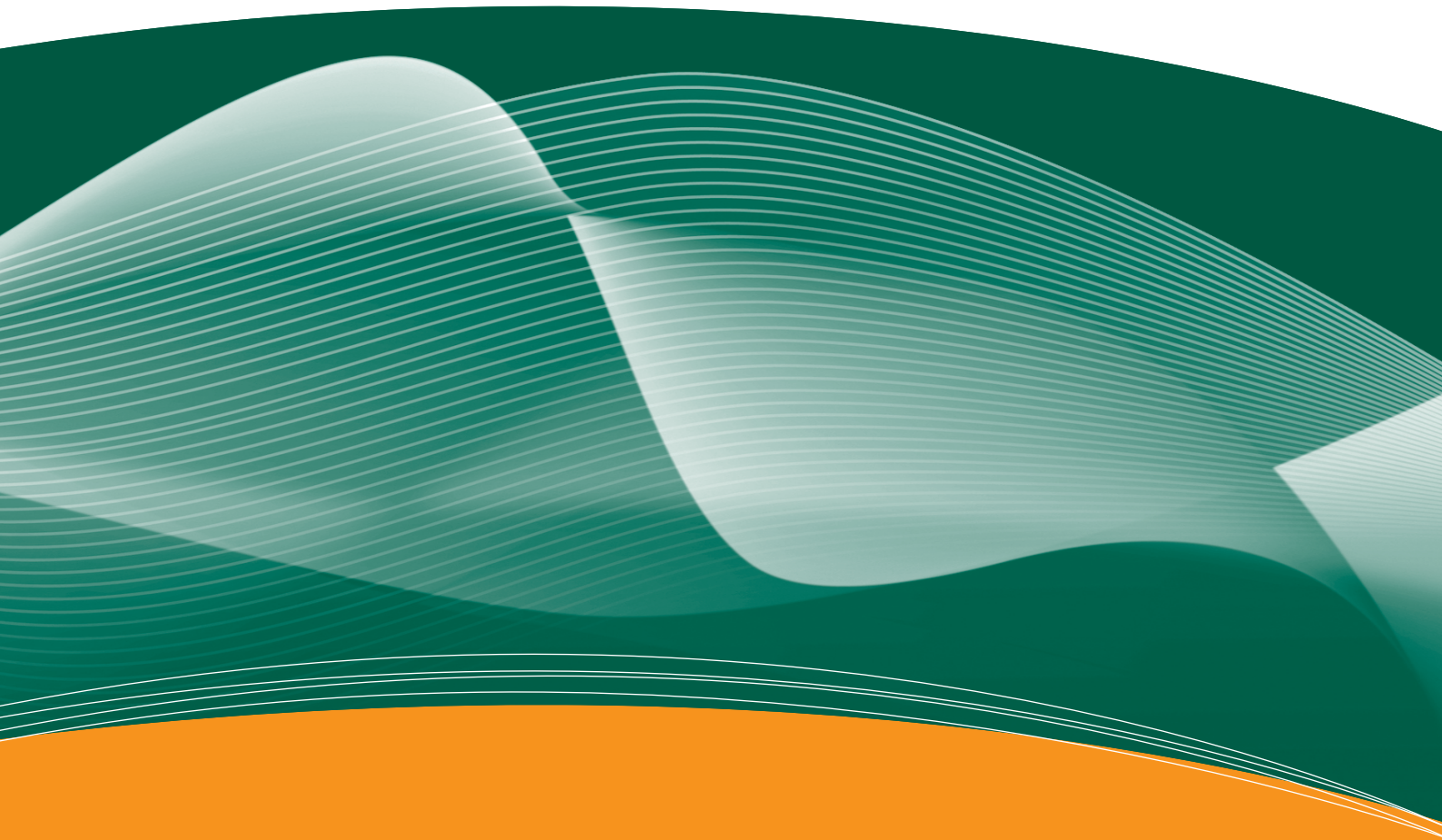
POLICYMONOGRAPHS

Back to the Bad Old Days? Industrial Relations Reform in Australia

Alexander Philipatos



THE CENTRE FOR INDEPENDENT STUDIES

National Library of Australia Cataloguing-in-Publication Data:

Philipatos, Alexander.

Back to the bad old days? : industrial relations reform in Australia / Alexander Philipatos.

9781922184085 (pbk.)

CIS policy monographs, 133.

Industrial relations--Australia.

Labor laws and legislation--Australia--21st century.

Collective bargaining--Australia.

Other Authors/Contributors:

Centre for Independent Studies (Australia)

Dewey Number: 331.0994

Back to the Bad Old Days? Industrial Relations Reform in Australia

Alexander Philipatos

CIS Policy Monograph 133

THE CENTRE FOR INDEPENDENT STUDIES

2012

ACKNOWLEDGEMENT

The author would like to thank Robert Carling, Simon Cowan, Ian Harper, Paul Oslington, and one anonymous referee for comments on an earlier draft. Responsibility for any errors remains with the author.

Contents

Executive Summary

Industrial relations reform in Australia has been hotly debated since the introduction of the Coalition's *Workplace Relations Amendment (Work Choices) Act 2005*. Since the Labor government replaced *Work Choices* with the *Fair Work Act 2009*, many business leaders have complained that the new legislation has made the labour market more inflexible and unworkable. Conversely, some union leaders have voiced their disappointment that the *Fair Work Act* does not go far enough in reversing the trend towards labour market liberalisation. So who is right? How far has Australia reformed its labour market?

A broad look at labour market reforms over the past two decades reveals that the results of both reforms are mixed.

The labour market is now more decentralised and flexible than it was two decades ago. The highly regulated system of compulsory arbitration has given way to bargaining at the enterprise level. In 1990, roughly half the workforce had their pay and conditions set by awards. By 2010, just 15% of workers were covered by the award only, while 80% of workers were covered by individual or collective agreements.

Strike action has declined markedly since the first wave of labour market reforms in the 1990s. Australia's strike rate averaged 54 work days lost per thousand workers from 1985 to 1993 when the first major reforms were introduced. The average strike rate since 1993 has been 13 work days—a 75% reduction from its pre-reform average. The reform era brought with it a limited right to strike and effective penalties for illegal strike action. The *Fair Work Act* has retained most of the reforms in *Work Choices*, and as a result, industrial disputes have remained at historically low levels. This has been a major success story of the reform era.

One caveat remains. Under the *Fair Work Act*, unions can strike over a wider range of matters than under *Work Choices*. To secure greater job security for their members, unions are increasingly seeking to restrict management's use of contractors or other sources of external labour. Business leaders are worried about this trend because restrictions on hiring decisions impede management's ability to hire suitable workers and contain cost. Hiring decisions ought to be management's prerogative since it is management, not unions, who are accountable to shareholders.

The *Fair Work Act*'s bargaining regime is designed to ensure unions a place at the bargaining table, even in circumstances where union membership is low and employers wish to deal directly with workers. When bargaining for a new agreement, employers and unions must adhere to new 'good faith' bargaining obligations. The impact of good faith obligations is not yet clear, and much will depend on how Fair Work Australia (FWA) interprets the law. If the obligations are interpreted broadly, unions may be awarded too much power and the bargaining process could become overly regulated and stifle business.

Since the introduction of the *Fair Work Act*, unfair dismissal provisions have broadened, and predictably, claims have increased. But more worrisome is the conciliation process, which is heavily biased towards employees. An unfair dismissal application does not cost much for the employee; however, the cost to the employer to contest a claim in court can be extremely high. Because of this imbalance, the employer will often choose to pay 'go away' money to avoid a costly court hearing, regardless of the merits of the case.

Successive labour market reforms have sought to increase labour market flexibility, but the *Fair Work Act* has reversed this trend. On most indicators, the Act has reinstated or strengthened restrictions that had been removed or relaxed by previous labour market reforms.

Introduction

Since the introduction of the *Fair Work Act 2009*, key figures in the business community have been raising concerns about its impact on business costs, productivity and employer-employee relations.

Last year, Peter Anderson, chief executive of the Australian Chamber of Commerce and Industry (ACCI), warned of 'a return to industrial chaos in the workplace.'[1] Earlier this year, Tony Shepherd, president of the Business Council of Australia (BCA), said Australia was becoming a 'high cost, low productivity nation.'[2] A few months ago, BHP Chairman Jacques Nasser said the new industrial relations framework 'pits labour against capital.'[3]

Based on these sentiments, one could be forgiven for thinking industrial relations in Australia is in crisis, dragging the country back to the pre-reform days of low productivity, inflexible work practices, and high levels of disputes.

At the same time, many unionists believe the *Fair Work Act* did not go far enough and that more work is needed to ensure a 'fair' balance between an employer's right to manage and a worker's rights. Dean Mighell, secretary of the Victorian Electrical Trades Union, described Labor's new laws as '*WorkChoices* lite,' with many other union leaders echoing this sentiment.[4]

Given the conflicting views about the impact of the *Fair Work Act*, and of labour market reforms generally, it is important to put recent workplace changes in historical context. Four large reforms since the early 1990s have fundamentally changed Australia's industrial relations framework:

1. *Industrial Relations Reform Act 1993* (IRA 1993)—Keating government
2. *Workplace Relations Act 1996* (WRA 1996)—Howard government
3. *Workplace Relations Amendment (Work Choices) Act 2005* (WCA 2005)—Howard government
4. *Fair Work Act 2009* (FWA 2009)—Rudd government.

The general direction of labour market reform has been towards greater liberalisation.

This monograph analyses the changes that have occurred in industrial relations over the past two decades and evaluates the degree to which each reform has advanced labour market flexibility. The focus is on assessing the reforms and drawing attention to problematic areas. Policy recommendations will follow in subsequent reports.

The monograph focuses on four broad areas:

1. wage setting
2. industrial action
3. bargaining
4. unfair dismissal laws.

Despite tightening some key areas of regulation and restriction, the general direction of labour market reform has been towards greater liberalisation. Governments of both persuasions have sought to increase labour market flexibility to create more favourable conditions for employment and productivity growth. Hence, after 20 years of workplace reforms, the central questions to ask in evaluating FWA 2009 are where does it fit within the story of industrial relations reform, and in what direction will it steer the Australian economy?

At each legislative change, both Labor and Coalition governments have pursued a similar agenda with similar objectives but to different degrees and with different principles (see Table 1).

Table 1: Summary of legislative changes

	Industrial Relations Reform Act 1993	*Workplace Relations Act 1996*	*Work Choices 2005*	*Fair Work Act 2009*
Wage setting	Liberalisation	Greater liberalisation	Greater liberalisation	More restriction
Industrial action	Allowed subject to restrictions	Greater restrictions	Greater restrictions	Fewer restrictions
Bargaining	Introduced restrictions	Fewer restrictions	No change	Greater restrictions
Unfair dismissal	Decreased flexibility	No change	Greater flexibility	Decreased flexibility

Compared to WCA 2005, FWA 2009 reversed several changes that yielded greater labour market flexibility. The labour market is less flexible now than it was under WCA 2005; however, these reforms are not a step back to the pre-reform era. To put labour market reform on a continuum from least flexible to most flexible, FWA 2009 would make the labour market less flexible than WCA 2005 on most indicators, but more flexible than IRA 1993.

Wage setting

For most of the twentieth century, the system of wage-setting in Australia was unlike the rest of the world.

The most fundamental transformation in Australian industrial relations has been changes to the method of determining wages and conditions. For most of the twentieth century, the system of wage-setting in Australia was unlike the rest of the world. In most countries, wages and conditions were the result of bargaining between employers and workers/unions subject to market pressures. In Australia, however, the prevailing model was compulsory arbitration. Instead of bargaining between employers and employees, wages and conditions were decided by legal tribunals.[5]

Typically, a union would serve a log of claims on the employer (or, as was often the case, several employers) outlining the pay rise and conditions the union desired. The union's demands were designed to be excessive, so that the employer would reject them and trigger a 'paper dispute.'[6] The union could ask for a large pay rise, more overtime, restrictions on working hours, etc. The intention was to secure higher wages and conditions through conciliation and arbitration than what the union felt it could get through bargaining. Once the employer rejected the claim, a paper dispute would arise and the union would lodge the dispute with an industrial tribunal to conciliate or arbitrate the agreement. Conciliation and arbitration were compulsory once the dispute was lodged.

During the conciliation phase, the tribunal would try to facilitate negotiations between parties. Most disputes would be settled in these negotiations, but many proceeded to arbitration where, after hearing from both parties, the tribunal would decide on the wages and conditions. These agreements, or awards, came to regulate all matters of employment relevant to employees. They also grew to dominate the labour market, underpinning wages and conditions for 68% of the workforce.[7]

Once an award had been created, unions would periodically seek improvements to wages and conditions for employees.[8] Unions would also use this opportunity to expand the application of the award to cover employees at other businesses that were not party to the original award, which tended to standardise wages and conditions for many employers. But it didn't stop there. Common rule awards within state jurisdictions also allowed the wage conditions of one workplace to be extended to other workplaces that were not originally part of the dispute. This helped standardise wages and conditions within industries,[9] and meant that a new business

starting in an established industry would have its employees regulated by the existing industry-wide award instead of being able to set its own pay and conditions.

Another unique part of Australia's pre-reform industrial relations system was the practice of having national wage cases. Each year a union, or a group of unions, would apply to the tribunal for a generalised increase in pay. These national hearings became test cases for all other federal awards, such that a pay rise granted to the unions involved would then filter through to all other federal awards.[10] Typically decisions would grant a pay rise to compensate for inflation or for productivity improvements generated in one or more sectors.

The problem with this highly centralised system of wage-setting, and with the award system more generally, is its one-size-fits-all nature. Productivity improvements in one business can and should be matched with wage increases in that business. But to award a pay rise to other businesses that have not had those same improvements raises labour costs and erodes profitability. Similarly, pay rises cannot be awarded to all award-covered employees to compensate for inflation as competitive pressures may render these businesses uncompetitive. Many businesses may need to cut prices to stay in business and cannot afford to award pay rises to their staff. For those businesses, the only way to absorb the increased labour costs is to lay off workers—or even go out of business.

Australia's rate of multifactor productivity growth was roughly 20% below the average of OECD countries.

Industry protection and labour protection

By international standards, Australia's industrial relations system used to be highly regulated—but with a high degree of trade regulation. Many industries received various forms of protection: import tariffs, quotas, subsidies and other import restrictions. The two forms of protection—industry protection and labour protection—reinforced each other. For example, industry protection made labour protection possible. Inefficient businesses that would otherwise have been unprofitable could continue to exist and award higher wages to workers as long as they were protected by subsidies or trade barriers. The incentives for firms to curb costs and improve productivity were much weaker. The costs could simply be shifted onto consumers via import tariffs and higher prices.[11]

This was possible as long as the more efficient and competitive industries, such as agriculture and mining—and, of course, consumers—effectively cross-subsidised the inefficient, protected sectors.[12] The system worked as long as favourable prices in competitive export markets financed a high standard of living. But this situation changed when export prices fell and trade terms shifted against local exporters. The resulting fall in the exchange rate for the Australian dollar and a growing current account deficit delivered the political impetus for economic reform.

Economists and politicians also grew more concerned about Australia's poor performance in productivity and real income growth relative to the international community. From 1970 to 1994, Australia's rate of multifactor productivity growth was roughly 20% below the average of Organisation for Economic Co-operation and Development (OECD) countries.[13] The lack of wage growth throughout the 1980s was discussed at length in the Senate. It became a rallying point for the Coalition, which was in opposition at the time and advocating labour market deregulation to increase productivity and real wages.[14]

Starting in the 1970s, trade barriers and other forms of protection were progressively wound back. During the 1980s, the Australian dollar was floated and financial restrictions were removed. International competition created a different business environment where success was attained by flexibility and innovation rather than protection. Certain rigidities in the labour market that were previously tolerated—such as minimum staffing levels, task demarcation, and closed union shops—needed to be eliminated so that businesses had the flexibility to adapt and respond to evolving competitive pressures.[15]

The shift to workplace agreements

Labor and Coalition governments have moved from centralised wage-setting to decentralised enterprise-level bargaining.

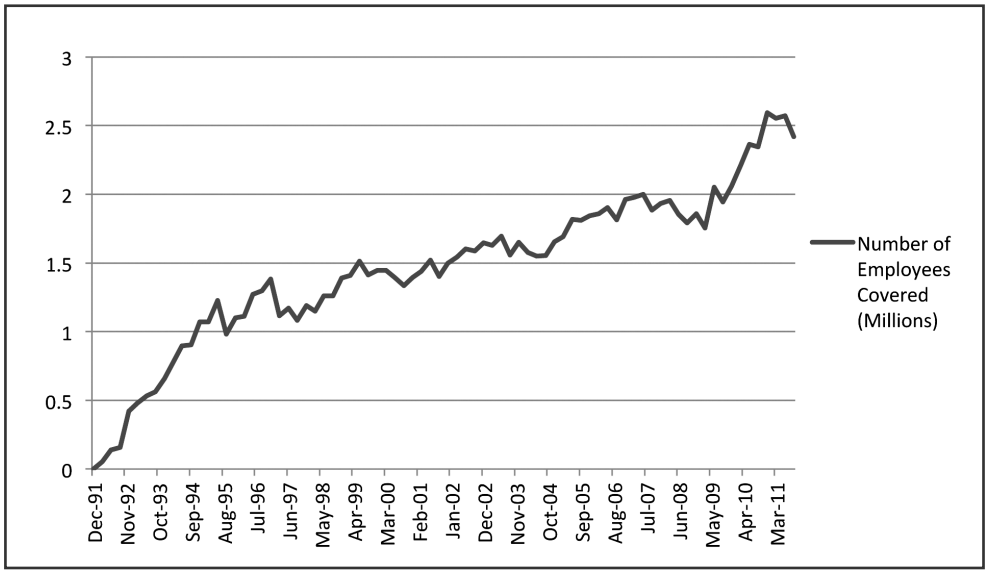
In the late 1980s and early 1990s, both Labor and Coalition governments started moving from a centralised wage-setting structure designed around arbitration to a decentralised system of enterprise-level bargaining. The purpose was to allow greater influence of market forces, diversify wages and conditions among businesses, and promote productivity. In negotiations between employers and unions, wage increases could be linked to productivity improvements yielding benefits to employers and workers. This position represented a consensus among business leaders, governments and union leaders. In 1991 Bill Kelty, secretary of the ACTU, said:

> The new wage bargaining strategy is a strategy designed to create more interesting and financially rewarding jobs, by stimulating greater worker involvement in all aspects of the way their industry and workplace operates, thereby driving enterprise reform and pushing up productivity levels.[16]

IRA 1993 placed enterprise bargaining at the centre of workplace reform with a new stream of collective agreements. The agreements were originally introduced in 1991 as part of the ALP-ACTU Prices and Incomes Accord (Mark VII), though they were not the focus of wage setting until 1993. The agreements needed to be registered and could be negotiated with or without a union. In practice, the majority were union agreements because under IRA 1993, non-union collective agreements were subject to stricter tests. To be registered, agreements needed to satisfy a 'no-disadvantage test'—wages and conditions needed to be at or above the relevant award, leaving workers no worse off than they would be under the old system. This way, awards were no longer the prevailing paradigm but served an important role as a 'safety net' of minimum wages and conditions.

The take-up of registered collective agreements has been strong since they were introduced, but was particularly strong from 1992 to 1995 and from 2009 to 2011. In 2008, registered collective agreements covered roughly 43% of the workforce (see Figure 1).

Figure 1: Number of employees covered by registered collective agreements, 1991 to 2011



Source: DEEWR (Department of Education, Employment and Workplace Relations), 'Trends in Federal Enterprise Bargaining (Approved),' Workplace Agreements Database.

The Howard government further advanced the decentralising agenda in 1996 by creating an individual bargaining system to compete with collective agreements. WRA 1996 created registered individual agreements (called Australian Workplace Agreements or AWAs) to be negotiated between an employer and an employee without a union. The new individual agreements were intended to generate greater flexibility and productivity by allowing direct negotiations between employers and employees (i.e. without unions) and greater use of individual performance pay. AWAs operated in a similar way as the existing registered collective agreements in a number of ways. First, both took primacy over awards, so once registered they would override any previous award. Second, both could vary the conditions of the award as long as the agreements satisfied the 'no-disadvantage test'—the conditions of the agreements needed to be at or above the relevant award conditions.*

Registered individual agreements were also given primacy over other agreements, even during the contract term. For example, if a registered collective agreement had been negotiated by an employer and a group of employees (or their union), the employer and an employee could negotiate a separate individual agreement. The advantages here include both flexibility and productivity. Employers could utilise performance pay for particular workers, and/or tailor working conditions (such as regular working hours) to a particular employee's circumstances.

Individual agreements were especially despised within the union movement because of their capacity to bypass unions in employer-employee bargaining.

In addition to introducing an individual bargaining stream, the Howard government simplified the safety net by limiting the number of 'allowable matters' in awards (i.e. the issues that awards could deal with) to 20.[17]

But the Howard government's industrial relations objectives were not fully realised until the Coalition gained control of both Houses of Parliament in the 2004 election.

In late 2005, the Howard government introduced WCA 2005, which made significant changes to the way registered collective and individual agreements operated. Based on the state system in Western Australia—which was established in 1993 and prompted widespread use of individual agreements, particularly in the mining sector—agreements were now to be underpinned by a set of minimum statutory conditions rather than the award system. WCA 2005 removed the no-disadvantage test, which required agreements be underpinned by awards, and replaced the award safety net with a lower, simpler standard of five conditions. The conditions were enshrined in the Australian Fair Pay and Conditions Standard and related to:

1. basic rates of pay and casual loadings
2. maximum ordinary hours per week
3. annual leave
4. personal leave
5. parental leave.[18]

Together with new restrictions on industrial action and exemptions for unfair dismissal (both discussed later), the lower safety net fuelled public backlash. Individual agreements were especially despised within the union movement because of their capacity to bypass unions in employer-employee bargaining.

---

* The no-disadvantage test in WRA 1996 was slightly different from the test under IRA 1993. Under the latter, each condition in an agreement needed to be at or above its counterpart in the award. Under WRA 1996 (and each subsequent reform), the agreement as a whole needed to be at or above the award, which allowed for more trade-offs.

The Howard government's intention in 2005 was to move individual bargaining to the centre of the industrial relations system. Despite the changes to legislation in 1996 and 2005, the take-up of registered individual agreements has been strikingly low.

Table 2 shows the method of setting pay for workers in 2008 and the proportion of workers under those conditions. After 12 years of operation (from 1996 to 2008), registered individual agreements set pay and conditions for just over 2% of the workforce.

Table 2: Methods of setting pay, 2008

	Private sector (%)	Public sector (%)	All employees (%)
Award only	20.4	0.4	16.5
Registered collective agreement	25.6	96	39.2
Unregistered collective agreement	0.7	0.5	0.6
Registered individual agreement	2.4	1.1	2.2
Unregistered individual agreement	44.7	2	36.5
Working Proprietors of Companies	6.2	–	5
Total	100	100	100

Source: ABS, 'Employee Earnings and Hours,' Cat. No. 6306 (August 2008).†

By contrast, registered collective agreements have been far more popular. They regulated wages and conditions for 40% of the workforce in 2008, including virtually all employees (96%) in the public sector. Perhaps one of the reasons employers have been unenthusiastic about the Howard government's registered individual agreements, despite the incentives, is the availability of unregistered individual agreements. Unregistered individual agreements, often referred to as common law contracts, were available long before the reform era and represent the most common form of agreement in the private sector. They are also underpinned by awards, but unlike registered agreements they cannot alter award conditions. Many unregistered agreements may operate like awards but contain additional 'over award' payments and conditions.

Despite the changes to legislation, the take-up of registered individual agreements has been strikingly low.

Unregistered individual agreements can still provide many of the advantages of registered individual agreements as long as the award's base conditions are not too onerous or inflexible. Advantages include direct employer-employee relationships, scope for individual performance pay, and flexible work hours paid through annual salary rather than rostered hours plus overtime. For skilled workers not reliant on the safety net conditions of the award, an employer will gain little in offering a registered agreement over an unregistered one (once again, subject to the burden of the award).

Registered individual agreements are no longer part of the industrial relations framework. One of the first changes made after the 2007 election was the abolition of Howard-era registered individual agreements. As previously mentioned, registered individual agreements had existed since the first Howard-era reforms in 1996; although the agreements had been opposed by the union movement since their introduction, they did not get the sort of broad community opposition until WCA 2005 amendments. Community opposition to individual agreements

† These statistics are released every two years, with the most up-to-date release being in 2010. The 2010 data, however, is not broken down according to public and private employees but part-time and full-time employees. In addition, there is no distinction between registered and unregistered agreements. Thus, the 2008 release is more informative.

since WCA 2005 was largely based on reductions in the safety net created by the removal of the no-disadvantage test. But it was also linked to other parts of the reforms more generally, such as changes to unfair dismissal laws. The Howard government tried to address the safety net concerns by introducing the Fairness Test as part of the *Workplace Relations Amendment (Stronger Safety Net) Act 2007*. The test was designed to ensure 'adequate compensation' was offered to employees whose new registered agreement (individual or collective) sought to remove certain award conditions such as overtime rates, weekend and holiday penalty rates, shift loading, and annual leave loading.

The incoming Rudd government could have constructed FWA 2009 to reverse WCA 2005 changes and reintroduce the no-disadvantage test, leaving registered individual agreements intact. Instead, Labor abolished the agreements and returned collective bargaining to centre-stage. Nevertheless, the abolition of statutory individual agreements will have limited economy-wide impacts for two reasons.

The abolition of statutory individual agreements will have limited economy-wide impacts.

First, registered individual agreements were relatively insignificant in aggregate. At their peak, the agreements covered just 2.2% of the workforce (see Table 2), so removing them will only affect this small proportion directly. The abolition of agreements will however have a more significant local impact on the industries that used them more widely. Some areas of the services sector used registered individual agreements primarily to reduce costs, since the new lower safety net of statutory conditions allowed employers to avoid paying many of the loadings and other conditions prescribed by awards.[19] The mining sector, which utilised them widely, was motivated by a combination of objectives. Excluding the union protected them from costly project delays emanating from industrial action or protracted bargaining. It also protected them from collective bargaining campaigns which sought to build upon the generous terms of individual agreements. Mining companies were also motivated by the opportunity to introduce substantial changes to work practices to increase productivity.[20] The abolition of registered individual contracts means that the ability to maintain productivity enhancing work practices and lower cost structures is undermined.

Second, registered collective agreements have provisions called Individual Flexibility Arrangements (IFAs) that allow an employer and employee individually to vary the terms of an award or enterprise agreement to suit their needs.[21] For example, an employee may wish to cash in entitlements, alter regular working hours (i.e. starting and finishing work earlier or later), or even negotiate financial incentives. By law, a modern award or enterprise agreement must contain a term that allows for the creation of an IFA giving the employer and employee greater flexibility than the award or collective agreement.[22] Either the employer or the employee can initiate an IFA, but both parties must agree in writing. Importantly, the employer must ensure that the agreement leaves the employee 'better off overall' than if there were no IFA, the same as the no-disadvantage test under WRA 1996.[23] These arrangements can be used to emulate individual contracts allowing flexibility similar to that available under registered individual agreements as they existed for 10 years under WRA 1996.

Wage-fixing and productivity

Productivity measures the level of output for a given level of inputs (labour and capital). It measures how efficiently firms and workers use their skills and capital to produce goods and services. A rise in productivity means that for a given level of labour and capital, more output is produced. In addition, capital deepening—an increase in the amount of capital (machinery/equipment) per worker—can also increase a worker's productivity. Productivity growth is a major driver behind rising real incomes; hence, it underpins improvements to Australia's standard of living.[24]

The impact of labour market liberalisation on productivity growth has been hotly debated since the first major reforms in 1993. Because industrial relations matters directly affect any business that employs staff, labour market reforms were expected to have far reaching effects on the economy-at-large. There was a consensus between business, unions and politicians that enterprise bargaining, as opposed to industry-wide or even economy-wide bargaining, would create a surge in productivity.

Part of that rationale was that the old system of wage-arbitration led to the proliferation of restrictive work practices that dampened the incentives for productivity growth. Having industry-wide or occupation-wide award structures were said to have led to:

The old system of wage-arbitration led to the proliferation of restrictive work practices that dampened the incentives for productivity growth.

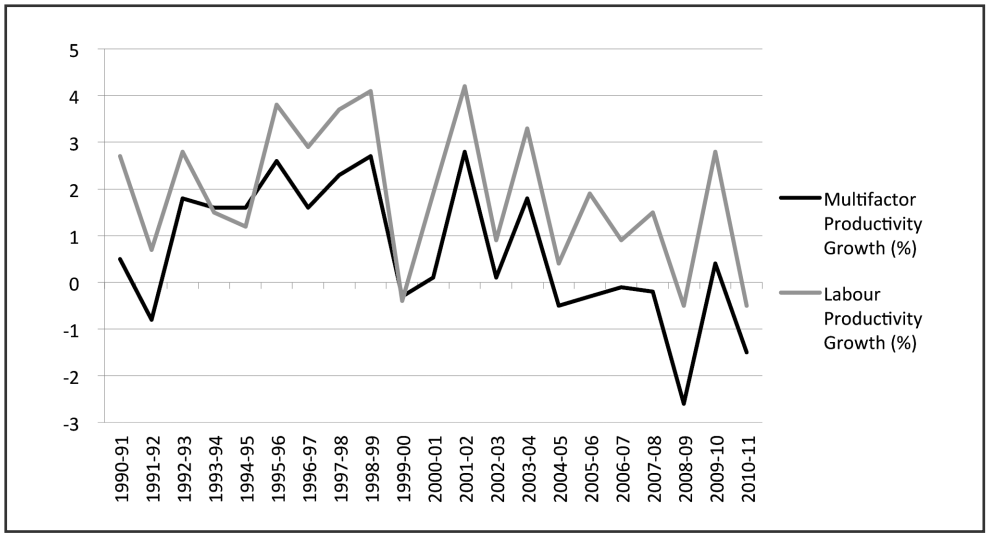
- task and function demarcation
- seniority-based rewards rather than performance-based advancement
- flat wage-earning profiles that served as a disincentive to training and long-term employment
- low trust between employers and employees/unions.[25]

A shift away from centralised wage-fixing towards enterprise bargaining was slated as the mechanism for removing these restrictive practices. For example, in a centralised system, where wage increases are not closely linked to the performance of the firm or the individual worker, there is little incentive for workers to cooperate in removing inefficient work practices.[26] Through enterprise bargaining, however, employers could negotiate the removal of inefficient work practices for increased wages, leaving both the employer and the worker better off.[27]

Australia's productivity performance throughout the 1990s seemed to confirm expectations about enterprise bargaining and productivity. Productivity growth surged above trend levels. An influential report by the Productivity Commission in 1999 compared labour productivity with the capital-labour ratio (level of capital deepening) from the early 1960s until the late 1990s.[28] The report found that productivity growth increased above its historical trend throughout the 1990s. By 1997–98, labour productivity was 15% higher than it would have been if the economy had continued on its historical trend.[29]

More recently, however, Australia's productivity performance has been poor. Productivity growth during the 2000s has been unimpressive in comparison to the 1990s, and this challenges the claim that labour market liberalisation and enterprise bargaining boosted productivity.

Figure 2: Productivity growth, 1990–91 to 2010–11



Source: ABS, 'Experimental Estimates of Industry Multifactor Productivity, Australia,' Cat. No. 5260 (December 2011), Table 4.

The effects of industrial relations reform on productivity growth remains unresolved. Though studies have found a correlation between labour productivity and industrial relations reform, none has been able to find a clear causal relationship.[30] The difficulty in establishing the relationship between labour market reforms and productivity is that too many factors affect productivity. The level of education, technical progress, infrastructure and other areas of public policy all have significant effects upon productivity growth. The 1990s saw significant advances in information technology and major changes to telecommunications, transport, electricity and water supply.[31] Hence, it is difficult to isolate the effects of labour market reforms.

To the extent that enterprise bargaining has made possible the removal of the restrictive work practices mentioned earlier, reforms have contributed to higher productivity growth. But these boosts in productivity will occur only once. After the impediments have been removed, the gains will have been exhausted. However, removing these inefficiencies does not necessarily require enterprise bargaining. If impediments could have been removed through the existing compulsory arbitration system, then improvements to productivity would come regardless of whether enterprise bargaining had been introduced or not.

Awards

One positive development of FWA 2009 has been the simplification and reduction in the number of awards. The award modernisation process was originally planned under Howard's reform agenda, but was never implemented. As part of Labor's *Forward with Fairness* policy, Fair Work Australia (FWA) has simplified, eliminated and amalgamated awards to just 122 compared to the thousands before the 1990s reforms. Awards today are much less complex than they used to be, regulate a lot less, and contain measures for increased flexibility.

This is a positive development because if awards are to act as a safety net, they ought to be few in number, and simple and easy to understand. Awards are not without problems, though. Awards build upon an already high safety net. Internationally, Australia has among the highest minimum wages in the world. In 2011, the OECD ranked Australia's minimum wage sixth-highest among 26 of the world's wealthiest countries.[32] Australia's minimum wage is 54% of the median wage and the award system builds higher wages and conditions on top of this minimum.[33]

The award modernisation process may have simplified the award system and reduced costs for some businesses. But for many other businesses, the amalgamation and creation of modern awards meant that they now had to comply with a higher minimum wage and/or higher conditions than had applied before. This was partially the result of a pledge by then Workplace Relations Minister Julia Gillard that 'no worker will be made worse off' because of modern awards.[34] In practice, when multiple awards were being combined into a new modern award (each with different minimum wages and conditions), it was not always the most generous award that was adopted. But in many cases, businesses paying award rates and conditions were faced with a substantial cost hike.

The award safety net ought to set an adequate level of minimum conditions. But it is important to remember just how generous Australia's safety net is compared to the rest of the world. Ensuring the safety net is not too onerous is vital, particularly for small businesses who have a limited capacity to pay. A burdensome safety net has adverse effects upon the ability of businesses to employ workers, or even to operate at all. There is also the risk that businesses who cannot afford to pay award rates will simply ignore the award system altogether and employ workers 'off the books.'

Australia's minimum wage is 54% of the median wage and the award system builds higher wages and conditions on top of this minimum.

Returning to the bad old days?

As mentioned earlier, there was a consensus that enterprise bargaining would generate more suitable terms and conditions than compulsory arbitration.[35] After two decades of industrial relations reform, the movement towards a decentralised industrial relations system has been largely successful. In 1990, almost half the Australian workforce had their wages and conditions set by the award only.[36] By 2010, it was 15%.[37] Individual and collective agreements, which covered just over half of the workforce before the reforms, now cover roughly 80%. The process has been positive to the extent that increased flexibility has allowed businesses to respond to market fluctuations domestically and internationally.

Industrial action, particularly strike action, is a drag on productivity and the economy.

Industrial action

Industrial action encompasses many types of disruptive processes. For employees, the most obvious is a strike, but other forms include work bans (e.g. refusal to work overtime), pickets, boycotts, going-slow, or work-to-rule. For the employer, there is only one option for industrial action: lockout. Industrial action, particularly strike action, is a drag on productivity and the economy. Every work day lost is a day less revenue for business and a day less wages for workers. Beyond the immediate players, the disruptions flow on to other businesses and consumers. For example, when workers at a busy port strike, large losses can be inflicted on a myriad other businesses that rely on an operational port to receive and ship goods. Such is the reality of an interdependent economy.

Strikes can cause a lot of pain for little or no gain. An obvious example is Qantas' recent disputes over outsourcing and contractors. Qantas had been negotiating new enterprise agreements with its pilots, engineers, ground staff and baggage handlers since late 2010. After recording a $216 million loss in 2010–11, CEO Alan Joyce announced a new strategy involving significant job losses and the relocation of some operations to Asia.[38] Amid the uncertainty about Qantas' international operations, the Transport Workers Union (TWU), representing ground staff and baggage handlers, wanted a clause that limited Qantas' use of contract labour to 20% of workers[39]—to limit the use of competing sources of labour and guarantee jobs for its members. After months of industrial action by its pilots, engineers and baggage handlers (each seeking their own bargaining claims through their own respective unions), Qantas brought the dispute to a head by locking out its employees and grounding its fleet.

The lockout caused significant harm to Qantas and its workers: 600 flights were cancelled; approximately 70,000 passengers were stranded at airports at home and abroad;[40] and the airline lost $68 million plus $15 million a week in revenue.[41] Qantas initiated the lockout to end the union's strike action by triggering provisions in FWA 2009 that allow FWA to terminate industrial action when it causes 'significant economic harm' to the parties involved or to the economy.[42]

After the enormous costs inflicted on the airline, the lost wages borne by workers, and the cost and inconvenience borne by passengers, the TWU's campaign was ultimately unsuccessful. FWA ruled against the TWU's claim for a 20% cap on contractors.[43] The three-member panel remarked that 'in our view this claim fails on merit,' and that 'to interfere with management's decisions on such a matter would require clear and strong evidence of unfairness,' but that 'no such case has

been established.'[44] A lot of pain inflicted for no gain. Now Qantas management and its union workers have to try to mend the sour work relations created by the strikes and lockout.

It is in the best interests of employers, employees and the wider economy that strikes are few and negotiations for wages and conditions are conducted in a civil manner. Industrial relations laws have a crucial role to play in this.

Changes in industrial action

Successive reforms have significantly changed the regulation, nature and incidence of industrial action in the past two decades.

Historically, Australian law never recognised a right to strike, which was deemed incompatible with the idea of peaceful resolution of disputes through conciliation and arbitration.[45] Instead, Australia's unique system of industrial courts, established soon after Federation, was designed to end the need for strike action. Instead of threatening or coercing employers to achieve better wages and conditions, which often provoked lockouts and stalemates, employees and unions in dispute with their employer could rely on the industrial court to arbitrate an outcome.

Industrial disputes dropped rapidly in the early 1990s and have been declining ever since.

The experiment was, in the words of Justice Henry Bournes Higgins, subsequently appointed inaugural president of the Commonwealth Court of Conciliation and Arbitration:

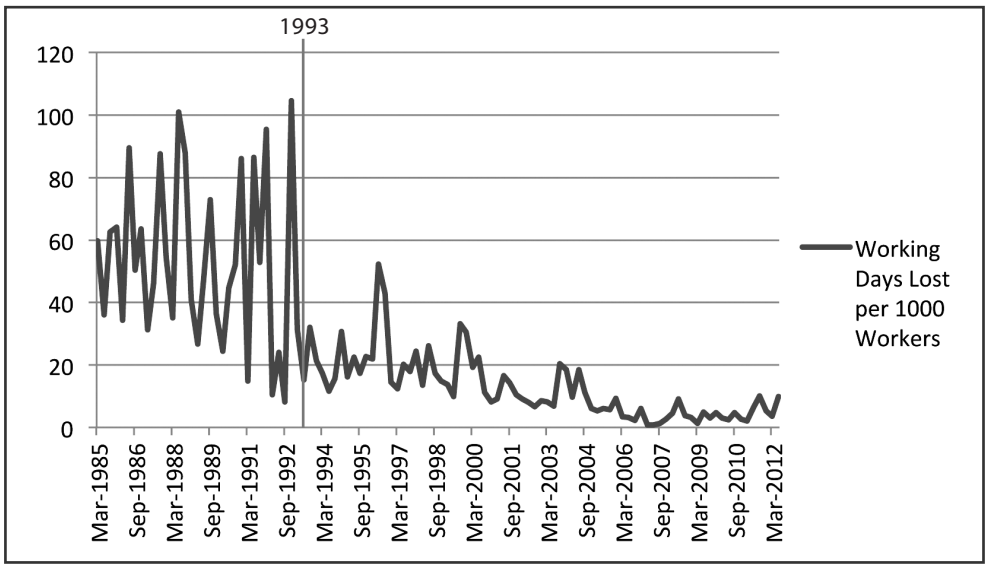
> A new province for law and order [in which] the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous process of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interests of the public.[46]

Higgins' experiment, enshrined in section 51(xxxv) of the Constitution, was designed to bring peace and cooperation to industrial relations matters. Unfortunately, the experiment failed. Historically, Australia has been extremely strike-prone, despite industrial action being illegal and arbitration readily available. Stephen Creigh points out that from 1962 to 1981, Australia's strike rate ranked fifth out of 20 countries in number of working days lost per thousand workers.[47] Prolonged disputes were rare, though; most were short-lived and often proceeded to arbitration.

Why was industrial action so widespread despite its illegality? Before the reforms of the 1990s, remedies available to employers were often inadequate or inaccessible. Because strikes were often short, the costs inflicted upon the employer were often not enough to justify the cost of litigation. Rarely did employers take workers or unions to court; instead, they relied on the industrial tribunals to broker a settlement.[48] Even when fines were imposed, they were often not collected.[49]

Recent trends show positive signs for industrial peace. Industrial disputes dropped rapidly in the early 1990s and have been declining ever since. Figure 3 tracks the rate of industrial action since 1985 as measured by the number of working days lost per thousand workers.

Figure 3: Industrial disputes, 1985 to 2012



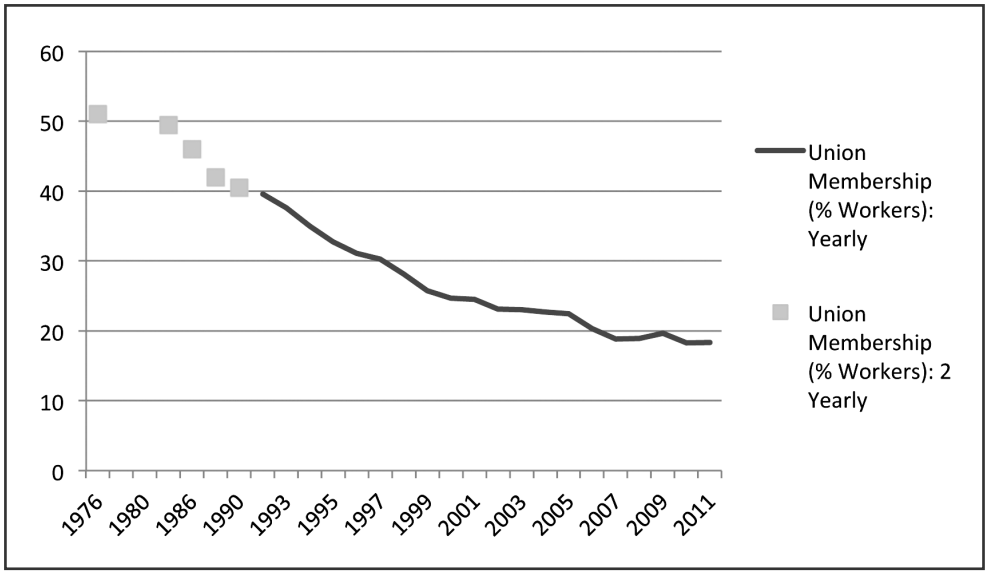
Source: ABS, 'Industrial Disputes, Australia,' Cat. No. 6321 (June 2012), Table 3b.

Since 1993, the strike rate has averaged 13 working days per thousand workers—a 75% reduction.

Two observations can be made here. First, the underlying trend has gone down, and second, there are two distinct time periods—before and after 1993. The strike rate before 1993 averaged 54 working days lost per thousand workers, but the variability was also quite high. The strike rate reached as high as 105 working days and often reached 80 or 90 working days per thousand workers. Since 1993, the strike rate has averaged 13 working days per thousand workers—a 75% reduction. The maximum strike rate halved to 52 working days and variability also declined.

An obvious contribution is diminishing trade union membership (see Figure 4).

Figure 4: Trade union membership, 1976 to 2011



Sources: ABS, 'Trade Union Members,' Cat. No. 6325 (August 1996); ABS, 'Employee Earnings Benefits and Trade Union Membership,' Cat. No. 6310 (August 2011); Rae Cooper and Brandon Ellem, '"Less than Zero": Union Recognition and Bargaining Rights in Australia 1996–2007,' *Labour History* 52:1 (February 2011), 49–69.

Trade union membership has been steadily declining since the 1970s, and its trend after 1985 roughly follows the reduction in industrial action. In 1976, 51% of workers were trade union members, whereas it is 18% today. However, this

decline began almost two decades before the onset of major labour market reform. Other indicators could also account for declining dispute levels—for example, the increase in number of casual and part-time workers who have less job security and cannot bear the loss of income from a strike as easily as full-time workers.[50]

These reasons may account for the downward trend in industrial action but do not explain the remarkable difference between the rate and variability of industrial action before and after 1993. The most fundamental changes to the rules regarding industrial action came in 1993 and in 1996. IRA 1993 introduced the concept of protected industrial action; three years later, under WRA 1996, more effective and accessible sanctions were introduced for unprotected industrial action. The combination of these two legislative changes accounts for the dramatic fall in the rate of industrial disputes.[51]

***Work Choices* made significant restrictions to the process and availability of industrial action.**

Protected industrial action is essentially a narrowly defined right to strike. Employees (or unions) cannot strike over any grievance. Strike action can only be deemed lawful (protected) if conducted in support of a new registered enterprise agreement. It must be taken over legitimate claims and within a designated bargaining period. Industrial action taken outside these boundaries is 'unprotected' and subject to tort liability (in the case of the union) or breach of contract (in the case of the employee).[52] Similarly, employers engaging in protected industrial action (a lockout) must also do so during the bargaining period of a new enterprise agreement—although, under FWA 2009, employers can only take industrial action in response to employee/union industrial action.

Since its introduction, protected industrial action has been subject to several reforms. WRA 1996 made minor changes to the scope and availability of protected industrial action, but made significant changes to the penalties for unprotected industrial action. Section 127 of WRA 1996 gave the Australian Industrial Relations Commission (AIRC) the power to suspend industrial action, and an avenue to enforce this order via an injunction in the Federal Court. WCA 2005 made significant restrictions to the process and availability of industrial action, including the range of legitimate claim for industrial action. FWA 2009 has kept the majority of these changes intact.

An overview of the main rules and restrictions regarding protected industrial action illustrates how governments have on the one hand given employees (and their unions) leverage during the bargaining process, but on the other, controlled and restricted the exercise of that leverage:[53]

1. Who can take protected industrial action?

- **IRA 1993**: Unions and employers could take protected industrial action only in support of an enterprise agreement; however, the party taking industrial action needed to be 'genuinely trying to reach an agreement' for the strike action to be protected.
- **WRA 1996**: In addition to unions and employers, a group of employees or an individual employee could take protected action (e.g. to strike over a new individual contract—AWA).
- **WCA 2005**: Pattern bargaining outlawed. Unions trying to secure uniform wages across several employers would be denied a ballot for industrial action by the AIRC. Protected action for registered individual contracts (AWAs) was removed.
- **FWA 2009**: Much the same as the 2005 changes, although employers' strike action was limited to defensive lockout (i.e. no first-strike lockout).

2. Legitimate claims for protected industrial action

- **IRA 1993**: Protected action could only be taken in support of matters that 'genuinely pertained to the employment relationship.'
- **WRA 1996**: Unchanged.
- **WCA 2005**: Same structure as 1993, although a long list of 'prohibited content' over which parties could not take industrial action was introduced.
- **FWA 2009**: Same structure as 2005, although the new list of 'unlawful terms' is shorter than the list of 'prohibited content,' and the definition of 'matters that pertain' to the employer-employee relationship has been widened to include matters between employer and union. Both changes allow employees/unions to take industrial action over a wider range of claims.

3. Acquiring authorisation for protected industrial action

- **IRA 1993**: Unions taking industrial action needed to comply with the rules of each union, but union members could apply to the AIRC for a ballot of members.
- **WRA 1996**: Same as 1993, except that industrial action had to be taken after the nominal expiry date of any existing agreement.
- **WCA 2005**: All employee industrial action (union or non-union) needed to be authorised by a ballot from the AIRC, and that ballot had to be conducted by an independent ballot agent (e.g. the Australian Electoral Commission). The AIRC was required to refuse protected action if parties were 'not genuinely trying to reach an agreement' or were pattern bargaining.
- **FWA 2009**: Same as 2005 but new good faith bargaining orders apply.

4. When the arbitrator can intervene?

- **IRA 1993**: The AIRC could terminate protected action if it threatened life, safety or an important part of the Australian economy.
- **WRA 1996**: Unchanged.
- **WCA 2005**: The AIRC and/or minister could terminate protected action if it threatened life, safety, an important part of the economy, or a third party. Parties could also request a cooling-off period.
- **FWA 2009**: FWA and/or the minister can terminate protected action if it threatens life, safety, an important part of the economy, a third party, *or one of the bargaining parties*. Similarly, parties can also request a cooling-off period.

The *Fair Work Act* approach towards industrial action represents continuity with, rather than departure from, *Work Choices*.

FWA 2009 approach towards industrial action represents continuity with, rather than departure from, WCA 2005. The Act's stance on pattern bargaining, secret ballots, the role of FWA, and the intent of parties to come to agreement is very similar to the requirements under WCA 2005. There are, however, some noteworthy exceptions.

The scope of enterprise agreements has widened with FWA 2009. The range of matters that can be included has increased, and so have the matters that employees/unions can strike over.

A common complaint of the business community is the increased strike action over 'job security' clauses. Unions have attempted to achieve increased job security for their members by inserting clauses that restrict the employer's use of external labour. These clauses can be as mild as a simple notification to the union of the intent to source outside labour. Other clauses are more restrictive—and either ban this option entirely or require union consultation and approval before hiring.

By reducing labour competition, unions secure more work and higher wages for their members. In the past, employers could use (or threaten to use) contractors to temper wage demands of unions.

Under WCA 2005, terms that restricted or placed conditions on using independent contractors or labour-hire arrangements were not permitted.[54] Hiring and suitability of workers was seen as the management's prerogative. Unions could not insert these restrictions into agreements, and hence, could not take protected industrial action to support them. FWA 2009 contains a list of unlawful content, but there is no prohibition on clauses of this nature.§ Hence, there is an ongoing tussle over which clauses should be open for negotiation, and which should be reserved for management.

The view of Coalition and Labor governments since the early 1990s is that workers should not have a universal right to strike but be able to take industrial action during negotiations for wages and conditions (in other words, matters that relate to work and only work). Strikes in sympathy for other workers, over public policy, and with no connection to the bargaining process for a new agreement have little to do with furthering employee interests at the workplace and are thus not protected (illegal). This is a significant departure from other countries, particularly those in Europe. Indeed, there is a greater respect in Australia for the principle in common law that a strike is a breach of an employee's duty to work.

This has been one of the most positive developments of the reform era. Governments have been able to award employees greater leverage in their claims for wages and conditions, but have simultaneously brought about relative peace by heavily restricting this privilege.

Bucking the trend: The building and construction industry

Although the majority of unions have adopted the practice of taking strike action within its new legal bounds, the building and construction industry has bucked this trend. After allegations of widespread criminal activity in the industry, the Cole commission (2001–03) was established to investigate alleged abuses of WRA 1996 and general lawlessness in the industry. Although the report found no definitive evidence of criminal activity, it did find that the industry was characterised by widespread disregard for the rule of law, particularly in relation to illegal strike activity, pattern bargaining, and intimidation tactics.[55]

Governments have awarded employees greater leverage in their claims for wages and conditions, but have also heavily restricted this privilege.

To deal with these problems (not all of them are due to union misconduct), the commission recommended special legislation for the industry. The Coalition government responded by passing the *Building and Construction Industry Improvement Act 2005* and creating the Australian Building and Construction Commission (ABCC) to police illegal strike action, coercion, sham contracting, and right-of-entry abuse, and publish information on wages and conditions.

But things have changed since. Along with the promise of rescinding WCA 2005, the Labor opposition had also promised to abolish the ABCC—an organisation the union movement believed had excessive powers and was biased against the unions. The Labor government dismantled the ABCC but replaced it with its own inspectorate—Fair Work Building and Construction (FWBC).

The *Fair Work (Building Industry) Act 2012* watered down the inspectorate's powers by:

- granting the inspectorate's director authority to set aside its power to compel building industry participants to answer questions as part of any investigation

§ For a full list of prohibited content under WCA 2005 or the list of unlawful content under FWA 2009, refer to the appendix.

- requiring the director to obtain an authority to exercise its compulsory interview powers and be subject to oversight in doing so
- reducing maximum penalties for breaching the *Fair Work (Building Industry) Act* from $22,000 to $6,600 for individuals and from $110,000 to $33,000 for organisations
- narrowing the circumstances under which industrial action by building industry participants will be considered 'unprotected'
- stopping FWBC from prosecuting parties for breaches of the legislation where the disputing parties have settled or discontinued a matter.[56]

The concept of good faith bargaining was centre-stage in the *Fair Work Act*, and aims 'to maximise workplace co-operation.'

Concerns that the powers are inadequate to deal with the issues in the sector resurfaced when construction company Grocon was subject to illegal strike action from the Construction, Forestry, Mining and Energy Union (CFMEU) this year. The blockade at the Myer redevelopment in Melbourne's CBD lasted 16 days in breach of two Supreme Court injunctions and cost the company $5 million–$7 million, according to Grocon.[57]

John Lloyd, former commissioner of the ABCC, believes that reducing the commission's powers—in particular, lowering the maximum penalty from $110,000 to $33,000 for unions—has compromised its ability to deter illegal strike action.[58] Grocon has commenced legal proceedings against the CFMEU to recover the cost of the strikes, and the matter is as yet unresolved. The outcome of the dispute, however, will have widespread implications for the sector.

Bargaining and unions

In the words of then Deputy Prime Minister Julia Gillard, FWA 2009 'has at its heart bargaining in good faith.'[59] The concept of good faith bargaining is centre-stage in the new legislation, and its stated objective is 'to maximise workplace co-operation.'[60]

The obligation to bargain in good faith is not a new concept. It exists in New Zealand and Canada, among other countries, and has a long history in the United States. Obligations to bargain in good faith were included in IRA 1993. But in *Community and Public Sector Union v. Australian Broadcasting Group* it was found that the AIRC had the power only to make orders regarding the process of bargaining, not the substance of negotiations.[61] More importantly, in *Asahi Diamond Industrial Australia Pty Ltd v. Automotive Food, Metals and Engineering Union*, the court held that the AIRC could not make orders compelling parties to negotiate or enter into an agreement.[62] The obligations were scrapped three years later upon the introduction of WRA 1996.

The obligation to bargain in good faith represents a marked difference between Labor and Coalition industrial relations policies because of their respective impact on unions and collective bargaining. Where the Coalition introduced statutory individual contracts to compete with the collective bargaining stream, the ALP sought to place collective bargaining at the centre of workplace relations. This occurs in several ways.

First, FWA 2009 mandates that any worker who is a union member has that union as his or her default bargaining representative.[63] Second, the good faith bargaining obligations are owed to all bargaining representatives.[64] This means even if a single union member accepts the union's status as bargaining representative, the employer must recognise and bargain with that union regardless of the employer's wishes or those of the remaining employees. This makes a simple bargaining process between an employer and employees much more complex, and renders irrelevant the preferences of non-union members or those employees who may not wish to be represented by the union.

Under WRA 1996 and WCA 2005, employers did not have to recognise a union seeking to negotiate on behalf of employees.[65] Although any worker was free to become a union member, a union could not negotiate with an employer without the employer's consent. Ron McCallum describes this framework as 'voluntary collective bargaining.'[66]

Underpinning this framework is freedom of contract—the principle that individuals (employers and employees, in this case) have the freedom to engage with, or not engage with, whoever they please. If employers did not wish to bargain with a particular union, or indeed any union, that was their right. Since the employer is responsible for the success or failure of the business, they ought to be able to set their own terms of employment. Employers could negotiate with unions but had the flexibility to back away if negotiations proved unproductive.

Labor's position is that a voluntary approach to bargaining does not give freedom of association (the right to collectively pursue common interests—usually through a union) enough weight and makes it too difficult for employees to bargain collectively. Therefore, unless the law contains additional protections for collective bargaining, it is too easy for employers to deny employees that right.

To this end, FWA 2009 imposes a legal obligation on employers and employees/unions to bargain in good faith. So what does it mean to bargain in good faith? How does it operate? What are the implications for employers, employees and economic activity?

Since the employer is responsible for the success or failure of the business, they ought to be able to set their own terms of employment.

The good faith obligations regulate the actions of employers and unions during negotiations for a new agreement. Although in theory these agreements (called enterprise agreements in FWA 2009) can be struck between an employer and a group of employees, in practice they are struck between employers and unions. As such, the obligations are designed to influence employer-union relations. When an employer and union begin bargaining in the following three ways to determine wages and conditions for workers, the good faith bargaining obligations commence.

1. The employer can initiate bargaining.
2. The employer and union can agree to bargain.
3. If the employer refuses to bargain and the union has the support of a majority of employees, the union can obtain a Majority Support Determination from FWA, forcing the employer to bargain.[67]

During the bargaining process, employers and unions need not reach an agreement, or even make concessions to the other party.[68] They must, however, adhere to these good faith obligations:

1. attending meetings at appropriate times
2. disclosing relevant information in a timely manner
3. responding to proposals made by representatives in a timely manner
4. giving genuine consideration to proposals made by representatives and providing reasons for responses
5. refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining
6. recognising and bargaining with other bargaining representatives.[69]

It is clear that the obligations are designed to simulate a cooperative and respectful relationship. But although good faith bargaining has laudable objectives, legislation often has very different effects in practice. There are two important concerns about the impact of good faith bargaining obligations.

Subjectivity and complexity

First, the obligations are vague and subjective. What constitutes a 'timely response' or 'genuine consideration'? What sort of conduct is considered 'capricious or unfair' and what kind of actions 'undermine collective bargaining'? These definitions are unclear and open to wide interpretation. There is also the danger that the Australian bargaining system could develop into the same 'legalistic quagmire' that bedevils the US system.[70]

There are two significant similarities between the US and Australian bargaining systems. First, both impose an obligation on employers and unions to bargain in good faith, and second, neither system requires parties to come to agreement or make concessions. The difference is that the US system is far more mature and its pitfalls well known.

For example, although there is no duty to come to agreement, the US National Labor Relations Board (NLRB) requires employers and unions to enter negotiations 'with an open mind and a sincere desire to reach agreement.'[71] The problem with this duty is that it lacks objectivity—as if the law requires employers and unions to enter negotiations with a set attitude.[72] This is at odds with the ability of employers and unions to take industrial action (i.e. strikes or lockouts). Can a union taking strike action, or an employer locking out workers, negotiate 'with an open mind'? What is the difference between legitimate tough bargaining (with all the tactical games that go with it) and a breach of good faith obligations? These are the difficulties the Australian system has to deal with.

Laws that are vague, complex or change often expose business to increased risk and legal costs.

The vagueness and subjectivity of the US system is reflected in a comment by the NLRB: 'No two cases are alike and none can be a determinative precedent for another because good faith only takes its meaning in its application to the facts of a particular case.'[73] If the NLRB has difficulty determining objective standards for good faith, what chance do employers and unions have?

There is a danger that obligations under FWA 2009 will be continually reinterpreted and the meaning of good faith will change regularly. This makes it difficult for employers and unions heading into negotiations to know where they stand, which actions they can and cannot take legally, when a union is expected to attend meetings and when not. These are not insignificant points. If an employer or union does not adhere to the good faith bargaining obligations, it faces bargaining orders from FWA, as well as fines up to $33,000 per breach.[74] Repeated breaches can lead to the making of a serious breach declaration, whereby FWA may arbitrate the agreement.[75]

This problem is more pressing for employers than unions, since it is the employer who must forecast costs, invest capital, and take risks. Business requires clear, predictable laws to plan operations and forecast future costs. Laws that are vague, complex or change often expose business to increased risk and legal costs.

Lord Ackner in *Wilford v. Miles*

The second cause for concern is that the obligations appear to be inconsistent with the adversarial nature of employer-union relations. Although the majority of employer-union relationships are productive, peaceful and respectful, there are still many that are not. The new obligations are not there to regulate already successful relationships. They are there to regulate conflict-ridden relationships. In his criticism of the US good faith bargaining system, Richard Naughton points out that Australian and British courts have been reluctant to impose a duty to bargain in good faith in commercial relationships because they recognise that businesses are entitled to pursue their own interests as they see fit.[76] In Britain, the courts have been far more critical of the good faith obligations. In *Walford v. Miles*, Lord Ackner of the House of Lords declared that such a duty was 'inherently repugnant to the adversarial position of the parties when involved in negotiations.'

> Each party ... is entitled to pursue his interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.[77]

At home in the NSW Court of Appeal, Lord Ackner's sentiment was echoed by Justice Kenneth Handley in *Coal Cliff Collieries Pty Ltd v. Sijehama Pty Ltd*.

> Negotiations are conducted at the discretion of the parties. They may withdraw or continue; accept, counteroffer or reject; compromise or refuse, trade-off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or slow as they think fit.[78]

Whereas *Work Choices* left employers free to ignore unions, *Fair Work Act* guarantees their presence at the bargaining table.

Both statements raise the point that negotiating parties ought to have the freedom to negotiate as they wish. Importantly, this must include the ability to withdraw from negotiations, for the knowledge that the other party can withdraw plays a significant part in regulating the demands and tactics of either party. Given this reality, it is a problem that employers can be forced to deal with a union against their will, particularly where there is only a small minority of union members among the employees. Good faith implies that the parties wish to negotiate with each other, and genuinely wish to come to an agreement. In circumstances where the employer does not wish to negotiate with the union, it is hard to conceive that an employer will genuinely wish to reach an agreement with the union, or will act in good faith. Furthermore, employers do not have the option of withdrawing from negotiations when the union makes ambit claims. Without this deterrent, employers may find themselves giving in to demands for wages and conditions that are financially irresponsible or unsustainable just to avoid breaching good faith bargaining obligations.

Implications

The good faith bargaining requirements in FWA 2009 are essentially intended to force employers to recognise and bargain with unions when one or more of their employees are members of a union. Though the obligations do not require the employer to make concessions, it appears they require the employer (and union) to try to reach an agreement. Whereas WCA 2005 left employers free to ignore unions, FWA 2009 guarantees their presence at the bargaining table.

Yet the good faith bargaining obligations are still relatively new and have not been subject to much judicial interpretation. As time passes and cases are put to trial, the meaning of the obligations will be tested and more clearly defined. Much hinges on how broadly the obligations are interpreted. There is a real possibility that, if interpreted widely, the obligations will become severely onerous upon business and place too much power in the hands of unions. If this happens, employers may find themselves forced to agree to unsustainable wage costs. If FWA adopts a narrow and consistent interpretation, employers and unions will have certainty about the application of the law and be able to enter negotiation knowing where they stand and what actions they can and cannot take.

Unfair dismissal laws

Since the introduction of FWA 2009, the rules of unfair dismissal have taken a backward step. Unfair dismissal laws are now available to many more employees, and as a result, many businesses (particularly small businesses) are feeling the effects.

Overview

For most of the twentieth century, there was no general law allowing employees to challenge a dismissal.[79] Unfair dismissal provisions first appeared in some states in the early 1970s before they were introduced federally in IRA 1993. Unlike the state provisions that existed at the time, IRA 1993 provisions on unfair dismissal carried a reverse onus of proof. State laws required the employee to demonstrate that a dismissal was 'harsh, unjust or unreasonable.' The IRA 1993 reforms required the employer to show a 'valid reason' for dismissal.[80]

The Howard government amended unfair dismissal laws to resemble state laws. The Coalition's WRA 1996 put the onus of proof back onto the employee.[81]

These changes were modest compared to the Coalition's real ambitions, which were realised when the 2004 election returned a Coalition majority in the Senate. With control of both Houses of Parliament, the Coalition passed WCA 2005, which made significant changes to the scope and operation of unfair dismissal provisions.

WCA 2005 expanded the reach of federal labour laws by deploying the Constitution's corporations power. As a result, many employees in private sector businesses previously covered by state laws were now covered under the federal jurisdiction. WCA 2005 exempted businesses with 100 or fewer employees from unfair dismissal claims; allowed larger businesses to dismiss staff for 'genuine operational reasons'; exempted seasonal workers; and increased the default probation period from three to six months. These changes reduced the number of employees eligible to make claims and decreased the likelihood of success for those who were eligible.

The introduction of FWA 2009 further widened the coverage of the federal laws and enlarged the pool of possible claimants. Since all states except Western Australia have referred their industrial powers to the federal government, FWA 2009 now covers all private sector workers except unincorporated bodies (such as sole proprietors and partnerships) in Western Australia.

Dismissal regulations create disincentives for employers to fire staff.

FWA 2009 reversed the changes to unfair dismissal provisions in WCA 2005. The exemption for businesses with 100 or fewer employees and the protection for employers dismissed for genuine operational reasons were scrapped. Instead, businesses with 15 or fewer employees must comply with the Fair Dismissal Code to protect small businesses from uncertainty and cost of claims.

Economic theory

Economic theory on unfair dismissal is relatively straightforward. Employers looking to hire workers face increased costs and uncertainty because of the possibility that a worker may file for unfair dismissal if sacked.[82] In the event of an unfair dismissal claim, the employer will be required to pay the administrative and legal costs, plus compensation if the claim is successful.

In addition to direct costs, unfair dismissal protections can have other unintended effects. Dismissal regulations create disincentives for employers to fire staff. In the case of unfair dismissals, this is the objective. The provisions are intended to motivate employers to persevere with troubled staff, or invest to improve the productivity of a poorly performing worker. However, many in the business community claim that unfair dismissal laws create unemployment by discouraging businesses from hiring new workers.

Recent research into the effects of dismissal regulation shows that dismissal costs may reduce sackings during downturns but limit hiring during upturns because employers foresee future downturns and expect costs for dismissals.[83]

Early work into dismissal regulations established that protection against dismissals has adverse effects upon hiring and firing decisions by changing the

bargaining position of existing workers vis-à-vis new workers. Edward Lazear found that existing workers are more likely to keep their jobs as a result of dismissal regulations, while new workers are less likely to be hired.[84]

Don Harding suggests that unfair dismissal laws can have equity effects. Employers aware of the risk of unfair dismissal claims discriminate against workers they perceive to be a greater risk. These include current and long-term unemployed workers, as well as those who, for no apparent reason, switch jobs frequently.[85]

Many of these effects fall disproportionately on the disadvantaged. Workers who change jobs frequently, are temporarily unemployed, and are long-term unemployed appear less likely to be hired as a result of unfair dismissal protection.

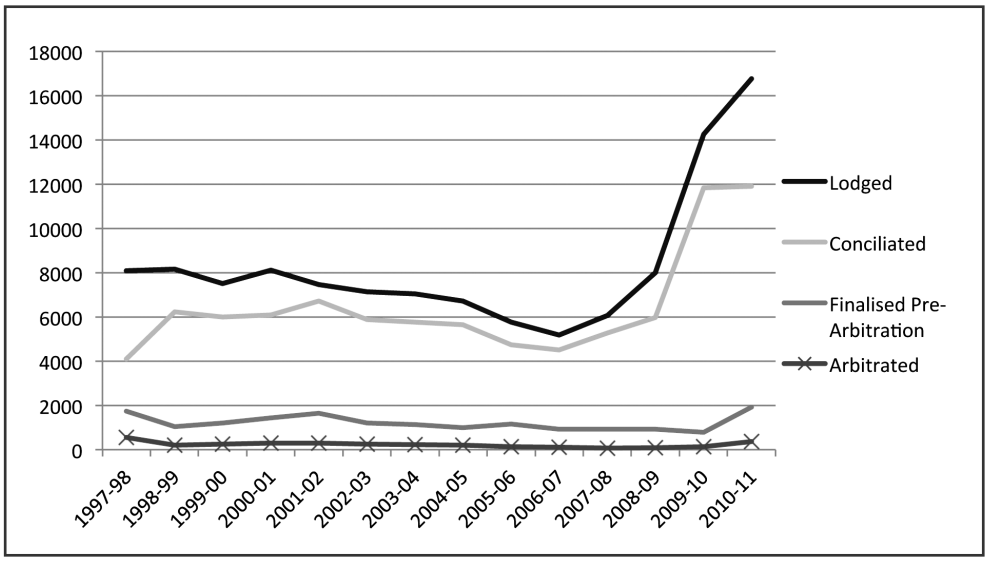
Unfair dismissal laws can also have an impact on worker productivity because of the way they affect an employer's hiring and firing patterns. The risk of an unfair dismissal claim gives employers less discretion to dismiss unproductive or disruptive workers. This makes it more difficult to conduct post-hire sorting to weed out undesirable employees who present well during the hiring process.[86] David Autor, William Kerr, and Adriana Kugler found that by increasing the cost of firing undesirable workers, dismissal protections lead employers to hold onto less productive workers rather than replacing them.[87] Employers may also attempt to limit their exposure to unfair dismissal claims by hiring casual workers, using contractors, or hiring more friends and family.[88] In so far as a more suitable or productive applicant is rejected, productivity will have been reduced.

Since the *Fair Work Act* was enacted in 2009, claims lodged with FWA have more than doubled from 8,000 per year to almost 17,000 per year.

Outcomes

Figure 5 shows outcomes for unfair dismissal claims from 1997–98 to 2010–11 under the federal jurisdiction. The outcomes cover the number of claims lodged, claims settled before or at conciliation, claims finalised before arbitration, and claims determined by arbitration.

Figure 5: Unfair dismissal outcomes (federal jurisdiction), 1997–98 to 2010–11



Source: AIRC/FWA Annual and Quarterly Reports, 1997–98 to 2010–11.

Since FWA 2009 was enacted, claims lodged with FWA have more than doubled from 8,000 per year to almost 17,000 per year. There are two reasons for this remarkable surge:

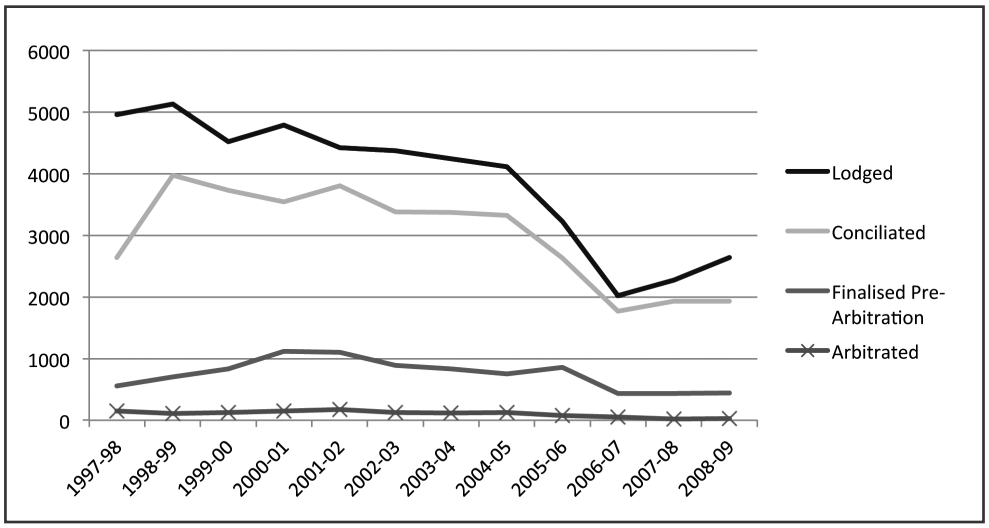
1. **Changes to content**: Small businesses are no longer exempt from unfair dismissal, which means many more businesses are susceptible to claims. Also, businesses no longer have the defence of operational reasons.
2. **Changes to jurisdiction**: FWA 2009 covers all workers in the private sector except in Western Australia. Claims are lodged with FWA rather than the state commission.

Thus jurisdiction changes mask part of the effects of legislative change. The introduction of WCA 2005 widened the applicability of the federal laws, while simultaneously decreasing the number of employees eligible to claim. These two changes have opposing effects on unfair dismissal outcomes recorded in Figure 5. WCA 2005 exemptions should decrease the number of claims, while the increase in federal jurisdiction funnels more claims to FWA (increasing the observed unfair dismissal claims). What matters is the change in the content of the legislation, not the change in jurisdiction. To draw conclusions about the impact of policy changes, the effects of change in the content of the Act need to be isolated from jurisdiction changes.

Work Choices **widened the applicability of the federal laws, while decreasing the number of employees eligible to claim.**

The effects of WCA 2005 can be seen in unfair dismissal outcomes in Victoria. Then Premier Jeff Kennett referred the state's industrial relations powers to the federal government in 1996, so workers in Victoria were covered by federal industrial relations laws rather than state laws. If the Victorian figures are used as a proxy for the rest of Australia, we can isolate the effects of WCA 2005 amendments from its jurisdictional impact.

Figure 6: Unfair dismissal outcomes in Victoria, 1997–98 to 2008–09



Source: AIRC/FWA Annual and Quarterly Reports, 1997–98 to 2008–09.

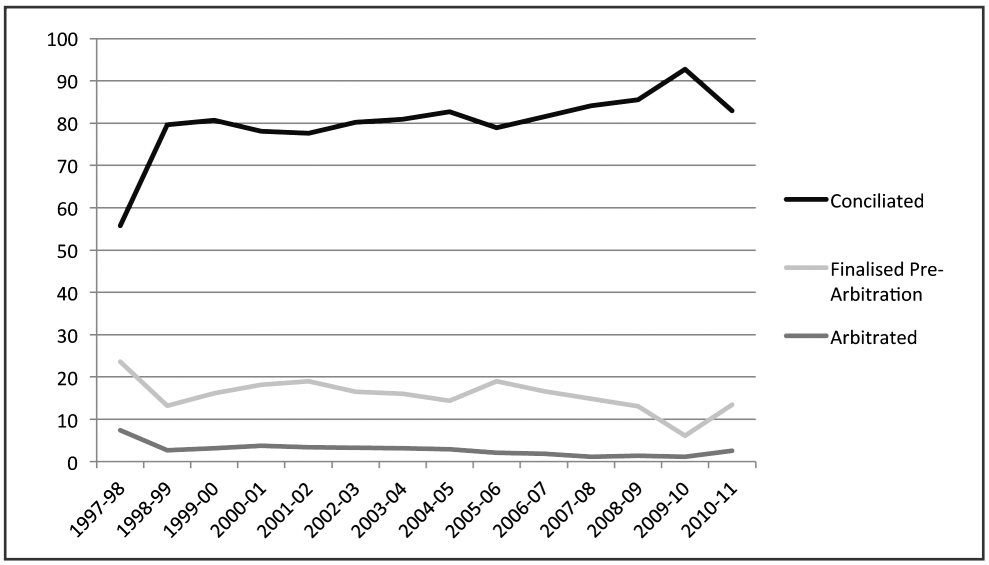
The data in Figure 6 show a much larger reduction in claims lodged and claims conciliated in Victoria than in the federal jurisdiction. The number of claims lodged is halved in the first two years of WCA 2005 before recovering slightly in the following two years. This reduction can be attributed to WCA 2005 exemption for businesses with fewer than 100 employees and the genuine operational reasons.

Unfortunately, the Victorian breakdown on unfair dismissal outcomes does not feature in FWA's annual reports after 2008–09, so it is difficult to analyse the impact of FWA 2009 in isolation of jurisdictional change.

Benoit Freyens and Paul Oslington analysed unfair dismissal outcomes since 2000–01 and concluded that the increase in claims under FWA 2009 is roughly in line with the increase in jurisdiction and the eligibility of employees to make claims.[89]

What is perhaps more important than the changes in the number of claims is the proportion of claims that are settled at conciliation. As Figure 7 illustrates, an average of 80% of all claims are settled by conciliation, 16% are finalised before arbitration, and 3% are finalised at arbitration. This makes the conciliation process extremely important.

Figure 7: Composition of unfair dismissal outcomes (federal jurisdiction), 1997–98 to 2010–11



Source: AIRC/FWA Annual and Quarterly Reports, 1997–98 to 2010–11.

The manner in which conciliation is carried out bears considerable weight on the outcome of the dispute, regardless of the merits of the case.

Conciliation is an informal negotiation where the employer, employee and an officer from FWA try to come to an agreement and resolve their dispute. It is not like a court appearance where the parties give evidence, argue their case, and undergo scrutiny.

Herein lies the problem. Dispute resolution carries with it issues that need scrutiny. The manner in which conciliation is carried out, and the advice the conciliator offers the parties, bears considerable weight on the outcome of the dispute, regardless of the merits of the case.

A chapter written by Grace Collier in Gary Johns' book, *Right Social Justice*, illustrates the problem:

> An employment separation can occur in three ways: A person can resign, be dismissed or be made redundant. Under the current legislation, someone can resign their job and claim unfair dismissal. Someone can be made redundant, accept a redundancy package, and claim unfair dismissal. And someone can be sacked and claim unfair dismissal.[90]

Any employee can lodge an application for unfair dismissal through FWA for $60, after which a conciliation date is set. The conciliator, as Collier says, usually begins along the following lines:

> Today is not about who is right and who is wrong. I will hear the parties speak but no evidence is to be put forward, as this stage is not about making judgements; it is about helping the parties settle the matter to avoid litigation.[91]

> The stories of the parties vary significantly and the conciliator usually very quickly comes to the point where they say something such as, 'you are saying one thing and you are saying another; I have no idea where the truth lies. The point is that if this matter is not settled today the employer will bear the cost of an expensive trial that could cost $30,000 or upwards. I am trying to assist you to avoid that situation, so as the employer, how much are you willing to pay to settle this matter today?' And with that the pressure upon the employer to pay 'go-away money' commences.[92]

That such pressure is exerted at even one negotiation is astounding. It is puzzling that no evidence is permitted at conciliation, and that the conciliator introduces no facts or challenges the claims of either party. Such negotiations mock the principle of fairness the laws are designed to uphold.

The conciliation and arbitration process is deeply flawed. Employees pay little cost for an unfair dismissal application, and do not bear the cost of an expensive court proceeding, so they have little to lose and much to gain. If employees know the cost implications for the employer (which information is readily obtained through 'no win no fee' legal advice), they have an incentive to pursue frivolous and exaggerated claims. Faced with the dilemma expensive court proceedings or less expensive settlement pay-out, the employer has a Hobson's choice.

Conclusion

Faced with the dilemma expensive court proceedings or less expensive settlement pay-out, the employer has a Hobson's choice.

Industrial relations in Australia has changed radically in the past two decades. The most fundamental change is undoubtedly the move towards a decentralised wage-setting framework where employers and employees/unions bargain over wages and conditions rather than adopt judgments handed down by arbitral tribunals. Workplace agreements are now the prevailing paradigm, with collective and individual agreements accounting for 80% of workers, while just 15% of the workforce remain on the award only. The new framework increases labour market flexibility and allows for much wider variation in the conditions catering to the diverse needs of different enterprises.

The reform period has also witnessed a considerable drop in industrial action. The strike rate today is 75% less than its pre-reform average. Paradoxically, the current record levels of industrial peace can be attributed to the introduction of a statutory right to strike. Since its introduction in 1993, protected action has been further restricted and regulated with positive results. FWA 2009 has kept in place many of the changes introduced by WCA 2005, which explains why claims about 'skyrocketing' strikes and a return to 'industrial chaos' are misdirected.

There is, however, cause for concern over the matters that employees/unions can strike about. Strikes over management's use of contractors or other sources of external labour are legitimate cause for concern among the business community, since they go to the heart of management's role in an organisation. Complaints that unions are striking over matters previously reserved for management are real. The ability of employers to decide who and how they hire can have a substantial impact on the way a business is run. This authority should be reserved for management, as it is management, not workers, who are responsible to shareholders.

Changes to federal unfair dismissal laws have been contentious. Although the evidence of employment effects is mixed (it is uncertain whether they increase or decrease unemployment), there are other damaging effects upon certain groups of workers. Existing workers find it easier to keep their jobs, while the unemployed

find it more difficult to obtain a job. In addition to the effects on equity in the job market, the unfair dismissal process itself is open to manipulation and exploitation. Pressure is placed on employers during the conciliation phase to pay 'go away' money to prevent the case from proceeding to trial. Given their harmful economic effects and the potential for abuse, unfair dismissal laws and the accompanying processes need to be overhauled.

Changes to the bargaining structure—in particular, good faith bargaining obligations—are yet to be determined as detrimental or beneficial. They are, however, designed to secure unions a place at the bargaining table. Although they are intended to promote cooperative workplace negotiations, experience in the United States suggests good faith bargaining obligations can become burdensome and confusing. The laws in Australia are still in their infancy and much rests on how FWA interprets the obligations.

Overall, the results of labour market reform have been mixed. Whereas the first three rounds of reform produced greater flexibility and liberalisation in labour markets, FWA 2009 has not. Areas of the legislation still require work, but contrary to the complaints of some business figureheads, FWA 2009 has not regressed Australia's industrial relations system to its pre-reform days.

The *Fair Work Act* has not regressed Australia's industrial relations system to its pre-reform days.

Appendix—Prohibitions on enterprise clauses

Under WCA 2005, the following list of prohibited content could not be inserted into an enterprise agreement:[93]

1. any provision relating to the negotiation of the agreement
2. a term prohibiting or restricting a person bound by the agreement from disclosing details about it
3. a term that directly or indirectly restrict the offering or making of AWAs
4. restrictions or conditions on the use of independent contractors or labour-hire arrangements
5. terms that contravene the freedom of association provisions in Part 16 of the Act, or that encourage or discourage union membership
6. any provision permitting industrial action
7. various union-related entitlements, including deduction of union dues from wages, trade union training leave, paid union meetings, mandatory union involvement in dispute resolution, rights of entry for union officials, and the provision of information about employees to unions
8. any terms that confer a right or remedy in relation to the harsh, unjust or unreasonable termination of an employee's employment.

Under FWA 2009, the following list of unlawful content cannot be inserted into an enterprise agreement:[94]

1. a discriminatory term
2. an objectionable term (which are terms that require or allow payment of a bargaining services fee, or a contravention of the general protections provisions of FWA 2009)
3. a term that confers an entitlement or remedy in relation to unfair dismissal before the employee has completed the minimum employment period
4. a term that excludes, or modifies, the application of unfair dismissal provisions in a way that is detrimental to, or in relation to, a person
5. a term that is inconsistent with the industrial action provisions
6. a term that provides for an entitlement to right of entry
7. a term that allows for the exercise of any state or territory OHS legislative right of entry in a manner different to the rights set out in the right of entry provisions of FWA 2009.

Endnotes

1 Ben Schneiders, 'Unions win right to strike at tribunal,' *The Age* (2 June 2011).

2 Louise Dodson and Mathew Dunckley, 'High cost, low productivity nation,' *The Australian Financial Review* (14 February 2011).

3 Annabel Hepworth and Sarah-Jane Tasker, 'BHP chief Jac Nasser lashes work laws,' *The Australian* (17 May 2012).

4 'Labor heading for 'WorkChoices lite,' ABC News (27 June 2007).

5 Mark Wooden, 'Australia's Industrial Relations Reform Agenda,' paper presented at the 34th Conference of Economists (University of Melbourne: Melbourne Institute of Applied Economic and Social Research, September 2005), 1.

6 Kayoko Tsumori, *The Road to Work: Freeing Up the Labour Market*, Policy Monograph 67 (Sydney: The Centre for Independent Studies, 2005), 43.

7 Rae Cooper and Brandon Ellem, '"Less than Zero": Union Recognition and Bargaining Rights in Australia 1996–2007,' *Labour History* 52:1 (February 2011), 51.

8 Andrew Stewart, *Stewart's Guide to Employment Law*, third edition (Sydney: The Federation Press, 2011), 21.

9 Mark Wooden, 'Australia's Industrial Relations Reform Agenda,' as above, 1.

10 Andrew Stewart, *Stewart's Guide to Employment Law*, as above, 21.

11 Mark Wooden, 'Australia's Industrial Relations Reform Agenda,' as above, 2.

12 Anne Hawke and Mark Wooden, 'The Changing Face of Australian Industrial Relations: A Survey,' *The Economic Record* 74:224 (1998), 79.

13 Industry Commission, 'Assessing Australia's Productivity Performance' (Commonwealth of Australia, July 1997), 13.

14 'Discussion of Matter of Public Importance,' Hansard (Canberra: House of Representatives, 4 December 1989), 3759.

15 Mark Wooden, 'Australia's Industrial Relations Reform Agenda,' as above, 2.

16 Bill Kelty quoted in Joanne Loundes, Yi-Peng Tseng, and Mark Wooden, 'Enterprise Bargaining and Productivity in Australia: What do We Know?' *The Economic Record* 79 (June 2003), 246.

17 *Workplace Relations Act 1996* (Cth), Section 89A(2).

18 Andrew Stewart with Elizabeth Priest, 'The Work Choices Legislation: An Overview' (Federation Press, December 2006), 17–19.

19 Patricia Todd, Donella Caspersz, and Michael Sutherland, '"Out with the Individual Agreements, In with the Collective Bargaining … Did Someone Forget to Tell the Employers?" Employers' Response to the Changes in Western Australia's Regulatory Framework,' 18th AIRAANZ Conference (Queensland: 2004), 525–534.

20 As above.

21 Fair Work Australia, 'Use of individual flexibility arrangements,' 1.

22 *Fair Work Act 2009* (Cth), Section 202(1).

23 Fair Work Australia, 'Use of individual flexibility arrangements,' 3.

24 Industry Commission, 'Assessing Australia's Productivity Performance,' as above, 11.

25 Mark Wooden, *The Transformation of Australian Industrial Relations* (Sydney: The Federation Press, 2000), 150.

26 Joanne Loundes, Yi-Peng Tseng, and Mark Wooden, 'Enterprise Bargaining and Productivity in Australia: What do We Know?' as above, 247.

27 As above.

28 Dean Parham, 'The New Economy? A New Look at Australia's Productivity Performance,' Productivity Commission Staff Research Paper (Canberra: Commonwealth of Australia, May 1999), 22.

29 As above.

30 Joanne Loundes, Yi-Peng Tseng, and Mark Wooden, 'Enterprise Bargaining and Productivity in Australia: What do We Know?' as above, 245.

31 Mark Wooden, *The Transformation of Australian Industrial Relations*, as above, 154.

32 OECD (Organisation for Economic Co-operation and Development), 'Minimum Relative to Median Wages of Full-Time Workers' (2011).

33 As above.

34 Judith Sloan, 'Evaluating the Fair Work Act,' *Policy* 26:4 (Summer 2010), 27.

35 Robyn Jones, 'The First Non-Union Enterprise Agreement in New South Wales: A Case Study in Flexibility,' *International Journal of Employment Studies* 3:2 (October 1995), 21.

36 Rae Cooper and Brandon Ellem, 'Less than Zero,' as above, 49–69.

37 ABS (Australian Bureau of Statistics), 'Employee Earnings and Hours,' Cat. No. 6306 (2010).

38 Alan Joyce, 'Qantas CEO puts his case,' *The Sydney Morning Herald* (27 October 2011).

39 Matt O'Sullivan, 'Qantas secures victory over outsourcing limits,' *The Sydney Morning Herald* (8 August 2012).

40 Qantas, 'Qantas responds to industrial action,' media release (Sydney: 29 October 2011).

41 Alan Joyce, 'No other option has been left to us,' *The Australian* (31 October 2011).

42 *Fair Work Act 2009* (Cth), Section 423(2).

43 Kylie Williams, 'Qantas claims industrial victory,' news.com.au (8 August 2012).

44 AAP, 'Fair Work Australia rules in favour of Qantas in dispute with TWU,' news.com.au (8 August 2012).

45 Andrew Stewart, *Stewart's Guide to Employment Law*, as above, 335.

46 Braham Dabscheck, 'Regulation Down Under: The Case of Australian Industrial Relations,' *Journal of Economic Issues* 27:1 (March 1993), 49.

47 Stephen Creigh, *Australia's Strike Record: The International Perspective* (Allen & Unwin, 1986).

48 Andrew Stewart, *Stewart's Guide to Employment Law*, as above, 336.

49 As above.

50 As above.

51 As above.

52 Shae McCrystal, 'Protected Industrial Action and Voluntary Collective Bargaining Under the Fair Work Act 2009,' *The Economic and Labour Relations Review* 21:1 (October 2010), 38.

53 This section borrows heavily from Shae McCrystal, 'Protected Industrial Action and Voluntary Collective Bargaining Under the Fair Work Act2009,' *The Economic and Labour Relations Review* 21:1 (October 2010), 44–45.

54 *Workplace Relations Regulations 2006* (Cth), Section 2.8.5(1)(h).

55 Cole Royal Commission into the Building and Construction Industry, *Volume 1: Summary of Findings and Recommendations* (Melbourne: February 2003), 5–6.

56 AMMA (Australian Mines and Metals Association), 'ABCC changes its name to fair work building and construction (accessed August 2012; page has since been removed).

57 AAP, 'Grocon, CFMEU start mediation,' *The Australian* (12 September 2012).

58 Ben Packham and Pia Akerman, 'Union thuggery returning, says former building commission watchdog chief John Lloyd,' *The Australian* (28 August 2012).

59 Julia Gillard MP, Prime Minister of Australia, 'The Fair Work Act, Second Reading Speech,' Hansard (Canberra: House of Representatives, 25 November 2008).

60 As above.

61 Anthony Forsyth and Andrew Stewart, *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Sydney: Federation Press, 2009), 122.

62 As above, 122.

63 *Fair Work Act 2009* (Cth), Section 176.

64 *Fair Work Act 2009* (Cth), Section 228.

65 Anthony Forsyth and Andrew Stewart, *Fair Work*, as above, 123.

66 Ron McCallum, 'Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws,' *Relations Industrielles/Industrial Relations* 57:2 (Spring 2002), 225.

67 *Fair Work Act 2009* (Cth), Section 237.

68 As above, Section 228(2).

69 As above, Section 228(1).

70 Richard Naughton, 'The Obligation to Bargain in Good Faith: Inspired Innovation or Legislative Folly?' Working Paper No. 6 (Centre for Employment and Labour Relations Law, April 1995), 9.

71 As above, 2.

72 As above.

73 *Borg-Warner Controls* (1972) 198 NLRB 726.

74 Fair Work Ombudsman, 'Enterprise bargaining fact sheet.'

75 *Fair Work Act 2009* (Cth), Section 235.

76 Richard Naughton, 'The Obligation to Bargain in Good Faith,' as above, 1.

77 David Pencer, 'Requiring Good Faith Negotiation,' *ADR Bulletin* 1:3 Article 1 (July 1998), 1.

78 As above, 2.

79 Andrew Stewart, *Stewart's Guide to Employment Law*, as above, 316.

80 *Industrial Relations Reform Act 1993* (Cth), Section 170DE.

81 Andrew Stewart, *Stewart's Guide to Employment Law*, as above, 317.

82 Benoit Freyens and Paul Oslington, 'Incidences and Outcomes of Unfair Dismissal Claims Under Fair Work, Work Choices and the Workplace Relations Act,' unpublished paper, 3.

83 Benoit Freyens and Paul Oslington, 'Dismissal Costs and their Impact on Employment: Evidence from Australian Small and Medium Enterprises,' *The Economic Record* 83:260 (March 2007), 2.

84 Edward Lazear, 'Job Security Provisions and Employment,' *Quarterly Journal of Economics* 105:3 (August 1990), 700.

85 Don Harding, 'Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses' (University of Melbourne: Melbourne Institute of Applied Economic and Social Research, October 2002), iv.

86 Mark Wooden, 'Australia's Industrial Relations Reform Agenda,' as above, 12.

87 David Autor, William Kerr, and Adriana Kugler, 'Does Employment Protection Reduce Productivity? Evidence from US States,' *The Economic Journal* 117 (June 2007), F189.

88 Don Harding, 'Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses,' as above, iv.

89 Benoit Freyens and Paul Oslington, 'Incidences and Outcomes of Unfair Dismissal Claims,' as above.

90 Gary Johns, *Right Social Justice: Better Ways to Help the Poor* (Ballan: Connor Court Publishing, 2012), 112.

91 As above.

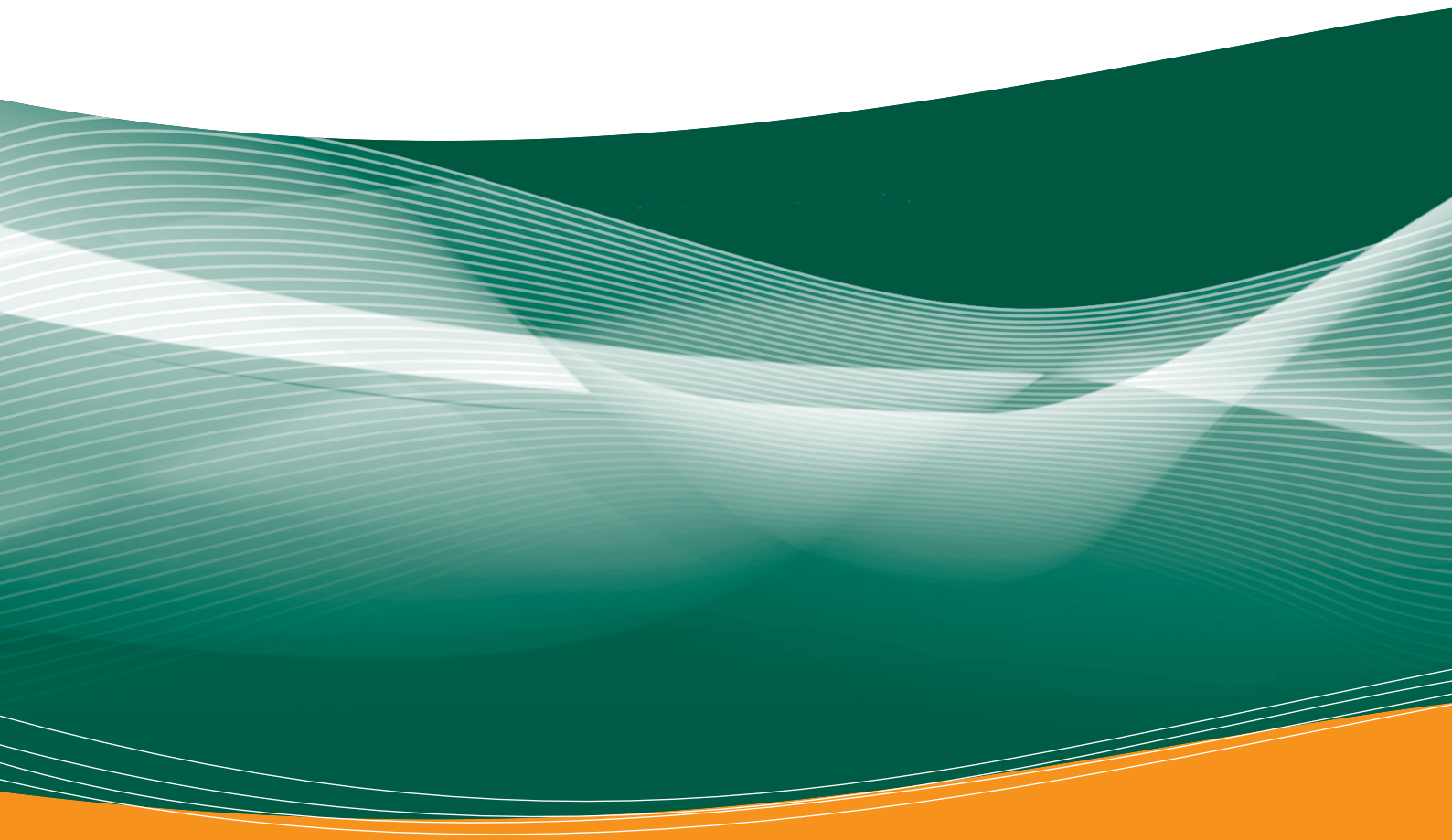
92 As above.

93 *Workplace Relations Regulations 2006* (Cth), Section 2.8.5(1)(h).

94 *Fair Work Act 2009* (Cth), Section 194.

About the Author

Alexander Philipatos is a Policy Analyst with the Economics Program at The Centre for Independent Studies. He holds a BEcon (Honours) from La Trobe University.



THE CENTRE FOR INDEPENDENT STUDIES

CIS Policy Monograph • PM133 • ISSN: 0158 1260 • ISBN: 978 1 922184 08 5 • AU$9.95
Published December 2012 by The Centre for Independent Studies Limited. Views expressed are those of the authors and do not necessarily reflect the views of the Centre's staff, advisors, directors or officers.

This publication is available from the Centre for Independent Studies.
PO Box 92, St Leonards, NSW 1590 Australia • **p:** +61 2 9438 4377 **f:** +61 2 9439 7310 **e:** cis@cis.org.au