. It recognised that disputes arose between collectivities rather than individuals by providing for registration of trade unions and employers. The Ministry of Industry or the parties could refer the dispute to compulsory settlement. Awards and agreements were legally enforceable and there was a prohibition on strikes and lockouts in any industrial dispute under the jurisdiction of a local or permanent state board. The South Australian Parliament eventually passed a severely modified version of the Bill in 1894. However, the legislation became a dead letter because it did not compel the parties to register under it.⁷

5 Greg Patmore, *Australian Labour History* (1991) 101-2.

6 Ibid 102.

7 Ibid 106.

Despite this, Kingston had profound impact elsewhere. The successful 1894 New Zealand compulsory arbitration legislation was based on Kingston's bill and provided an example for Australian jurisdictions. Following a Royal Commission on Strikes in 1890-91, New South Wales experimented with voluntary arbitration in the *Trades Dispute Conciliation and Arbitration Act 1892* (NSW), which required the agreement of both parties before conciliation and arbitration could take place. Employers took advantage of a declining labour market to ignore the legislation and funding ended in December 1894. This failure fuelled the push towards compulsory conciliation and arbitration legislation and New South Wales enacted the *Industrial Arbitration Act 1901* (NSW). The new federal Commonwealth Parliament passed similar legislation in 1904.⁸

Trade unions were an essential feature of the Australian system of compulsory arbitration. Registered unions brought grievances to the industrial tribunals on behalf of workers. Compulsory arbitration assisted union growth and gave unions a role in the determination of legally binding awards covering wages and conditions. Security against rival unions, rights of union entry into the workplace and clauses in arbitration awards that give preference to unionists in promotion and retention emphasised the importance of unions in giving voice to Australian workers.⁹ As Stuart Macintyre has noted, 'the system of industrial arbitration transformed unions from associations tolerated by the state into protected organisations that the Court recognised, assisted and regulated.'¹⁰

Labour historians, however, have found unions that did not take advantage of the arbitration provisions assisting union organising or found them disappointing. The New South Wales Nurses' Association in 1938 appointed their first organiser but did not obtain a right of entry permit. The union preferred the organiser to obtain the permission of medical superintendents and matrons before speaking to nurses. The union did not want to challenge the rigid discipline of the hospital hierarchy. Many unions found that they were unable to take advantage of preference clauses in the federal arbitration jurisdiction before 1970. The Commonwealth Court was reluctant to interfere with managerial prerogative and would only do so if the union could prove there was some threat to union membership. At the Port Kembla and Newcastle Steelworks in the late 1930s the preference to unionists clause in the industry award was not 'watertight' as the 'other things being equal' qualification was too subjective. BHP at Newcastle claimed that discrimination against unionists did not occur because the employment officer did not know who the unionists were.¹¹

8 Ibid 106-16.

9 Ibid 120-21.

10 Stuart Macintyre, 'Arbitration in Action' in Joseph Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 years of Australian Industrial Conciliation and Arbitration* (2004) 55, 61.

11 Rae Cooper and Greg Patmore, 'Trade Union Organising and Labour History' (2002) 83 *Labour History* 3, 10-11; Mary Dickenson, *An Unsentimental Union. The NSW Nurses Association 1931-1992* (1993) 66, 69; Warwick Eather, 'Protect the Newcastle Steelworks: BHP, the Trade Unions and National Security 1939-40' (1989) 57 *Labour History* 78, 80, 85-7; Richard Mitchell, 'The Preference Power and the Practice of the Federal Industrial Tribunal, 1940-1970' (1987) 29 *The Journal of Industrial Relations* 3, 3-24.

There were also limits on how far sympathetic Labor governments could impose union membership on workers. Following a landslide victory in the 1953 state election, the Cahill Labor Government in New South Wales announced that it would amend the *Industrial Arbitration Act 1940* (NSW) to provide for compulsory unionism. This was consistent with longstanding Labor Party and Labor Council of New South Wales policy and highlighted the influence of the Anti-Communist Industrial Groups within the Labor Party. The Groupers believed that compulsory unionism would consolidate their power inside the Party as Grouper-controlled unions, such as the Federated Clerk's Union and the Shop Assistants' Union, who experienced difficulties in recruiting members, would gain members, finance and more delegates at Labor Party conferences. The legislation became law in New South Wales on 17 December 1953 and gave workers 28 days to join their appropriate union or apply for conscientious objector status with the Industrial Registrar. Conscientious objectors had to pay the equivalent amount in union dues into consolidated revenue. Employers challenged the validity of the legislation in the High Court and through various legal manoeuvres prolonged the case for six years. Employer organisations advised members to await the decision of the High Court before complying and employers informed employees that they would pay any fines if they decided not to join a union. Employer tactics made the legislation practically inoperative. With the dramatic decline in the influence of the Industrial Groups by the late 1950s, there was less support in the Labor Party for the legislation. The Labor Government repealed the legislation in 1959 and replaced it with a provision allowing industrial tribunals, upon application by a union, to insert clauses relating to absolute preference to unionists in awards or industrial agreements in appointments and retrenchment. The provision for conscientious objection remained. Even when compulsory legislation existed in Queensland in the 1960s, the organisers for the Federated Miscellaneous Workers' Union (FMWU) found it still necessary to expend considerable resources enrolling new members.¹² Nikola Balnave claimed generally that 'within the framework of compulsory conciliation and arbitration, unions have only achieved mild and ineffective forms of union security.'¹³

The priority given by compulsory arbitration to registered unions did not prevent employers developing other forms of worker voice, particularly at the workplace level. In 1920 the Australian Paper Mills Company had welfare committees at each mill, which were elected by employees and discussed matters that were not dealt with by the union. Influenced by the Safety First movement in the US, safety committees date from 1915 in the New South Wales Government Railways and from 1924 at the BHP steelworks in Newcastle. The weekly departmental safety committees at BHP were responsible for safety measures in

12 Nikola Balnave, 'Legislating for Compulsory Unionism: The New South Wales Experience' (1997) 72 *Labour History* 149, 149-162; Margot Beasley, *The Missos: A History of the Federated Miscellaneous Workers' Union* (1996) 67; David Clune, 'New South Wales Labor in the 1950s: The Cahill Government, 1952-1956' in Australian Labor Party NSW Branch (ed), *Traditions for Reform in New South Wales* (1987) 101, 118-120.

13 Balnave, above n 12, 150.

their plant, investigated accidents, and in some cases involved workers nominating representatives to the committee. During the labour shortages of the economic boom that followed World War II, employers showed some interest in joint consultation with workers. World War II provided a boost to this practice, with the federal government encouraging production committees to improve productivity. These committees flourished in factories undertaking war work and meatworks, and usually included union representatives. However, employers in the meat processing industry and Australian Paper Manufacturers (Botany, Sydney) abandoned work committees by the mid-1950s on the grounds that they had become another avenue for union grievances. Imperial Chemical Industries of Australia and New Zealand followed its British parent's practice of works councils. By 1959 there were works councils at 12 factories, each with an equal number of representatives elected by employees and management nominees. The works manager acted as chairperson. Although they could not deal with matters that were covered by agreements with unions, they could deal with issues such as safety performance, plant efficiency and canteen management. There were also yearly meetings of a Central Council, attended by the chairman of the Company, a Managing Director, Executive Directors of the Company and four representatives from each works council, two of whom were employee representatives chosen by ballot. There were 90 attendees at the April 1959 Central Council meeting, which dealt with issues such as first aid training and trade discounts for employees. While a 1967 survey found that 49 per cent of Australian firms had management or employee committees, the survey provided no data on the constitutions or ambit of these committees. By 1995, 33 per cent of workplaces with more than twenty employees had joint consultation schemes. They tended to be workplaces that were large, public sector ones and had a high union presence.¹⁴

II ALTERNATIVE AUSTRALIAN LEGISLATIVE APPROACHES TO EMPLOYEE VOICE

An alternative model to compulsory arbitration developed in Victoria, where there was a long history of public concern over 'sweating' and state intervention through factory legislation. The factory legislation of 1873, 1885 and 1890 provided some relief from sweating, but did not eliminate it. The 1890s depression heightened public concern over the sweating of workers. A Victorian parliamentary inquiry, held in 1893–95, investigated sweating and revealed that

14 Advisory Council of Science and Industry, *Industrial Co-operation in Australia* (1920) 29; Alison Moorehead et al, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey* (1997) 188-195; Greg Patmore, *A History of Industrial Relations in the NSW Government Railways* (PhD Thesis, University of Sydney, 1985), 311-12; Patmore, above n 4, 154; J C Russell and C C Johnstone, 'A Look at Personnel Practices in Australia' (1968) 24 *Personnel Practice Bulletin* 264, 274; 'Our Safety Page', *The BHP Recreation Review* (Melbourne), 26 August 1925, inside front cover; 'Another Year Went By', *The BHP Recreation Review* (Melbourne), August 1932, 20; Len Weickhardt, 'Joint Consultation in Imperial Chemical Industries of Australia and New Zealand Limited', *The Journal of Industrial Relations* (1959) 69, 69-79.

the reports of sweated labour were not exaggerated. A Liberal government amended the factory legislation in 1895 to provide for wages boards to combat sweating. The wages board model establishes boards consisting of an equal number of employers and employees and a chairperson. The chairperson could determine the outcome if the board was deadlocked. There was no system of registration and a wages board could periodically review the minimum wages and conditions without a dispute. The wages boards were initially strongly opposed by employers. Employers ultimately dropped their opposition, however, because they feared the alternative of compulsory arbitration, which recognised trade unions. Labour in Victoria was politically weak and unable to achieve compulsory arbitration. Although the Melbourne Trades Hall Council organised a Labor Party in May 1891, it had to revive it four more times over the next 11 years. Queensland, South Australia and Tasmania adopted similar systems of wages boards for varying periods. Even though there was no provision for unionism in the wages board system, there appears to have been a positive impact on union membership because workers co-operated to lobby for wages boards, elect representatives, ensure uniform arguments and voting in wages board hearings and watch for breaches of wages board determinations.¹⁵

There was early experimentation with non-union representation in the New South Wales industrial arbitration system. The conservative Wade government in 1908 passed the *Industrial Disputes Act 1908* (NSW), which combined the characteristics of the Victorian wages board system and compulsory arbitration. Union registration was retained in practice and a new Industrial Court acted as a tribunal of final appeal for the decisions of the wages boards. The *Industrial Disputes Act* (NSW) did, however, challenge union representation. The legislation allowed associations of at least 20 workers, as well as registered industrial unions, to apply for wages boards. The provision, however, was only used on one occasion. The Traffic Employees' Association (TEA), which was seeking industrial registration, gained a wages board to cover Traffic Branch employees of the New South Wales Government Railways in May 1909. It was a move to prevent the rival registered Amalgamated Railway and Tramway Service Association (ARTSA) from gaining a wages board to cover Traffic Branch employees in Sydney. During a period of ARTSA deregistration, the TEA achieved its goal of registration in December 1912. The first Labor Government restored the primacy of industrial unions in the *Industrial Arbitration Act 1912* (NSW).¹⁶

There was again interest in experimenting with alternative forms of representation against the industrial and political turmoil of the last years of World War I and the immediate post-War period. There was a major strike in New South Wales in 1917 centred on the State railways and tramways. In 1919–20 there was an unprecedented strike wave that included maritime workers and Broken Hill miners. The Russian Revolution and the movement towards One Big Union led to conservative hysteria over a possible Bolshevik challenge to

15 Patmore, above n 4, 111, 116–121.

16 Patmore, above n 14, 237–8, 281–3.

Australian capitalism. Some conservatives argued that the radical threat could be neutralised by raising workers' living standards through increasing productivity and allowing employees to participate in management decisions. Fears also arose that Australian industry would not survive international competition in the post-War world unless reforms were introduced. While the Bolshevik threat declined in the 1920s, international competition remained an issue.¹⁷

In 1918, George Beeby, the Nationalist Minister for Labour and Industry in New South Wales, amended the *Industrial Arbitration Act 1912* (NSW) to empower a Board of Trade to establish 'mutual welfare committees', 'industrial councils' and 'shop committees'. Beeby drew his ideas primarily from the UK, where there was the concept of Whitleyism, which proposed management and employee joint committees at the national, industry and workplace levels. He hoped that the industrial tribunals would deal with wages and hours, while his committees and councils would deal with all other issues. Despite Beeby's hopes, management and labour showed little enthusiasm for his ideas. The Beeby provisions persisted in the New South Wales arbitration legislation but were practically moribund. The New South Wales Industrial Commission did set up an industrial council at a major defence construction site at St Mary's near Sydney, which during 1956–58 dealt with issues such as job representatives, seniority and retrenchment. It had representatives from both unions and management.¹⁸

Safety was to prompt further legislative interest in alternative forms of representation. While there is a general view that such legislation dates from the 1970s,¹⁹ during the Second World War New South Wales legislated for safety and welfare committees in amendments to the *Factories and Shops Act 1912* (NSW) in 1941. Section 36(C) provided for a Factory Welfare Board to 'encourage and assist in factories of welfare and safety committees'. The Board was to 'direct and supervise the activities of such committees'. Upon the recommendation of the Board, the Minister 'may' have established welfare or safety committees. The Board held its first meeting on 17 June 1942. It envisaged these committees as having an equal number of employer and employee representatives with a 'responsible' member of management as chair. The committees were to meet monthly and consider all matters to promote the health, safety and welfare of workers. In 1956 the Board became the Factory and Industrial Board and its jurisdiction was extended to premises other than factories. While the Board continued to 'encourage' these committees, it is

17 Patmore, above n 4, 146-7.

18 Charles Patrick Mills, *New South Wales Industrial Laws* (3rd ed, 1969) 284-6; Greg Patmore, 'Industrial Conciliation and Arbitration in NSW Before 1998' in Greg Patmore (ed), *Laying the Foundations of Industrial Justice. The Presidents of the Industrial Commission of NSW 1902-1998* (2003) 5, 36; Lucy Taksa, 'George Stephenson Beeby 1920-1926' in Greg Patmore (ed), *Laying the Foundations of Industrial Justice. The Presidents of the Industrial Commission of NSW 1902-1998* (2003), 129, 141-3.

19 Mark Bray et al, *Industrial Relations. A Contemporary Approach* (3rd ed, 2005), 237.

unclear what impact the legislation actually had. The *Occupational Health and Safety Act 1983* (NSW) absorbed these earlier provisions for safety committees.²⁰

The 1983 New South Wales legislation was part of a range of legislation passed in all jurisdictions relating to health and safety influenced by the 1970 inquiry chaired by Lord Robens in the UK. The inquiry recommended mechanisms for ensuring that workers and employers had a greater say in deciding and reviewing occupational health and safety ('OHS') standards. At the workplace level the legislation provided for non-union joint employee/employer OHS committees and OHS representatives. Unlike the provisions under the New South Wales *Factories and Shops Act 1912* (NSW), these committees were mandatory under certain circumstances. The New South Wales legislation provided for these committees in workplaces of more than 20 employees, if the majority of employees requested it, or where directed by the New South Wales WorkCover Authority. Most jurisdictions have provided for the election of committees and representatives, while some gave representatives the right to call a stop to dangerous practices. This legislation appears to have had a major impact on worker involvement at the workplace level. The Australian Workplace Industrial Relations Survey ('AWIRS') in 1990 and 1995 indicated that 41 and 43 per cent of all workplaces with 20 or more employees had specialist occupational health and safety committees. Philip Bohle and Michael Quinlan estimated in 2000 that excluding New South Wales there were 30 000 health and safety representatives in Australia. Further, despite the non-union nature of the committees, there is evidence of union involvement. According to the 1995 AWIRS, 19 per cent of non-union workplaces and 59 per cent of union workplaces with delegates had specialist occupational health and safety committees.²¹

III THE SHIFT AWAY FROM UNION REPRESENTATION

During the 1980s employers began to call for a reform of Australian industrial relations that was to undermine the role of unions in industrial arbitration as the voice of workers. The close relationship between the trade unions and the federal Labor government, highlighted by the Accord and increased competitive pressures, motivated these demands. At its most extreme, the New Right, represented through the H R Nicholls Society, called for the scrapping of the arbitration system, enterprise level bargaining and the elimination of trade union power. They argued that trade unions inhibit the operation of the market and undermined the relationship between employers and workers at the workplace. There was an assumption that individual employers and employees had equal

20 'Factory Welfare Board', *NSW Industrial Gazette*, 31 October 1942, 42-43; John Robert Nolan and Kenneth Cohen, *Federal and State (NSW) Industrial Laws* (1948) 865-7; Memorandum from C R Cole, Secretary of Factory Welfare Board, to Manager, 31 July 1942, in BHP Billiton Archives (Melbourne, W002/072/0001); *Report of the Department of Labour and Industry on the Working of Part II of the Factories and Shops Act 1912, as amended for 1961* (1962) 29-30.

21 Phillip Bohle and Michael Quinlan, *Managing Occupational Health and Safety. A Multi-disciplinary Approach* (2nd ed, 2000) 253-268, 430; Bray et al, above n 19, 237-8; Moorehead et al, above n 14, 453.

bargaining power. As a number of disputes in the mid-1980s indicated, the New Right supported the use of the common law or secondary boycott provisions of the federal *Trade Practices Act 1974* (Cth) to curb union militancy. They were also against closed shops and preference provisions in awards. Their ideas had some influence. The Business Council of Australia, which consisted of Australia's largest employers, called in 1989 for the phasing in of enterprise bargaining and the establishment of enterprise unions.²²

At the state level in the 1980s, where conservative parties held power, there was the first push to reduce the significance of the unions in the industrial relations law. The conservative National Party government in Queensland crushed an electricians' strike against the use of contractors by a state electricity board in 1985 and introduced the Voluntary Employment Agreement system in 1987. The latter system, with legislative amendments, allowed employers to directly negotiate secret agreements with their employees without trade union intervention. A state Labor government, elected in December 1989, repealed the legislation in 1990. In Victoria, the *Employees Relations Act 1992* (Vic) allowed individual workers for the first time to negotiate directly with employers for their own agreements. Many Victorian workers subsequently fled to the federal jurisdiction and the Kennett Government referred Victoria's industrial relations powers to the Commonwealth in 1996.²³

The ideas of the New Right influenced the Greiner Coalition Government's approach to industrial conciliation and arbitration in New South Wales. It commissioned Professor John Niland of the University of New South Wales, who had long advocated a move away from compulsory arbitration towards a North American collective bargaining model, to review industrial relations in New South Wales and recommend changes. Niland delivered the first volume of *Transforming Industrial Relations in New South Wales* to the Government in February 1989 and a second volume in January 1990. A major theme of the Niland reports was the advocacy of regulated decentralised industrial relations based on enterprise bargaining. In November 1989, the Government responded to the first Niland report with its own white paper, which only adopted some of Niland's reforms. Its major proposals included: the establishment of an industrial commission and an industrial court; the introduction of facility for enterprise bargaining with single employers that are private and automatically registered but with certain minimum standards; abolition of union preference; and controlled access by individuals to the Commission.²⁴

The coalition tried on several occasions to implement these recommendations during 1989 and 1990, but did not control the Legislative Council. It had two areas of success, which diluted the significance of registered unions in New South Wales industrial jurisdiction. The *Industrial Arbitration (Enterprise*

22 Greg Patmore, 'The Future of Trade Unionism – An Australian Perspective' (1992) 3 *International Journal of Human Resource Management* 225, 238-9.

23 Laurence Boulle, 'Voluntary Employment Agreements: A Queensland Essay' (1990) 3 *Australian Journal of Labour Law* 247, 247-270; Bray et al, above n 19, 240; P McCarthy, 'Power without glory: the Queensland electricity dispute' (1985) 3 *The Journal of Industrial Relations* 364, 364-382.

24 Patmore, above n 18, 47-8.

Agreements) Amendment Act 1990 (NSW) commenced operation in January 1991. The legislation allowed the Industrial Commission to certify enterprise agreements after a public interest test. Unions or newly established works committees of employees negotiated the agreements. Sixty-five per cent of employees had to approve the committee and the agreement in a secret ballot. While the agreements then had to be ratified by the state industrial tribunal before registration, the tribunal could approve an agreement that did not meet its wage fixing guidelines if it improved productivity and efficiency at the enterprise. The second success was the *Industrial Arbitration (Unfair Dismissal) Amendment Act 1991* (NSW), which commenced operation on 5 July 1991 and allowed individual employees access to the Industrial Commission for the first time to seek redress against harsh, unjust or unreasonable dismissals. The legislation also eliminated the tribunal's role of approving enterprise agreements, restricted the right of unions to enter the workplace, abolished preference to unionists and banned the closed shop.²⁵

After the 1991 elections, the Government reintroduced into Parliament its reforms packaged as the Industrial Relations Bill in August 1991. Independents, who held the balance of power in both chambers of New South Wales Parliament, did not obstruct the passage of the Bill and the legislation came into effect on 31 March 1992. The new *Industrial Relations Act 1991* (NSW) replaced the *Industrial Arbitration Act 1940* (NSW). It reinforced the diminished role of unions in the New South Wales jurisdiction. Individuals continued to have access to the tribunal in cases of unfair dismissal without the need for unions. It encouraged single union coverage at each workplace through a ballot and abolished preference clauses and closed shops. Enterprise bargaining without the intervention of the Industrial Relations Commission was a main aim of the legislation. An employer could make an enterprise agreement with either one or two unions representing employee members, individual employees in a defined group or a works council elected by employees. Enterprise agreements negotiated with employees in a defined group or works council had to be approved by 65 per cent of employees in a secret ballot. A Commissioner for Enterprise Agreements certified that the parties understood the agreement's provisions and then forwarded it to the Industrial Registrar for registration and placement on a public register. Employers did not take advantage of the enterprise bargaining provisions. A maximum of 18.6 per cent of workers in the New South Wales award system had their wages and conditions regulated by enterprise agreements between 1992 and 1996. Three quarters of enterprise agreements only partially regulated wages and conditions and continued to rely on awards. At best, in July

25 Ron McCallum, 'Two Approaches to Industrial Relations Reform in New South Wales: The Making of the Industrial Relations Acts of 1991 and 1996' in Dennis Nolan (ed), *The Australasian Labour Law Reforms: Australia and New Zealand at the End of the Twentieth Century* (1998) 89, 98-99; John Shields, 'William Kenneth Fisher 1981-1998' in Greg Patmore (ed), *Laying the Foundations of Industrial Justice: The Presidents of the Industrial Commission of NSW 1902-1998* (2003) 230, 252-4.

1995, only 4.65 per cent of employees in the New South Wales award system had their conditions of employment solely regulated by enterprise agreements.²⁶

In the wake of the March 1995 New South Wales election, the new Carr Labor Party Government successfully passed the *Industrial Relations Act 1996* (NSW), which received Royal Assent on 13 June 1996. The new legislation merged the Industrial Relations Commission and Industrial Court into a single tribunal – the Industrial Relations Commission. The Commission gained authority over enterprise agreements, which must be approved by at least 65 per cent of the employees who are to be covered by the agreement. The Commission would not approve the enterprise agreement if it were to the ‘net detriment’ of an employee compared to an award. If an employer negotiated an enterprise agreement without union involvement then the employer was required to notify the Industrial Registrar, who notified any relevant organisations. While the Act enshrined freedom of association and prohibited victimisation of non-unionists, the Legislative Council deleted a provision in the Bill that allowed consent agreements or awards to contain a preference clause under certain circumstances.²⁷

While the New South Wales Labor Government attempted to reverse the agenda to weaken the role of unions in its jurisdiction, the federal Labor government assisted that agenda in its jurisdiction. The belief in free markets became a dominant philosophy under Bob Hawke and Paul Keating, his successor. From 1985 the Accord underwent several revisions, in a sequence which had many parallels with the degeneration of incomes policies under Labour Governments in the UK between 1964 and 1979. Deteriorating terms of trade, an exploding foreign debt and inflation led the Accord partners to focus on wage restraint and improving productivity through micro-economic reform. There was a shift away from a centralised arbitration to enterprise bargaining overseen by the industrial tribunals. The federal commission abandoned wage indexation in December 1986. The Keating Labor Government further encouraged enterprise bargaining in 1993 by amending the federal arbitration legislation to allow for non-union bargaining, which challenged the previous privileged position of unions in bringing industrial issues before the federal tribunal.²⁸ The claim that this was the first time that workers did not require ‘registered organisations’ to bring about changes in wages and conditions²⁹ is incorrect, given the *Industrial Disputes Act 1908* (NSW). Nevertheless, it was the turning point for unions in the federal arbitration system. Fortunately, the provision did not attract much interest from employers. Further, employers may have been discouraged from negotiating these agreements because unions could

26 McCallum, above n 25, 101-104; Patmore, above n 18, 48-50; Brad Pragnell and Michael O'Donnell, ‘A Failed Experiment? Enterprise Bargaining under the New South Wales Industrial Relations Act’ (1997) 39 *The Journal of Industrial Relations* 3, 4-7.

27 McCallum, above n 25, 104-5; Jeff Shaw, ‘A Balanced Industrial Relations Reform Package for New South Wales’ 1996 (38) *The Journal of Industrial Relations* 57, 57-69.

28 Greg Patmore and David Coates, ‘Labor Parties and the State in Australia and the UK’ (2005) 88 *Labour History* 121, 129-30, 133.

29 Australian Centre for Industrial Relations Research and Training (ACIRRT), *Australia at Work: Just Managing?* (1999) 41.

still be a party to any Commission hearing concerning whether these agreements undermined award criteria. The shift towards enterprise bargaining did not halt a decline in union membership, which fell from 51 per cent in 1976 to 30.3 per cent in 1997. Workers also faced retrenchment in many key industries, increased casualisation, declining real wages, work intensification and longer hours.³⁰

The weakening of the union role continued with the election of the Howard Liberal and National Party Government in March 1996. The *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) limited the role of the Commonwealth Commission to 'allowable matters' and placed an emphasis on bargaining, similar to the repealed 1991 New South Wales Act. Unions could now only intervene in non-union agreements if their members were covered by the proposed agreements. The rights of entry for union officials into the workplace were restricted, with the union required to give 24 hours notice of any visit. The legislation removed the power of the federal tribunal to include preference to unionist clauses in awards and extended freedom of association to include the formal recognition of the right not to join a union. Following the lead of the 1992 Victorian legislation, the legislation introduced individual agreements between employers and employees known as Australian Workplace Agreements ('AWAs'). While they have many of characteristics of an individual contract of employment, they were publicly enforceable. They also excluded the operation of any applicable award. It is a matter of contention whether employees bargain their AWAs or are effectively represented in the negotiation of the AWAs. Some AWAs are offered to employees by employers on a 'take-it-or-leave-it' basis. Further, while AWAs covered only six per cent of employees in February 2006, employers are using AWAs to further weaken unions. Companies, such as the Commonwealth Bank and Telstra, which have previously accepted unions, use AWAs to undermine union organising and strengthen their position in enterprise bargaining.³¹

The latest push for reform by the Howard Government is the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), which passed into law on 14 December 2005. Unions are further marginalised. One major thrust of the legislation is to weaken the state systems of industrial regulation, which are currently overseen by state Labor governments that are more sympathetic to unions, by creating a national system of regulation. This is done through the corporations power in section 51(xx) rather than the conciliation and arbitration power in section 51(xxxv) of the *Constitution*. The Labor state and territory governments, as well as unions, have launched a High Court challenge against use of the corporations power to extend the federal government's jurisdiction

30 Ibid; Rod Lambert, 'Globalization and the Erosion of Class Compromise in Contemporary Australia' (2000) 28 *Politics and Society* 93, 102-7; Tim Rowse, 'Elusive Middle Ground: A Political History' in Joseph Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 years of Australian Industrial Conciliation and Arbitration* (2004) 17, 51.

31 Bray et al, above n 19, 240-3; Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005), 58-9, 208-210, 523-532; Office of Employment Advocate, *Australian Workplace Agreement Fact Sheet, February 2006* (2006) Office of Employment Advocate <http://www.oea.gov.au/docs/awa_fact_sheet> at 23 March 2006.

over labour relations. The rights of entry for unions into workplaces have been further eroded in the legislation. Union officials can only enter a workplace to investigate a breach of an award, agreement or the Act if it affects one employee who is a member of the union. The regulations under the legislation also prohibit workplace agreements from providing for employee union fees to be paid from payroll deductions and allowing employees to attend trade union training. The legislation maintains AWAs and non-union 'employee collective agreements' and introduces the employer greenfields agreement, which allows employers to unilaterally determine an 'agreement' at a new worksite before any employees are recruited. These agreements apply nominally for 12 months and may continue after that until terminated or replaced.³²

IV CONCLUSION

The Australian model of conciliation and arbitration assumed that unions were the workers' voice in bringing grievances to industrial tribunals. While there was greater state control of unions through registration with the arbitration system, there were legislative benefits that included preference to unionist clauses and rights of entry. As compulsory unionism in New South Wales highlighted, there were limits to how far this privileged status could go. In addition, compulsory arbitration did not stop employers, particularly larger firms, from experimenting with other forms of non-union representation, such as works councils, that dealt with issues not covered by industrial tribunals.

There have been alternative legislative approaches to giving voice to workers. The wages boards system of Victoria and several other jurisdictions did not privilege unions. Despite this, collective activities associated with the wages boards, such as the election of employee representatives, encouraged union membership. Under the *Industrial Disputes Act 1908* (Cth), there was an unsuccessful attempt to give groups of workers rather than trade unions access to arbitration tribunals. There were also legislative attempts in New South Wales to encourage industrial councils, welfare committees and safety committees before the 1970s. While it is unclear what success the New South Wales Industrial Welfare Board had in setting up welfare and safety committees, the provisions for industrial councils were virtually moribund. By contrast, there has been greater success in spreading non-union worker representation through the committees provided for by the OHS legislation enacted in all jurisdictions since the 1970s. The presence of unions in a workplace also encouraged the formation of these committees.

The rise of economic rationalism, the deteriorating economic climate of the 1980s and employer concern at the close relationship between unions and the Hawke/Keating Labor Government contributed to the demise of the special position of unions in Australian industrial regulation. Spurred on by the New

32 'Devilish Details', *Australian Financial Review* (Sydney), 21 March 2006, 4; Andrew Stewart and Elizabeth Priest, *The Work Choices Legislation: An Overview* (2006) Federation Press <<http://www.federationpress.com.au/pdf/WorkChoicesLegislation0206>> at 20 March 2006.

Right and the business community, conservative state and federal governments have stripped unions of their special status, encouraged non-union collective agreements and promoted individual bargaining between employees and employers.

With regard to individual and non-union collective bargaining, there is concern that workers will not be adequately represented. The assumption underlying this shift is that employers and employees have equal bargaining power. For most workers this is not the case and unions provide an independent voice for workers that protect them against victimisation. If the Australian economy deteriorates, the inequality of workers compared to employers will be exacerbated. Some more liberal employers may promote works councils and employee representative plans to give their workers a voice in the absence of a union presence and underpin non-union collective agreements. However, as the experience with employee representation plans before the *National Labour Relations Act 1935* in the US indicates, management had the power of veto over these plans and they could disregard any protests by employee representatives. Unfortunately the legislative pendulum relating to representation in Australia has gone too far in the direction of the individual, denying the Australian worker adequate and independent collective representation.