From 'Uncharted Seas' to 'Stormy Waters': How Will Trade Unions Fare Under the Work Choices Legislation?

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Abstract

The 2005 'Work Choices' legislation builds on earlier legislative and policy measures of the Howard Coalition Government that have restricted the activities and undermined the traditional legal rights of unions. This article highlights the key aspects of the 2005 legislation affecting trade unions. The constitutional basis of the new framework for regulating registered organisations is considered, as it presents unions with the challenge to revisit the validity of their registration under Federal law or to 'opt out' of registration altogether. The new union 'right of entry' provisions provide employers with far greater scope to resist or limit unwanted union influence at the workplace. Amendments to the 'freedom of association' provisions will restrict unions' capacity to engage in a range of tactics to support the collective representation of workers' interests, and limit their ability to block de-unionisation or individualisation strategies by employers. We conclude that the 2005 Act constitutes the most serious threat to Australian unions yet, but that the high-profile debate generated by the reforms, and the erosion of conditions which will inevitably follow for some workers, provide opportunities for unions to re-establish their relevance and reverse declining membership levels.

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Introduction

In this article, we consider the implications of the Howard Coalition Government's 2005 Work Choices legislation for trade unions. From holding a central and increasingly strong position under the conciliation and arbitration system for much of the twentieth century, Australian unions have faced major challenges over the last twenty-five years or so. This article begins with a brief discussion of these developments, including the major changes to the legislative and policy framework affecting unions over this period. We focus, in particular, on the Coalition's 'first wave' of anti-union measures under the *Workplace Relations Act 1996* (Cth) ('pre-reform 1996 Act'), and how unions have withstood these and subsequent Government efforts to reduce their power and influence. While the pre-reform 1996 Act was described as taking unions into 'uncharted seas' (Naughton 1997), the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('2005 Act') will take unions into 'stormy waters'. The new legislation will further restrict the organisational activities of unions, and reduce many of the benefits that have traditionally flowed from registration under the formal industrial relations system. However, the passage and implementation of the 2005 Act also present unions with significant new recruitment opportunities. The remainder of this article is taken up with an analysis of the main provisions of the 2005 Act relating to trade unions, the implications of these provisions, and possible union strategies in response. We then conclude with some final observations about the likely impact of the new legislation on Australian unions.

Testing Times for the Unions

Australian unions held a pivotal position under the conciliation and arbitration system from its inception in 1904. While registration under this system entailed high levels of legal regulation for unions, they also obtained considerable rights and benefits – including corporate legal personality; exclusive representation rights; award 'preference' rights for unionists (providing a basis for compulsory unionism in many industries); and de facto 'recognition' by employers through the award-making process (see Frazer 1995). The considerable legal and institutional support provided by the compulsory arbitration system contributed greatly to the growth and organisational security of unions over the course of the twentieth century – such that by 1953, trade union membership had reached 63 per cent of the total labour force, and remained around 50 per cent until the early 1980s (Crosby 2005: 12, 42-43; see further Rimmer 2004).

Since then, however, the level of trade union membership in Australia has fallen dramatically. The extent and causes of the unions' declining fortunes are well documented (see Peetz 1998; Deery and Walsh 1999; Crosby 2005). Factors contributing to the almost 30 per cent drop in union membership over this period include the massive reduction in highly-unionised manufacturing employment, arising from the economic reform process; the growth of casual, part-time and 'contract' labour arrangements; and (commencing in the early 1990s) the increasing adoption of aggressive 'individualisation' and 'de-unionisation' strategies by employers (see generally Deery and Mitchell 1999). In addition, of course, the legal rights traditionally accorded to unions have been significantly wound back as part of the 'de-collectivist' labour laws introduced by Federal and State conservative governments during the 1990s (see Nolan 1998). Generally, these reforms involved the undermining of collective bargaining by opening up non-union and individual agreement options;[1] the abolition of union preference rights in favour of 'voluntary unionism'; and tight constraints on union recruitment and organisational activity, and the right to strike.

As part of the overall objective of reducing the role and influence of 'third parties' like unions and industrial tribunals, in favour of direct relationships between employers and employees at the enterprise level, the pre-reform 1996 Act contained an array of measures aimed at destabilising established union structures, encouraging competition between unions, and bolstering the rights of non-unionists (see Naughton 1997; Coulthard 1999). These included provisions for the creation of new 'enterprise unions', and for disaffected union members to 'disamalgamate' from large industry unions. The monopoly representation rights that unions long held under the 'conveniently belong' rule were weakened. Award and enterprise agreement provisions for 'closed shops', or other forms of union security, were banned. Union 'rights of entry' for recruitment and compliance purposes were limited through the introduction of permit and notice requirements. Further, legal protections available to union members under the 'freedom of association' provisions (such as protection from victimisation) were also extended to *non*-members.

Since the passage of the pre-reform 1996 Act, the Government has pursued various other policy and legislative initiatives directed at breaking the strength of unions in specific industry sectors. So, for example, we have seen the Government-sponsored confrontation on the waterfront (see Orr 1998); the Cole Royal Commission leading to passage of the *Building and Construction Industry Improvement Act 2005* (Cth), including a range of new offences and hefty penalties potentially applicable to construction

unions (see Howe 2005); and the promotion of union avoidance and individualised and non-union bargaining strategies in the higher education sector, and across the federal public service (see Rosewarne 2005; Weeks 1999). In addition, union officials have been subjected to increased levels of financial accountability through the new Registration and Accountability of Organisations Schedule ('RAO Schedule'), inserted in the pre-reform 1996 Act in 2002 (for background, see Forsyth 2000). Additional statutory amendments were passed in 2003 to counter union 'bargaining fee' strategies, designed to persuade non-union 'free riders' to take up union membership (see Orr 2001).

What, then, has happened to Australian unions in the ten years since the Howard Government's assault on their role and legitimacy commenced? Overall, unions have adapted to the harsher regulatory environment better than most observers had expected (see the qualified assessment in Pyman 2001: 344-346). They have been assisted by the failure of certain aspects of the pre-reform 1996 Act to fulfil the Government's intended purposes. For example, there have been very few applications, and even less that have succeeded, under either the enterprise union or disamalgamation provisions (see Creighton and Stewart 2005: 504-505, 509-510). While there have been several demarcation 'stoushes', with some unions seeking to take advantage of the modified 'conveniently belong' rule to expand coverage rights, the Prime Minister's vision of competitive unionism and a membership 'free-for-all' (see Naughton 1997: 112-113) has not been realised. Further, in several notable cases, unions have creatively utilised the freedom of association provisions to thwart employer restructuring and individualisation strategies – albeit that the Government intended the provisions to operate primarily for the benefit of non-unionists (see further below).

During this period, unions have implemented various strategies to address their declining membership levels. With union density falling to 28.1% of the workforce in 1998 (ABS 1994-2004), the following year the Australian Council of Trade Unions ('ACTU') released the *Unions@Work* Report (ACTU 1999). This report urged unions to focus on rebuilding membership through the adoption of strategies including the development of workplace union 'activists', and targeting areas of employment growth such as telecommunications 'call centres' and the hospitality industry. There followed a slight increase in overall union membership numbers in 2000, although union density again dropped, to 24.7% (ABS 1994-2004).

In 2003, the ACTU issued another report, *Future Strategies: Unions Working For A Fairer Australia* (ACTU 2003). This update to the 1999

strategy document highlighted the importance of union recruitment in non-unionised workplaces, through funding for 'new member organising' campaigns and other innovative, American-style organising tactics such as visiting workers in their homes. *Future Strategies* also committed unions to ongoing organising efforts in the union 'heartland', primarily through the further extension of delegate structures. Unions were also encouraged to adopt common approaches to recruitment in new areas. Several examples have emerged of the successful implementation of these strategies. For instance, in the Pilbara region of Western Australia, a local union presence was established following a successful recruitment 'blitz' in workers' homes (Cooper 2003: 207-208). However, this example also illustrates that inter-union rivalries can scuttle recruitment efforts: the co-operative approach among unions fell apart when the Australian Workers Union (AWU) negotiated a consent award with the employer, Rio Tinto, effectively excluding other unions involved in the local union project. These events undermined earlier union enthusiasm for co-operative union organising ventures, and led the ACTU to establish new rules to avoid such problems in future campaigns (Cooper 2004: 216-218).

Overall union membership numbers again rose slightly in 2003, but this did not translate to increases in union density levels, which fell to 23% in 2003, and to a new low of 22.7% in 2004 (with figures for that year showing that only 17.4% of workers in the private sector belonged to trade unions) (ABS 1994-2004). Ironically, the debate leading to the passage of the 2005 Act provided a unique opportunity for unions to engage with the public through a sustained media campaign in opposition to the Government's proposals. By November 2005, several unions provided anecdotal reports of dramatic increases in membership levels in response to this campaign. However, it remains to be seen whether this trend can be sustained, and can contribute to a reversal of the steady downward trend in union density in Australia over the last twenty-five years (see further the Conclusion below).

The Work Choices Legislation and Trade Unions

We turn now to consider how key provisions of the 2005 Act[2] will affect trade unions. In doing so, we note that these provisions cannot be considered in isolation. Rather, they must be viewed alongside the new bargaining arrangements introduced by the 2005 Act. These arrangements significantly undermine the bargaining power of unions by removing safeguards such as the no disadvantage test, discouraging independent

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scrutiny of agreements prior to their approval, restricting the content of agreements and providing for unilateral termination of agreements. Unions will be further sidelined by new limits on their involvement in non-union agreement-making and the extensive new restrictions on industrial action.[3]

Union Registration and Accountability

The scheme in the RAO Schedule for the registration, regulation and accountability of employer and employee organisations, overseen by the Australian Industrial Relations Commission (AIRC), essentially remains in place (see now WR Act: Schedule 1). However, there have been some significant changes to the RAO Schedule, primarily as a result of the shift in the constitutional basis for the federal workplace relations system from the 'labour power' to the 'corporations power'.[4]

Before considering those aspects of the new provisions, and the types of organisations that can now be (or remain) registered, it should be noted that the objects of the RAO Schedule have also been amended. The new objects highlight the role of the registered organisations provisions in promoting enhanced employment relations, and reducing the adverse effects of industrial disputation. They also emphasise the desirability of registration of a diverse range of organisations; and the need to subject unions and employer organisations to certain standards, in order for them to gain statutory rights and privileges. As before, those standards promote efficiency and accountability in management, and democratic participation by members in the affairs of registered organisations. Finally, the new objects acknowledge that the RAO Schedule is intended 'to assist employers and employees to promote and protect their economic and social interests' by forming employer and employee organisations. This is an interesting addition, given the pre-reform 1996 Act's repeal of the former legislation's (long-standing) object of 'encouraging' the registration of representative organisations. However, the modest encouragement now offered is only for a diluted form of employee representation, given that this object is subjugated to the overall aim of harmonious workplace relations and limiting strikes.[5]

The registration and regulation of employer and employee organisations was traditionally considered 'incidental' to the establishment of the conciliation and arbitration system, based on the labour power in the Constitution (Creighton and Stewart 2005: 104). However, the national workplace relations system introduced by the 2005 Act relies primarily on the corporations power for its constitutional underpinning. Accordingly,

the RAO Schedule has been amended to reflect these changed constitutional arrangements, so that it now provides for the registration of two main types of employee organisations.[6]

Primarily, there are 'federally registrable employee associations', or trade unions – that is, an association of employees which is a constitutional corporation, *or* the majority of whose members are 'federal system employees'. In turn, 'federal system employees' include employees of constitutional corporations; federal public sector employees; Victorian employees; or employees working for employers engaged in interstate or overseas trade or commerce, employers operating mainly in the Territories, or employers in certain industries (for example, banking, insurance and telecommunications). Independent contractors who would fall within any of the above categories if they were employees, are also included within the concept of federal system employees.

The AIRC is given discretion to cancel the registration of existing federally-registered unions if they are not, or they cease to be, federally registrable associations. Many unions will be able to meet the new requirements for federal registration, by showing that more than half of their members are federal system employees. However, the registration of several unions would have to be called into question under these new arrangements – in particular, those whose members are predominantly engaged by *State* government departments or instrumentalities, such as unions covering public school teachers and health and emergency services workers. Determination of the continued eligibility for registration of these types of unions may have to await resolution of the broader question, thrown up by the 2005 Act, as to whether state government entities are 'constitutional corporations' and are therefore employers covered by the national workplace relations system (see Prince and John 2005: 49-50).

Alternatively, a union could retain its registered status by becoming a constitutional corporation itself.[7] Here, the provisions introduced by the 2005 Act open up further complexities, such as whether a trade union can actually be a 'trading corporation' of the type envisaged by the corporations power in the Constitution;[8] how, in any case, a union can incorporate under Federal law when it is precluded from doing so by the *Corporations Act*;[9] whether corporate status obtained by virtue of registration under State associations incorporation legislation[10] might suffice for the purposes of the new Federal union registration requirements; and, again, whether unions are able to register under these State laws. It will be some time before the strategies that unions adopt to maintain their 'federally registrable' status begin to take shape, and these complexities are resolved.

In the meantime, some unions – even if they fall within the new registration criteria – are considering the option of 'deregistering' and operating outside the formal system of workplace regulation (for example, the Electrical Trades Union in Victoria; see Workforce 2005a). This appears to be based on the view that the traditional advantages of registration have dwindled, while the restrictions imposed on unions have increased sharply under the new legislation. Certainly, some benefits would flow to unions if they chose to operate outside the federal legal framework. For example, they could largely determine their own arrangements for internal management and accountability to members. On the other hand, unregistered unions would not be able to utilise the provisions of the WR Act that provide a role for unions in agreement-making, and the enforcement of awards, agreements and statutory rights on behalf of their members. Union rights of entry, and established representation rights, would also become unenforceable for unions operating outside the workplace relations system.

Another major factor that unions will need to consider in determining their strategic response to the new legislative terrain is that the constitutional validity of the registration provisions is itself plagued with doubt. The extent of the corporations power's reach as a vehicle for regulating workplace relations will be the central question for determination in the High Court challenge to the 2005 Act already lodged by several State Labor governments (Workplace Express 2005a, 2006). In particular, there is considerable uncertainty as to whether that source of power extends so far as to support the framework for regulating unions and employer organisations introduced by the 2005 Act (see Stewart 2005: 222-223; Prince and John 2005: 55-59). Anticipating these problems, the new legislation attempts to ensure that if parts of the definitions of 'federally registrable' employer and employee associations are found to be constitutionally invalid, the remaining parts can continue to operate. The validity of the relevant legislative provision,[11] and the amended RAO Schedule generally, await consideration by the High Court – but in our view, the registered organisations provisions appear to be the most constitutionally uncertain aspect of the 2005 Act.

The RAO Schedule also makes provision for 'federally registrable enterprise associations'. These are essentially the same workplace-based associations as those first introduced in 1996, with some changes to reflect their new constitutional basis. In addition, the minimum number of members required to form an enterprise association has been lowered from 50 to 20, in order to increase the take-up rate of these under-utilised

employee representative bodies (see above). It should also be noted that certain State-based unions (and employer organisations) can obtain transitional registration in the Federal system, and full registration within three years. This is intended to enable such organisations to continue to represent members covered by State awards and agreements that 'move' to the Federal workplace relations system under the transitional provisions of the 2005 Act.

The former provisions for the cancellation of registration of unions have been maintained, although the potential grounds for deregistration have been broadened to ensure compliance with some of the new 'norms' of the system introduced by the 2005 Act. For example, breaches by unions (or their members) of Federal Court injunctions aimed at stopping 'unlawful' industrial action, or injunctions made under the freedom of association provisions (see below) could now lead to deregistration.

Right of Entry

The union right of entry provisions implemented by the 2005 Act are an example of the use of prescriptive law to 're-regulate' workplace relations (see Howe 2005: 2-3), in direct contrast with the Howard Government's claim that it is establishing a 'simpler' and more 'flexible' system (see Howard 2005: 39). The single right of entry provision that was inserted into the *Conciliation and Arbitration Act 1904* in 1973 (s 42A) provided a limited entitlement to enter workplace premises for officials of federally registered unions who were not already covered by right of entry provisions in existing awards (see Ford 2000: 2-3). This section was the forerunner to the right of entry provisions in ss 286 and 306 of the *Industrial Relations Act 1988*. The 1996 reforms replaced these provisions with a set of seven, more detailed sections (pre-reform 1996 Act: ss 285A-G) and made right of entry provisions in awards unenforceable. Under the 2005 Act, right of entry requirements have been expanded to the extent that they now comprise some forty-two provisions of the WR Act (ss 736-777). The substance of these provisions reveals an increase in the extent of regulation of trade union activity, with new restrictions on the types of persons who may obtain a permit from the Industrial Registrar; the types of activities that may be undertaken while a permit-holder is on an employer's premises; and the types of employees to whom a permit-holder is allowed to have access.

A new objects clause states that the aim of the right of entry provisions is to balance the right of unions to effectively represent their members, against the right of employers to run their businesses without undue

interference or harassment. While this has previously been recognised as the implicit aim of right of entry provisions (Ford 2000: 1; Shaw and Walton 1994: 553), the 2005 Act makes this object explicit for the first time. Some aspects of the previous framework for right of entry remain unchanged: right of entry is only available to union officials who have obtained a permit, for the purposes of investigating suspected breaches of awards and to hold meetings with employees who are eligible to be members of the union (ie for organisational and recruitment purposes); permit-holders must provide advance notice of their intention to enter an employer's workplace premises and outline the nature of their proposed activities; employers must not hinder permit-holders in exercising these rights; and the AIRC has powers to deal with those who misuse the provisions.

However, as indicated above, the 2005 Act introduces several significant constraints on union entry rights. Importantly, to begin with, the new Federal provisions override State right of entry laws – that is, union officials *cannot* obtain entry to workplaces of employers covered by the new national system, by relying on union right of entry provisions in State industrial legislation. There is one exception to this general rule: union officials can continue to enter workplaces of employers covered by the new national system, pursuant to entry rights under State occupational health and safety (OHS) legislation.[12] However, entry rights under State OHS laws now operate subject to the new Federal procedural limits on right of entry, including the requirements to obtain a permit, comply with permit conditions, and provide 24 hours' notice of the intention to enter and the reason for doing so.

The granting of right of entry permits to union officials is now subject to a 'fit and proper person' test. Under this test, an official must have received training on the rights and responsibilities of permit holders; must not have been convicted of an 'industrial' offence, or offences involving fraud, dishonesty or violence; and must not have had his or her entry rights under State laws revoked or suspended. If a permit-holder wishes to enter an employer's premises to investigate a suspected breach of an award or a collective agreement, the following criteria must be met: the permit-holder's union must be bound by the relevant award or collective agreement; there must be at least one member of that union performing work on the premises; and the suspected breach must relate to the work of those employees. Where a union official suspects that the employer is breaching an (individual) Australian Workplace Agreement (AWA), he or she only has the right to enter where an employee covered by the AWA

requests the union's assistance in writing. Given the link in practice between individualised bargaining arrangements and deunionisation (Peetz 2002), it is unlikely that employees on AWAs will invite union involvement in this way. Combined with the new prohibition on union right of entry for discussion purposes where *all* of the employees are engaged on AWAs (see below), these provisions will make it extremely difficult for unions to maintain a presence at individualised workplaces.

The right of a permit-holder to enter an employer's premises to hold discussions with employees is now conditional upon there being employees in the workplace who are members, or eligible to become members, of the permit-holder's union *and* who are covered by an award or collective agreement binding on that union. As it is no longer possible for a union to be bound by a non-union collective agreement, and such agreements exclude the operation of awards, there is no right of entry for discussion purposes where all employees at a workplace are covered by AWAs or a non-union collective agreement. The new provisions for unilateral termination of workplace agreements will increase the impact of this restriction on union entry rights. Once a collective agreement made under the 2005 Act has expired, an employer may unilaterally terminate the agreement on 90 days' notice, forcing employees onto the new Australian Fair Pay and Conditions Standard (AFPCS), and any applicable 'protected award conditions'. These employees will no longer be covered by an award and therefore the union will be excluded from entry to the workplace for discussion purposes until such time as a new union collective agreement is made. It will be more difficult for the union to obtain such an agreement, as they will have no right to enter the workplace to promote support for the agreement amongst employees (see ACTU 2005: 89-91).

Even in unionised workplaces, the detailed regulation of union activities may operate to discourage employee participation in those activities. For example, a permit-holder is not authorised to enter or remain on the premises if he or she fails to comply with an employer's reasonable request to hold discussions in a particular room or area and/or to take a particular route to reach that room or area. This provides greater scope for employers to monitor, and potentially obstruct, employee involvement in unions. Similarly, the requirement for union officials to provide details of the breach that they are proposing to investigate, and to specify the employee records they require for inspection, may enable employers to identify those employees who have raised concerns over compliance issues. That said, the freedom of association provisions provide protection against adverse treatment by the employer of such employees. As was the case under the

pre-reform 1996 Act, the requirement for unions to give 24 hours' (but now not more than 14 days') notice of the proposed entry also provides the employer with a potential tactical advantage.

Running against the 2005 Act's extensive stripping of the AIRC's powers, the tribunal has been given a broader remit to deal with unions and union officials who misuse their statutory entry rights. Suspension or revocation of a union official's entry permit by the AIRC is now mandatory where the permit-holder has misrepresented his or her entry powers; has been ordered to pay a penalty due to a breach of the right of entry provisions; has had his or her entry rights under State law suspended or cancelled; or engaged in conduct that was not authorised by a State OHS law when relying on rights of entry under that law. Certain minimum periods of suspension or revocation are now applicable: three months for a 'first offence', twelve months on the second occasion, and five years on the third or subsequent occasions. The AIRC also has the power to ban a union from obtaining permits for its officials for a specified period, where a permit-holder has abused his or her rights under the right of entry provisions (eg by exercising the right of entry for union recruitment purposes excessively). Further, civil penalties have been significantly increased for offences under the right of entry provisions: the new maximum penalties are $33,000 for a body corporate and $6,600 for individuals. The 'offences' to which these penalties apply include employers refusing or delaying entry, or otherwise hindering or obstructing a permit-holder in the exercise of his/her entry rights; and permit-holders hindering or obstructing any person, or acting in an improper manner.

Overall, the changes introduced by the 2005 Act enable employers to set real limits on the frequency, extent and purposes of union right of entry, and provide them with new remedies against unions and union officials who 'abuse' their entry rights. These provisions will have a major impact on the ability of unions to represent their members in collective bargaining, and to enforce compliance with industrial instruments and legislation. They will also make it harder for unions to boost organising and recruitment efforts through the development of workplace-based representative structures, as outlined in the ACTU's *Future Strategies* document (discussed above). As one of the key benefits traditionally associated with registration under the formal regulatory system, this drastic reduction in the scope of union entry rights will make the option of non-registration more attractive for some unions.

Freedom of Association

The freedom of association provisions introduced in 1996 built on the previous statutory protections for unionists against victimisation by employers. Significantly, however, the 1996 provisions also expanded the notion of 'freedom of association' so as to protect the right of employees *not* to join a union (that is, employees were safeguarded against union or employer conduct aimed, for example, at requiring or forcing them to join a union). These new provisions were adopted as part of the Government's policy objectives of stamping out compulsory unionism, and protecting the rights of individual employees (rather than workers as a collective group), including their right to decide whether to join a union, and to join the union of their choice. Arguably, by preserving the negative right to *dis*associate, the Government has twisted the concept of freedom of association as it is understood in international labour law (see Naughton 1997: 118-119; Creighton and Stewart 2005: 523-524).

However, the practical operation of the freedom of association provisions over the last ten years has seen them provide a more effective 'shield' of protection from discrimination against union members, than (as the Government intended) for non-unionists. In a number of high-profile cases, unions have used the provisions to obtain interim injunctions, preventing employers from implementing strategies that could be shown to be 'tainted' by impermissible anti-union or 'de-collectivisation' objectives. So, for example, the corporate restructure and subsequent termination of union members' employment undertaken by Patrick Stevedores in the 1998 waterfront dispute fell foul of the freedom of association provisions;[13] as did the outsourcing of home care functions by a local council;[14] and attempts by the Commonwealth Bank to place its entire workforce on individual workplace agreements,[15] and (a few years later) to create a subsidiary entity as a basis for individualising employment relations in one of its business units.[16]

This is not to say that unions have *always* been able to successfully utilise the freedom of association provisions, or that the operation of the provisions has not caused difficulties for some unions. For example, a freedom of association action brought by the AWU failed to counter BHP's introduction of individual agreements in its iron ore operations in the Pilbara – primarily because several members of the Federal Court took the view that the individualisation strategy did not necessarily involve the (illegal) motive of de-unionisation on the employer's part.[17] These and other similar decisions have been strongly criticised. For example, Quinn has questioned the wisdom of a judicial approach to the freedom of

association provisions which seeks to protect only the *individual* rights of employees, rather than their rights to effective *collective* representation by trade unions (see Quinn 2004).

Further, the Government has charged the Office of the Employment Advocate ('OEA') with the role of aggressively 'policing' the provisions, particularly in respect of unions. As a result, there have been several cases in which unions have been found to have engaged in freedom of association breaches – for example, by trying to force a labour hire company to remove a non-unionist from a worksite.[18] The use of the provisions against unions in this way has no doubt led to a moderation of overt union tactics to maintain closed shops. Overall, however, the freedom of association provisions have (rather unexpectedly) proved to be an important strategic device for trade unions.

This explains the amendments introduced by the 2005 Act (see WR Act: Part 16), which make it more difficult for applicants to obtain interim injunctions under the provisions and which broaden the types of union conduct that are prohibited under the freedom of association provisions. The circumstances in which the provisions operate have been changed to reflect the constitutional basis for the national workplace relations system. So, for example, the prohibitions in Part 16 apply in respect of conduct by or against a constitutional corporation, or conduct that adversely affects employees of such a corporation.

The prohibitions on *employer* conduct essentially remain the same. Employers must not engage in 'prohibited conduct' (such as dismissing an employee, or changing employment conditions), for a 'prohibited reason' or for reasons that include a prohibited reason (for example, an employee's membership or non-membership of a union; or the fact that an employee is covered by an award or workplace agreement, or has engaged in lawful industrial action). 'Inducing' an employee to join or (more likely) not to join a union, or to cease being a union member, also remain prohibited.[19]

Unions, and their members and officials, are now subject to a wide range of prohibitions under Part 16. For example, they must not pressure employees into joining in industrial action, or paying a union bargaining fee. Nor can they engage in conduct aimed at forcing employers or subcontractors to enter into union collective agreements. In addition, several new general prohibitions have been introduced, aimed at addressing 'the most common forms of inappropriate conduct that are contrary to rights to freedom of association' – including false or misleading statements about union membership, such as 'no ticket, no start' policies on building sites; and strike action to enforce union membership (Explanatory

Memorandum 2005: 383).

Remedies including civil penalties and compensation orders continue to be available for freedom of association breaches. The Federal Court is still able to grant injunctions to stop or prevent such breaches, although an important change has been made in this respect. Generally, a 'reverse onus of proof' applies in freedom of association proceedings – so that, for example, a union member alleging that his or her dismissal by an employer was motivated by the employee's union membership or activism need only prove that the dismissal took place; the employer then has to *disprove* that the dismissal was for a prohibited discriminatory reason. In interim injunction applications, where the applicant must show that there is a 'serious question to be tried' that the freedom of association provisions have been breached, the reverse onus of proof has operated to make this a relatively easy threshold for employees and unions to satisfy.[20] However, following the 2005 amendments, the reverse onus no longer applies in applications for interim injunctions under Part 16 – a change that is clearly designed to counter the unions' successful use of the freedom of association provisions in recent years.

Finally, a range of 'objectionable provisions' are prohibited from being included in awards, workplace agreements, and even in unregistered common law agreements. Objectionable provisions are those that require or permit conduct that would breach Part 16, such as a clause in an award or agreement requiring an employer to give 'preference' to union members, requiring non-members to pay a bargaining services fee to a union, or mandating union membership in a workplace. Indeed, a provision that merely 'indicates support' for union membership is considered objectionable. All these types of provisions are rendered void, and the AIRC and OEA have powers to remove them from existing awards and agreements.

Conclusion

Over the last fifteen years or so, Australian unions have been hit with successive waves of statutory and policy intervention by Federal and State governments. The ideological flavour of this 'assault' on unions has much in common with the legislative strategy adopted by the Thatcher and Major governments to curb union power in Britain in the 1980s (see Auerbach 1990; Naughton 1997: 117-118). Since 1996, the Howard Coalition Government has adopted various measures to challenge the role and legitimacy of unions, and in many ways to 'demonise' them before the

Australian public. The legislative changes introduced in 1996 have certainly made life more difficult for unions in Australia. At the same time, as we have outlined, certain aspects of the pre-reform 1996 Act have not had the adverse impact on unions that the Government intended – and, in the case of the freedom of association provisions, have actually worked to the unions' advantage.

However, the latest instalment of aggressive anti-union measures contained in the 2005 Act represent the most serious threat to Australian unions yet. The amended freedom of association provisions will deliver a 'double blow' to unions: restricting their capacity to engage in a range of tactics to support the collective representation of workers' interests, at the same time as they limit unions' ability to block de-unionisation or individualisation strategies by employers. The new right of entry provisions will provide employers with far greater scope to resist or limit unwanted union influence at the workplace. In addition, the legislation seeks to marginalise bargaining for union collective agreements to the periphery. Therefore, a major challenge for the unions is to carve out a role as the 'first choice' representative of employees negotiating non-union and individual agreements. In addition, they will need to continue to deliver good bargaining outcomes to their members in areas of union strength – a goal that may be more difficult to achieve with the substantial limits on 'protected' industrial action that are now in place.

The new framework for the regulation of registered organisations presents unions with other major strategic questions to address. As we have indicated, some unions will have to revisit the validity of their registration under the RAO Schedule, and some may need to take steps to obtain incorporated status independently of the WR Act. Indeed, some unions might decide to 'opt out' of registration under the legislation altogether. On top of all this, there is a (far from remote) possibility that the whole system of union registration will be the first deck in the new legislative 'house of cards' to tumble if the States' constitutional challenge to the legislation succeeds.

With the 2005 Act closing the door on many avenues for effective union organisation and representation, a range of other strategies and systems of legal support for unions are now under consideration. For example, unions are certain to continue developing corporate law mechanisms, such as 'shareholder activism' and employee rights in insolvency, as an alternative basis for advancing workers' interests (see Anderson and Ramsay 2005; Whelan and Zwier 2005). There will also be vigorous debate within the Australian labour movement over the next few

years about a range of overseas models for increasing union influence. These include the consensus-based 'partnership' approach adopted by British unions under the Blair Labour Government (see Terry 2003; and the critical analysis in Crosby 2005: 215-227); the merits of alternative employee representative bodies, such as European-style 'works councils' (see Gollan and Patmore 2002); and statutory union recognition rights for collective bargaining, based on the British and North American models which require unions to demonstrate majority support among the workforce (see Forsyth 1999; McCallum 2002; Combet 2005).

In conclusion, some observers have assessed the implications of the 2005 Act for Australian unions in dire terms, calling into question their ongoing relevance and future existence (see the discussion in Shaw 2005). Certainly, the challenges facing unions in the new era of Work Choices are monumental. However, as the level of public interest and overall success of the ACTU's campaign in opposition to the new laws in 2005 shows, there are also major opportunities for unions – they now have a chance to win over the 'hearts and minds' of Australian workers, and demonstrate the importance of collective representation to those whose wages and conditions are downgraded as a result of the new laws (see Gittins 2005). Indeed, some unions have reported a recent surge in membership numbers as a result of the high-profile public debate over the Government's reform proposals and union efforts to highlight concerns about their negative effects on workers (see Workforce 2005b).[21] Paradoxically, despite the extensive constraints imposed on unions by the 2005 Act, its practical operation over the next few years could enable them to re-establish their relevance and recover some of the ground that they have lost since the early 1980s.

Notes

[1] It should be noted that, at the Federal level, non-union enterprise agreements were first introduced by the Keating Labor Government in 1993.

[2] The 2005 Act amended and re-numbered the 1996 Act, with effect from 27 March 2006. Unless otherwise stated, references to legislative provisions in the following discussion will be to the *Workplace Relations Act 1996* ('WR Act'), as amended and re-numbered by the 2005 Act.

[3] For detailed discussion of the provisions of the 2005 Act relating to agreement-making and industrial action, see the articles by Sean Cooney and Shae McCrystal elsewhere in this edition.

[4] See further the article by John Williams elsewhere in this edition.

[5] That is, this inevitably limits the potential for unions to fulfil their traditional purposes of representing workers' interests through collective action, including industrial action if necessary: for discussion, see Rawson 1981; Ewing 2005.

[6] Provision is also made for federally registrable *employer*associations.
[7] Note that corporate status obtained by virtue of a union's previous registration under the RAO Schedule is not sufficient for these purposes.
[8] For discussion of some of the differences and similarities between trade unions and corporations, see Forsyth 2000: 37-41.
[9] See *Corporations Act 2001* (Cth), s 116.
[10] For example, the *Associations Incorporation Act 1981* (Vic).
[11] WR Act: Schedule 1, cl 18D.
[12] See eg ss 79-94 of the *Occupational Health and Safety Act 2004* (Vic).
[13] *Patrick Stevedores Operations No. 2 Ltd v MUA* (1998) 195 CLR 1
[14] *Greater Dandenong City Council v ASU* (2001) 184 ALR 641.
[15] *FSU v Commonwealth Bank of Australia* (2000) 106 IR 139.
[16] See *FSU v Commonwealth Bank of Australia* [2005] FCA 796 (9 September 2005), and [2005] FCA 1847 (16 December 2005); in the latter decision, a record fine of $750,000 was imposed on the employer for its breaches of the freedom of association provisions.
[17] *BHP Iron Ore Pty Ltd v AWU* (2000) 97 IR 266; *AWU v BHP Iron Ore Pty Ltd* (2001) IR 410; compare Justice Gray's decision at first instance, *AWU v BHP Iron Ore Pty Ltd* (2000) 96 IR 422.
[18] *Employment Advocate v NUW*(2000) 99 IR 376; see also the cases discussed in Creighton and Stewart 2005: 527-528.
[19] However, the BHP cases (see n 17 above) have established that it may be difficult for unions to show that the employer had the necessary *intent* to induce employees to end their union membership.
[20] See eg David's Distribution Pty Ltd v NUW (1999) 91 FCR 463.
[21] Union membership figures for 2005, released just prior to publication of this article, indicate that the debate over the 2005 legislative changes may have contributed to an increase in union membership, although these latest statistics reflect the position as at August 2005 (ie prior to the most intense period of public debate over the Government's Work Choices proposals, in the latter part of 2005). The 2005 figures showed an increase of approximately 70,000 in overall union membership numbers, but a further decline in union density to 22.4% of the total workforce and only 16.8% in the private sector (see ABS 2005).

References

Anderson, K. and Ramsay, I. (2005) *From the Picketline to the Boardroom: Union Shareholder Activism in Australia*, Research Report, Centre for Corporate Law and Securities Regulation and Centre for Employment and Labour Relations Law, University of Melbourne.

Auerbach, S. (1990) *Legislating for Conflict*, Clarendon Press, Oxford.

Australian Bureau of Statistics ('ABS') (1983-1986) *Trade Union Members, Australia*, Canberra, 6325.0.

ABS (1994-2004) *Employee Earnings, Benefits and Trade Union Membership, Australia.* Canberra, 6310.0.

ABS (2005) *Employee Earnings, Benefits and Trade Union Membership, Australia.* Canberra, 6310.0.

ACTU (1999) *Unions@Work: The Challenge for Unions in Creating a Just and Fair Society.*

ACTU (2003) *Future Strategies: Unions Working For A Fairer Australia* (May 2003), [Online], Available: http://www.actu.asn.au/public/papers/Organising.html [accessed 8 May 2003]

ACTU (2005) 'Submission to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005' (11 November 2005).

Coulthard, A. (1999) 'The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion under the Workplace Relations Act 1996 (Cth)', in Deery, S. and Mitchell, R. (below), pp. 48-68.

Creighton, B. and Stewart, A. (2005) *Labour Law*, 4th edition, The Federation Press, Sydney.

Combet, G. (2005) *Industrial Relations: Give Workers a Genuine Choice*, Speech to the Australian Industry Group, 23 August 2005.

Cooper, R (2003) 'Trade Unionism in 2002' *Journal of Industrial Relations*, 45: 205-223.

Cooper, R (2004) 'Trade Unionism in 2003' *Journal of Industrial Relations*, 46: 213-226.

Cooper, R. (2005) 'Life in the Old Dog Yet? 'Deregulation' and Trade Unionism in Australia', in Isaac, J. and Lansbury, R. (eds), *Labour Market Deregulation: Rewriting the Rules*, The Federation Press, Sydney, pp. 93-106.

Crosby, M. (2005) *Power at Work: Rebuilding the Australian Union Movement*, The Federation Press, Sydney.

Deery, S. and Mitchell, R. (eds) (1999) *Employment Relations: Individualisation and Union Exclusion – An International Study*, The Federation Press, Sydney.

Deery, S. and Walsh, J. (1999) 'Union Decline in Australia: The

Role of Human Resource Management Practices and the Union-Hostile Workplace', *Australian Journal of Labour Law*, 12: 21-31.

Ewing, K. (2005) 'The Function of Trade Unions', *Industrial Law Journal*, 34: 1-22.

Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth).

Ford, W. (2000) 'Being There: Changing Union Rights of Entry Under Federal Industrial Law', *Australian Journal of Labour Law* 13: 1-27.

Forsyth, A. (1999) 'Proposals for Statutory Union Recognition Rights in Britain and Implications for Australia', 12: 32-42.

Forsyth, A. (2000) 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model, *Australian Journal of Labour Law*, 13: 28-49.

Forsyth, A. and Sutherland, C. (2006) 'Collective Labour Relations Under Siege: The Work Choices Legislation and Collective Bargaining' *Australian Journal of Labour Law* (forthcoming).

Frazer, A. (1995) 'Trade Unions under Compulsory Arbitration and Enterprise Bargaining', in P. Ronfeldt and R. McCallum (eds), *Enterprise Bargaining, Trade Unions and the Law*, The Federation Press, Sydney, pp 52- 83.

Gittins, R. (2005) 'Are the unions up to the IR challenge?', *The Age*, 6 July 2005.

Gollan, P. and Patmore, G. (eds), *Works Councils in Australia: Future Prospects and Possibilities*, The Federation Press, Sydney.

Howard, J. (2005) 'Prime Ministerial Statement: Workplace Relations, Parliament of Australia', *Commonwealth Parliamentary Debates*, House of Representatives (26 May 2005).

Howe, J. (2005) *'Deregulation' of Labour Relations in Australia: Toward Command and Control*, Working Paper No. 34, Centre for Employment and Labour Relations Law, University of Melbourne.

McCallum, R. (2002) 'Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws', *Relations*

Industrielles, 57: 225-251.
Naughton, R. (1997) 'Sailing into Uncharted Seas: The Role of Unions Under the Workplace Relations Act 1996 (Cth)', *Australian Journal of Labour Law*, 10: 112-132.
Nolan, D. (ed) (1998) *The Australasian Labour Law Reforms: Australia and New Zealand at the End of the Twentieth Century*, The Federation Press, Sydney.
Orr, G. (1998) 'Conspiracy on the Waterfront', *Australian Journal of Labour Law*, 11: 159-185.
Orr, G. (2001) 'Agency shops in Australia? Compulsory Bargaining Fees, Union (In)Security and the Rights of Free-Riders', *Australian Journal of Labour Law*, 14: 1-35.
Peetz, D. (1998) *Unions in a Contrary World: The Future of the Australian Trade Union Movement*, Cambridge University Press, Cambridge.
Peetz, D. (2002) 'Individual Contracts, Bargaining and Union Membership', *Australian Bulletin of Labour* 28: 39-52.
Prince, P. and John, T. (2005) *The Constitution and Industrial Relations: Is a Unitary System Achievable?*, Parliament of Australia, Parliamentary Library, Research Brief, no. 8, 2005-06, 28 November 2005.
Pyman, A. (2001) 'Workplace Relations and Other Legislation Amendment Act 1996 (Cwlth): Experiences of Five Australian Trade Unions', *Journal of Industrial Relations*, 43: 340-347.
Quinn, D. (2004) 'To Be or Not to Be a Member – Is That the Only Question? Freedom of Association under the Workplace Relations Act', *Australian Journal of Labour Law*, 17: 1-34.
Rawson, D. (1981) 'The Law and the Objects of Federal Unions', *Journal of Industrial Relations*, 23: 295-309.
Rimmer, M. (2004) 'Unions and Arbitration', in J. Isaac and S. Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, pp. 275-315.
Rosewarne, S. (2005) 'Workplace 'Reform' and the Restructuring of Higher Education', *Journal of Australian Political Economy* 56: 186-206.
Shaw, M. (2005) 'Make or break for the unions', *The Age*, 26

November 2005.
Shaw, J. and Walton, C. (1994) 'A Union's Right of Entry to the Workplace,' *Journal of Industrial Relations,* 36: 546-553.
Stewart, A. (2005) 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation', *Australian Bulletin of Labour*, 31: 210-236.
Terry, M. (2003) 'Partnership and the Future of Trade Unions in the UK', *Economic and Industrial Democracy*, 24: 485-507.
Weeks, P. (1999) 'Reconstituting the Employment Relationship in the Australian Public Service', in Deery, S. and Mitchell, R. (above), pp. 69-87.
Whelan, Justice S. and Zwier, L. (2005) 'Employee Entitlements and Corporate Insolvency and Reconstruction', Research Paper, Centre for Corporate Law and Securities Regulation, University of Melbourne.
Workforce (2005a), 'Unions to abandon sinking ship?, *Workforce*, Issue 1521, 9 December 2005.
Workforce (2005b), 'Unions thank Howard for membership boom', *Workforce*, Issue 1518, 18 November 2005.
Workplace Express (2005a), 'News in brief', *Workplace Express,* [Online], Available: http://www.workplaceexpress.com.au [accessed 21 December 2005]
Workplace Express (2005b), 'Family First to vote against Work Choices bill; Democrats and Greens propose extensive change', *Workplace Express*, [Online], Available: http://www.workplaceexpress.com.au [accessed 30 November 2005]
Workplace Express (2006), 'State Governments reveal detail of High Court challenges to Work Choices Act', *Workplace Express*, [Online] Available: http://www.workplaceexpress.com.au [accessed 20 January 2006]I