

ENTERPRISE BARGAINING AND THE REREGULATION OF AUSTRALIAN INDUSTRIAL RELATIONS*

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Abstract

In the 1990s Commonwealth and state governments in Australia have embarked on major reforms to their respective systems of industrial relations. Such reforms have resulted in Australia moving away from a centralised to a decentralised system of industrial relations as embodied in different systems of enterprise bargaining. Enterprise bargaining constitutes a reregulation of Australian industrial relations. The paper is concerned with exploring the consequences of and prospects flowing from the adoption of enterprise bargaining. It examines constitutional, institutional and historical issues associated with Australian industrial relations; examines major features and issues associated with the new regime(s) of enterprise bargaining; and explores prospects for the future.

In the 1990s the Commonwealth and state governments *all* enacted extensive pieces of legislation to foster a new approach(es) to industrial relations regulation. A, if not the major, goal of these respective pieces of legislation is to encourage a more enterprise, or workplace, based approach to conducting industrial relations in Australia.¹ In turn, a decentralised enterprise based approach is heralded as providing the best means of enabling Australia to conquer its various domestic and

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1 See for example *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) S 3(b); and *Industrial Relations Act 1996* (NSW) S 3(c).

international economic problems.²

An issue which will initially be considered is whether Australia's move to enterprise bargaining constitutes a radical departure from previous arrangements, or a re-definition of Australia's traditional approach to industrial relations regulation. The adoption of enterprise bargaining constitutes a rejection of the centralisation assumptions contained in the (quasi-) corporatist policies pursued by Australia during the wage indexation experiment of 1975 to 1981, and under the Australian Labor Party—Australian Council of Trade Unions' Accords between 1983 and October 1991, when the Australian Industrial Relations Commission (reluctantly) agreed to the adoption of enterprise bargaining.³ Enterprise bargaining is 'radical' in the sense of substituting decentralisation for centralisation.

Much of the case for enterprise bargaining has been based on the need to deregulate labour markets and (tautologically) give sway to market forces, which it is claimed, will enhance economic growth and prosperity.⁴ It is difficult to see how the recent reforms can be regarded as deregulatory. At the Commonwealth level the Liberal and National Parties coalition government enacted the *Workplace Relations and Other Legislation Amendment Act* 1996 (Commonwealth)—a document which runs to 324 pages! The Victorian coalition government's *Employee Relations Act* 1992 (Victoria) comprises 132 pages. In 1993 the Western Australian coalition government introduced three pieces of legislation—the *Workplace Agreements Act* 1993 (Western Australia) which is 78 pages in length, the *Minimum Conditions of Employment Act* 1993 (Western Australia) 31 pages and the *Industrial Relations Act* 1993 (Western Australia) 43 pages. Such legislation may be regarded as constituting additional examples of what Lord Wedderburn, in examining the legislative experience of the United Kingdom during the Thatcher era, described as 'Deregulation leads to reregulation by a State determined to protect the market order'.⁵

Moreover, the various legislative models developed (so far) envisage a

2 See Reith's *Second Reading Speech* 1996. For a critique of arguments concerning industrial relations structure determining economic performance see Dabscheck 1995: 33–40.

3 For an examination of events leading up to this decision see Dabscheck 1995: 49–75. Also see Dabscheck 1996.

4 For example see BCA 1989.

5 Wedderburn 1989: 18.

continuing, or more or less strong, role for awards and third parties—whether they be traditional industrial tribunals or a new creation in the form of an employment advocate/commissioner for enterprise bargaining. Major innovations contained in these legislative changes are that unions do not need to be involved in the making of collective agreements, and that agreements, both collective and individual, can take precedence over awards, and/or assume quasi-award status. In this sense the embracing of enterprise bargaining in the 1990s should be regarded as constituting a redefinition and/or extension of the traditional manner in which Australia has conducted industrial relations.

This paper is concerned with exploring the consequences of and prospects for Australia flowing from its move towards various systems of enterprise bargaining. It will begin with an examination of constitutional, institutional and historical issues associated with Australian industrial relations. This will be followed by a discussion of major issues associated with the new regime(s) of enterprise bargaining. The third section will focus on prospects for the future. Given the problems associated with crystal ball gazing the analysis provided will be somewhat tentative and speculative. The paper will end with a summary and conclusion.

Constitutional, Institutional and Historical Context

Australia is usually regarded as having a unique system of industrial relations. Such uniqueness stems from the peculiarities of the Australian Constitution and the existence of a multitude of industrial tribunals to regulate relationships between employers/managers and workers/unions. The Australian Constitution specifies powers available to the Commonwealth Parliament, with powers not mentioned being the responsibility of the states. To the extent that there is an inconsistency between laws of the Commonwealth and the states, Section 109 of the Constitution specifies that the former shall prevail 'to the extent of the inconsistency'. The major industrial relations power *traditionally* available to the Commonwealth has been Section 51, paragraph XXXV of the Constitution. It states

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to... Conciliation and Arbitration for the prevention and settlement of industrial disputes

extending beyond the limits of any one state.

Section 51, paragraph XXXV, is an indirect power. The Constitution forced the Commonwealth government to delegate powers of conciliation and arbitration to industrial tribunals charged with the responsibility of settling and preventing industrial disputes. Subject to other powers in the Constitution, the Commonwealth government could not directly legislate on such matters as wages, hours of work, working conditions and so on. If it was desirous of achieving certain industrial relations outcomes, it was forced, like other parties, to argue its case before the Australian Industrial Relations Commission (and its predecessors)—the major Commonwealth industrial relations tribunal.

State governments are not precluded from becoming directly involved in industrial relations. On a number of occasions important developments with respect to conditions have been established at the state level by legislation. The various states have legislated to create different tribunal systems. Generally speaking, the mainstream state tribunals have followed the lead of the Australian Industrial Relations Commission, or have been compelled to by legislation, with respect to major issues.

A number of decisions by the High Court enabling the Commonwealth to utilise the 'corporations' (Section 51, paragraph XX) and 'external affairs' (Section 51, paragraph XXIX) powers have fundamentally challenged the traditional view of the constitutional basis of Australian industrial relations. Beginning with the *Concrete Pipes* case of 1971, including the landmark *Koowarta* case of 1982 and *Tasmanian Dam* case of 1983, through to *Victoria v. Commonwealth* case of 1996⁶, the High Court has enabled the Commonwealth to assume direct industrial relations powers. Such decisions have not only enabled the Commonwealth to downgrade and erode the power of the commission, but also, via Section 109 of the Constitution (see above), to override or reduce the legislative powers of the states. These decisions provide the constitutional basis for the creation of a national, or unitary, system of industrial relations regulation. The *Industrial Relations Legislation Amendment Act* 1992

6 *Concrete Pipes* case (1971) 124 CLR 468; *Koowarta* case (1982) 153 CLR 168; *Tasmanian Dam* case (1983) 46 ALR 625; and *Victoria v. Commonwealth* (1996) 138 ALR 129.

(Commonwealth), *Industrial Relations Reform Act* 1993 (Commonwealth) and the *Workplace Relations and Other Legislation Amendment Act* 1996 (Commonwealth) which have, in different ways, sought to encourage the development of enterprise bargaining, have drawn on the 'corporations' and 'external affairs' powers.

Created in response to strikes/lockouts and economic depression in the 1890s, industrial tribunals have been a mainstay of Australian industrial relations throughout the twentieth century. Henry Bournes Higgins, the second President of the Commonwealth Court of Conciliation and Arbitration from 1907 to 1921, claimed that industrial tribunals would usher in

a new province for law and order...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.⁷

While Higgins championed the role of industrial tribunals we need to be wary of overstating the role that he believed they should perform. In his hands they would determine minimum terms and conditions of employment—the most famous example being the 1907 *Harvester* judgement⁸ which established such a wage for an adult unskilled male labourer—and provide a vehicle for the resolution of industrial disputes. Higgins said that 'The ideal of the Court is a collective agreement settled, not by the measurement of economic resource, but on lines of fair play'.⁹ He also said

The Court leaves every employer free to carry on the business on his own system, so long as he does not perpetuate industrial trouble or endanger industrial peace; free to choose his employees on their merits and according to his exigencies; free to make use of new machines, or improved methods, of financial advantages, of advantages of locality, of superior knowledge; free to put the utmost pressure on anything and everything except human life.¹⁰

7 Higgins 1915: 14.

8 *Harvester* case (1907) 2 CAR 1.

9 Higgins 1919: 190.

10 Higgins 1915: 21.

Australia has traditionally operated a three-tiered (or level) system of wage determination. The three tiers are national wage cases, industry cases and over-award or direct negotiations between the parties. In national wage cases a full bench of the commission determines wages and/or the rules or principles that govern wage determination, for all workers covered by Commonwealth awards (such decisions are usually replicated by state tribunals). These are generic cases where the commission hands down decisions which are believed to be consistent with Australia's industrial relations and economic needs. Industry cases involve the commission, or relevant tribunal, in dealing with wages and working conditions in a particular sector or industry. Such cases are usually heard by individual tribunal members who, in theory at least, are able to fashion decisions which take into account unique circumstances relevant to the industry/sector and workers concerned. Industry cases may involve little more than 'rubber-stamping' exercises where the industrial tribunal concerned gives its imprimatur to agreements negotiated by the parties. With over-award bargaining wages are determined by direct negotiations between employers and workers/unions. Such bargaining takes account of local and unique factors at a particular workplace. The agreements so reached reflect the variance in bargaining power which exists between different groups of workers/unions and employers. Over-award pay has the potential to reduce the scope and relevance of industry and national wage cases.

Developments in Australian industrial relations over the last three decades or so can be usefully analysed in terms of a continuing struggle between protagonists as to which tier, or combination of tiers, provides the best or most appropriate basis for industrial relations regulation. Those who favour the first tier, national wage cases, argue that Australia's various economic and industrial relations problems can be best resolved via a centralised (quasi-corporatist) system where, by and large, all workers should receive similar treatment. With this approach uniformity of treatment is regarded as the golden rule of industrial relations regulation. Those who advocate greater reliance being placed on the second and third tiers, industry cases and over-award negotiations, maintain that the Australian labour market is too complicated and diverse to sustain uniformity. It is argued that decentralisation would enable respective groups of employers and workers/unions to shape wages (and working conditions) in terms of the various and diverse factors that are relevant to them.

On several occasions during the 1960s, when Australia experienced full employment and high rates of economic growth (see Table 1), the Commonwealth Conciliation and Arbitration Commission expressed concern about over-award payments undermining its decisions in national wage and industry cases.¹¹ In the 1966 *General Motors Holden* and 1970 *Oil Industry* cases the commission rejected union applications that wages should be linked to company or industry profitability, respectively.¹² In the *Oil Industry* case it said 'increased prosperity should be shared amongst employees generally and not be confined to employees in the more prosperous sectors'.¹³ The commission hoped 'that the bulk of wage increases would come from [its decisions in] national wage cases'.¹⁴ In the full employment, high growth (classic demand pull inflation) era of the late 1960s/early 1970s (see Table 1) the commission was unable to achieve this goal—the parties were unprepared to wait around for the commission to dole out wage increases in national wage cases.

The stagflation of the mid-1970s (see Table 1) provided the Australian Conciliation and Arbitration Commission with a means to obtain the parties' acceptance of national wage cases being the major source of wage movements. The commission was prepared to link wages to prices in regular national wage cases if the parties agreed to keep wage movements from the other two tiers to a minimum. In so doing the commission maintained that wage indexation provided the best means to overcome Australia's economic and industrial relations problems. The wage indexation experiment operated from 30 April 1975 to 31 July 1981. The experiment ended following a short-lived mining and resources boom, in 1980 and 1981, when an increasing number of employers, in both the public and private sectors, offered wage rises which clearly breached the commission's wage indexation guidelines.

In 1982 and 1983 Australia experienced negative economic growth and a substantial bout of stagflation (see Table 1). The Australian Labor Party and Australian Council of Trade Unions entered into an Accord, which championed

11 See Eighth, Ninth and Tenth Annual Reports, President of the Commonwealth Conciliation and Arbitration Commission, and 1965 *Basic Wage* case, 100 CAR 178 : 228.

12 *General Motors* case, 115 CAR 931 ; *Oil Industry* case 134 CAR 159.

13 134 CAR 159 : 164.

14 1974 *National Wage* case, 157 CAR 293 : 301.

Table 1 Australian Economic Indicators: 1967-68 to 1995-96

Year	Change in Prices %	Change in Wages %	Real Wage Growth %	Real GDP Growth %	Employment Growth %	Unemployment Rate %	Current Account Deficit as % of GDP
1967-68	3.3	5.8	2.5	4.4	2.3	1.7	4.4
1968-69	2.6	7.3	4.7	9.3	2.5	1.6	3.4
1969-70	3.2	8.4	5.2	5.2	2.5	1.5	2.2
1970-71	4.8	11.1	6.3	4.3	4.1	1.4	2.1
1971-72	6.8	10.4	3.6	3.1	2.2	1.7	0.7
1972-73	6.0	9.6	3.6	3.2	1.7	2.5	- 1.7
1973-74	12.9	18.1	5.2	7.5	3.1	1.8	1.7
1974-75	16.7	28.3	11.6	1.6	1.2	2.4	1.8
1975-76	13.0	15.2	2.2	1.7	- 0.2	4.6	1.9
1976-77	13.8	12.9	- 0.9	3.7	1.0	4.7	2.8
1977-78	9.5	9.9	0.4	1.1	0.6	6.5	3.1
1978-79	8.2	7.7	- 0.5	4.9	0.8	6.1	3.3
1979-80	10.2	9.9	- 0.3	2.4	2.3	6.2	1.6
1980-81	9.4	13.5	4.1	3.3	2.7	5.9	3.9
1981-82	10.4	13.7	3.3	3.9	1.2	6.1	5.5
1982-83	11.5	11.2	- 0.3	- 3.6	- 1.7	8.9	3.8
1983-84	6.9	8.5	1.6	5.0	0.9	9.5	3.7
1984-85	4.3	6.9	2.6	5.9	3.0	8.5	4.9
1985-86	8.4	5.9	- 2.5	3.6	4.3	7.9	6.1
1986-87	9.3	6.2	- 3.1	1.8	2.7	8.3	4.4
1987-88	7.3	6.0	- 1.3	5.9	3.0	7.8	3.4
1988-89	7.3	6.8	- 0.5	6.1	4.1	6.6	5.1
1989-90	8.0	6.6	- 1.4	3.6	3.8	6.2	5.8
1990-91	5.3	5.8	0.5	- 1.1	- 0.4	8.4	4.1
1991-92	1.9	2.9	1.0	- 0.3	- 1.6	10.4	2.9
1992-93	1.0	0.7	- 0.3	3.1	0.2	11.0	3.6
1993-94	1.8	3.0	1.2	3.3	1.9	10.5	3.9
1994-95	3.2	1.5	- 1.7	5.9	4.0	8.9	6.1
1995-96	4.2	4.4	0.2	3.1	2.6	8.5	4.2

Source: R. A. Foster, *Australian Economic Statistics: 1949-50 to 1994-95*, Reserve Bank of Australia, Occasional Paper No. 8, Sydney, June 1996; Department of the Treasury, *Economic Round-up*, AGPS, Canberra. Figures are subject to revision.

centralised wage determination, in the form of a re-run of the wage indexation experiment, as providing the best means to overcome Australia's economic and industrial relations problems.¹⁵ While the early years of the Accord were associated with domestic recovery, Australia experienced severe *international* economic problems in the mid-1980s (see Table 1). Criticisms were continually directed at Australia's centralised system of wage determination, and at industrial tribunals and

15 In Dabscheck 1989: 46 it is argued that the wage indexation component of the Accord (Mark I) was fashioned to fit in with a policy/position that the commission was desirous of implementing.

trade unions placing constraints and restrictions on the ability of companies/enterprises to flexibly respond to the demands of competing on international markets. From the mid-1980s on Australia has been assailed with a continual stream of writings and statements from various quarters to decentralise, deregulate and deunionise.¹⁶

In the second half of the 1980s, continuing into the 1990s, the major parties in Australian industrial relations, expressed support to move the focus of regulation from the centre/national wage cases to enterprise or workplace based bargaining. The Accords III to V, and various decisions of the commission, combined centralisation and decentralisation in an effort to wean the parties off their past dependence on centralised regulation. The experiment with quasi-corporatist centralisation was at an end. In February 1990 Australian Council of Trade Unions' secretary Bill Kelty said 'The issue...is not whether or not there will be enterprise bargaining but what sort of enterprise bargaining, what sort of relationships'.¹⁷

Dimensions of Enterprise Bargaining in the 1990s

Commonwealth and state governments, whether Labor or non-Labor/Coalition, have experimented with different models or variants of enterprise bargaining. Six key issues, or dimensions, of this experimentation can be identified. First, should there be a role for industrial tribunals and awards? Despite the deregulatory rhetoric associated with attacks on the centralised/quasi-corporatist arrangements of the 1990s, with the exception of Victoria (see Table 2), 1990s versions of enterprise bargaining envisage a role for industrial tribunals and awards. Tribunals will continue their traditional role of resolving industrial disputes, and will have responsibility, of varying degrees, for vetting different types of agreements to determine whether or not they are consistent with criteria specified in the respective pieces of legislation. Moreover, various types of agreements are moored to awards (depending on the jurisdiction) and there are requirements for periodic reviews of awards to ensure that they satisfy various legislative criteria. The *Workplace*

16 For a more detailed examination of these issues see Dabscheck 1989, 1995, 1996.

17 *Australian Financial Review*, 14 February 1990.

Table 2 Models of Industrial Relations Regulation, Commonwealth and States : 1996

Jurisdiction	Awards	COLLECTIVE	AGREEMENTS	Individual Agreements	Employment Advocate
		Unionised	Non-Unionised		
Commonwealth	✓	✓	✓	✓	✓
New South Wales	✓	✓	✓		
Victoria*					
Queensland	✓	✓	✓	✓	✓
South Australia	✓	✓	✓		✓
Western Australia	✓	✓	✓	✓	✓
Tasmania	✓	✓	✓		✓

* Victoria referred its powers to Commonwealth.

Relations and Other Legislation Amendment Act 1996 (Commonwealth) is intent on, for want of a better term, pruning back the coverage or spread of awards to twenty 'allowable matters'.

The second and third dimensions are unionised versus non-unionised collective agreements, and individual versus collective agreements respectively. Under the various legislative arrangements, agreements, whether they be collective or individual, and assuming that they satisfy various legislative tests (see below), will take precedence over awards. Traditionally, unionised workers have negotiated agreements with employers, which respective industrial tribunals have ratified in the form of certified agreements, or which have been made available to workers in the form of over-award pay¹⁸ (see above). The making of awards and the associated involvement of industrial tribunals has been traditionally dependent on unions processing claims on behalf of workers. Higgins observed in 1915 that 'the system of arbitration...is based on unions. Indeed, without unions, it is hard to conceive how arbitration could be worked'¹⁹.

Individual and non-union collective agreements turn Higgins on his head. Such agreements enable employers and workers to enter into arrangements which have an 'award-like' status, and obviate the need for union involvement. Table Two summarises the position of the various jurisdictions concerning collective and individual agreements. New South Wales, South Australia and Tasmania are the only jurisdictions which don't recognise individual agreements (as taking precedence over awards).

18 In saying this it is recognised that non-unionised workers have received wage levels higher than those specified in awards from employers.

19 Higgins 1915: 23.

The major criticism of non-unionised collective and individual agreements is that 'unscrupulous' employers will use threats of unemployment to coerce workers into accepting reductions in wages and/or erosions in working conditions. Legislatures have responded to this in a number of ways. The *Industrial Relations Reform Act* 1993 (Commonwealth) enabled unions to assume a representational role in the determination of non-unionised collective agreements. Other responses, which are the fourth and fifth dimensions of the discussion here, are to erect safety nets below which agreements cannot fall, and to enable an industrial tribunal, or a new regulatory instrument in the form of an employment advocate/commissioner for enterprise bargaining, to vet or approve such agreements subject to various legislative criteria.

Safety nets seek to link agreements, both individual and collective, to awards, specify that different categories of workers should not be discriminated against, or that agreements satisfy minimum, 'public interest' and 'no disadvantage', or in New South Wales no 'net detriment', tests (in comparison with awards). Such safety nets can be more or less high. Tasmanian and Western Australian legislation (and the *Industrial Relations Act* 1991 (New South Wales) of the Greiner government)²⁰ only specified minimum hourly rates of pay and various leave entitlements. 'No disadvantage' tests linked to awards, as in the Commonwealth, New South Wales (since the *Industrial Relations Act* 1996), Queensland and South Australia constitute a stricter, or higher, safety net.

In overseeing the negotiation or processing of such agreements industrial tribunals and employment advocates can be given more or less power to ensure that workers have not been subjected to 'duress' or 'coercion', and that such agreements are not inconsistent with various legislated safety nets. Table 2 summarises the position of the various jurisdictions concerning the use of instruments such as an employment advocate. New South Wales is the only jurisdiction without an employment advocate—such, or similar, functions are performed by the Industrial Relations Commission of New South Wales.

The sixth dimension is something of a paradox. While enterprise bargaining

20 For a critical examination of the Greiner government's 'failed' experiment with enterprise bargaining see Pragnell and O'Donnell 1997.

1990s style embraces decentralisation it also holds out prospects for Australia moving to a national, or unitary, system of industrial relations regulation. The *Employee Relations Act* 1992 (Victoria) abolished awards and compulsory arbitration. Because of fears by unions that the legislation would adversely impact on workers the Keating Labor government passed the *Industrial Relations Legislation Amendment Act* (No. 2) 1992 (Commonwealth) to enable workers, who did not have access to a state tribunal which made use of compulsory arbitration, to be covered by the Australian Industrial Relations Commission. The legislation precipitated an increasing exodus of Victorian workers to the Commonwealth. The Victorian government sought to stem this flow by allowing for the determination of minimum wages in the form of the *Employee Relations Amendment Act* 1994 (Victoria).

Victoria, South Australia and Western Australia challenged the constitutional basis of the *Industrial Relations Act* 1988 (Commonwealth)—or more correctly major sections of the *Industrial Relations Reform Act* 1993 (Commonwealth). Their challenge was mainly based on the use of the 'external affairs' power to sustain such legislation. In September 1996 the High Court basically found against the states, ruling that industrial relations legislation can be based on the 'external affairs' power.²¹ In October 1996 a full bench of the Australian Industrial Relations Commission ruled that state government employees could be covered by its awards.²² Following these decisions the Victorian government decided to refer its industrial relations powers to the Commonwealth.²³

In 1997 the Queensland coalition government enacted the *Workplace Relations Act* 1997 (Queensland) which replicated major sections of their Commonwealth colleagues' *Workplace Relations and Other Legislation Amendment Act* 1996 (Commonwealth). The Commonwealth is also desirous that all state governments will introduce complimentary legislation to their 1996 Act. If not, those employers who are not incorporated in terms of Section 51, paragraph XX, of the Australian Constitution will not be subject to the *Workplace Relations and Other Legislation Amendment Act* 1996. Such employers, and their workforces, would be subject (in

21 *Victoria v. Commonwealth* (1996), 138 ALR 129.

22 *Australian Industrial Relations Commission*, Dec 1357/96 S Print N 5615, 17 October 1996.

23 State Government of Victoria, November 1996.

theory at least) to the common rule provisions of state awards.

Portents for the Future

In the 1990s both Commonwealth and state governments have enacted legislation to facilitate and encourage the growth of enterprise bargaining. In doing so they have erected safety nets of different heights and tightness to provide safeguards, or minimum protections, for employees. There are three major components of these safety nets—a continuing role for industrial tribunals and awards, linkages between awards and both collective and individual agreements, and the functions of employment advocates/commissioners for enterprise bargaining.

What matters should be included in awards, and how 'generous' should the minimum, or safety net, provisions be? The *Workplace Relations and Other Legislation Amendment Act* 1996 (Commonwealth) reduced the number of issues contained in awards to twenty 'allowable matters'. It is conceivable that a future coalition Commonwealth government, with a majority in the Senate, could further, or substantially reduce the scope of awards. The Coalition's 1992 industrial relations policy *Jobsback!* specified only five minima—adult and youth hourly rates of pay and annual, sick and (unpaid) maternity leave.²⁴ To the extent that Australia experiences continuing domestic and international economic problems (see Table 1) pressure will be mounted to reduce the generosity of award provisions. In various jurisdictions agreements are linked to awards by 'no disadvantage' and similar tests (see above). If awards contain fewer items, and operate at less generous levels, their relevance as instruments to help protect workers covered by agreements will be substantially eroded.

The discussion in the above paragraph assumed the existence of a generic safety net award. This assumption will be relaxed. It is likely that unionised workers with strategic bargaining power will be more able to secure favourable awards (from which they can pursue additional benefits in enterprise bargaining) than workers not so strategically placed. This would seem to indicate that there will be a

24 *Jobsback!* 1992. State coalition governments have legislated for similar minima in agreements (see above).

Table 3 Mechanisms for Regulating Wages and Estimates of Average Wage Movements: 1996

Form of Labour Market Regulation	Percentage of Employees	Estimated Average Annual Wage Increase (%)
Awards only	35	1.3
Awards and Registered Enterprise Agreements	30	4 – 6
Registered Enterprise Agreements	5	4 – 8
Individual Contracts	30	0 – 8

Source: John Buchanan and Ian Watson, 1997: 'The Living Wage and the Working Poor', Presentation to 'Poverty in Australia: Dimensions and Policies', Australian Centre for Industrial Relations Research and Teaching, University of Sydney, p. 7 (mimeo).

widening in the income and entitlements contained in awards (and agreements) of different groups/types of workers.

Such a supposition is borne out by information contained in Table 3. It provides estimates of average annual wage increases for workers subject to different regulatory modes during 1996. Award only workers (35 per cent of employees) received average increases of 1.3 per cent. This compares to award and registered enterprise agreement employees (30 per cent) who received average increases of between four and six per cent; registered agreement only employees (5 per cent) between four and eight per cent; and individual contract employees (30 per cent) nought to eight per cent.

What will be the reaction of industrial tribunals, such as the Australian Industrial Relations Commission, to this situation? On equity (and anti-discrimination) grounds will tribunals be induced to lift the award conditions of less strategically placed workers to those who enjoy more bargaining power? Or will they adopt a more passive role, indicating, in effect, that awards will only be uplifted/updated (?) following changes negotiated by the parties in (collective) agreements? With respect to enterprise bargaining the Australian Industrial Relations Commission has taken the view that it should adopt a 'non-interventionist' approach, with responsibility for such negotiations residing with the parties.²⁵ In April 1997 the Australian Industrial Relations Commission awarded a safety net increase of \$10 per week for those workers who had not obtained similar wage rises via enterprise bargaining. It was estimated that this would increase Average

25 See [Seventh] Annual Report of the President of the Australian Industrial Relations Commission: 6 + 7.

Weekly Ordinary Time Earnings by 0.34 per cent.²⁶

The relevance of different legislative arrangements concerning the negotiation of agreements, collective or individual, will be dependent on the 'no disadvantage' tests conducted by industrial tribunals and/or functions performed by employment advocates. The discussion here will distinguish unionised and non-unionised workers. As of 1996 approximately one-third of the workforce is unionised (see Tables 4 and 5²⁷). While recognising that unions vary in terms of their resources and capability, unionised workers would presumably be able to rely, or draw, on the services of union officials during the negotiation of enterprise agreements. Both the 1994 and 1995 Department of Industrial Relations' Annual Reports on *Enterprise Bargaining in Australia* found that unionised workplaces had a significantly higher propensity to participate in the negotiation of enterprise agreements than non-unionised workplaces. In 1994 the difference was 68 per cent and 47 per cent respectively; and for 1995, 56 per cent and 28 per cent respectively.²⁸ It is interesting to note here in considering such collective agreements that the 1994 Annual Report pointed to the limited 'capacity of management and unions, in terms of necessary skills and resources to bargain effectively'.²⁹ The question of 'bargaining skills' did not concern the authors of the 1995 Annual Report!

Non-unionised workers, whether they find themselves involved in collective or individual negotiations, are likely to be less skilled bargainers, than workers represented by union officials—whether they be full-time officials or workplace delegates. Almost a century ago Sidney and Beatrice Webb pointed to the asymmetric nature of the bargaining skills of employers and workers. They said

the art of bargaining...forms a large part of the daily life of the entrepreneur...

26 Australian Industrial Relations Commission, *Safety Net Review—Wages*, 22 April 1997, Dec 335/97 S Print P 1997, Sydney. For a commentary on this case see Dabscheck 1997.

27 Table Four is based on surveys of employees, while Table Five is derived from censuses of unions.

28 Department of Industrial Relations, 1994 Annual Report: 15; Department of Industrial Relations, 1995 Annual Report: 258. The 1995 Report also found that full-time union officials were involved in the negotiation of a high proportion of union-based workplace agreements: 83–84.

29 Department of Industrial Relations, 1994 Annual Report: 128.

Table 4 Surveys of Australian Union Membership: 1976 to 1996

	Year	Union Membership (‘000)	Percentage of Workforce Unionised
November	1976	2,512.7	51.0
March-May	1982	2,567.6	49.0
August	1986	2,593.9	45.6
	1988	2,535.9	41.6
	1990	2,659.6	40.5
	1992	2,508.8	39.6
	1994	2,283.4	35.0
	1995	2,251.8	32.7
	1996	2,194.3	31.1

Source: Australian Bureau of Statistics, *Trade Union Members, Australia*, Canberra, Cat. No. 6325•0; Australian Bureau of Statistics, *The Labour Force, Australia*, December 1994, Canberra, Cat. No. 6203•0; Australian Bureau of Statistics, *Weekly Earnings of Employees (Distribution)*, August 1995, Canberra, Product No. 6310•0•40•001.

Table 5 Australian Union Membership, Financial and Total: 1967 to 1996

		FINANCIAL		TOTAL	
	Year	Union Membership (‘000)	Percentage of Workforce Unionised	Union Membership (‘000)	Percentage of Workforce Unionised
December	1967	n. a	n. a	2,151.3	54.0
	1970	n. a	n. a	2,331.4	49.0
	1975	n. a	n. a	2,834.2	56.0
	1980	n. a	n. a	2,955.9	56.0
	1983	n. a	n. a	2,985.2	55.0
June	1985	2,802.8	51.0	3,154.2	57.0
	1990	3,053.2	46.0	3,422.2	52.0
	1991	3,027.9	47.0	3,382.6	53.0
	1992	2,822.6	44.0	3,135.1	49.0
	1993	2,715.2	43.0	3,000.1	47.0
	1994	2,524.6	38.0	2,890.2	44.0
	1995	2,439.7	35.0	2,756.0	40.0
	1996	2,450.4	35.0	2,800.5	40.0

Source: Australian Bureau of Statistics, *Trade Union Statistics, Australia*, Canberra, Cat. No. 6323•0; Australian Bureau of Statistics, *Australia*, Canberra, Product No. 6323•0•40•001.

The manual worker on the contrary, has the very smallest experience of, and practically no training in, what is essentially one of the arts of the capitalist employer. He never engages in any but one sort of bargaining, and that only on occasions which may be infrequent, and which in any case make up only a tiny fraction of his life.³⁰

As already mentioned, non-unionised workers are less likely to be involved in the negotiation of enterprise agreements than unionised workers. The Department of Industrial Relations' 1995 Annual Report on *Enterprise Bargaining in Australia* found that managers are developing a taste for individual, over collective, bargaining.³¹ It also reported that small business displayed little interest in negotiating (legislatively mandated) agreements. It said 'The vast majority appeared happy to conduct their employee relations through a combination of managerial prerogatives, individual bargaining and reliance on award standards'.³²

To what extent will employment advocates be able to protect the rights of non-unionised workers negotiating (legislatively mandated?) collective or individual agreements? To begin with, many workers may not be aware of the existence of such a regulatory instrument to oversee or safeguard their rights in such negotiations. Employers, particularly those in small business, may feel relatively unconstrained in negotiating agreements with workers, individually or collectively, via a standard form contract. To the extent that workers are aware of employment advocates they may find it difficult to travel from across town, or remote areas, to visit the employment advocate in normal office hours. It should be remembered that unions have traditionally appeared for members before industrial tribunals in attempting to ensure that their rights and interests are protected.

The ability of employment advocates to perform their various functions will be dependent on the resources made available to them by their political masters. In an era of government cutbacks, fuelled by a deregulatory rhetoric, governments may find themselves being somewhat parsimonious in resourcing the offices of various employment advocates. If this is the case, employment advocates will find it difficult to devote resources, and fulfil their statutory obligations, in policing and maintaining safety nets. Will employment advocates adopt an activist or passive stance in performing their respective functions? Unlike industrial tribunals, which have a tradition of independence, and a predilection for searching for 'a new province for law and order', employment advocates under both Commonwealth and Western Australian legislation, for example, are subject to legislative directions by

31 Department of Industrial Relations, 1995 Annual Report : 21 – 21.

32 Department of Industrial Relations, 1995 Annual Report : 58.

their respective ministers. Moreover, whereas members of industrial tribunals have terms to (usually) age 65, employment advocates are appointed on shorter terms—³³ ranging from five to seven years. These factors would not seem to augur well for employment advocates who adopted an activist stance in interpreting their legislative functions. Finally, can we expect employment advocates and industrial tribunals, in respective jurisdictions, to work in tandem, or will the two find themselves embroiled in jurisdictional and demarcation issues?

One of the major criticisms made of enterprise bargaining is that it will disadvantage workers, particularly those with limited bargaining power—such as women, part-time and migrants or non English speaking background workers. The 1994 and 1995 Department of Industrial Relations' Annual Reports on *Enterprise Bargaining in Australia* cast some light on these criticisms. Both reports have found, generally speaking, that women, part-time and non English speaking background workers have fared as well as male, full-time and English speaking background workers under enterprise bargaining. If anything, non English speaking background workers feel slightly worse off because of their lack of 'voice', or participation, in agreement making processes.³⁴

The Department of Industrial Relations' 1994 Annual Report found that 28 per cent of employees felt better off following all the workplace changes that had occurred in the previous twelve months, 40 per cent no change, 26 per cent worse off and four per cent don't know.³⁵ The 1995 Annual Report found similar levels of 'satisfaction'—30 per cent said they were better off, 44 per cent about the same, 24 per cent worse off and three per cent don't know.³⁶ The 1995 Annual Report indicates that enterprise bargaining has been associated with an increase in work intensification and stress at work. In the previous twelve months 58 per cent of employees reported that the effort they put into their work had increased, four per cent said it had gone down and 36 per cent no change. Fifty per cent reported an

33 The Commonwealth has a five year term, South Australia six years and Tasmania seven years.

34 Department of Industrial Relations, 1994 Annual Report : 230 – 277 ; Department of Industrial Relations, 1995 Annual Report : 156 – 176.

35 Department of Industrial Relations, 1994 Annual Report : 216.

36 Department of Industrial Relations, 1995 Annual Report : 155 + 321.

increase in stress in the previous twelve months, seven per cent said it had gone down and 41 per cent no change. Finally, 46 per cent reported that the pace at which they worked had increased in the previous twelve months, four per cent said it had gone down and 48 per cent no change.³⁷

Summary and Conclusion

In the 1990s Australia moved from a centralised to a decentralised system(s) of industrial relations. Despite the deregulatory rhetoric associated with this shift Australia's various Commonwealth and state systems of industrial relations are still highly regulated. Enterprise bargaining 1990s style has involved Australia in a fundamental exercise of reregulation.

During the 1960s and early 1970s Australia operated a form of enterprise bargaining in the persona of over-award bargaining. In the context of a fully employed economy it was argued that unions had the 'economic whiphand',³⁸ and found it relatively easy to gain improvements in wages and working conditions from employers. In the 1990s, with continuing, seemingly intractable, domestic and international economic problems, the 'whip' has found itself in the hands of employers. Evidence presented in the Department of Industrial Relations' Annual Reports on *Enterprise Bargaining in Australia* indicates that approximately fifty per cent of the workforce is experiencing work intensification.

The various legislative changes examined here may be only the first wave of the brave new world of enterprise bargaining. To the extent that Australia experiences continuing economic pressures, criticisms will be directed at the slowness of and extent of change to the various legislative regimes governing industrial relations. Pressure will be mounted anew to lower safety nets and to erode and reduce the role of regulatory bodies such as industrial tribunals and fledgling employment advocates/commissioners for enterprise bargaining. Australia may find itself embarking on further rounds of reregulation as the *State* searches for new ways to help enterprises compete on international markets.

37 Department of Industrial Relations, 1995 Annual Report : 153.

38 The term was used by Woodward 1970 : 116.

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