The Fruits of Abdication: Australian Multi-employer Award Respondency+

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Abstract

This paper examines the structure of Australian multi-employer awards. It suggests that these awards do not exhibit occupational, industry or representational concentration and thus follow no clear rational principles. The hybrid award system is sub-optimal and can be explained by employer associations' neglect in the formative period of arbitration. Multi-employer awards are in need of reform if Australia is to become and remain internationally competitive.

1. Introduction

In recent years there has been a growing interest in enterprise bargaining and the decentralisation of wage determination. Developments on these fronts should not obscure the fact that for the foreseeable future the majority of private sector employees and employers will continue to work under

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employment conditions established by multi-employer awards. For this reason it is important that industrial relations reform extend to the area of multi-employer awards and multi-employer bargaining.

A major difficulty in attempting changes to the multi-employer award system is the absence of any systematic analysis of the existing award structure. This was a factor leading the Industrial Relations Commission to agree to a review of award structures in the National Wage Case decision of October 1991.

This article analyses the structure of multi-employer awards. It argues that the present structure of such awards can be criticised on both economic and industrial relations grounds. It suggests that multi-employer award respondency has not been shaped by principles designed or made to that particular purpose. Various legal devices for establishing respondency have combined with tribunal rulings (chiefly aimed at regulating union jurisdiction) and the ad hoc interests of unions and employers, to produce the existing pattern of multi-employer awards. The empirical evidence suggests that awards exhibit neither an industrial nor an occupational concentration. Rather, they have evolved as occupational hybrid awards. The evidence also suggests that there is an absence of representative concentration. This implies that single employer association respondency is not the norm.

The paper is broken up into three substantive sections. In Section 2 we outline the basic rules of award respondency together with the broad consequences of those rules.

Section 3 documents the patterns of multi-employer respondency. It examines a number of characteristics of the 77 largest awards, each of which determines the employment conditions for 10,000 or more employees. This Section suggests an untidy and inefficient award structure.

In Section 4 we offer an explanation for that structure. We argue that, unlike their counterparts in other countries, Australian employer associations failed to exercise a decisive role in shaping award structures as the quid pro quo for conceding union recognition in the formative period of the compulsory arbitration system. We note that multi-employer bargaining is not unique to Australia. Elsewhere, however, it tends to be contoured around the structure and membership of industry associations of employers. Industry-wide agreements are the outcome. At a key phase in the development of compulsory arbitration Australian employers devoted energy to opposing its introduction or reducing its impact rather than to guiding its structure. By default the outcome was a system of awards contoured around the membership of occupational unions. A factor permissive of this employer association abdication was the development of 'protection all round'

which insulated most employers from the adverse affects of inefficient labour awards and practices. The removal of such protection necessitates a reassessment by associations of the State-imposed 'historic compromise' and the resultant multi-employer award structure.

2. The Basic Rules of Employer Respondency

Principles of multi-employer award respondency are concerned with determining which employers, or groups of employers, should be brought together into common awards. There are two rational principles by which this problem can be handled. The first is an occupational principle; all employers using a common occupation (defined by the skills and attributes of employees) should be bound by the same award. Closely bound up with the notion of 'the rate for the job', occupational awards can be consistent with standard factor prices as well as 'fairness'. The second is an industrial principle; all employers in a common industry (defined by their product market) should be bound by the same award. A system of industry awards might be expected to be more responsive to product market considerations (changes in demand, technology and so on) than a system of occupational awards. The choice between industry and occupational awards is a fundamental one based on competing priorities accorded to product and labour markets respectively.

Fundamental to which multi-employer award structure (or structures) emerge are those rules, both formal and informal, which determine award respondency. Such respondency concerns the definition of which employers, unions and employees are covered by a particular award. In this section we are concerned with the character of these rules and procedures, and their broad consequences for the system of awards as a whole.

Historically unions have taken the initiative to make employers respondent to legally binding awards. They have done so as a matter of policy; to extend the coverage of awards as widely as possible. They have also acted for reasons of administrative convenience - to reduce the costs of making and enforcing awards - a factor which has encouraged the development of legally binding multi-employer awards. Though it is not technically necessary for unions to initiate formal award making proceedings under federal and state arbitration Acts, it has become customary for them to do so.

The role of employers and employer associations in award making has tended to be more passive. It does not follow that employers are always opposed to award respondency. They sometimes welcome awards for a wide variety of reasons. But only in very rare circumstances do employers

take the initiative to open formal proceedings for establishing award coverage where it has not previously existed. It may be inferred that employer passivity generally leaves the onus with unions to establish initial claims upon employer respondency to awards, and to the extent these claims are allowed, to determine the structure of that respondency.

One practical consequence of union policy, supported by tribunal operation, is that awards extend to a very high proportion of the workforce. In the 1950s and 1960s awards covered approximately 90 per cent of wage and salary earners. In recent years this figure has tended to fall. Between 1985 and 1990 award coverage declined from 85 per cent to 80 per cent of employees. Nevertheless, award coverage remains extensive.

There are three main ways in which an employer may be made respondent to an award: a common rule provision making the award binding upon all employers in an industry or occupation; being named as an individual employer respondent to a particular industrial dispute which is then resolved by the making of an award; membership of a registered employer association which is made respondent to an award through being a party to a particular industrial dispute.

The common rule provision makes employers respondent to an award whether they are named in that award or not, whether or not they belong to an employer association, and irrespective of whether they are aware of the award. A common rule may be included in an award of all the state arbitral systems. The federal system is not legally capable of making a common rule except in the two territories. Since the common rule is the most comprehensive and simplest way to establish wide award coverage many unions have preferred to retain state awards (with a common rule) or to supplement federal awards with a state counterpart award (which replicates the terms of the federal award). As a result state awards continue to apply to more employees than do federal awards (46.5% compared with 31.5%). Many of Australia's largest awards - covering clerks, shop assistants and club employees - are state common rule awards.

Lacking the power to order a common rule, the Australian Industrial Relations Commission normally makes employers respondent to an award when they are named by a union as individual parties to an interstate industrial dispute. The creating of an interstate industrial dispute by the serving of a log of claims (the 'paper dispute') may result in a number of awards, some single-employer others multi-employer, each in part settlement of the dispute. The making of any resultant single-employer awards may not be a cumbersome procedure. However, in the case of multi-employer awards the process is more complex and requires the union to name each firm it wishes to be bound by the award. Establishing and updating

lists of respondent employers is a demanding business, while the extension of the award to other respondents involves the servicing of 'roping-in' awards.

In the federal system employers can also be made respondent to an award by belonging to a registered employer association which is a named party to the log of claims giving rise to the particular award. In some instances unions rely solely upon employer association membership as a means of establishing respondency. However, employer associations do not always make known their membership. In industries with many small firms this can make respondency uncertain for the union. Moreover, this procedure may only be used for 'registered' employer associations. Most associations with federal awards are registered, but a few are not.

These three devices facilitate binding employers to multi-employer awards. Employer respondency is, however, only part of the story. To meet the formal requirements for an award to have force, proper employer respondency is a necessary but not sufficient condition. Certain additional conditions may also be necessary concerning union membership, the type of work performed and the geographical location of the work site. For these reasons, a long list of factors *actually* shape respondency. They include the following:

(a) specification of respondent employers (the three devices above);

(b) specification of respondent union(s). Many awards name an applicable union, and cannot be applied to members of other unions doing the same work in the same firms (since they are covered by different awards);

(c) specification of classifications. An award can only apply to employees performing work that can properly be related to a specific classification in the award. Classification definitions are sometimes provided to clarify this point. Conversely disputes and litigation over classification specification may result, especially where different unions (with different awards) are competing for a particular group of workers;

(d) specification of industries/occupations to which the award applies. Many awards (federal and state) contain a clause determining the application of the award to particular industries/occupations. Such clauses are often superfluous because other factors define respondency adequately;

(e) specification of area of operation. State awards cannot cross state boundaries. Many state awards only cover part of a state (especially in Queensland). Many federal awards apply only in certain states and not in others. Thus the Metal Industry Award does not apply in

Western Australia, nor the federal Transport Workers' Award in New South Wales and Queensland. Such boundaries are usually made explicit in awards.

It is clear from this list that determining whether employees of a particular employer are respondent to an award can involve matters additional to whether an employer has been made respondent either by common rule, named respondency, or employer association membership. The complexity of the factors affecting multi-employer awards permits scope for 'award shopping' (for the employer, finding the cheapest award and for the union, the most lucrative), and complex litigation.

It is untrue, however, to assert that multi-employer award respondency flows *solely* from union jurisdiction, and the other factors outlined above. This would understate the impact of employer and employer association policy. Employers have themselves shaped award respondency to suit their own interests, seeking at various times the fragmentation of multi-employer awards, the making of single-employer awards, or the de facto achievement of these same ends within an award by the creation of specialised parts, schedules or appendices. In many instances such applications are by consent. However, there are guidelines governing disputed claims, sometimes concerning whether there is 'commonality' of employers covered by a single claim for an award (R v Gough (1966) 114 CLR 385). It should be noted that employers may dispute whether they have sufficient commonality to justify being bound by a common award. However, such cases are rare, and the chances of success are not great.

While the legal procedures for award making facilitate the establishment of multi-employer awards with broad application across the workforce, they do not *necessarily* require that awards conform to any particular type, whether industrial or occupational. However, the practical operation of these procedures has *tended* to place unions in a position where they dictate respondency patterns, rather than employer associations. Further the procedures for determining disputes over respondency have *tended* to flow from union jurisdictional matters, rather than award structure issues per se.

3. Patterns of Multi-Employer Award Respondency

In this section we examine the pattern of employer respondency to multi-employer awards. In doing so we invoke two tests. First, does award respondency correspond to the outlines of industry groups or sub-groups? Second, does award respondency follow the boundaries of occupational groups or sub-groups? In the previous section we referred to 'occupational'

and 'industrial' principles as being the two rational principles around which multi-employer awards could be grouped, and referred to the competing rationalities respectively of the product and labour market. The occupational principles involves all employers using a common occupation being bound by the same award for that occupational group. Its industrial relations advantages lie in that it provides a visible 'rate for the job', can be consistent with standard factor prices and conforms with notions of equity. The industrial principle involves all employers in a common industry being bound by the same award. The economic advantages of this principle lie in the fact that such awards may be more responsive to product market changes. We now ask whether the structure of Australian multi-employer awards meets either of these principles.

3.1 Industrial concentration

The data collected by the Australian Bureau of Statistics (ABS) in its survey of Awards in May 1990 indicates that large awards (covering more than 10,000 employees) cover.47.4% of award covered wage and salary earners. From the perspective of the operation of the award system as a whole, these large awards are very important. The ABS lists 77 awards covering more than 10,000 employees of which 45 cover private sector employees and 32 cover employees of federal, state or local governments and government business enterprises. The former are of particular interest. They cover approximately 1.4m employees or 31 per cent of award covered wage and salary earners. They have tended to be 'pace-setting' or 'pattern-setting' awards for the determination of wages and employment conditions. They are *all* multi-employer awards.

To what extent do these large private sector multi-employer awards correspond to a single industry or to several industries? To answer this question we show in Table 1 data upon these awards indicating how many industry groups and sub-groups they cover, and whether employees are concentrated in particular industries. The industry groups and sub-groups are taken from the ASIC classification of the ABS. This is taken as a proxy (necessarily loose) for the existence of common 'product market conditions' for employers.

While some allowance needs to be made for the fact that ASIC Industry sub-groups need not amount to units that are significantly different in terms of employer business activities and interests, nevertheless this data suggests several important points. Only two of these 45 awards apply to employees in a single major industry group. Single industry awards are rare. In practice, industry dispersion is high. Twenty of these awards apply to five

Table 1: Industrial Concentration of Large Multi-Employer Awards (Private Sector)*

	Federal Awards	Employees Covered (000s)	No. of Industry Groups	No. of Industry Sub-groups	Employees in Largest Industry Sub-group (%)	Industrial Concentration
Federal Awards						
1	Metal Ind.(Pt.1)	148	9	68	18	Very low
2	Bank Officers	76	1	1	100	Very high
3	Vehicle Serv. etc	60	5	16	83	Medium
4	Clothing Trades	35	3	7	48	Medium
5	Graphic Arts	33	4	17	67	Low
6	Hotels, etc.	24	4	5	94	High
7	Transport Workers	21	9	22	65	Low
8	Textile Industry	19	2	9	31	Low
9	Nat.Bld Trades	18	7	18	46	Low
10	Insurance Off	18	3	5	76	High
11	Timber Industry	18	4	10	54	Low
12	Motels	16	2	2	99	Very High
13	Rubber etc	16	2	15	42	Low
14	Vehicle Industry	14	5	12	46	Low
15	Metal Tr(Pt 3,V.)	13	4	14	38	Low
16	Transport (Gen.)	10	9	25	71	Low
New South Wales Awards						
17	Shop Employees	107	5	23	49	Low
18	Clerks	84	7	84	11	Very low
19	Club Employees	53	2	3	58	High
20	Restaurants	18	5	7	74	High
21	Cleaning Con'tors	12	5	5	93	High
22	Pharmacy	11	2	2	99	Very high
23	Priv. Hos. Nurses	10	2	3	68	High
24	Vehicle Repair,	10	n/a	n/a	n/a	-
Victorian Awards						
25	Commercial Clerks	76	10	84	9	Very low
26	Hosp. Ben. Homes	48	4	8	83	High
27	General Shops	35	5	20	28	Low
28	Painters	33	5	8	97	High
29	Registered Nurses	28	3	6	86	High
30	Food Shops	27	3	4	99	Very high
31	Hotel, etc.	20	5	10	48	Medium
32	Store Packers etc.	11	4	27	19	Very low
33	Clothing & Footwear Shops	11	2	4	89	High
34	Law Clerks	10	1	2	85	Very high

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Table 1 cont'd

Federal Awards	Employees Covered (000s)	No. of Industry Groups	No. of Industry Sub-groups	Employees in Largest Industry Sub-group (%)	Industrial Concentration
Queensland Awards					
35 Clerks & S'Board	56	9	73	19	Very low
36 Shop Ass. S'thern	34	4	18	35	Low
37 Shop Ass. Central	20	2	8	54	Medium
38 Shop Ass. North	14	3	8	78	High
39 Engineering	11	10	41	25	Very low
South Australian Awards					
40 Clerks	27	10	64	14	Very low
41 Shops	15	4	13	31	Low
42 Hospital & Ancil.	13	3	7	94	High
Western Australian Awards					
43 Shop & Warehouse	42	9	32	24	Very low
44 Metal Trades	16	6	34	19	Very low
45 Clerks	10	6	31	41	Low

Note: Industrial Concentration is calculated by dividing % of employees in largest industry sub-group by the Number of Industry Sub-groups. Ratios below 1.0 are deemed very low, 1-5 are low; 5-10 are medium; 10-25 high; 25+ very high. Thus, the Metal Industry Award Part I has a concentration index of 0.28 (18/68) and is deemed 'very low', while the Bank Officers' award has an index number of 100 (100/1) and is deemed very high.

* A large award is one which applies to 10,000 or more employees.

Source: Unpublished data in 1990 ABS Survey *Award Coverage Australia*, ABS Cat.No.6315.0.

or more major industry groups. Thirty-seven apply to more than five industry sub-groups. Only 23 awards have more than 50% of employees located in the largest industry sub-group. The remaining 22 awards have a majority of employees dispersed across more than one industry sub-group.

We classified employment concentration by combining two indices - the number of industry sub-groups covered, and the percentage of employees in the largest industry sub-group. Our basic criterion for judging concentration is whether an award (like the Bank Officers' (Federal) Award) applies in a single ASIC industry sub-group, or whether (like the Metal Industry Award Part 1) it is spread across many industry sub-groups. However, this criterion must be modified to allow for the possibility that

awards may be dispersed across many industries, while the vast majority of affected employees are in a single industry. On this basis, we gauged that five awards were very highly concentrated; 13 were highly concentrated; five were medium concentrated; 13 exhibited low concentration; and nine showed very low concentration. Almost half of these awards (22) fell into the last two categories of low or very low industrial concentration.

Several very large awards are highly dispersed across industries. These include the (federal) Metal Industry Award Part 1, covering 148,000 employees spread across 68 industry sub-groups, with only 18% in the largest industry sub-group; the New South Wales Clerks Award covering 84,000 employees in 84 industry sub-groups, the largest holding only 11% of employees; the Victorian Commercial Clerks Award which regulates 76,000 employees in 84 industry sub-groups, the largest holding only 9% of award employees; and the Queensland Clerks & Switchboard Attendants Award (which is similar). Relatively smaller awards exhibiting the same pattern of dispersion also have an influential role, notably some of the Transport Workers' and Storepersons Awards.

While some imprecision attaches to what is meant by 'industry award', this evidence strongly suggests they are very rare. Large multi-employer awards appear to span many employers in dissimilar product markets.

For the purposes of comparison, Table 2 presents the industrial dispersion of employees under the 32 large public sector awards. Almost all the awards in this group have high or very high employment concentration in a single industry sub-group. This is because awards governing areas such as health, education, railways, and police focus upon groups where the occupation and industry are identical. The only dispersed awards (in terms of ASIC sub-groups) are the general public service awards which reflect the diverse activities that public servants may be required to perform, even when working for a single employer.

3.2 *Representational concentration*

To what extent do these industrial divisions within awards lead to multiple employer association respondency, a reflection of the fact that different sub-industry groups may be represented by different associations with dissimilar interests? This aspect of employer diversity may be traced in association respondency to awards. As mentioned above, there are three principal ways this arises. An individual employer may be a named respondent to an award. While this is always the case for enterprise awards and agreements, it is not necessary for multi-employer awards. Nevertheless, in the federal system it is common for unions to serve logs of claims on individual employers and make them individually respondent to

Table 2: Industrial Concentration in Large Public Sector Awards*

Award	Employees Covered (000's)	No. of Industry Groups	No. of Industry Sub-groups	Employees in Largest Industry Sub-group (%)	Industrial Concentration
Federal Awards					
1 Aus. Gov.Emp. Gen.	53	6	17	84	High
2 Admin/Clerical	27	9	21	61	Medium
3 Higher Ed. (Gen.)	20	1	1	100	Very High
4 Higher Ed. (Acad.)	20	1	1	100	Very High
5 Local Gov. (Vic)	16	4	5	96	High
6 Local Auth. (Vic)	15	4	5	87	High
7 APS - Senior Exec.	14	7	13	46	Medium
8 R'lways Traffic &	12	1	1	100	Very High
9 R'lways Sal. Off.	10	2	2	91	Very High
New South Wales Awards					
10 Gov. Teachers-	42	1	1	100	Very High
11 Pub. Hosp. Nurses	31	1	4	97	Very High
12 Admin & Clerical	30	6	14	45	Medium
13 Local Government	14	5	7	93	High
14 Municipal Emp.	14	4	4	94	Very High
15 Hospital Employees	13	2	4	92	Very High
16 Police	12	1	1	100	Very High
17 School Clerks	10	1	2	92	Very High
18 Hosp. Gen. Emp.	10	1	3	92	Very High
Victorian Awards					
19 Gov. Teachers -	50	1	2	96	Very High
20 Vic. Public Ser.	43	7	14	37	Medium
21 Hosp & Ben.Homes	n/a	n/a	n/a	n/a	-
22 Registered Nurses	n/a	n/a	n/a	n/a	-
23 VPSB Det. No	179	n/a	n/a	n/a	n/a -
Queensland Awards					
24 Teachers	32	1	2	99	Very High
25 Public Service	30	8	18	38	Medium
26 Railways (State)	20	2	2	86	Very High
27 Nurses, Pub. Hos.	13	1	2	94	Very High
28 Local Authority	11	6	9	62	Medium
South Australian Awards					
29 Admin & Cler. Off.	15	9	22	26	Low
30 Teachers	15	1	2	82	Very High
Western Australian Awards					
31 Teachers	29	1	1	100	Very High
32 Public Service	23	8	22	30	Low

*A large award is one which applies to 10,000 or more employees. For method of determining industrial concentration see note to Table 1.

Source: Unpublished data in 1990 ABS Survey *Award Coverage Australia*, ABS Cat. No. 6315.0

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a particular award made in settlement of a dispute, even though they belong to an association. An extension of this device is the 'roping in' award. Second, employers may become respondent directly through their membership of an employers' association. This device is again more significant in the federal system where formal respondency is of crucial importance in determining precisely who is covered by a particular award. It is not important in the state systems where employer associations often have a loose and ill-defined relationship to particular awards. The third device is the common rule. This is available only to state awards and to federal awards in the two territories and effectively removes the need to determine formal employer respondency.

Because of these three different modes of respondency it is often difficult to determine which associations are actively involved in the administration of a particular award. Several options may arise. This list is not exhaustive.

- An association is formally respondent to an award and is active in hearings concerning the award.
- An association is formally respondent to an award but no longer has members covered by it. It may remain active, even despite the lack of relevant membership.
- An association is not formally respondent to an award, but has members who are named respondents, and acts on their behalf.
- An association has formal respondency and members covered by an award, but effectively sub-contracts representation of their interests to another association.
- A common rule applies to employers whose association administers the award on their behalf through formal involvement in a state board or conciliation committee (whose employer membership is often limited and does not span all the interested associations).
- A common rule applies but an association with members covered by the award has a lower level of involvement in its administration for example, passive reporting of award changes.

In Table 3 we report findings upon employer association 'respondency' to large private sector awards. The object of this is to show the extent to which employer representation may be divided, even though certain members are bound by a common award. It will be apparent that this information should be treated with caution since respondency has a tighter formal meaning in the federal system than in the state systems, and because formal respondency is not synonymous with active involvement in administration of a particular award. Nevertheless, this data gives us a crude indication of the pattern of division of employer association respondency. We can only

Table 3: Multi-Employer Association Respondency: Large Private Sector Awards*

	Federal	NSW	VIC	QLD	WA	SA	Total
1 Association	2	5	1	—	1	—	9
2 Associations	5	2	2	—	2	1	12
3 Associations	2	—	2	—	—	—	4
4 Associations	3	—	5	—	—	—	8
5 or more	4	—	—	5	—	2	11
Not Known		1					1

* A large award is one which applies to 10,000 or more employees.

Source: ABS, *Award Coverage Australia; 1990*, Cat.No.6315.0; and data taken from individual awards or transcripts of award proceedings.

surmise the extent to which these divisions correspond to tensions and differences of interest, and the way these differences may weaken employer effectiveness, or be resolved satisfactorily.

If we take the respondency of three or more associations to indicate a low level of concentration, then just over half of the awards fall into this group. If we take four or more as the indicator, then 19 of the large multi-employer awards fall into this group. In some instances there were very long lists of respondent associations. One of the awards has 23 association respondents.

We have outlined two aspects of employer fragmentation *within* awards - that they may be divided into different industry groups or sub-groups which have divergent interests, and that they may be organised into different associations for representational purposes. We term these *industrial* and *representational concentration*. To what extent are the two associated?

Of the 45 large multi-employer awards in the private sector, only 15 show a mismatch between industrial and representational concentration. By this we mean that an award shows a high concentration of employees into industrial sub-groups but a low concentration of employers into associations or vice versa. As a general rule, we would suggest that awards which are spread across many diverse groups of employers are likely to be shared between a number of different associations. The nature of the relationship between these associations is difficult to predict. It may be competitive, conflictual, accommodative or harmonious.

The apparent exceptions to this rule are not compelling. Only three of these are Federal awards where employer association respondency to an award has a 'hard' meaning.

Table 4 : Award Concentration - Occupation Sub-groups

	(a) Occupational Sub-group (ASCO)	(b) Number of employees in occupation sub-group	(c) Number of Awards	(d)	(e) % of award employees in 10 largest awards in each jurisdiction	(f)
	(000s)		Federal	State	Federal	State
Metalworking						
4103	Metal fitters and Machinists	91.9	72	121	82	56
4205	Boilermaking & Welding Tradespersons	54.2	39	59	92	71
8101	Assemblers	74.1	45	67	89	65
8101	Trades Assistants	37.6	60	82	68	47
Clerical						
5101	Office Secretaries & Stenographers	124.8	54	115	75	80
5301	Accounting Clerks	329.8	120	95	68	76
5503	Transport Recording & Despatch Clerks	31.3	46	71	74	63
5505	Stock & Purchasing Clerks	90.6	87	149	62	56
5601	Receptionists & Information Clerks	185.4	85	155	70	71
Retail						
6301	Sales Assistants	337.1	61	119	79	76
Road Transport						
7105	Truck Drivers	111.8	82	145	68	55
Storepersons						
8908	Storemen/Women	98.1	68	154	60	55

Source: ABS, *Award Coverage Australia, 1990* unpublished data.

These included the Insurance Officer (Clerical Indoor) Staffs Award (employees concentrated into only five industry sub-groups with 76% in the largest, but four separate employer associations) and the Timber Industry Award (employees spread over 10 industry sub-groups and four major groups, but employers organised into only two associations). These are not extreme cases, and it is easy to discover special circumstances why industrial concentration and representative concentration need not be closely

linked. The remaining 12 cases are found in the State jurisdictions and may represent underestimates of employer association complexity (because of diffuse respondency requirements), or an overestimate of industrial diversity (thus ASIC differentiates retail sub-groups which are unlikely to reflect diverse industrial interests).

3.3 Occupational concentration

If multi-employer awards do not match 'industry' boundaries, does it follow that they are more closely related to occupations? Such a finding might be expected, given the importance of union structure in shaping multi-employer award respondency patterns and the fact that Australian unions tend to have 'occupational' coverage. Is this competing rationale the basis on which award respondency is determined?

Table 4 shows certain aspects of award structure in key occupations within the Metals, Clerical, Retail, Road Transport and Storepersons' areas. Several key occupational sub-groups have been selected to indicate whether awards are constructed around them. It need not be expected that an occupational award be confined exclusively to an occupational sub-group; the majority of such awards are likely to contain several occupational classifications. What is significant is the extent to which each sub-group is concentrated into a small number of awards or divided into many awards.

What the data in Table 4 suggest is that awards are no more organised around occupations than they are around industries. The occupational sub-groups listed are large, common ones. They are clearly divided into large numbers of both federal and state awards. Columns (e) and (f), showing the percentage of award employees in the 10 largest awards, would normally exclude enterprise awards. Clearly, there are numerous multi-employer awards in each occupational sub-group, at both federal and state levels. The 'occupational' principle in award making has the virtue of fixing a standard factor price (rate for the job) which may facilitate labour mobility, increase 'perceptions of fairness' and reduce conflict. To the extent that key occupations are highly segmented into many awards (some by federal/state jurisdiction, industry sub-group, or enterprise), these advantages may be lost *unless* there is a high degree of similarity between awards arising from comparative wage justice, the 'minimum rates' structure, or some other operative principle.

The data in Table 4 are not limited to private sector multi-employer awards. To exclude public sector and private sector single employer awards Tables 5 and 6 show, first the total number of awards in several occupational

Table 5: Total Number of Comprehensive Awards*, by Industry and Jurisdiction

Awards	Federal	NSW	VIC	SA	QLD	TAS	WA	TOTAL
Metals	67	22	6	7	7	5	24	138
Clerical	97	17	10	20	9	1	19	263
Retail	12	13	9	19	22	4	4	83
Warehousing	32	11	5	4	37	-	6	95
Road Transport	46	35	-	5	125	2	8	221
Aluminium	14	-	-	-	-	-	-	14
Total	268	98	30	55	290	12	61	814

* Total number of awards less single issue awards and roping-in awards

Source: ABS, *Award Coverage Australia*, unpublished data.

Table 6: Total Number Comprehensive Multi-Employer Awards*, by Industry and Jurisdiction

Awards	Federal	NSW	VIC	SA	QLD	TAS	WA	TOTAL
Metals	34	4	4	3	3	4	7	59
Clerical	16	7	4	8	13	-	16	64
Retail	12	11	9	15	9	4	4	64
Warehousing	18	11	4	2	13	-	3	48
Road Transport	28	24	-	-	19	-	5	76
Aluminium	14	-	-	-	-	-	-	14
Total	122	57	21	28	57	8	32	326

* Note: Total number of comprehensive awards (Table 5) less public sector and enterprise awards.

Source: ABS, *Award Coverage Australia*, unpublished data.

areas (plus the aluminium industry), and then the total with public sector and enterprise awards deducted. These figures are calculated from tribunal award indexes and will be inflated by the inclusion of a few defunct awards. They reinforce the conclusion that there exist multiple awards within major occupations. This is true within jurisdictions - showing that the multiplicity of occupational awards does not arise solely from tribunal duplication.

Multiple awards within occupations arise from the practice of separating out industry sub-groups. Thus in road transport, for example, several

multi-employer awards deal with the occupation of driver within the industry sub-groups of oil, milk, timber and refuse carting. The occupation of clerks is covered by general clerical awards and also by industry sub-group awards for retailing, taxi companies, club employees, and so on. The occupation of storepersons is largely covered in this way by awards for storepersons in grain stores, wool stores, oil, retail, bulk liquid and the like. In short, our system is primarily one of occupational awards supplemented by industry sub-divisions and enterprise awards.

One consequence of this mixture of occupational and industry awards may be that we tend to have the worst of both worlds and the best of neither. An advantage of a system of industry awards is that it encourages award conditions to be modelled around the economic, technological and business characteristics of a particular group of similar employers. This advantage tends to be lost when occupational structures overlay the industry ones. First, there will be multiple occupational awards within the industry which fragments the industry focus. Second, primacy is usually given to occupational award requirements (which tend to be copied from more general awards) again weakening the disposition to reflect industry conditions. The advantage of occupational awards is that they fix a 'fair rate for the job', facilitating labour mobility and reducing conflict. This advantage vanishes once occupations are broken into industry sub-groups. The 'fair rate for the job' is replaced by a jumble of conflicting rates and wage leapfrogging. Advantages for labour allocation and industrial peace are lost. We suggest that Australia's award system may suffer from the above mentioned disabilities.

The Tables suggest that the pattern of multi-employer award coverage does not conform to any neat principles. Industrial concentration within awards is generally low, especially with large 'pace-setting' private multi-employer awards. Representational concentration is low. Diverse industry groups within awards have encouraged multiple employer association representation. Occupational concentration is also low. Many simple occupations are fragmented into different awards - public sector, enterprise, and industry sub-groups.

This pattern conforms with what was developed in Section 2 about the primacy of union interests in determining an award structure based initially on occupations. We suspect that employer associations have been allowed their second choice, to break occupations into industry sub-group awards. However, we have also contended that this compromise is the worst of both worlds.

4. Employer Neglect and the Shaping of Award Structures

We have offered evidence in section 3 which suggests that award structures are sub-optimal. Multi-employer awards are a hybrid between occupational and sub-industry types, a hybrid which results in none of the advantages of each type and yet which maintains the disadvantages associated with each type. Further, our empirical evidence suggests that representational concentration is low, and that multi-employer bargaining is further complicated by the fact that it is also multi-association bargaining. Sometimes such bargaining is also multi-union bargaining, the result of the occupational underpinnings of most awards. In trying to redress this sub-optimal situation it is instructive to examine those forces which gave rise to the existing arrangements. We suggest two critical factors: employer association inactivity in shaping bargaining structures in the early stages of the arbitration systems, and the development of a system of 'protection all round' which insulated employers from any inefficiencies resulting from association neglect.[1]

There is evidence to suggest that the shape of multi-employer bargaining tends to be *broadly* established at the early stages of joint regulation, and afterwards exhibits little change unless subjected to major economic or political shocks (Sisson 1984). Thus the role of employers and their associations at the formative period of any industrial relations system has an important influence on the resultant bargaining relations and award structures.

It has been argued by a number of authorities that in other countries employer associations, rather than trade unions, have been more influential in determining the bargaining procedures and systems, the procedural and substantive rules, the level of bargaining and the bargaining agents (see, for example Adams 1981; Clegg 1976, 1979; Flanders 1968, 1974; Fox 1967, 1975; Ingham, 1974; Phelps Brown 1959; Plowman 1988; Sisson 1984, 1987). In sum, these authorities would suggest that four factors led to employer associations recognising unions and to their establishing bargaining procedures which suited employers. These factors were the rise of durable union organisations, the need for orderly bargaining procedures, a desire to minimise the role of the State, and the perceived need to reduce the socialist objectives of unions.

By establishing bargaining procedures employer associations provided an orderly means of dealing with unions. These procedures also minimised the need for State intrusion. Further, by recognising unions for bargaining purposes, unions were in turn forced to recognise the right of managers to manage. Union activities were directed into a narrow focus of seeking improvements in employment conditions rather than changes to the capitalist system itself.

The recognition by management of unions and vice-versa is often referred to as the 'historic compromise'. As the primary architects of the bargaining systems, employers were successful in reducing the number of bargaining union agents (or in enforcing single-unit bargaining), in establishing either industry-wide or enterprise bargaining, and in reducing if not eliminating multi-association bargaining.

This overseas experience contrasts with the Australian. Following their victories during the strikes of the 1890s, employer associations exhibited little interest in recognising defeated unions or dealing with them. This happened, notwithstanding the fact that universal manhood suffferage and payment of members of parliament at this time enabled Labor Parties to be formed, and that these Parties attracted significant support at elections. Unlike their European counterparts who came to terms with the new political order, Australian associations actually disbanded following the strikes. Employers did not take the opportunity offered them by their superior bargaining position to determine bargaining procedures which suited them. When the State intervened to force such procedures upon them, their reactive approach of 'legislation and litigation' resulted in, at best, a negative influence upon the bargaining structures which evolved by way of compulsory arbitration. Through compulsory arbitration the State forged the historic compromise which in most other countries had resulted from employers' pragmatic assessment of changed conditions.

The advent of compulsory arbitration resulted in the establishment of employer associations on a permanent basis. The formation of the Employers' Federations and the diversification of trade associations into industrial relations was the result of parliamentary bills to introduce compulsory arbitration. This factor, together with the tariff question, also led to the reconstituting of the Chambers of Manufactures at this time.

Employers, through their associations, continued a reactive, negative response to the possibility of industrial legislation compelling them to deal with unions. Rather than seek to establish other procedural rules which would obviate the need for compulsory arbitration, associations sought to frustrate compulsory arbitration and the wages boards systems which evolved in some states through court action in the in the hope that Supreme Courts and the High Court would make the legislation inoperable or that parliament would repeal it.

This initially proved a successful tactic. In Victoria, Supreme Court challenges to the wages boards system effectively resulted in employers having a veto right for many years. In New South Wales, where compulsory arbitration was introduced on a seven-year trial period in 1901, employers sought to frustrate the system. So frequent were their appeals to the

Supreme Court (which openly condemned the arbitration legislation) that the Act was made unworkable. The President of the Arbitration Court considered that the Act had been 'riddled, shelled, broken fore and aft and reduced to a sinking hulk' (1907 *AR(NSW)* 59). At the federal level, employer High Court challenges were such that in the first twenty-five years of the Commonwealth the industrial power came to play 'a greater part in political history and legal controversy than the whole of the rest of the Constitution put together' (Garran, 1930, p. 464).

A difficulty with this negative approach was that it led to increasingly diminishing returns. In the absence of an alternative method of dealing with disputes governments, by now often Labor governments, amended the legislation to overcome any deficiencies indicated by employers' litigation and to reduce the capacity for such litigation. At the federal level, where the Constitution continued to provide a fruitful source of employer sorties, the Fisher Labor Government increased the size of the High Court and appointed judges who were more sympathetic to a federalist approach. After 1914 employers' litigation merely served to open up the 'new province for law and order'. By 1920 employers were complaining that the industrial powers of the Constitution has become 'so strained that the difficulty is to know if there is any industry or trade beyond the federal Court and if there is anything more than a shadow left of the State Courts'. The employers' final sortie on the arbitration system, the attempt by the Bruce Government to repeal the Act in 1929, was also a failure.

It was not until 1938 - over three decades after the enactment of the *Conciliation and Arbitration Act* 1904 - that the Central Council of Employers of Australia came to accept arbitration as 'the settled law of the land' and sought some form of accommodation with the arbitration system. By then much of the arbitration mould had been cast. In the absence of an employer input, this mould was largely shaped by unions and the legislature. Employers' negative approach during the system's formative period reduced their input into developing bargaining procedures.

The negative approach also limited employers' capacity to influence award structures. Unlike the situation in other countries, they did not attempt to force unions into an industry or enterprise mould, nor did they seek State imposition of single unit bargaining. As in other areas of bargaining relationships, Australian employers have, for the most part, reacted to circumstances rather than tried to shape those circumstances. The result has not been industry awards based upon the industry of the employer, but rather a plethora of awards based on the occupations covered by unions. In the context of occupationally-based unions, employers in large establishments came to be confronted by many unions and many awards. Thus

the situation of a single-employer association bargaining with a single union did not become the norm in Australian industry. Rather there developed a situation of multi-union, multi-employer and multi-association bargaining. Enterprise bargaining was not a significant feature of awards, notwithstanding the fact that for decades the Acts provided for employers with more than 100 employees to register in their own right as unions of employers.

An important explanation for employer reactivity would appear to be the fact that employers were able to seek redress and compensation for tribunal deliberations outside the formal industrial relations machinery. This, in part, was the result of arbitration forming a part of New Protection - the combination of tariff protection and arbitrated wages. New Protection divided employers. Manufacturers wanted protection and were prepared to accept the social regime attached to it. Other employers opposed protection and arbitration. The division of employers into opposing camps made it difficult for them to formulate a common strategy, particularly when those opposing arbitration were also seen to be free-traders. Over time, the development of 'protection all-round' - a system in which non-manufacturing employers or enterprises were given concessions, bonuses, incentives, bounties and subsidies - widened the orbit of those with a vested interest in the maintainence of a high degree of regulation of the labour and product markets. For example, concern for the effects of protection on the cost of farm machinery and the its potential effects on the export of rural products was a factor giving rise to the formation of the Country Party in 1921. Over time, various forms of subsidies and concessions, and in particular the centralised marketing of farm products, led to farmers being as dependent upon the State as manufacturers and unions. 'Regulated protection' was afforded a number of other industries such as banking, insurance and civil aviation.

These protectionist developments reduced employers' need for an efficient award system; provided a soft, cost-plus bargaining environment; and reduced management's overall concern with labour efficiency and productivity.

The permissive environment of New Protection is now a thing of the past. Australian industry is confronted by a new order, one in which international competitiveness is an important ingredient to survival.

The major changes which have taken place in industrial relations and wage determination in recent years can be attributed, in large measure, to changes on the tariff front. Wage principles, developed in the past on the basis of protected industry, have had to take account of the new economic order. Changed conditions have reduced both union bargaining power and membership. Changed conditions have also forced companies to remove

labour market and technological inefficiencies or go out of existence. The Commission has attempted to use the National Wage system to modernise awards, remove workplace inefficiencies, to decentralise wage determination and to induce enterprise bargaining. Contemporary employer associations are caught up with this process of change and have another opportunity to shape bargaining structures.

5. Conclusion

This paper contends that unions, supported by industrial tribunals, have taken the initiative in establishing multi-employer awards. The formal operation of the Australian system of industrial regulation does not have to work this way. In practice it has. Two consequences were highlighted. The first is that award coverage is still very extensive, although a decline has taken place in recent years. Second, the principles that shape multi-employer award respondency have been directed primarily towards regulating union jurisdiction, or resolving disputes over it. The consequences for award structure have been largely unintentional. Award coverage can be settled under either an industry principle or an occupational principle. The first is geared more towards the need of industry product markets; the second to labour allocation and industrial peace. Neither principle has gained formal recognition or been conceded importance relative to the precedence accorded to securing union jurisdictional coverage.

Reference was made in Section 4 to the peculiarities in Australia's 'historic compromise' approximated by State fiat rather than employer strategy, and which allowed unions to exercise more influence (than in most other countries) in shaping multi-employer award coverage. In other countries when voluntary multi-employer bargaining evolved, the *normal* structure of such agreements was that they bound the members of a single employer association and the union (or unions) it faced in a reasonably defined 'industry'. In Australia, award respondency more often follows the obverse pattern. A single union (usually occupational) faces several employer associations spread across a number of industries. The consequences for industry bargaining are that each discrete industry (however defined) is lumped with several other industries into a number of occupational awards. 'Industry' interests may well get lost in such a structure.

The consequences of employers' historic abdication may be seen in the present structure of multi-employer bargaining. Australia's large multi-employer awards are not based on industries. In most instances they are highly fragmented across many industry groups and sub-groups. Significantly,

industrial diversity *within* awards has been matched by low representational concentration. Most large awards have several employer association respondents. Neither is there an award structure which corresponds closely to occupations. Most occupations are divided between a large number of awards - federal/state, public/private, and multi-employer/single-employer.

Lacking strong guiding principles, Australian multi-employer awards have evolved in a form which matches no clear principles. Their growth has been disorganised and ad hoc to a large degree. Insofar as a pattern can be found, it is that occupational unions have taken the first move in building occupational awards, and that employers have then exercised the second option of sub-dividing into industry (or company) sub-units *within* major occupations. The results may be sub-optimal. The hybrid system maintains the disadvantage s of either industry or occupation awards, but does not result in the advantages of either type of award. We would appear to have the 'worst of both worlds'.

A major challenge of industrial relations will be to make multi-employer awards more relevant to industry needs and more sensitive to the global context within which Australian industry must operate. The Commission's study of award structures is but a first step in facing that challenge.

Notes

1. These arguments are developed more fully in Plowman 1988 and 1992.

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