

Enterprise Bargaining and Union Recognition: Australian, Canadian and American Paths

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Abstract

Enterprise bargaining is increasingly used to define industrial relations systems. In the Australian context, public policy since the early 1990's has emphasised deregulation of the industrial relations system to workplace level adopting many of the features of North American style bargaining regimes. However, the paper argues, that unlike the North American bargaining model that provides for union recognition at law as a core feature of the bargaining process, the Australian version is bereft of any legally enforceable union recognition or security arrangements. It is argued that the absence of union recognition means that Australia's regime of enterprise bargaining is slowly but inexorably moving towards individualism, as unions have no mandated exclusive bargaining rights. The Australian version of enterprise bargaining, unlike the North American models, is predicated on volunteerism.

Introduction

Enterprise bargaining is increasingly used to define industrial relations systems, even in those regimes, such as Australia's, where it had formerly been of lesser or marginal importance. The notion of enterprise bargaining, however, can mean quite different things and have very different implications, depending upon the context in which it was created and the mission(s) with which it is bestowed. In this paper, we attempt to cut through some of the confusion that can be engendered by notions of enterprise bargaining, by comparing such regimes in Canada, the USA and Australia. In the former two polities, employment relationships have for the most part always revolved around the level of the enterprise and transfer mechanisms to broaden the outcomes of such practices throughout the economy as a whole have been partial, and haphazard. Since, the 1930s state intervention has entailed regulation of enterprise bargaining through the establishment of a procedural framework in which it may be pursued. However, small differences which began to emerge in the postwar era have had startling effects. In the case of America, they have led to a steady 35 year erosion of trade union influence. In the instance of Canada, trade union densities have more than held their own, while arguably the labour movement has gained in social influence.

Given this lengthy experience with enterprise bargaining in the North American context, a comparative analysis with the recent move down this path in Australia could be of some benefit in providing fresh insights. In Australia, an emphasis on enterprise bargaining has coincided with a precipitous decline in trade union membership. In order to account for such divergences, where enterprise bargaining has overlapped with trade union maintenance (Canada), slow, but continuous erosion (USA) and steep decline (Australia) it is

necessary to analyze the differing connotations that the notion and practice of enterprise bargaining has in the employment regimes under study. In turn, this calls for an analysis of the differing historical contexts in which enterprise bargaining came into significant play. Our goal then is to offer an explanation as to how one practice – bargaining at enterprise level – can be associated with trade union maintenance, longer term erosion, or short precipitous decline. Finally, it is worth asking aloud the question of whether a North American, Wagner style regime of procedures could in the foreseeable future be adopted in the Australian context, and if so, whether it would be of much help to an embattled labour movement.

Enterprise Bargaining: Meanings and Implications

Enterprise bargaining can and does refer to differing objects both in law and in practice. In the first instance, it refers to the level at which employment relationships, including the terms and conditions of the employment relationship between labour and capital are resolved. As suggested by the very term, in regimes of enterprise bargaining such conditions are established at the locale of immediate employment - the point of production. In North America, where labour movements were historically weak and dispersed and where employers, with a few notable industry exceptions, did not place a premium upon cooperation with one-another, bargaining at the enterprise level has always been commonplace. As recently as a decade ago, 48 percent of all Canadian collective agreements, (covering more than 500 workers), were with a single employer at a single work site. An additional one-third of such agreements were again with a single employer but covered multiple work places, while only 8 percent of

collective agreements covered more than one employer, (Arrowsmith and Courchene:1989, p.107). By far and away then, the most common form of organised regulation has been via enterprise bargaining in both Canada and the USA.

The notion of enterprise bargaining also carries other baggage with it. Given the historical lineage of enterprise bargaining in North America, it may come as surprise to learn that the term is seldom encountered there. If anything the term 'enterprise bargaining' would be used synonymously with the much more common place notion of *collective bargaining*. Indeed, this is the only kind of enterprise bargaining which is permitted under the Wagner style framework that defines industrial relations in North America. In other words, *collective bargaining* is undertaken by independent, certified trade unions, most frequently not at the level of corporate enterprises, but rather at the level of individual plants or offices. There is no role in the system for enterprise unions.

Wagner, Taft-Hartley and Union Attrition in America

The 1935 National Labor Relations Act (NLRA), just as commonly known as the Wagner Act, so named after its author, Democratic Senator Robert Wagner, and the above mentioned Canadian equivalents, Wartime Order in Council, PC 1003, and the 1948 Industrial Relations and Disputes Investigation Act are where the story of modern enterprise/collective bargaining almost begins. We say almost, on account of the important precedent set by the National Industrial Recovery Act (i.e. New Deal) legislation of 1933 and the efforts that were made at implementing it. In what would prove to be a very fateful codicil to the NIRA, the famous section 7(a) stipulated that each industry code of fair competition would recognize the right of employees to organize and bargain collectively through representatives of their own choosing. Company unionism was also proscribed under the terms of the New Deal, (Millis and Brown:1950, p.21-22).

While Section 7(a) proclaimed a new norm for the conduct of industrial relations, it did not provide a machinery to oversee its implementation, nor just as importantly, sanctions for refusing to do so. Owing to this, the NIRA actually sparked campaigns of civil disobedience, on the part of both employers and workers. Employers responded precisely by setting up company or employer dominated unions, euphemistically known as *employee representation plans*. Between 1933 and 1935, membership in such enterprise based units actually grew more quickly than independent trade union membership, (Derber:1975, p.113). Workers responded in droves by initiating a strike wave that took in whole cities (San Francisco, Minneapolis), and which saw the number of strikers/million labour force members double between 1932 and 1933 (Russell:1990, p.175).

It was out of this context, in which capital had lost significant amounts of political legitimation but trade unions were still too weak to insist upon

the rights putatively bestowed by the NIRA that the Wagner Act was born. In short, this piece of legislation put into place the machinery which would make good on the promise of the New Deal regarding genuine negotiations over the terms and conditions of the employment contract. The NLRA contained two major innovations. Firstly, it defined what could be considered to be 'unfair labour practices'. Such practices specifically included employer interference in the establishment of, or selection of, trade union representation on the part of a work force through such activities as discrimination against trade union members, victimisation, or the establishment of employer dominated representation plans. Penalties were established and could be levied by a National Labor Relations Board against recalcitrant employers up to and including reinstatement of employees with back pay.

Just as importantly, the NLRA placed a duty and a responsibility upon employers to bargain in good faith with the chosen *trade union* representatives of their work forces. Failure to do so also constituted an unfair labour practice. To operationalize this dimension of the act, the National Labor Board was invested with the powers to certify trade unions in their capacities to represent and bargain on behalf of workers. A specific protocol was developed for this purpose. Workers desirous of trade union representation, or unions wishing to organise workers could petition the Board for purposes of recognition. Once it was satisfied that a majority of workers in "the unit appropriate for the purposes of collective bargaining", as defined by the Board, supported trade union representation, a union would be so designated.

It is important to recognise that underlying the Wagner Act and its provisions ran a deep conviction that true industrial relations pluralism was the only way to resolve the unsatisfactory state of American capitalism. As signified by the preamble to the Act, not only was the inherent inequality between corporate capital and individual workers recognized, but such inequality was portrayed as being decidedly dysfunction, leading both to disruptive conflict and to crises of inadequate effective demand. Thus everything in the Act was directed towards fostering a permanent and sustainable collective bargaining relationship between the parties to the employment relation. For this reason, the NLRA upheld the principle of exclusive representation, (i.e. only one union at any given workplace). Once it could be determined through such mechanisms as a Board supervised certification vote, or count of union members, that a majority supported trade union representation, then the trade union body receiving the largest swath of support would gain exclusive representation rights to represent the workers at that facility (enterprise). Tellingly, the act envisaged that on most occasions an "employer unit, craft unit, plant unit, or subdivision thereof" (Cox:1948, p.1348) would be most suitable for the purposes at hand, hence the adoption of so-called enterprise bargaining, although this notion is not referred to in the NLRA

The period between the passage of the NLRA and 1938 was arguably the highwater mark for

labour rights in America. From that point, until its major revision in 1948 under the Taft-Hartley amendments, judicial review of specific cases tended to produce additional qualifications, which were not necessarily helpful to the labour movement. One ruling in particular is noteworthy and would cast a longer shadow over industrial relations in America as time went on. In the Mackay Radio strike of 1938, the Board held that striking workers were not automatically entitled to regain their jobs if replacement workers/'scabs' were successfully deployed. In other words, once on strike, workers would have to win their jobs back as part of winning the strike. Only if the employer could be shown to have committed an unfair labour practice would striking workers be entitled to resume their previous positions, (Millis and Brown:1950, p.102). This is significant in several respects. First, in America, unlike Canada, Labor Board decisions are regularly subject to appeal through the courts of common law. These bodies have traditionally been pre-occupied with individual rights while collective or social rights were largely an alien concept. As well, the Mackay case consented to the use of strike breakers in industrial conflict. As time went on, vesting strike breakers with full rights, including the right to vote in decertification campaigns and in contract ratification proceedings would become an important resource in American industrial relations.

Such decisions, however, paled in comparison with the 1947 Amendments to the NLRA, also referred to as the Taft-Hartley Act after its sponsors. The full title of the bill – “An Act to amend the NLRA ... *to equalize legal responsibilities of labor organizations and employers* and for other purposes” (our emphasis) – gives away the plot. Amongst the 1947 amendments to the NLRA the following were of seminal importance in the repercussions for future industrial relations in the US.

1. Enunciation of unfair trade union practices including the use of secondary boycotts;
2. Prohibition of the closed shop and sanctioning of state 'right to work' laws;
3. A more complex, and inflexible procedure for certifying trade unions, requiring mandatory votes and ceding rights of 'free speech' to employers during recognition contests;
4. Refusal to certify or decertification of any union which had connections with the Communist Party of America;
5. Tightening up of the definition of non-supervisory employees, thereby restricting the base for future recruiting.

Taken together, these measures had a long term chilling effect on the US labour movement. 'Operation Dixie', the planned organizing drive in the southern American states was stopped dead in its tracks, (Davis:1986). Overall, the Taft-Hartley amendments made it much more difficult to organize non-unionized work sites as certification election success rates plummeted from more than 80 percent prior to Taft-Hartley to under 50 percent from the early

1970s onwards, (Goldfield:1987, p.149) Indeed, this is now the dominant theme in American industrial relations - the failure of the union movement to replace its aging membership. However, unlike the Australian situation, discussed below, out and out de-unionization has not been common in the American experience. Rather than de-unionize 'brown-field' sites, the establishment of new non-union 'green-field' sites, both in new industries, and in older industries, has been the dominant trend in American industrial relations. The Taft-Hartley laws have made this a likely outcome. Cumbersome certification procedures that allow ample scope for the de facto exercise of unfair employer labour practices during certification campaigns render new organizing an uphill battle, (Fantasia:1988).

Expansive Wagnerism: Maintaining and Regaining Union Membership in Canada

Comparative industrial relations is full of interesting twists and turns and nowhere is this more in evidence than when we compare the Canadian situation with that which has just been described. With respect to employment matters, the Canadian state, like its counterpart in Australia, played a more interventionistic role from early on in the century. This assumed the form of compulsory conciliation through the constitution of ad hoc tripartite boards that oversaw employment relations in industries that were deemed essential to the public good. These Boards were given the power to intervene in industrial disputes and to postpone strike action until after the exercise of compulsory conciliation. In this way, Canada fell mid-way between the early century compulsory arbitration systems of Australia and New Zealand, and the judicial/injunctive system of the US. Having a battery of legislation in place, Canadian authorities were reluctant to emulate the Wagner Act, to which they attributed an upheaval in strike action and civil unrest. Unhappily though, the compulsory conciliation of the Industrial Disputes Investigation Act (1907) did nothing to resolve the very issues that were bedeviling employment relations of the time; namely the right to engage in free collective bargaining with agents of choice. Consequently, recognition strikes were frequent, hard fought and lengthy affairs, especially when labour markets were tight, as they were during both World Wars.

Only with the breakdown of industrial relations and the emergence of Canada's largest strike wave to date, between 1942 and 1944, were federal authorities pressed into adopting PC1003, the Wartime Labour Relations Regulations. It is important to understand that this was an expedient measure, borne more by the dint of circumstances than by political conviction. It bore the protocols of the NLRA, but without any of the conviction that free collective bargaining was the most sensible manner by which to conduct employment relations. As a result, PC1003 remained very much a parsimonious version of the original Wagner Act. In fact, it would bear a greater resemblance to what would become the Taft-Hartley Act than to the original NLRA!

In this vein, the Canadian law specified that employees could elect *bargaining representatives* for the purpose of collective bargaining, thereby potentially leaving the door open to non-union representation, while the Wagner Act equated the notions of collective bargaining with *labour organizations*, (Fudge:1987; Warrian:1986). Like the later Taft-Hartley Act, PC1003 introduced the notion of unfair employee labour practices that included recruiting workers on company premises and the use of tactics such as work slow-downs. Certification was also more difficult under the Canadian law; fully 50 percent + one of the affected work force had to signal their approval by a vote, union membership, or other means that they were in favour of such representation before the War Labour Board would certify the union as a bargaining agent. This was a higher benchmark than required under the Wagner Act to initiate activation of the certification machinery (Russell:1995).

Given the diverse starting points of American and Canadian labour law reform, it is intriguing that Canadian law has witnessed a progressive liberalization, while American law became more restrictive. As suggested above, PC1003 was mainly a stop-gap measure. It was still unclear what status unions would have in post-war Canada. For this reason, a *quasi-corporatist* accord such as had been effected in wartime America between labour and the state was not possible in Canada, (Davis:1986; Dubofsky:1994; Russell: 1990; 1995). With large question marks hanging over the post-war situation, industrial relations conflict continued in Canada for the duration of the war and into its aftermath. This, we suggest, was responsible for the progressive extension of Wagner type principles during this period.

Probably, the best example of this occurred around the issue of union security. Unlike the NLRA, PC1003 was utterly silent on this issue. With peace time demobilization about to occur, unions in Canada were fearful that without security protocols, they would be quickly reduced to the same position that they had held prior to 1944, when they enjoyed no more than a voluntary status. In what was to become a land mark case at the Ford motor company, an arbitrated ruling to a bitter four month long strike produced the novel Rand Formula in 1946. While rejecting the granting of either the closed or union shop, on the basis of managerial prerogative over hiring rights, Rand did order the mandatory payment of union dues by all employees who worked in a unionized workplace, regardless of whether they were unions members or not. Over time, Rand Formula arrangements would be generalized across the Canadian industrial relations landscape. This would represent a significant extension of the Wagner model, which was permissive of union security agreements, but left it up to the parties to negotiate such arrangements if they could. This simple solution to the vexatious issues of union recognition, compulsory union membership, and union security was to prove enduring. It retained a degree of individual choice over whether to join a union or not, while offering union security by placing a prohibition on the 'free rider problem'.

A similar dynamic wherein bitter disputes have led to novel extensions of the Wagner principles

can be witnessed in other realms of Canadian industrial relations as well. This has led to innovations such as: arbitrated first contract legislation and 'anti-scab' legislation in certain, but not all, provincial jurisdictions. Both of these measures addressed the vulnerability that striking workers were cast in as a result of early decisions regarding their status under the Wagner Act (e.g. the Mackay dispute). Both provisions make it more difficult for avowedly anti-union employers to force long strikes, use replacement workers, and subsequently de-certify the union through the enlistment of non-union replacement workers. Another notable development has been the use of so-called 'automatic certification' procedures. This nullifies the need for lengthy, hard fought certification votes. If a union is able to demonstrate a certain threshold of support in the workplace, through having signed up a large proportion of the workforce as members, then it can be automatically certified and recognized as the bargaining agent for that site.

Australia: From Compulsion to Voluntarism

Historically, the treatment of the main issues that we have identified in this paper as being defining moments in the industrial relations system - union recognition, union security rights and collective bargaining - have proceeded along different paths in Australia. Our argument in this regard is as follows. The *Workplace Relations Act 1996* Cth (WRA) has successfully produced a situation akin to the pre-Wagner era in North America, where union recognition, the pursuit of collective bargaining and union security rights were all contested terrain. In such an environment, it is difficult at best for unions to thrive. In this vein we argue that WRA is best viewed through the lens of a neo-liberalism that places competition and the fiction of individual choice at the heart of the bargaining process. We go further and argue that Australian unions have not achieved the type of mandated security arrangements associated with North American style bargaining regimes. Australian policy makers have not enacted similar security provisions. Rather the Australian enterprise bargaining regime is based on voluntarism. Owing to this, it is highly unlikely that the outputs of enterprise bargaining in Australia will be similar to those that have obtained in Canada and the United States. Recognition strikes for the purposes of collective bargaining may again become a common feature of industrial relations in Australia.

Why is the Australian regime of enterprise bargaining different? The introduction in 1904 of arbitral machinery (under the later titled *Commonwealth Conciliation and Arbitration Act, 1904*) empowered the Commonwealth with power to create tribunals invested with jurisdiction to 'prevent and settle by conciliation and arbitration disputes extending beyond the limits of any one State' (Section 51 (xxxv) of the Constitution). This power extended to the establishment and maintenance of a system, in some form or another, of arbitral machinery necessary for dispute resolution (*The*

Queen v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR at 341-342). Hence it is possible to identify a dominant model of industrial relations in Australia based on an interventionist system of compulsory conciliation and arbitration that has legally regulated the employment relationship placing collectivist interests above private interests (Weeks, 1995; Sebbens, 2000). But such a regulated system required interlocutors. Unionism was encouraged. As Higgins (the second President of the Industrial Court observed 'the system of arbitration...is based on unionism. Indeed, without unions, it is hard to conceive how arbitration could be worked' (1922: 23).

From inception of the arbitration system, union recognition rights were directly tied to the machinery of arbitration. The early *Commonwealth Conciliation and Arbitration Act 1904* in Section 55 (2) provided a schedule of conditions 'to be complied with by associations...applying for registration'. These included setting out the 'affairs by which the association was run', as well as the 'rules of the association specifying the purposes for which it was formed'. Section 55(1) required that in an application for registration, the association had to be amongst other things, an association 'in or in connection with any industry'. By 1905, provisional regulations were made enabling the Industrial registrar to approve, amend or cancel union registration and in particular refuse to register any association as an organization 'if an organization, to which the members of the association might conveniently belong, has already been registered'. The close association between the growth in arbitration and unionism has been seen by some as symbiotic (Howard, 1977). Having once become registered, a trade union was virtually assured of perpetual legal existence, protected from competition from rival bodies, unless its membership fell so low that it became defunct. Its members were also assured of the benefits of industrial awards. An impartial Court looked after the welfare of the members, thus leaving union officials with minimal need to develop grass-roots organization.

According to Plowman (1989) the creation of the centralized arbitration system had the effect of forcing employers to recognize the newly established legal rights of unions to represent their members. Prior to this, employers had used a range of common law rights (e.g. tort, law of trespass, contract law) and other means, such as employing strike breakers, as a way of refusing to deal with unions. Though the precise relationship between the arbitration system and the growth in unionism is unclear (Gahan, 1996), compulsory conciliation and arbitration gave unions an ex parte interest in the employment relationship. Union recognition was further enhanced by decisions of the High Court of Australia that set out the procedural rules for serving logs of claims and generating industrial disputes concerning wages and conditions of both union and non-union members alike on the basis of the interest that a union has 'in the establishment or maintenance of industrial conditions' so as to 'prevent employers employing anyone on less favorable terms' (*Burwood Cinema Limited v The Australian*

Theatrical and Amusement Employees' Association (1925) 35 CLR 528).

However, creating awards and recognizing unions raised concerns regarding so called 'free riders', those workers not represented by unions and exposed to potential employer exploitation. The remedy was to ensure that employers employed only unionists (and encouraged free riders to sign up!) by inserting 'preference to unionists' clauses that required an employer to either specifically appoint unionists to jobs or at least advise the union before hand of job vacancies. Preference clauses came closest to imposing arbitrarily determined compulsory unionism (Weeks, 1995). In some awards for example, the *Theatrical and Amusement Employees Award – State* (Queensland) the preference clause was absolute; 'all employees employed under this award shall be members of the union'. In other instances, the High Court watered down the preference clause, but insisted that employers advise unions of job vacancies and give union members the opportunity to present themselves for as applicants (*R.v Holmes; Ex parte Petrochemical Co Ltd* (1972) 126 CLR 529). However, by the early 1970's the attitudes of tribunals began to change with some jurisdictions such as the then Queensland Conciliation and Arbitration Court interpreting these clauses as 'preference where all things are equal' at the point of engagement and redundancy. Nevertheless the strong connection between arbitration, award making and union membership ensured direct involvement and recognition of unions as the ex parte voice of workers. We argue that this would later prove to be a fundamental weakness as the labour regulatory regime became increasingly weaker at the middle in favor of decentralized wage bargaining.

The above dominant industrial relations regulatory paradigm remained virtually unchanged until the mid 1980's when public policy dramatically tilted in favor of reform. The incoming ALP government in 1983 and the Australian Council of Trade Unions (ACTU) adopted a corporatist approach involving economic and trade union reform (Hampson, 1996). With the support of the ACTU, the then ALP Government introduced the *Industrial Relations Act 1988* that included giving the Commission power to determine union coverage in cases of demarcation disputes (Section 118). In 1993, a new Section 118A was added giving the Commission expanded jurisdiction to adjust the representational rights of unions by making those rights exclusive, or by removing them, or by conferring new rights without reference to a live demarcation dispute. New amalgamation provisions were also introduced that were designed to facilitate the formation of 'industry based organizations'. However, a fundamental problem with these powers was that they related only to union coverage and did not give the successful union legally enforceable recognition and bargaining rights with employers. This deficiency would later be carried over to the 1996 Workplace Relations Act (WRA).

The ALP Government also sought to shift the focus of industrial relations to the workplace by introducing legislation providing for union stream of certified agreements (CA's) and non union

enterprise flexibility Agreements (EFA's). The new two tier system sought to change awards from primary instruments of the employment relationship to acting as 'safety nets', underpinning workplace agreements in conjunction with importing into the labour regulatory regime the provisions of the ILO labour and working conditions standards. However, whereas the North American style Wagner legislation afforded union recognition at law, public policy in Australia was not prepared to go that far. This was a deliberate policy objective. Unions were to rely upon a traditional arbitral union security provided through award coverage and union registration in the context of a move towards the sort of regulatory regime (i.e. enterprise bargaining) that would undermine the very foundations of arbitral authority. This new environment was to be based largely upon the principle of voluntary recognition, (Full Bench of the AIRC, *Enterprise Flexibility Agreements Test Case*, (1995) 59 Industrial Reports 430).

The election of the Howard Coalition Government in 1996 ushered in a fundamental realignment of industrial relations. The introduction of WRA fundamentally introduced a new dominant model of industrial relations based on voluntarism and 'free choice'. The objects of the WRA included amongst others: the encouragement of workplace or enterprise agreements (Section 3(d)); removing union representational monopoly by introducing freedom of association which enables employees to join or not to join a union, or to set up their own union (Sections 3(f) and Part XA); and provisions to ensure that trade unions remain accountable to their members (Section 3(g)). Direct employer – employee arrangements through the use of non-union workplace agreements (either Australian Workplace Agreements (AWA's) or Certified Agreements (Parts VIB and VID) are encouraged, while the closed shop is banned and the power to grant union preference clauses in awards is removed. The WRA also removed the restraints on a new trade union being registered in an industry where there is an already existing union, if it can be shown that the new union, (e.g. an enterprise union), would be more effective in representing members (Section 189(1)(j)(ii)), while the protocol for registering a trade union are reduced from requiring a minimum of 1000 employees to a new minimum of 50. Along similar lines, the new Act also provides a mechanism for 'disamalgamation', so that the large amalgamations implemented during the mid 1980's can be broken up. Former amalgamated unions can be reconstituted and re-registered as if the amalgamation had not occurred (Section 253ZH).

Whilst the Act may encourage greater workplace co-operation between workers and management, the strategy behind it involves a number of anti-union elements, (Peetz:1998, 289). These include the removal of union preference clauses from awards and agreements; diverting union time and resources into defending 'freedom of association' actions; encouraging fragmentation by dis-amalgamation and the growth of enterprise unions; diverting union resources to the defense of long standing award conditions; and threatening unions financially by creating large

areas where employers can seek damages after union action.

Whilst new Australian laws have replicated certain elements of the North American system such as recognizing and distinguishing between interest and rights disputes and putatively sanctioning the norm of bargaining in good faith, these are at best superficial similarities. Under the WRA employers have more flexibility in choosing the way in which they want to regulate their employee relations. Certified agreements (CA's) can be either union or non-union (Sections 170LJ, 170 LK, 170LO, 170 LC). Employers also have opportunities to make non union 'common' law style contracts with employees individually or collectively through the medium of Australian Workplace Agreements (AWA's), an option which would be wholly illegal in the North American context. These are approved by the Office of the Employment Advocate and there need be no union involvement in their formulation, (Sections 170VE and 170VF). Both CA's (Section 170XA) and AWA's (Section 170 XE) must pass a global 'no disadvantage test' as compared to an applicable or deemed award.

The WRA also sets out detailed provisions concerning the requirements to be contained in the notice initiating the bargaining period that begins after the day on which such notice is given (Section 170MK). As in the North American legislation, an employer or employee may only take industrial action during the bargaining, or 'open' period, that is after the nominal expiry date of an existing CA when such action is protected from prosecution, (Section 170MI to 170ML). Strikes that are not covered as protective action can be subject to damages claims under common law and tort. Unlike the Canadian and American systems, however, in Australia a bargaining period can be initiated by either an employer, a union, or *by an employee acting on his/her own behalf or on behalf of other employees*. As spelt out in the Asahi case, a Full Bench of the AIRC concluded that 'Australia's system of enterprise bargaining system facilitates and encourages direct bargaining *where the parties wish to bargain. It is not a system of compulsory negotiation and concession making*', (our emphasis, Appeal, Full Bench of AIRC, *Asahi Diamond Industrial Australia Pty Ltd v AFMEU*, 1995, 59 Industrial Reports, 385 at 421). In short, while the WRA provides the traditional Wagner type safeguards to employers, in distinguishing between legal and illegal strikes, providing required notification for strike action, etc., it provides little security for trade unions and the pursuit of collective conditions.

Despite the limitations of the bargaining regime under WRA, over the past few years, specialist courts such as Federal Court and the High Court of Australia have in some situations, read into WRA 'implied' recognition rights under 'Freedom of Association'. Most notably, such an approach was evident in the decisions concerning the 1998 MUA dispute where successive court of appeal decisions upheld an implied union right of representation Federal Court of Australia (see *MUA v Patrick Stevedores No 1 Pty Ltd*, 79 Industrial Reports 281-304, *Federal Court of*

Australia, Patrick Stevedores Operations No 2 Pty Ltd and ors v MUA and ors, 79 Industrial Reports 305-317 and *High Court of Australia. Patrick Stevedores Operations No 2 Pty Ltd and ors v MUA and ors*, 79 Industrial Reports 339-408). Recent cases such as attempts by BHP and the Commonwealth Bank to introduce non-union agreements suggest an emerging approach by the Federal Court to 'recognition rights'. In the case of BHP's attempt to offer non-union contracts to its iron ore operations the Court found that the Company had hoped that offering individual contracts would encourage employees to leave the union. That being so, 'the concept of union membership contemplated by the respondent would be a mere shell. It would be devoid of any meaningful benefit to the employees who retained it, because they would be unable to exercise their rights as members to engage in collective bargaining as to their terms and conditions of employment' (*Australian Workers' Union v BHP Iron Ore Ltd*, Federal Court of Australia, FCA 39, VG 24 of 2000, 31 January, 2000, Full Court Appeal, BHP Iron Ore Pty Ltd v Australian Workers Union, FCA 430, V 24 of 2000, 7 April, 2000). Similarly, the Commonwealth Bank's attempts to introduce AWA's following unsuccessful bargaining with the Finance Sector Union came unstuck when the Court found that the bank may have breached the freedom of association by inducing employees through 'duress' to enter into a non-union agreement (*Finance Sector Union v Commonwealth Bank of Australia*, Federal Court of Australia, FCA 1372, V 716 of 2000, 28 September, 2000). Both of these cases involved granting temporary injunctions pending trial at a later date. Meanwhile however, any implied right of recognition under the doctrine of freedom of association remains just that – an assumed right held by individual agents. This remains a far cry from the collective rights that were first vouchsafed by the Wagner Act.

Conclusion

Wagner style legislation corresponded with the development of a *mature Fordism* in North America. The Australian labour regulatory regime grew out of concerns regarding unrestrained Taylorism. Since the early 1980's, neo-liberal challenges have placed this system in jeopardy. Responsible regulation has given way to irresponsible voluntarism. Given this context, we think it unlikely that an appropriation of North American type legislation is in the cards for Australia anytime soon. If it were, such provisions would stymie outright de-unionisation of the type which is currently occurring in such Australian industries as mining. Without significant extension though, it would do little to aid union recruitment in new post-Fordist settings.

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