ISSUE ANALYSIS

THE CENTRE FOR INDEPENDENT STUDIES

No. 41 10 November 2003

Poor Laws (3)

How to Reform the Award System and Create More Jobs

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EXECUTIVE SUMMARY

Despite the hype about enterprise bargaining and the individualisation of employment arrangements since the early 1990s, the award system continues to play a significant role in Australia's industrial relations. This is because awards serve as the basis for many non-award agreements.

An award—a legally enforceable document that sets out the minimum rates of pay and conditions of employment—typically applies to employees across an industry or an occupation. This one-size-fits-all approach does not take into account the particular circumstances of particular enterprises. For example, hospitality businesses in Sydney and Hobart, if covered by the same award, are obliged to pay their workers similiar wages, regardless of the varying costs of running a business in those cities. Such an anomaly may be contributing to Tasmania's relatively high jobless rate.

Some critics argue that the cumbersome and centralised award system should be replaced by a system that relies on the common law, but there is only limited support among employers for such a measure. Employers in certain industries, such as agriculture, generally see the award system as detrimental. Yet many others do not have a burning desire to abolish it.

They are concerned that upon the removal of the award system, polititicians and unions would soon begin to fill the legal vacuum with new legislation, and things would change for the worse.

This is not to say that the award system should be left as it stands now. Surveys and interviews with employers reveal an enduring dissatisfaction with the current system. Four reforms are proposed:

(i) reintroduce differential rates of pay for regional businesses;
(ii) make it easier for employers in extreme hardship to access exemption from certain award provisions;
(iii) ban pattern bargaining explicitly; and
(iv) provide employers with an option to opt out of the award system.

These reforms would aim to create a more decentralised, flexible system where working conditions and wages would better suit the nature and location of individual enterprises. Productivity and job creation would be boosted as a consequence.

Kayoko Tsumori is a policy analyst at The Centre for Independent Studies. This paper is the third in the *Poor Laws* Issue Analysis series. The author is grateful to a number of anonymous employer associations for instructive discussions on the award system, which constitute an important part of this paper. The author also wishes to thank Des Moore, Mark Wooden, Suri Ratnapala, Greg Lindsay, Andrew Norton, Peter Saunders and Carolynn Chen for their helpful comments and suggestions. The usual disclaimers apply.

ISSN: 1440 6306
www.cis.org.au

Introduction: Is the award system just another poor law?

The award 'system' has been a cornerstone of Australia's industrial relations for almost a century. The award—a legally enforceable document that sets out the minimum rates of pay and conditions of employment—is usually made by a process that begins with a union serving a log of claims on an employer or a group of employers. These claims are by design extravagant—for example, a 100% pay rise—so that they will be rejected by employers. Thereby arises a 'paper dispute', in which a relevant industrial tribunal is called to conciliate and arbitrate. Conciliation and arbitration are compulsory. Once made, an award is legally binding and remains so usually for three years.[1]

A typical award applies to employees across an industry or an occupation. This one-size-fits-all approach does not take into account the particular circumstances of particular enterprises. This, critics say, may hinder productivity, for rates of pay set by an award may not reflect the performance of enterprises concerned.[2] Workers have little incentive to abandon inefficient work practices, resulting in low productivity. The upshot of low productivity may be job losses. There is another reason why an award may frustrate optimal operations of enterprises. The process of award making, which is set off by creation of a dispute, is adversarial by nature and encourages confrontation rather than cooperation between employers and employees. Again, productivity tends to suffer.

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Industry or occupational awards, by having little or no regard to individual enterprises' capacity to pay, can also lead to unemployment. Some of the enterprises that come under a given award may well have the capacity to provide wages and conditions as prescribed by that award. But others may simply not be able to afford the consequent labour costs. They may have no choice but to let some employees go or even to close down their businesses. The award system then, in theory, would increase unemployment.

It is difficult to find strong evidence that would allow an effective evaluation of these theoretical claims. Since the Australian Industrial Relations Commission (AIRC) approved enterprise bargaining in October 1991,[3] the locus of industrial relations has, to a remarkable extent, shifted from industries to enterprises. The role of the award system has declined accordingly. Productivity has shot up, and unemployment as of August this year is at its lowest since January 1990. It has yet to be established, however, that the rise in productivity or the fall in unemployment has been caused by the decline of the award system.[4]

The previous two papers in The Centre for Independent Studies' *Poor Laws* series have argued that unfair dismissal laws and minimum wages, while intended to protect workers, achieve quite the opposite by contributing to unemployment.[5] This paper, the third of the series, explores the question of whether the award system is indeed another example of such poor laws. It suggests that, while the case for abolishing awards is not compelling, there is an acute need for fundamental reform. In particular, four measures are proposed:

(i) reintroduce differential rates of pay for regional businesses;
(ii) make it easier for employers in extreme hardship to access exemption from certain award provisions;
(iii) ban so-called 'pattern bargaining' explicitly; and
(iv) provide employers with an option to opt out of the award system.

The award system today

The award system arose out of a belief that workers were at an inherent disadvantage *vis-à-vis* employers. Pre-federation Australia in the final decade of the 19th century was beset by widespread industrial unrest. Industrial tribunals were therefore established at both federal and state levels, with powers to arbitrate between employers and workers. The making and variation of awards in prevention and settlement of industrial disputes was, and still remains, central to their function. At that time, the new system was seen as 'ethical progress', for it would correct the inequality of bargaining power that undoubtedly existed between employers and employees, with the government effectively protecting the latter.[6] Award coverage gradually grew and stood at 87% of the total workforce in 1974.[7]

As noted earlier, enterprise bargaining has now replaced award making as the predominant method of setting pay. Nonetheless, one in five employees still depends entirely on awards, that is, receive wages exactly as prescribed by relevant awards (see Table 1). The incidence of

Table 1. Methods of setting pay, 2002 (%)

Occupation[a]	*Skill Level*[a]	*Awards only*[b]	*Collective agreements*[c]	*Individual agreements*[d]	*Total**
Managers and administrators	1	0.4	20.5	79.1	100.0
Professionals	1	7.4	55.7	36.9	100.0
Associate professionals	2	6.1	37.7	56.2	100.0
Tradespersons and related workers	3	25.7	27.9	46.4	100.0
Advanced clerical and service workers	3	12.1	24.4	63.4	99.9
Intermediate clerical, sales and service workers	4	25.2	35.1	39.7	100.0
Intermediate production and transport workers	4	17.7	46.1	36.2	100.0
Elementary clerical, sales and service workers	5	41.5	35.2	23.3	100.0
Labourers and related workers	5	34.4	38.1	27.5	100.0
All occupations		*20.5*	*38.2*	*41.3*	*100.0*

*May not be 100.0 due to rounding.
Notes: (a) Occupations and skills are classified according to the Australian Bureau of Statistics (ABS), *Australian Standard Classification of Occupations*, 2nd edition, ABS Cat. No. 1220.0 (Canberra: ABS, 1997); (b) Employees who had their wages or salaries set primarily by awards and were not paid more than the award rates of pay; (c) Employees who had their wages or salaries set primarily by registered or unregistered collective agreements or enterprise awards; (d) Employees who had their wages or salaries set primarily by registered or unregistered individual agreements.
Source: ABS, *Employee Earnings and Hours*, ABS Cat. No. 6306.0 (Canberra: ABS, 2002), Table 25.

award-only coverage is particularly high among the lowest-skilled workers: approximately 42% of 'Elementary clerical, sales and service workers' and 34% of 'Labourers and related workers' have their pay determined by awards.

Yet these statistics underestimate the continuing importance of the award system. There are five ways in which workers classified under 'collective agreements' or 'individual agreements' in Table 1 have their pay and conditions influenced by awards:

(i) Awards serve as the basis for the majority of enterprise agreements

Enterprise bargaining, after being endorsed by the AIRC, was given a greater role under the Industrial Relations Reform Act 1993 (1993 Act). The Workplace Relations Act 1996 (1996 Act), which amends the 1993 Act, is intended to further facilitate enterprise bargaining. For example, it limits the scope of an award to '20 Allowable Matters' and encourages employers and employees to include other matters in enterprise agreements.[8] Trade unions negotiate enterprise agreements on behalf of employees at relevant enterprises. Under the 1996 Act, groups of employees are also allowed to undertake enterprise bargaining without union representation. An enterprise agreement, once drawn up, is brought before a relevant industrial tribunal for a 'no-disadvantage test'. This aims to ensure that pay and conditions established through enterprise bargaining, taken as a whole, are not inferior to those set out in an award that would otherwise be applicable. Enterprise agreements that fail the no-disadvantage test are neither certified by nor enforceable in industrial tribunals. Put another way, the contents of certified enterprise agreements are to a significant extent dictated by those of corresponding awards.[9]

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(ii) 'Comprehensive agreements' remain very rare

It is possible, technically speaking, for a certified enterprise agreement to set all the terms and conditions of employment and thereby to override any relevant awards. But such 'comprehensive agreements' are the exception rather than the rule. Most certified agreements—96.8% according to a 2001 estimate—still operate in conjunction with awards.[10] For example, a worker may have his or her pay set by an enterprise agreement and working conditions by awards.

(iii) Increases in award rates flow on to employees whose wages are supposedly set by enterprise agreements

On 30 September 2002, there were 14,450 federal enterprise agreements that contained provisions concerning wages.[11] Among the 1,537,000 employees who were covered by such agreements, 21,200 (1.4%) would be granted automatic pay increases in line with safety net

adjustments, that is, annual award wage reviews conducted by the AIRC; 97,700 (6.4%) would receive increases where consistent with principles behind safety net adjustments; 57,700 (3.7%) would receive increases depending on levels of safety net adjustments; and another 302,100 (19.6%) were covered by agreements that left open the possibility of pay increases based on safety net adjustments.

(iv) 'Pattern bargaining' is common

Pattern bargaining generally refers to a process of enterprise bargaining whereby trade unions seek uniform pay and conditions for employees across an industry. It is particularly widespread in the building and construction industry, where 61% of whose workers were covered by pattern agreements in 2000 to 2001.[12] Because pattern bargaining is essentially award making in disguise, it is likely to deliver very few, if any, of the potential productivity or employment gains associated with enterprise bargaining.

(v) Award-only workers who receive 'over-award payments' are classified as being on individual agreements

The 'individual agreements' category in Table 1 is not entirely what it seems to be. It includes not only workers who genuinely have individual agreements—for instance, workers whose pay and conditions are set at common law or by certified individual agreements[13]—but also workers who are covered by awards but receive wages that exceed the rates prescribed by those awards (over-award payments).

Despite all the hype about the prevalence of enterprise bargaining or the individualisation of employment arrangements, the award system continues to play a significant role in Australia's industrial relations. Hence, reforming and improving the current system should be a lasting priority. This paper, accordingly, uses the term the award system to include enterprise and individual agreements insofar as their contents are affected by those of awards.

Theoretically speaking...

Cross-country studies have sharply disagreed on what effect centralised bargaining might have on economic performance or even on whether there is any link at all between the two.[14] Two recent studies, however, have put forward a somewhat compelling, though largely theoretical, case against centralised bargaining.[15] In a nutshell, they both argue that today's industrial economies, which have been vastly transformed over time, are incompatible with centralised bargaining. Compared to the past, tasks performed by individual workers are far more diverse, and the labour force as a consequence is far more heterogeneous. The 'equal wage for equal work' principle of centralised bargaining, applied under these circumstances, will result in misallocation of resources and will lower productivity. This, according to the authors of these studies, is why there has been increasing resistance to centralised bargaining in many industrial countries as well as why they need to move further away from their heavily regulated labour market regimes.[16]

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Wage setting in today's Australia remains essentially centralised. Certainly, it is possible by law to adjust award wages upwards (but not downwards), and individual enterprises are allowed to make over-award payments to their employees. Nonetheless, the levels of these payments would still be influenced by base award rates that are centrally determined. Industrial tribunals are, in making their decisions, not primarily concerned with the circumstances of individual enterprises. They are instead guided by 'comparative wage justice'—a notion that employees performing similar work, irrespective of the enterprise to which they belong, should receive similar pay. Take federal award wages, which are annually adjusted in the AIRC's safety net review. Typically, all award minimum wages are increased by the same amount. In the May 2002 decision, for example, federal award workers were granted an $18 per week across-the-board pay rise.[17] There is therefore a broad tendency for wage rigidity—or more precisely, wage relativity between industries and occupations—to persist over time. One study shows that market forces—such as price levels, national productivity and unemployment rates that would determine wage levels in a competitive economy—had little bearing on award wage levels at least before 1997.[18] This is despite the fact that the AIRC is given a mandate to refer to general economic conditions in performing their tasks (1996 Act, s 90).

The organisation of work within an enterprise or a workplace steadily evolves in a rapidly changing economy like today's. As Assar Lindbeck and Dennis Snower argue with regard to centralised bargaining in general, a group of workers who are pigeon-holed by an award as falling under the same occupational category may differ in attributes such as judgement, initiative, creativity and competence.[19] Employers should be able to give such workers different tasks and pay them accordingly. The same applies to low-skilled workers, a large proportion of whom rely entirely on awards. The outcome of award wage determination, which might well have been appropriate in the past, no longer suits contemporary enterprises or workplaces.

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Is there empirical evidence?

If, as theory predicts, the award system is a major impediment to productivity growth and employment growth, the rise of enterprise bargaining after the early 1990s should have boosted productivity and employment. There are some signs that this has happened. Australia's productivity performance during the growth cycle from 1993-94 through to 1998-99—that is, after the role of enterprise bargaining was enhanced—was better than that during any of the preceding growth cycles.[20] Survey findings show that firms that opted for enterprise agreements generally had higher productivity than firms that remained on awards.[21] The unemployment rate, which had reached 10% in 1993, steadily dropped after that.

These statistics, however, only point to correlation, not causation. The increase in productivity and the decrease in unemployment might have merely coincided with the spread of enterprise bargaining. Likewise, it is entirely possible that productivity had been higher to begin with at firms that opted for enterprise agreements, for there are a number of factors besides enterprise bargaining that can drive productivity and employment growth. Perhaps the most important is technological advance and innovation, which unfolded rapidly in Australia in the 1990s.[22]

Interestingly, employers themselves appear ambivalent about enterprise bargaining. The two major industrial relations surveys conducted in the 1990s—the 1995 Australian Workplace Industrial Relations Survey, and the 1998 National Institute of Labour Studies Workplace Management Survey—both show that the most common reason why employers adopted enterprise bargaining was to obtain better productivity outcomes.[23] There is, however, little evidence that such expectations were met by the end of the 1990s. In the 1999 Workplace Agreements Survey of New South Wales employers, 59% of the employers who had embraced (any) non-award agreements claimed that there had been no effect on labour productivity at their firms, and 62% indicated that profitability had neither improved nor deteriorated.[24] Furthermore, there were large numbers of employers who had no non-award agreements. Of these employers, a significant proportion said this was because they were comfortable with existing awards (55%) and/or because they saw no perceivable advantage in adopting non-award agreements (49%, multiple responses allowed).[25]

How do employers perceive the award system?

The evidence that the reform undertaken so far has benefited enterprises is at best weak. There are even some employers who believe that switching over to non-award agreements is not worth the hassle. So do employers see any advantage in further dismantling the award system? To answer this question, The Centre for Independent Studies carried out interviews with several employer associations across Australia while surveying employers' opinions expressed in the media.

Many employers do see the award system as detrimental to their businesses. But the degree to which they do so differs from one employer to another, depending on the industry to which they belong. Typically, those in agriculture are very critical of awards. The National Farmers' Federation (NFF) has described the award system as 'ancient',[26] and has often expressed strong opposition to the annual safety net decision. For example, the May 2003 safety net decision, whereby minimum award wages were raised by up to $17 a week, was in the NFF's view 'disappointing when drought had cut 80,000 rural jobs and halved farm incomes' and 'unfair on unemployed rural workers who would be "priced out of jobs"'.[27] According to another agricultural employer association, awards are causing farming employers many problems, and they want the award system scrapped.[28]

The strong opposition among farmers to the award system is understandable. Agriculture is particularly susceptible to seasonal fluctuations and weather conditions. Farm incomes are anything but stable or predictable. The award system, which centrally imposes uniform wages and conditions without much regard to local conditions, is impractical for farmers. Industrial tribunals may, in the case of extreme hardship, exempt employers from certain award provisions, but this is very rare.[29] Given such rigidity, the NFF believes that individual employers and employees at workplace levels should make agreements, instead of relying on awards or even enterprise agreements.[30]

An employer association in the building and construction industry similarly believes that there are many problems with awards.[31] The National Building and Construction Industry Award 2000,[32] the principal award applying to this industry, is 'highly prescriptive'.[33] It specifies, apart from regular wages, 21 allowances and 41 special rates of pay, which are exceedingly difficult for employers to calculate and keep track of. The Final Report of the Royal Commission into the Building and Construction Industry (the Cole Royal Commission), presented in February 2003, points to this issue and recommends that awards be made less complex.[34] In Commissioner T. H. R. Cole's view, few employees are likely to have a full understanding of their rights, while it is a 'major exercise' for employers to try to ensure that their employees receive precisely what they are entitled to.[35] Allegations of under or non-payment of entitlements are a frequent cause of industrial action in the building and construction industry, adversely affecting productivity.[36]

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Other industries where the award system clearly has negative effects include the hospitality and retail industries. Awards covering hospitality workers usually set penalty rates for work performed outside ordinary hours, that is, on weekends and public holidays. The Hospitality Industry—Accommodation, Hotels, Resorts and Gaming Award 1995,[37] for instance, prescribes double time and a half. The Australian Hotels Association (AHA) considered this practice 'outdated' and, using the Tasmanian hotel industry as an example, said:

> The award system is nearly 100 years old, [and] it was designed for traditional industries where public holiday work was really the exception rather than the rule but our industry is really a 365 day a year industry and public holidays are really a standard working day for those in our industry because we cater to the leisure needs of others.[38]

The only way for hotels to cover the high labour costs, according to the AHA, was to raise prices, although most of them were reluctant.[39]

An additional problem in this case may be that the aforementioned award applies not only to Tasmania but also to three other states (New South Wales, Victoria and part of Queensland). The cost of living, especially housing, differs from state to state. The median house price in the March 2003 quarter was $165,000 in Hobart and nearly three times higher in Sydney at $460,000.[40] To rent a two-bedroom flat privately in the same period, Hobart residents would have paid on average $145 per week, and Sydney residents, $270 per week, almost twice as much.[41] Yet hospitality workers in these cities receive similar wages as long as they belong to the same occupational category. The cost of living also differs between regions within a state. But award workers in city centres would be paid just as much as their country counterparts who fall under the same occupational category. It is questionable whether this is indeed fair for workers in relatively more expensive cities or regions. Neither would it be fair for regional employers who, while probably profiting from lower property prices, might face high costs because locally unavailable goods have to be transported from other areas.

Employers in the Victorian retail industry have also faced challenges created by awards.[42] Earlier this year, the 17,000 retailers not covered by an award were roped into the federal Shop Distributive and Allied Employees Association—Victorian Shops Roping-In (No. 1) Award 2003. They are now obliged to pay their employees penalty rates for work performed on weekends and after hours. This represents huge additional labour costs, and many retailers, particularly those small to medium-sized, may not be able to afford them. An association for retail employers noted that the roping-in 'would have quite negative consequences on employment' due to employers who would have to let some workers go or would even be forced out of business.[43] Soon, Victorian employers other than those in the retail industry may be subjected to the same fate, as the Victorian Parliament has recently passed the Federal Awards

(Uniform System) Act 2003. This means that all Victorian employers, including those who are currently not covered by awards, will be roped into federal awards.

Small business owners in Western Australia had a similar problem when the Gallop government in 2002 abolished state workplace agreements and reinforced the role of awards.[44] The operator of a small patisserie, for example, had no choice but to compensate for heavy award penalty rates by a 15% price increase. A letter posted in his shop window read:

> The award system does not provide the seven-day business with the same flexibility that we had with the workplace agreement, where every employee, customer and employer could profit from the advantage. [The price] increase is beyond our control and we apologise for any inconvenience this could cause.[45]

He noted as well that his staff had been satisfied with their previous pay and conditions.[46]

So businesses of certain size and in certain industries find awards contrary to their interests. Other employers are generally sympathetic to such sentiments. But, at the same time, there is no apparent desire to abolish the award system completely.

Broadly speaking, there are two explanations for this. One is that the outcomes of enterprise bargaining in some instances may not greatly differ from those that would have been brought about by award making. This is surely the case with pattern bargaining. As one employers association pointed out, it is mistaken to assume that, 'in the absence of awards, [employers will] automatically have a better environment'.[47] To a lesser degree, this is most likely true for any other certified agreements.

The other reason why employers are not always strongly opposed to the award system is that the labour market can be regulated not only through awards but also through statutes. If the award system, including industrial tribunals, were abolished, politicians—of all persuasions—as well as unions and other interest groups would soon begin to fill the legal vacuum with new legislation. Things might well change for the worse upon removal of the award system. Even with awards, there is already a myriad of legislation. The New South Wales jurisdiction alone has 49 separate pieces of legislation that govern workplace relations, and statutes regarding occupational health and safety and workers' compensation represent an enormous burden for many employers. An association for retail employers also indicated that small to medium-sized retailers were simply unable to catch up with frequent legislative changes.[48] The award system at least has the advantage of being 'known and understood' among employers, as one employer association put it.[49]

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Return to common-law contracts?

Des Moore, a leading critic of labour market regulation, argues that existing employment law, which centres around conciliation and arbitration by industrial tribunals, not only damages the economy but is also superfluous.[50] In his view, it should be replaced by a system that relies on the common law.[51]

Under the common law, freedom of contract is guaranteed. There are six prerequisites which a contract must satisfy in order to become enforceable at common law. Perhaps the most important is the requirement that parties to a contract genuinely consent to its contents. Contracts are void if entered into by mistake, by misrepresentation, under duress, under undue influence and/or in an unconscionable manner. The other five prerequisites are:[52]

- the parties must have a mutual intention to create a legally enforceable bargain;
- the contract must be made by way of an offer which is made by one party and accepted by the other;
- the contract must be supported by some valuable consideration (that is, it must include a promised wage on which a claim can be enforced);
- the parties must be legally capable of making a contract;
- the contract must not have an illegal purpose.

As Moore puts it, the common law 'offers a coherent and viable alternative legal framework within which employment relationships can satisfactorily be established'.[53]

Admittedly, the common law is not perfect. There are a few situations that may fall outside common-law jurisdiction. Among other things, the common law only provides adequate

remedies for a contract *at the time it is entered into*. If that contract subsequently turns out to be unfair or unconscionable, it may not be reviewed or varied at common law. This shortcoming would need to be rectified, for example, with a minimum level of legislation. Such a statute already exists in federal and New South Wales jurisdictions. The federal 1996 Act (ss 127A-127C) allows the Federal Court of Australia to review contracts entered into by independent contractors, and the NSW Industrial Relations Act 1996 (s 106) grants the NSW Industrial Relations Commissions the power to void or vary work contracts that it finds unfair either at the time or after it is entered into.[54]

Moore also points to two problems that might arise under the common-law contractual regime.[55] One is increased judicial activism in the common-law courts. At present, judgements made by industrial tribunals are often seen to be biased against employers,[56] and this might simply be repeated under the common law. Moore therefore proposes to codify that part of the common law which applies to employment relations and thus to avoid affording undue discretion to the courts.[57] The other possible problem with the common-law alternative has to do with the cost. Settling industrial disputes at common law is usually more expensive than doing so in industrial tribunals. Those on low incomes would particularly be disadvantaged. To address such a concern, Moore proposes that the AIRC be replaced by a voluntary (as opposed to compulsory) body that would provide advisory and mediation services to low-income workers 'either on a subsidised basis or free of charge'.[58]

With regional differentials, labour costs in country Australia would be reduced to appropriate levels. More jobs would be created as a result.

Such an entirely common-law based system appears, on the face of it, simple and attractive. It might be of little help to employers, however, if awards were removed only to be replaced by a series of new legislation to fill the consequent legal vacuum. The end result would almost no doubt be a legal maze that is more cumbersome and onerous than the award system.

A proposal for reform

This is not to say that the award system should be left as it stands now. Employers in certain industries do see problems with awards, and there are four small steps that can be taken to make big differences:

(i) Reintroduce regional differentials

Some awards used to specify separate rates of pay for regional employees. But these now appear to have gone largely out of use. For example, a December 1989 decision by the AIRC documents a case where regional differentials for the country printing industry were removed as part of 'award restructuring'.[59] These should be reintroduced. As noted earlier, it is unfair as well as absurd that workers are paid the same amount no matter where they live. With regional differentials, labour costs in country Australia would be reduced to levels more appropriate to local conditions. Employers would have a greater incentive to open new businesses in, or relocate their existing businesses to, the country. More jobs would be created as a result.

(ii) Make it easier to access exemption from certain award provisions

Some businesses, in particular small and medium-sized ones, may find it especially difficult to comply with awards in times of hardship. For such employers, it should be made easier than at present to obtain exemption from award provisions which are deemed particularly onerous. For example, the NFF in October 2003 made an application to the AIRC, so that farmers faced with the prolonged drought would have readier access to wage relief.[60] If this is approved, a more unfortunate consequence for agricultural industry workers—further job losses—might be minimised. This measure would also be helpful in areas with high unemployment.

(iii) Outlaw pattern bargaining

This proposition is made with regard to the building and construction industry in the Final Report of the Cole Royal Commission cited earlier.[61] A pattern agreement is a quasi-award and is thus likely to deliver few of the positive outcomes that may well stem from an enterprise agreement. In the case of the building and construction industry, pattern bargaining takes place between union officials and delegates from major contractors and employer associations. Yet the employers who are represented there, Commissioner Coles points out, 'employ relatively few workers', and small subcontractors who employ the most workers in the industry are not

involved.[62] The federal 1996 Act, while encouraging enterprise bargaining, nevertheless contains no clause that explicitly precludes pattern bargaining. For this reason, the Cole Royal Commission proposes that such a clause be included in a separate act designed exclusively for the building and construction industry.[63] This should instead be done in the 1996 Act, so that employers who belong to other industries will also be covered.

(iv) Provide an option to opt out of the award system

Theoretically speaking, employers can offer their employees whatever employment arrangement they want. This includes enterprise or individual agreements uncertified by industrial tribunals, which have the potential to be more flexible. That being the case, why do many employers still choose certified agreements? The answer is enforceability, according to 70% of the managers responding to the 1998 National Institute of Labour Studies Workplace Management Survey.[64] If conditions provided in a certified agreement are breached, remedies can be sought through industrial tribunals. Uncertified agreements, by contrast, can only be enforced at common law. This, as noted earlier, can be more cumbersome and more expensive than going to industrial tribunals. Moreover, while uncertified agreements are not subject to formal no-disadvantage tests, pay and conditions provided by them nevertheless may be at least equal to those of awards or certified agreements that would otherwise be applicable.

There is an argument that employers should have the freedom to do business without undue constraint, as long as their conduct is not in breach of other laws, contrary to public policy, and so forth. If this argument is accepted, then there may be a case for allowing employers to set, in uncertified enterprise or workplace agreements, pay and conditions that reflect their circumstances. Employers, given the discretion to manage their allocation of staff and resources effectively, may be able to hire extra staff and so create more job opportunities. This would give rise to a dual system, which would involve, on the one hand, employment relations operating within the boundaries of the award system, and, on the other, employment relations enforced solely through the common law.

Employers should have the freedom to do business without undue constraint.

Such a dual system would only be feasible if two problems were solved. First, it would probably be necessary to set minimum rates of pay and conditions by statute. This is what happened in Western Australia, where, between 1993 and 2002, employers and employees were allowed to enter into workplace agreements that would override awards or other agreements,[65] as long as minimum requirements specified in the Minimum Conditions of Employment Act 1993 were met. The second problem is that employers opting for the common-law arrangements could face high litigation costs. There are a number of possible solutions to this. One is to make common-law employment contracts enforceable in industrial tribunals. Another is, as Des Moore suggests, to set up a voluntary body that would advise on and mediate in industrial matters at a low cost.[66] Yet another is to introduce user-pay fees into the conciliation and arbitration system, so that those opting in to it and those opting for the common-law system would both bear the true cost of the services that they receive. This would reduce the disadvantage of uncertified agreements compared to certified agreements.

A dual industrial relations system is worth considering. Moore's proposal outlined earlier, as well as the Western Australian experience, indicate that it is a practical possibility. If, under the dual system, the majority of employers opt out of the award system, Australia's industrial relations landscape could be entirely transformed. But if the award system is truly as useful as its staunch supporters say it is, it will survive without the backing of the government.

Endnotes

1 Parties unsatisfied with the outcome of arbitration may lodge an appeal to the Full Bench of the industrial tribunal.

2 For example, see Mark Wooden, *Industrial Relations Reform and the Consequence for Working Time, Job Security, Productivity and Jobs*, a paper presented at the Towards Opportunity and Prosperity conference (Melbourne: Melbourne Institute of Applied Economic and Social Research, University of Melbourne, 4-5 April 2002), 2-3.

3 Australian Industrial Relations Commission (AIRC), Print K0300.

4 For example, see Joanne Loundes, Ye-Ping Tseng and Mark Wooden, 'Enterprise Bargaining and Productivity in Australia: What Do We Know?' *The Economic Record* 79: 245 (June 2003), 245-58.

5 Kayoko Tsumori, *Poor Laws (1): The Unfair Dismissal Laws and Long-term Unemployment*, Issue

Analysis No. 26 (Sydney: The Centre for Independent Studies, 2002); Kayoko Tsumori, *Poor Laws (2): The Minimum Wage and Unemployment*, Issue Analysis No. 28 (Sydney: The Centre for Independent Studies, 2002).

6 Marian Sawer, *The Ethical State?: Social Liberalism in Australia* (Melbourne: Melbourne University Press, 2003), 55, 63.

7 Derived from D. Plowman, S. Deery and C. Fisher, *Australian Industrial Relations* (Sydney: McGraw-Hill, 1980), Table 5.1.

8 'Twenty Allowable Matters' are: (a) classifications of employees and skill-based career paths; (b) ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations of working hours; (c) rates of pay generally such as hourly rates and annual salaries, rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system; (d) piece rates, tallies and bonuses; (e) annual leave and leave loadings; (f) long service leave; (g) personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave; (h) parental leave, including maternity and adoption leave; (i) public holidays; (j) allowances; (k) loadings for working overtime or for casual or shift work; (l) penalty rates; (m) redundancy pay; (n) notice of termination; (o) stand-down provisions; (p) dispute settling procedures; (q) jury service; (r) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; (s) superannuation; (t) pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's businesses or commercial premises.

9 The other type of certified non-award agreement that was made possible by the 1996 Act is the Australian Workplace Agreement (AWA). The AWA is struck between an employer and an individual employee, although employees have an option to engage in bargaining jointly. A no-disadvantage test similar to that for enterprise agreements applies. AWAs that fail to satisfy the no-disadvantage test are not enforceable in the AIRC. The primary responsibility to administer the no-disadvantage test for AWAs lies with the Office of Employment Advocate (OEA), a statutory body established under the 1996 Act. The AIRC is nevertheless involved where the OEA is unable to reach a decision whether to certify an agreement. AWAs presumably allow more flexibility compared with awards or certified enterprise agreements. But the no-disadvantage test means that the award system still exerts influence on the contents of AWAs. In any event, the incidence of AWAs remains very low. Although it increased at an average annual rate of 21% between 1999 and 2001, only 1.7% of salary and wage earners are estimated to have been covered by AWAs in 2001. See Department of Employment and Workplace Relations (DEWR) and the Office of the Employment Advocate (OEA), *Agreement Making in Australia under the Workplace Relations Act: 2000 and 2001* (Canberra: Commonwealth of Australia, 2002), 149-50.

10 DEWR and OEA, *Agreement Making in Australia*, Figure 2.7.2.

11 DEWR, *Safety Net Review—Wages 2002-2003: Commonwealth Submission* (Canberra: Commonwealth of Australia, 26 February 2003), www.workplace.gov.au, Figure 6.1.

12 DEWR and OEA, *Agreement Making in Australia*, Figure 3.7.1.

13 See note 9.

14 For example, Lars Calmfors and John Drifill, in their seminal study ('Bargaining Structure, Corporatism and Macroeconomic Performance', *Economic Policy* (April 1988), 14-61), argue that wage bargaining undertaken at the central, or the national, level is less likely than enterprise bargaining to lead to negative consequences such as inflation and unemployment. The central bargainers are compelled to consider the wider implications of wage rises, because the outcomes of their bargaining would affect all workers, not just workers at a particular enterprise. The OECD, on the other hand, finds no statistically significant relationship between bargaining structure and economic performance—although it also stresses that its evidence is by no means conclusive. See 'Economic Performance and the Structure of Collective Bargaining', *Employment Outlook* (1997), 83.

15 Assar Lindbeck and Dennis J. Snower, 'Centralised Bargaining and Reorganised Work: Are They Compatible?' *European Economic Review* 45 (2001), 1851-75; Barry Eichengreen and Torben Iversen, 'Institutions and Economic Performance: Evidence from the Labour Market', *Oxford Review of Economic Policy* 15:4 (1999), 121-38.

16 Lindbeck and Snower, 'Centralised Bargaining', 1873; Eichengreen and Iversen, 'Institutions and Economic Performance', 137.

17 Kristine Gough, 'Lowest Paid Win Extra $18 a Week', *The Australian* (10 May 2002).

18 Alison Preston, 'Market and Spillover Forces in Wage Award Determination in Australia, 1986-1997', *Applied Economics* 32 (2000), 1963.

19 Lindbeck and Snower, 'Centralised Bargaining', 1854,1869.

20 The rates of annual average productivity growth for growth cycles since the mid-1960s are as follows:

Growth cycle	Labour productivity	Capital productivity	Multifactor productivity
1964-65 to 1968-69	2.5	-0.8	1.2
1968-69 to 1973-74	2.9	-0.7	1.5
1973-74 to 1981-82	2.4	-1.5	1.0
1981-82 to 1984-85	2.2	-1.8	0.8
1984-85 to 1988-89	0.8	-0.2	0.4
1988-89 to 1993-94	2.0	-1.3	0.7
1993-94 to 1998-99	3.2	-0.1	1.8
1964-65 to 1998-99	2.4	-0.9	1.1

Source: ABS, *Australian System of National Accounts*, 2000-01, Cat. No. 5204.0, Table 22.

21 Yi-Ping Tseng and Mark Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey*, Working Paper No. 8/01 (Melbourne: Melbourne Institute of Applied Economic and Social Research, University of Melbourne, July 2001); Tim R. L. Fry, Kelly Jarvis and Joanne Loundes, *Are Pro-reformers Better Performers?* Working Paper No. 18/02 (Melbourne: Melbourne Institute of Applied Economic and Social Research, University of Melbourne, September 2002).

22 Wooden, *Industrial Relations Reform*, 5.

23 Mark Wooden, *The Transformation of Australian Industrial Relations* (Leichhardt: The Federation Press, 2000), 47-48.

24 Richard Hall and Kristin van Barneveld, *Working It Out? Why Employers Choose the Agreements They Do—A Survey* (Sydney: Australian Centre for Industrial Relations Research and Training, University of Sydney, October 2002), Table 17.

25 As above, Table 12.

26 'National Farmers' Federation Opposes Wage Rise', ABC Online, www.abc.net.au (19 February 2000).

27 Paul Robinson, '$17 Wage Rise Ruling Angers Farmers', *The Age* (7 May 2003).

28 Interview, 19 September 2003.

29 An employer association, interview, 29 September 2003.

30 'Workplace Agreements Should Replace Awards', News Release, The National Farmers' Federation (24 January 2002).

31 Personal communication, 13 October 2003.

32 Award ID AW790741.

33 Royal Commission into the Building and Construction Industry, *Final Report: Reform—National Issues Part 2*, Vol. 8 (Melbourne: Royal Commission into the Building and Construction Industry, 24 February 2003), 43.

34 As above, Chapter 9.

35 As above, 50.

36 As above, 50.

37 Award ID AW783479.

38 'Hospitality Award Needs Reform—AHA', *ABS News* (7 June 2003).

39 Kane Young, 'Hotels Say Public-Holiday Wages Too High', *Hobart Mercury* (7 June 2003).

40 Spatial and Distributional Analysis Section, Department of Family and Community Services, *Australian Housing Market: Statistical Update—June 2003*, www.facs.gov.au.

41 As above.

42 The legal environment surrounding Victorian employers is somewhat unique. After having abolished the state award system in 1993, Victoria in 1996 ended up referring most of its industrial relations powers to the federal government. As a result, there is now sort of a dual system. On the one hand, there are workers who are covered by federal awards or certified agreements, and on the other, there are workers whose minimum terms and conditions of employment are provided by Schedule 1A of the federal 1996 Act.

43 Interview, 2 October 2003.

44 The WA *Workplace Agreements Act* 1993 allowed employers and employees to enter into workplace-level agreements that, unlike federal workplace agreements, overrode awards. Both collective and individual workplace agreements were possible, while the latter took precedence over the former. The *Labour Relations Reform Act* 2002, however, replaced all state workplace agreements with 'employer-employee agreements' that are subject to certification by the WA industrial tribunal and are thus less flexible.

45 Ben Harvey, 'Prices Up As Shops Face New Pay Law', *The West Australian* (2 December 2002).

46 Surveys carried out by the Chamber of Commerce and Industry in Western Australia in November 2000 and January 2002 suggest that the majority of WA employees were indeed satisfied with workplace agreements. Fifty percent of survey respondents believed that their earnings were likely

to be higher under an individual workplace agreement, whereas only 13% indicated that this would be the case under an award; 52% believed that their working life was likely to be more flexible under an individual agreement, whereas only 13% indicated that this would be the case under an award; 50% wanted to be on an individual workplace agreement, whereas only 14% wanted to be on an award; and finally, a whopping 84% supported further deregulation of industrial relations. See Lyndon G. Rowe, *How is Industrial Relations Reform Progressing in Australia?*, paper presented at the Towards Opportunity and Prosperity Conference (Melbourne: The University of Melbourne, 4-5 April, 2002).

47 Interview, 29 September 2003.

48 Interview, 2 October 2003.

49 Interview, 29 September 2003.

50 Des Moore, 'An Alternative to the Australian Industrial Relations Commission', *Australian Bulletin of Labour* 26:2 (June 2000), 140-41.

51 It needs to be noted here that every existing employment arrangement is underpinned by a common-law contract, be it written or oral. Provisions in a contract cannot be less generous than those of a corresponding award.

52 James J. Macken, Paul O'Grady and Carolyn Sappideen, *The Law of Employment*, 4th Edition (North Ryde: LBC Information Services, 1997), 74-94.

53 Moore, 'An Alternative', 140.

54 Macken, O'Grady and Sappideen, *The Law of Employment*, Chapter 14.

55 Moore, 'An Alternative', 141-43.

56 For example, see Des Moore, *Judicial Intervention: The Old Province for Law and Order*, an address to The Samuel Griffith Society's 13th Conference (Melbourne, 31 August-2 September 2001), www.hrnicholls.com.au.

57 Moore, 'An Alternative', 142.

58 As above, 143.

59 AIRC, Print J0813. Award restructuring, initiated in 1988, refers to a process of revising awards by removing obsolete classifications, reducing the number of classifications, and redefining the range of tasks falling under each classification.

60 'Farmers on EC Shouldn't Pay Wage Rises—NFF', *Australian Associated Press* (21 October 2003).

61 Royal Commission into the Building and Construction Industry, *Final Report: Reform—Establishing Employment and Conditions*, Vol. 5 (Melbourne: Royal Commission into the Building and Construction Industry, 24 February 2003), 61.

62 As above, 59.

63 As above, 61. Commissioner Cole's recommendation discussed here is as follows:
An Act dealing specifically with the building and construction industry, provisionally called the Building and Construction Industry Improvement Act:
(a) prohibit 'pattern bargaining', that term being defined broadly along the lines adopted in the *Workplace Relations Amendment Bill 2000* (C'wth);
(b) provide that, on application of an interested person or the proposed Australian Building and Construction Commission, the Federal Court may grant an injunction (interim, interlocutory or permanent) restraining any person or the servants or agents of any person from engaging in pattern bargaining; and
(c) provide that it is a ground for the deregistration of any employer organisation or union registered under the *Workplace Relations Act 1996* (C'wth) that such an organisation has contravened or failed to comply with the terms of such an injunction.

64 Wooden, *The Transformation*, Figure 3.5 (multiple responses allowed).

65 See note 46.

66 Moore, 'An Alternative,' 143.

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ISSN: 1440 6306
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