

# Re-imagining the Role of Trade Unions After WorkChoices

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No system where interests collide can proceed without a means to break deadlocks or redress major asymmetry of market power. — (Gardner 2008: 40)

A focus on asymmetry of market power emerges as a central theme within three of the four plenary papers examining the future shape of Australia's federal industrial relations system. Gardner, Hancock and McCallum all affirm the inherent power imbalance existing in the common law employment contract as a continued justification for regulation in the arena of industrial relations. Yet, imbalance of power is not unique to the employment relationship,<sup>2</sup> a factor which has contributed to many commentators seeking a broader regulatory justification for intervention.<sup>3</sup> This approach is not incompatible with recognition of the existence and effect of power imbalance in the context of employment and the role of regulation in correcting power imbalance. It does, however, seek to establish a broader justificatory basis for the regulation of work, a project which may help the discipline of labour law move beyond the contract of employment as the locus of regulation. The rationale behind the impetus to extend the principles underpinning labour regulation clearly emerges in the acknowledgement made in each of the plenary papers of the declining role of trade unions and strike action within the modern federal industrial relations system. If collectivism is in decline, alternate methods of regulating the relationship of employees and employers should be adopted.

This discussion will consider two of the central themes emerging from the plenary papers: power imbalance; and the impact of the shift in regulating trade unions as representatives of workers generally in favour of the regulation of trade unions as representatives or agents of individual union members. Gardner suggests that the causes of the declining influence of trade unions in Australia have been misrepresented as social rather than legal. Commenting on the impact of the amendments made to the federal legislation by the Keating Government in 1993 and the Howard Government in 1996, Gardner observes that 'the diminution of collective representation and influence looked like a

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societal change not a legislatively induced one.’ The discussion will consider the ongoing role of trade unions and collective action within the Australian industrial relations framework in light of the history of industrial relations in Australia and the pessimistic assessment of the future of collective representation that emerges within some of the plenary papers. For example, Hancock argues that ‘[i]t may well be unrealistic to expect the unions to “turn around” the secular decline in their penetration of the work force.’ However I believe this focus on the decline in union density is unhelpful in the Australian context. It is possible to imagine a rejuvenated role for trade unions as representatives of workers generally if we consider the role of unions in Australia within their historical context.

In his plenary paper, McCallum reminds us of the origins of employment regulation and the transformation of the master and servant relationship from service to contract at the time of the industrial revolution. McCallum emphasises that the contractual relationship is characterised by command and obedience, wherein the employee submits to the control of the employer in return for payment. The underlying capital and managerial power of the employer is reinforced at common law by the terms of the contractual bargain which require the employee to obey lawful and reasonable commands, upon threat of summary termination.

This emphasis on the contractual basis of the individual employment relationship serves to illustrate the inadequacy of the common law to redress the unequal position of an individual employee against the pre-existing capital power of the employer. It is also a useful tool for teaching students who have never studied industrial relations or labour law. The necessary role of the institutions of industrial relations can be illustrated by asking students to put aside their pre-existing understanding of what employers can and cannot do, and instead focus simply on what controls are actually placed on employers under the common law. Students are generally surprised to find that none of the controls that they assumed they would find around hours, wage rates, location of work, workloads and safety standards (beyond a limited common law obligation to maintain safe systems of work) exist under the common law. Instead, the principle of managerial prerogative and the right to terminate upon giving notice accord employers an extremely high degree of control over their employees with few if any restrictions around how they exercise that control. While Riley (2005) has argued that potential exists for the development of protections for employees at common law, and the nascent duty of mutual trust and confidence offers a potential check on employer action, the common law has not yet delivered for the bulk of employees.<sup>4</sup> Additionally, the expense and difficulty of litigating at common law will restrict the usefulness of these remedies to more senior or high level employees, who already have a degree of individual market power and arguably less need for employment protection.

This teaching approach reveals that students actually begin their studies confident in their understanding of how employees must be treated at work. In particular, students usually believe that the contract of employment is characterised by fairness — that employers must treat employees fairly, equally and in

accordance with certain basic standards. Although anecdotal, my experience of teaching labour law to undergraduate students highlights the fundamental importance and role of the industrial relations framework in Australia. As McCallum notes: '[t]he advent of a century of conciliation and arbitration has made us forget that the laws of work have favoured those who accrue capital'. The perception that these controls exist stems from the institutions of industrial relations not from the employment contract. In Australia, until the passage of the WorkChoices amendments, these controls had been established through the collective framework, through awards and more recently, collective agreements; institutional controls that relied almost entirely on the participation of trade unions.

Each of the four plenary papers under discussion acknowledge this history — that the common law employment contract is unsuitable for correcting power asymmetry and that the institutions of conciliation and arbitration and collective bargaining have, to a greater or lesser extent, helped to correct that imbalance for most workers. However, there is a divergence in their views on the importance of the role of trade unions in any future model of industrial relations. While the reasons for this divergence differ and include the pragmatic (declining union density; political considerations) and the speculative (Hancock suggests that a revival of union power carries a risk of a return to stagflation), all of the four plenary papers are pessimistic about the capacity of trade unions to act as representatives of workers in the future, outside of a more limited role as agents of their individual members.

The reasons behind the transition of the role of trade unions from general representatives of workers to merely representatives of individual union members (a membership that until the passage of WorkChoices was in decline) are taken up within Gardner's paper. Gardner points to the shifting legislative framework, particularly after the 1993 and 1996 amendments to the federal industrial statute, as the author of the diminution of collective representation and influence rather than any broad social shift in attitudes to unions. Gardner argues that this change in the role of trade unions was the result of a number of legislative changes including the introduction of statutory rights for individuals, the shift to an enterprise focus, the inclusion of non-union agreements and the reduced scope of protection for union organisation and activity. All of these changes undermined the historical role of Australian trade unions in establishing and maintaining working conditions for all employees (members and non-members), and emphasised the role of the union as a representative of a smaller group of employees — their members. Collective agreements could be made with employees excluding the involvement of a trade union. Protected strike action was offered only to employees acting as union members with other union members; or to all employees at a single enterprise only if they acted independently of any trade union. This emphasised that when unions acted, even if any agreement would ultimately apply to all workers, it was only as representatives of their own membership.

The decollectivisation (or 'individualisation') of industrial relations in Australia is not unique (see Deery and Mitchell 1999). However, the legislative

diminution of collective representation has been particularly significant in Australia and may have had a disproportionate impact upon trade unions because of the unusual history of Australian industrial relations. The conciliation and arbitration systems established federally and in many of the states fostered a deeply embedded perception of trade unions as representatives of workers generally, achieving gains for members and non-members alike, which has been very difficult to dislodge in the era of collective bargaining. This is not to suggest that Australia has no history of collective bargaining,<sup>5</sup> but the centrality of conciliation and arbitration and the pervasiveness of the award system fundamentally affected Australian attitudes towards the legitimate function of trade unions.

The extent of the impact of conciliation and arbitration on the Australian psyche is neatly summed up by Creighton and Stewart (2005: 151):

[A]wards still play a crucial role in each jurisdiction, and in the broader society. This can be attributed to the interplay of a range of factors. These include a deep (and perhaps unconscious) community attachment to the award system, and its perceived benefits in terms of maintaining an equitable balance between the interests of employers and workers, and acting as a social safety net.

The extent to which this continues to be true in the aftermath of the WorkChoices changes is illustrated by the fact that despite creating the circumstances in which the award system could potentially be rendered redundant as more and more employees were excluded from the application of awards (Owens 2006: 177), the WorkChoices amendments did not simply scrap awards. The New Zealand experiment in 1991 offered a precedent for such a move (see Anderson 1999: 206–207) and advocates of the WorkChoices amendments had been vocal in their criticisms of the system. However while new awards were prohibited and the foundations of the system were undermined, the existing set of awards were retained. In passing the amendments, the former Coalition government did not shy away from implementing the core of their industrial relations agenda, but politically they appear to have thought it necessary to stop short at the wholesale abolition of the award system.

Trade unions were an integral component of the award system and acted in practice as representatives of workers generally, not merely as agents of their individual members. If the community has, as Creighton and Stewart suggest, a deep attachment to the award system, it is likely that this attachment extends to the role that trade unions played in the award system as representatives of workers generally in setting community standards for the regulation of work.

The connection between the award system and the role of trade unions is not one that is clear and overt. If it were, the distinction drawn by the former Coalition government in the WorkChoices amendments between retaining the existing award system (undermining it gradually rather than all at once) and expressly restricting the power of trade unions with respect to bargaining, freedom of association and rights of entry would not have been made (see Forsyth and Sutherland 2006). Trade unions were systematically singled out as a part

of an ideological campaign that manifested in the WorkChoices amendments. However, it is unlikely that the linking of the benefits of the award system and the role of trade unions in establishing and maintaining those benefits and high living standards could be so easily severed.

A consequence of conciliation and arbitration, awards and community attachment to the role of awards in maintaining living standards has been that historically, and even up until the WorkChoices changes, the Australian community have not been exposed to the necessity for high union density in order to achieve and maintain high employment standards. State systems operated common rule awards and large numbers of employers were roped into awards in the federal system. Even after the shifts to collective bargaining in 1993 and 1996, the award system maintained a relatively high social safety net for those left behind in the gains made by collective bargaining. Certainly, the system was imperfect. The social safety net failed to deliver paid maternity leave, struggled with gender pay equity and favoured the standard of a full-time, male employee.<sup>6</sup> However, it continued to reinforce the understanding that the benefits of the system could be obtained without union membership because union gains applied to all relevant workers under either the award or a collective agreement where applicable.

The declining role of the trade union movement as a representative of workers generally over at least the past decade does reflect broader societal changes including changes to the nature of work, demographic shifts and the movement to a service dominated economy away from manufacturing (Watson et al 2003: 50–54). However, targeted legislative changes and the historical lesson that union gains flow to the community regardless of membership have also played a significant part in the decline. All of the plenary papers except Gardner underplay the importance of the ongoing role of collective representation in Australia, given that the community retains a residual embedded attachment to the role of trade unions in sustaining working conditions. Certainly, as Gardner notes (2008: 34), WorkChoices ‘... provided the opportunity for the union movement to reveal to workers the consequences of this new industrial relations. The reinstatement and reinforcement of the asymmetric power of the employer was now visible and pervasive’. The reality of asymmetric power had been masked since the introduction of conciliation and arbitration by protective industrial relations institutions.

Where does this leave us in terms of regulating collective representation in the future? In approaching the regulation of industrial relations, there needs to be acknowledgement of the reality of the impact of conciliation and arbitration on trade union density and of the legitimate role that trade unions play within industrial relations. Australia does not have a history or tradition of widespread collective bargaining in which union membership played a significant role in establishing and maintaining wages and conditions. If the Rudd vision of industrial relations retains, as the ‘Forward with Fairness’ policy documents suggest that it will, large elements of the WorkChoices approach to regulating trade unions, the important role that trade unions can play in collective bargaining will be undermined. It appears that the WorkChoices approach will

be retained with respect to rights of entry, levels of bargaining and protected industrial action.

Trade union rights of entry were significantly curtailed by the WorkChoices amendments and 'Forward with Fairness' suggests that the right of entry provisions will be retained. These provisions significantly restrict the capacity of trade unions to provide information about trade union membership and the role of trade unions in collective bargaining. Allowance for greater trade union access to work sites can assist in overcoming information asymmetry between workers and employers. It can also assist in facilitating the role of unions as a voice for workers generally.

The capacity for trade unions to act, either independently or in conjunction with employers, in establishing industry level conditions ensuring parity for union members (and non-unionists) and providing economies of scale for employers in bargaining was reduced by the WorkChoices amendments and is unlikely to be restored under the ALP. As Hancock argues 'there is... no reason that the enterprise should be the focus for all bargaining'. The focus on the setting of employment conditions at the enterprise level without reference to the genuine needs and goals of the bargaining participants ignores the potential for economies of scale and efficiencies that can occur if parties are free to choose the level at which they bargain.

Access to protected industrial action in support of bargaining claims by trade unions was made significantly more difficult (see McCrystal 2006). Compulsory secret ballots of union members were instituted, despite the fact that no union member could be forced to take protected industrial action against their will or expelled from their union for failing to do so (Orr and Murugesan 2007: 283). Additionally the discretionary powers of the AIRC to require protected action to cease were removed and replaced with mandatory provisions which emphasise the rights of third parties and the necessity of restricting the impact of industrial action over the legitimate role of strike action in collective bargaining. The ALP has indicated that it intends to retain these changes, although it is unclear if discretion will be restored to whichever institutional body is given control of industrial action.

These are the WorkChoices changes that the ALP federal government has indicated it will keep. Importantly, however, the government has indicated that it will move to instigate good faith bargaining and require employers to recognise trade unions and bargain with them in certain circumstances. However the ALP has suggested that recognition of unions would be based on majority representation, a requirement that will be more difficult to achieve in Australia than in a country with a history of collective bargaining. Unions in Australia must overcome the historical influence of conciliation and arbitration on perceptions of the need to join a trade union.

If we accept that the history of conciliation and arbitration in Australia has fundamentally affected the way that Australians approach trade unions, including decisions around membership and perceptions of the role of trade unions in representing worker interests more generally, we can conceptualise a role for trade unions that is not irreversibly and fundamentally linked to membership

density. This could involve recognition of the role of trade unions in providing a voice for workers particularly in the maintenance of a social safety net. Further, because trade union negotiated bargains may ultimately (if approved) apply to all workers at an enterprise and not just union members, a mechanism could be established to allow non union employees to have opportunities to consult with a trade union. They could even participate in protected industrial action if they would be covered by any resultant agreement and want to demonstrate their support for the claims made by the union.

Commentators such as Stone (2004) have convincingly argued that trade unions must adapt to the new realities of work in the post-Fordist era. However, their capacity to do so must not be hindered by legislation which marginalises their traditional Australian role of acting as a voice for workers generally. Such an approach would be more in keeping with Australia's industrial relations history. It could help establish legitimacy for trade unions as the representative of workers in the new industrial relations framework and continue the tradition in which the institutions of industrial relations offset the harshness of the common law for all workers, not just those working in sectors with high union density.

## Notes

1. I would like to thank Joellen Riley for commenting on an earlier draft of this paper.
2. In examining the conceptual framework for regulating work arrangements and discussing the work of Hugh Collins and Alan Hyde, Judy Fudge notes that 'inequality of bargaining power does not provide a *distinctive* or persuasive justification for regulating employment because it is conceptually vague and empirically inconclusive' (my emphasis) (Fudge 2006: 16).
3. A number of commentators have recently undertaken work exploring the justifications and boundaries of labour market regulation. For example see Davies and Freedland (2004); Fudge (2007). For an Australian perspective, see the collection of essays in Arup, Gahan, Howe, Johnstone, Mitchell, and O'Donnell (2006).
4. For discussion of the duty of mutual trust and confidence see Riley (2003).
5. Creighton has shown that collective bargaining was originally a feature of the conciliation and arbitration system. However after 1913 the legislative mechanism to facilitate collective bargaining was rarely used. Over award bargaining also occurred during the height of the conciliation and arbitration system, but it was not a dominant feature. See Creighton (2000).
6. For example see Baird (2005) on the failure of the conciliation and arbitration system to develop a paid maternity leave standard; Hunter (2006) on the interaction between industrial relations in Australia and precarious work.

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