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THE IMPACT OF INDUSTRIAL RELATIONS LAW REFORMS IN AUSTRALIA SINCE 1996 ON THE UNION MOVEMENT

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Abstract

Government industrial relations law reforms can have widespread implications on the power tussle between workers, the union, and the employer. This dissertation examines how the Australian Government's reforms since 1996 have impacted the union movement. During this period, both left and right-wing political parties implemented new industrial relations frameworks, consequently abolishing the well-entrenched 1904 arbitration system with its preferred compulsory unionism provisions.

Key aspects of union organising and activism were analysed to determine the effects and influence of these reforms. This analysis included statistical data evaluating union membership and strike action. The principle findings of this dissertation are that the narrowing of regulations, particularly concerning freedoms to disassociate, individualism, and workplace right of entry, negatively impacted the union movement. This was evident by the declines of union membership and strike action. The reforms eroded protective collective rights resulting in a serious threat to the Australian union movement. The union movement subsequently adjusted its structural approach by adopting the organising works model. However, the implementation of the organising works model has not curbed union membership or industrial action declines.

The Abbott Coalition government is yet to make any significant labour reforms. With union membership currently representing only 17% of the workforce, the Australian union movement is in a fragile predicament as to its future.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

A handwritten signature in black ink, appearing to read 'B. Cameron', with a long horizontal flourish extending to the right.

Bridget Cameron

Abbreviations

ABS	Australian Bureau of Statistics
ACTU	Australian Council of Trade Unions
AiG	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AWA	Australian Workplace Agreement
CA Act	<i>Conciliation and Arbitration Act 1904 (Cth)</i>
CFMEU	Construction, Forestry, Mining and Energy Union
FW Act	<i>Fair Work Act 2009 (Cth)</i>
ILO	International Labour Organization
IR Act	<i>Industrial Relations Act 1993 (Cth)</i>
NES	National Employment Standards
OEA	Office of the Employment Advocate
WR Act	<i>Workplace Relations Act 1996 (Cth)</i>
Work Choices	<i>Workplace Relations Amendment (Work Choices) Act 2005</i>

Chapter One - Introduction

1.1 Introduction

Leading labour law scholar Kahn-Freund makes the following observation of the government's role in regulating labour law, 'the main object of labour law [is] to be a *countervailing force* to counteract the inequality of bargaining power which is inherent and must be *inherent in the employment relationship*'.¹ Thus, the primary objective of the government legislating labour laws is to address the imbalance of power within the employment relationship by providing parties a *platform of equal footing*. The employer has access to economic capital and skilled bargaining resources. In contrast, employees sell their labour and are often replaceable. Thus, the employer has a stronghold to dictate employment terms. One means for employees to address this power imbalance is through collective membership and solidarity within the union movement. As conflict will inevitably arise between employers and unions out of the protection of employees' interests, the government may intervene if this impedes on public interest. That being said, government intervention is not always aimed at providing equal footing. It is the primary aim of this dissertation to explore this through the analysis of the challenges faced by the union movement in the context of Australian labour law reforms since 1996. To achieve this, each government's intervention through party policy² and law reforms will be considered. This dissertation will question whether such intervention has weakened unions' ability to freely function. This analysis will be conducted with particular focus on industrial action, collective agreement-making, workplace right of entry, right to strike, and union membership.

From 1904, Australian unions experienced stability as a majority quasi-secure actor within the labour framework with legislated compulsory unionism through the 'conciliation and arbitration system' (arbitration).³ Unions flourished as regulations supported advocacy and union recognition. Economic growth in

¹ Otto Kahn-Freund, *Labour and the Law - Hamlyn Lecture Series* (Stevens and Sons, 5 May 1972), p 18

² 'Party policy' is comparable to UK's white paper

³ See *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309

manufacturing, infrastructure, and public services also contributed to the rise in unionism and collective bargaining.⁴ Yet, recent reforms, economics, and political changes altered the union movement's capabilities where they are no longer a majority workplace party. This dissertation concentrates on post-1996 reforms, which coincided with a dramatic decline in union membership and strike action. A commonly cited reason for this decline is 'the shift in economy system... brought about by financialization, its interaction with the government, and the resultant inadequacies of labour's capacity to response'.⁵ From 1996, both left and right-wing political parties were encouraged by market liberal ideology to introduce a new labour framework. This dissertation will consider three periods of government: the John Howard Coalition (1996-2006), Kevin Rudd and Julia Gillard Labor (2007-2013), and the Tony Abbott Coalition (from 2013). In doing so, it will explore the impact of the reforms against a socio-legal analysis of declines in union membership and industrial disputes. Furthermore, it will examine the implication in theory and model shifts from a *corporatism*, operating under a *service* model, to *pluralism*, operating under an *organising* model.

To evaluate post-1996 labour reforms, literature relating to the union movement's organisation of workers will be considered. In assessing such interaction, this dissertation will primarily illustrate how reforms have directly impacted on unions' ability to represent workers' rights. It will question whether the relevant governments went beyond implementing labour reforms. This is disputable in light of their clearly publicised opinion of unions. Howard's Coalition government openly broadcasted its law reform intentions, which focused on 'eradicating' unions from the workplace in preference for individual rights.⁶ Subsequent governments largely adopted Howard's individualist approach. Even when the union movement backed the Labor party for the 2007 election, once in office, Rudd publicised that it was not the government's

⁴ Mark Bray and Andrew Stewart, 'From the arbitration system to the Fair Work Act' (2013) 34 *Adelaide Law Review* 21, p 25

⁵ David Peetz and Janis Bailey, 'Dancing Alone: The Australian Union Movement Over Three Decades' (2012) 54(4) *Journal of industrial relations* 525, p 528

⁶ Liberal-National Coalition party, *Better pay for better work - industrial relations policy* (1995)

position to secure the unions' role as workers' advocate.⁷ Upon the Coalition party's return to office in 2013, Abbott announced a Royal Commission to probe into union governance and corruption to 'shine [a] spotlight in to the dark corners' of the movement.⁸

Consequently, the union movement can no longer rely on long-standing government relationships, political influence, or a return of arbitration laws. A comparison of government reforms and attitudes towards unions against Kahn-Freund's principles of labour law (as stated above) shows that the union movement must adapt its strategies. It must become its own 'countervailing force' to collectively counteract workers' unequal bargaining powers and advance workers' rights. This is particularly the case when governmental reforms have failed to impose an equal footing platform approach.⁹

1.2 Dissertation structure

This dissertation comprises five chapters. Chapter Two contains a historical review of labour laws introduced in 1904. It evaluates the arbitration system featuring compulsory unionism, and considers the 'organising' approach of the union movement and its shift from this approach in light of recent reforms.¹⁰ A statistical data benchmark of union membership and industrial disputes will illustrate the pre-1996 arbitration system against the reforms.

Chapter Three evaluates the Howard Coalition government reforms from 1996 to 2007. It examines party policy and labour reforms against the pre-1996 arbitration system. Declines in union membership are evaluated against membership trends in other western countries such as the United Kingdom (UK) and United States (US). While these countries' law reforms will not be

⁷ George Megalogenis, 'Rudd casts unions adrift' (5 May 2007) *The Australian*

⁸ Latika Bourke and Emma Griffiths, 'Prime Minister Tony Abbott announces royal commission to "shine spotlight" on alleged union corruption' (11 February 2014) *Australian Broadcasting Corporation (ABC) News*

⁹ Kahn-Freund, n 1

¹⁰ David Peetz and Barbara Pocock, 'An Analysis of Workplace Representatives, Union Power and Democracy in Australia' (2009) 47(4) *British journal of industrial relations* 623, pp 628-30

considered here, this comparison will advance the hypothesis that the Australian government's interventions went beyond the conceivable implications from globalisation and responsive law reforms.

Chapter Four examines the Rudd and Gillard Labor government reforms from 2007 to 2013. It questions party policy and law reforms compared against the arbitration system and the Howard government reforms. The impact of these reforms will be assessed against outcomes from Australian Bureau of Statistics (ABS) statistical data in relation to union membership and industrial action.

Chapter Five contains a final discussion of the dissertation's aims and how the research presented addresses the central hypothesis. A brief summary of each government's framework will also consider the political actions of the Abbott Coalition government from 2013. Concluding this dissertation will be an evaluation of the impacts of law reforms and their influence on the future of the Australian union movement.

Before proceeding with the analysis, Sections 1.3 and 1.4 below will briefly introduce key models and the unique Australian government structure and political parties, which have influenced both the implementation of reforms and the union movement's structure.

1.3 Australia's political and parliamentary structure

The Parliament of Australia has a bicameral structure represented by 150 elected members of the 'House of Representatives' (embracing elements of the executive Westminster system) and 76 members of the 'Senate' (adopting features from US Congress), who are appointed by Federal and State government representatives. The significance of this structure is that legislation must pass both houses. Consequently, an objection by either house to any tabled Bill could indefinitely delay the passing of legislation.¹¹

¹¹ See Australian Government, *Parliament of Australia* (2014)

The separation of the two houses impacted on the Howard, Rudd and Abbott governments' ability to pass reforms during their first terms in office. This will be further discussed in Chapters Three, Four, and Five.

Further, there are two major representing Australian political parties: the Coalition, a centre-right economic liberalist and social conservative party representing farmers (National Party) and upper-middle-class society (Liberal Party), and Labor, a centre-left democratic socialist party with union influence, which is considered a labour movement representative. An influential minor party that will also be discussed in this dissertation is the Australian Democratic Party, which broke away from the Liberal party in 1977. It represents social-liberal ideology and middle-class left-leaning ideals.

1.4 Union organisation models

Creighton, Ford, and Mitchell claim that for maximum performance of its organising functions, a union 'requires a level of membership and financial resources, which is sufficient to enable it to exercise power in the labour market. It also requires a degree of protection for its officers as they go about conducting the affairs of the organisation'.¹² These requirements extend to a number of union functions: the ability to recruit members, provide services to existing members, and advocate on their behalf. To execute these functions, the movement may shift its strategic approach according to changes due to globalisation, economics, and law reforms that can impact its organising capacity. This dissertation considers in particular whether the aggressive reforms after 1996 resulted in the union movement shifting from a corporatist to a pluralist approach.

From corporatism to pluralism

Schmitter defines 'corporatism' as occurring where a state and a privileged interest group benefit from a political exchange. The corporatist structure is described as:

¹² Breen Creighton, William Ford and Richard James Mitchell, *Labour law : text and materials* (Law Book Company, 2nd Ed. ed, 1993), p 995

‘a system of interest representation in which the constituents units are organized into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports’.¹³

Corporatism as a policy process is the interaction between the public authority and the union movement to cooperate ‘in the articulation of interests, allocation of values and implementation of policy’.¹⁴ Prior to the 1996 reforms, the labour framework functioned under an arbitration system regulated compulsory unionism, assuring high union membership representing the majority of the workforce. Consequently, they were influential in government policy formation, and had the power to influence significant governmental economic reforms. This will be further discussed in Chapter Two.¹⁵

‘Pluralism’ focuses on aggregating preference to members and prioritising self-interest, differing from corporatism, which focuses on shared conception of public good.¹⁶ Pluralism envisages participation by a multitude of ‘voluntary, competitive, non-hierarchically ordered and self-determined’¹⁷ interest groups, which do not exercise any representative monopoly, influence (government), or receive any special state endorsement.¹⁸ In 1996, the Howard Coalition government’s sweeping reforms led to an inimical relationship with the unions with the *Workplace Relations Act 1996* (WR Act) and *Work Choices*¹⁹ laws

¹³ Phillippe C. Schmitter, ‘Still the century of corporatism?’ (1974) *Review of Politics* 85, p 93

¹⁴ Tonia Novitz and Phil Syrpis, ‘Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism’ (2006) 10 *Industrial Law Journal* 367, p 371

¹⁵ Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 2010), pp 706-7

¹⁶ Christian Hunold, ‘Corporatism, Pluralism, and Democracy: Toward a Deliberative Theory of Bureaucratic Accountability’ (2001) 14(2) *Governance* 151, p 160

¹⁷ Schmitter, n 13, p 96

¹⁸ Novitz and Syrpis, n 14, p 373

¹⁹ *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)*, Commonwealth of Australia; Canberra

marginalising their role.²⁰ The aptly labelled ‘anti-unions’²¹ reforms removed unions as a recognised party from the workplace, gave preference to individual freedom of disassociating rights for workers, and abolished compulsory unionism. It is possible that these reforms aimed to force a model shift from secure corporatism, with laws mandating the unions’ compulsory involvement, to the pluralism approach, with heavily regulated activity and constituted individualism. The Rudd Labor government’s *Fair Work Act 2009* (FW Act) continued to largely align with pluralism, as the ‘law [continued to] defers more to individualistic free choice than collective rights’.²² The legislation failed to recognise the union as a party involved in collective bargaining. In fact, it only recognised the employer and employees as parties to any agreement.

Historically, the Australian unions’ strategic models are heavily influenced by abundant government regulations. This regulation has been fundamentally different to that of other countries such as the UK. Until the late 1990s, the UK unions’ strategies were shaped by minimal regulatory influence and government intervention through a period of ‘voluntarism’. Voluntarism is the ‘principle of non-interference by the state and the action of employers and trade unions, save in cases where collective representation does not deliver industry justice or stability’.²³ Subsequently in 2000 the UK Labour government introduced the *Employment Relations Act 1999*, bringing into force a new statutory union recognition procedure. While it has been stated that it was not the Blair Government’s intention to promote collective bargaining, the reforms did enable unions to be recognised as a party if they could demonstrate majority support when mobilising for collective bargaining.²⁴ Thus, UK unions’ strategic models have only recently been influenced by government dictation. However, these regulations have not demonstrated the magnitude of those seen in the Australian

²⁰ Creighton and Stewart, n 15, p 155

²¹ Australian Council of Trade Unions, ‘About Trade Unions’ (2012) *Australian Council of Trade Unions*

²² Breen Creighton and Andrew Forsyth, *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012), p 216

²³ Sian Moore, Sonia McKay and Sarah Veale, *Statutory Regulation and Employment Relations - The Impact of Statutory Trade Union Recognition* (Palgrave Macmillan, 2013), p 10

²⁴ *Ibid*, pp 1-2

labour system. Furthermore, the UK unions are currently privileged with legislated recognition in collective bargaining. In comparison, the recent Australian reforms demonstrate ‘an active role [in the] institutional architecture, in the marking out of the boundaries of [the] bargaining system, and in shaping the relationship between (and sometimes within) the industrial relations parties’.²⁵ Reforms have decentralised bargaining, heavily regulated the unions’ ability to organise workers, and removed them as a registered party to any bargaining agreement. Thus, Australian reforms have distinctively challenged the union movement. In response, it has shifted its approach and strategies to defend and improve employment conditions.²⁶ In April 1999, Australian Council of Trade Unions (ACTU) delegates travelled to the UK, Belgium, Canada, Ireland, and the US to observe membership building strategies. ACTU Secretary Greg Combet announced a significant shift in policy when launching *unions@work*.²⁷ Adopting ‘organising works’, this document emphasised the need to develop workplace activism, and broaden the union agenda.²⁸

From logic of influence and logic of membership

Intertwined with corporatism and pluralism approaches, Streeck and Schmitter²⁹ identify two competing concepts for assessing an organisation’s governance and members’ involvement. First, the ‘logic of influence’ denotes that the union movement ‘adapt[s its] aims and methods to the actual decision-making processes on which they [the union, not its members] wish to exert an impact’.³⁰ Unions focus on ‘gain[ing] access to and exercise[ing] adequate influence over public authorities (or conflicting class associations)’, concentrating on what can

²⁵ Rae Cooper, ‘Remaking industrial Relations? Unions, the state and industrial relations regime change in Britain and Australia’ (April 2008) *Australian Review of Public Affairs*

²⁶ Bob Carter and Rae Cooper, ‘The Organizing Model and the Management of Change : A Comparative Study of Unions in Australia and Britain’ (2002) 57(4) *Relations industrielles (Québec)* 712

²⁷ Australian Council of Trade Unions, ‘unions@work - the challenge for unions in creating a JUST and FAIR society’ (30 August 1999) *Australian Council of Trade Unions*

²⁸ Peetz and Pocock, n 10, p 629

²⁹ See Wolfgang Streeck and Phillippe C. Schmitter, *Private Interest Government: Beyond Market and State* (Sage, 1985)

³⁰ Richard Hyman, ‘Trade unions and the politics of the European social model’ (2005) 26(1) *Economic and Industrial Democracy* 9, p 24

be achieved from associations with other actors or third parties. Yet, an organisation would largely operate autonomously from its members by concentrating on how an organisation acts on its members' behalf. The ability of an organisation to successfully influence in this way 'enabl[es] them to survive and to prosper'.³¹ Such as during the arbitration system, the Australian union movement held majority workplace representation, had little member decision-making involvement, and could significantly influence other parties within the labour framework.

Secondly, the 'logic of membership' concept refers to organisational policies that 'maintain their representative credentials by articulating the wishes and interests of their constituents'.³² Members play an active role in the organising and function the body. They are attracted to the union because of its protection of conditions and other incentives. Flourishing membership offers sureties to the union movement. It enables unions to 'extract from them [members] adequate resources to ensure their [unions] survival'.³³ Conversely, this approach gives first priority to members' needs, which differs from the first logic.

Germany's unions, for example, experienced a shift from a logic of influence to a logic of membership as a result of social policy reforms in the mid-1980s to 1990s. In 1984 burdensome collective bargaining provisions existed, which the government did not change 'in fear of unmanageable industrial and political conflict'.³⁴ With increased international competition, this resulted in high unemployment and onerous social policy, leading to greater reliance on social security. In the 1990s, Germany's fiscal capacities had been exhausted leading to cut backs in social security spending. This resulted in changes to their social policy, and union's influence diminished. This 'contributed to the [unions']

³¹ Wolfgang Streeck and Phillippe C. Schmitter, 'The Organization of Business Interests: Studying the Associative Action of Business in Advanced Industrial Societies' (1999) MPIfG Discussion paper 99/1 *Max-Planck-Institut für Gesellschaftsforschung, Germany* 29, p 19

³² Hyman, n 30, p 24

³³ Streeck and Schmitter, n 31, p 19

³⁴ Wolfgang Streeck, *Re-Forming Capitalism : Institutional Change in the German Political Economy* (OUP Oxford, 2009), p 64

organisational decline, among other things by weakening their control over their members.’³⁵

In Australia, concurrent to the Howard government heavily regulating individualism and decentralised bargaining, a diminishing corporatist approach gradually instigated a shift to a pluralist model. In doing so, the union movement oriented its structure to align with the logic of membership approach.

1.5 Research methodology and data

The research in this dissertation predominantly focuses on evolving the hypothesis that post-1996 labour reforms had damaging impacts on the union movement. It analyses primary source law reforms and secondary source literature. The review of primary sources identifies imperative legal rights, law reforms, and concepts to support the advancement of the hypothesis, while secondary sources support the understanding of legal concepts and their application.

While several academic secondary sources have examined law reforms against the effects on union activism, to date they have only compared the influence of reforms against either union membership, or industrial action, but not both factors concurrently. This dissertation will consider both aspects to better establish whether the reforms have impacted on union strength, function, and the ability to organise members. Furthermore, there has been minimal study of the adoption of organisational models or strategies by Australian unions. This dissertation will advance that discussion by way of comparison to other countries. It will also examine the strategic approach taken by unions in response to decades of declining membership, workplace presence, organisation, and resources.

Existing primary and secondary sources will be supplemented by quantitative research, which will provide a fuller understanding of the impact on union

³⁵ Ibid

membership and industrial action through the introduction of new statistical data. Analysing such data from the relevant governmental periods will assist in determining how the reforms may have encouraged or diminished the union movement. Quantitative resources offer insight into the research topic by providing the materials to conduct a generalised and objective analysis of the hypothesis³⁶ and has several advantages. The data used is sourced from the ABS, a government agency and Australia's official national statistical organisation.³⁷ It records statistics on economic, environmental and social issues. First, the data used addresses the aims of this dissertation by either advancing or disputing the hypothesis. It can be analysed by recorded units to identify variations of union membership and industrial action over a captured time. Second, this data offers a basis for a more precise discussion on the impact of law reforms on the union movement. Finally, ABS is a reliable and consistent impartial source measuring data from 1912 to 2014. This dissertation considers data that measures union membership,³⁸ and industrial disputes.³⁹ The data has been correlated with matching periods of governmental reform to illustrate trends over the periods in question.

There has been criticism of the use of quantitative research, particularly in surveying data to illustrate broader social changes. However, ABS materials evaluate the trends of periodic data with a consistent methodology from year to year based on the variance of sampling. This dissertation considers periodic data over the most recent 18-years of reforms (however ABS statistics will be considered from 1912-2013). Therefore, it is believed that year to year variance will have minimal influence on the outcome of this dissertation. Thus, the use of both primary sources and academic secondary sources in conjunction with quantitative data will provide a comprehensive foundation to prove or disprove the hypothesis. It will also further current research and discussions on the topic of the Australian union movement and its organising strategies.

³⁶ Alan Bryman, *Social Research Methods*. (Oxford University Press, 2nd ed, 2004), p 281

³⁷ Recorded ABS data published on <http://www.abs.gov.au> with latest release on 4 June 2014

³⁸ ABS, 'Employee Earnings, Benefits and Trade Union Members, Australia - Catalogue no. 6310.0' (4 June 2014)

³⁹ ABS, 'Industrial Disputes, Australia, December 2013 - Catalogue no. 6321.0.55' (March 2014)

Chapter Two: The history of the union movement

2.1 Introduction

Prior to the recent 18 ‘years of regulatory failure’⁴⁰, Australia’s arbitration system was untouched by any significant reforms for nearly 100 years. Historically, English common law and the emerging labour laws accompanied European settlement. Australia then implemented a unique strategy in 1904 by adopting the arbitration system. This novel system reinforced ‘compulsory’ arbitration where opposing parties could compel each other to the employment tribunal⁴¹ regardless of the significance of the industrial dispute. In effect, the arbitration system secured unions’ compulsory involvement as most disputes were fast-tracked for tribunal resolution.⁴²

This chapter will provide a brief analysis of the arbitration system that was adopted as the predominant labour dispute resolution framework from 1904 to the mid-1990s. The arbitration system guaranteed that the ‘service’ model adopted by the union movement safeguarded high union membership. This system provided quasi union recognition that guaranteed the unions a role to service members.⁴³ To appreciate the implications of recent reforms, this chapter will also consider the shift in approach from a service to ‘organising’ model. In effect, union leaders became more dependent on organising members as the union movement was no longer secured as a compulsory stakeholder. Thus, consideration will primarily focus on how these approaches integrated within the legal framework either by being encouraged or displaced by the reforms.

⁴⁰ Andrew Stewart, *Australian Labour Law, Past and Present; Keynote speech* (2012 Labour Law Conference, 13 August 2012)

⁴¹ The industrial relations juridical system in the 20th century held various titles, which will be referred to in this dissertation as the ‘tribunal’. In 1904 the *Conciliation and Arbitration Act 1904* (Cth) Part II - ‘Commonwealth Court of Conciliation and Arbitration’, then in 1988 the *Industrial Relations Act 1988* (Cth) established the ‘Australian Industrial Relations Commission’ (AIRC); and in 1993 *Industrial Relations Reform Act 1993* (Cth) established the ‘Industrial Relations Court of Australia’ that would only hear matters on referral from the AIRC. The *Fair Work Act 2009* renamed the AIRC to ‘Fair Work Australia’ then ‘Fair Work Commission’.

⁴² Creighton and Stewart, n 15, pp 32-8

⁴³ Bray and Stewart, n 4, pp 24-5

Finally, a brief analysis will also consider the potential influence that the Accord agreement (from 1983 to mid-1990s) may have had on the service model. During this period Australia was amid an economic crisis resulting in high rates of unemployment in the mid-1980s. One strategic response involved the government and union movement entering into an agreement to restrict wage demands by fixing wage increases.

2.2 Compulsory conciliation and arbitration in the 20th century

At the end of the 19th century, labour law regulation assumed a different structure from that which originated from English settlement. Rather than adopting an existing framework, Australia introduced an arbitration system for labour dispute resolutions. This system was partially dictated in the Australian Constitution⁴⁴ s 51 (xxxv) that includes ‘conciliation and arbitration of industrial disputes extending beyond the limits of any one State’.⁴⁵

In 1904, the new *Conciliation and Arbitration Act 1904* (CA Act),⁴⁶ later replaced by the *Industrial Relations Act 1988* (IR Act), emphasised ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’.⁴⁷ It operated through most of the 20th century and ‘placed a heavy emphasis on delegated regulation’⁴⁸ and uniquely featured ‘compulsory unionism’, which was strategically relied upon by unions and operated in two forms. First, by ‘closed shop agreements’, where the worker was required to join a preferred union in order to obtain or retain employment. Second, by ‘union preference clauses’ ensuring preference for

⁴⁴ *Commonwealth of Australia Constitution Act 1900 (Imp)*, United Kingdom was enacted on 9 July 1900, and enforce on 1 January 1901

⁴⁵ See Creighton and Stewart, n 15, Chapter 4

⁴⁶ *Conciliation and Arbitration Act 1904 (Cth)*, Commonwealth of Australia; Canberra

⁴⁷ CA Act - Long title.

⁴⁸ Bray and Stewart, n 4, p 24

engagement and promotion of union members, while non-members were more likely to be terminated in cases of workforce retrenchment (provided an equal assessment criteria was met).⁴⁹

Yet, the CA Act provided some confining industrial action regulations. During the second reading of the Bill, Prime Minister Alfred Deakin declared that a primary objective of the Act was to ensure ‘no more strikes or lockouts’.⁵⁰ The sentiment was mirrored in the s 2(1) objectives of the CA Act. Yet, the CA Act not only pursued the *prevention* of strike action, it prohibited any person or organisation undertaking ‘anything in the nature of a lock-out and strike action’ as a manner for dealing with industrial disputes⁵¹ by imposing a penalty of 1000 pounds (equivalent \$13,000 AUD or £7,000 today). As an exception, s 6(3) permitted industrial action ‘to anything proven to have been done for a good cause’.⁵² As a result, the arbitration conferred union recognition as a party to a dispute to counter-balance the prohibition to organise strike action.⁵³ This recognition permitted the union to independently bring disputes for conciliation or binding arbitration under s 55(1) of the CA Act.

Criticism of these provisions suggested that the ‘price paid’ by unions for recognition in the arbitration system was ‘unprecedented legislative supervision of their [unions’] internal affairs’ that relinquished the right to strike.⁵⁴ Creighton and Stewart, who compared Australia’s framework against international systems, identified two characteristics that distinguished arbitration system: *compulsoriness* and consideration of the *public interest*. These characteristics were reflected in the Court’s duty to use lawful means to

⁴⁹ Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 2010), pp 706-7

⁵⁰ Alfred Deakin, ‘*Conciliation and Arbitration Bill 1904* - second reading speech’ (22 March 1904) *Prime Minister - Parliament of the Commonwealth of Australia Hansard*

⁵¹ *CA Act* - Part II - Prohibition of lock-outs and strikes

⁵² *CA Act* s 6(3), the defendant carrying the onus of proof

⁵³ *CA Act* s 26 - ‘Any organisation represented before the Court... shall be deemed a party to the dispute’; and s 27- ‘On the hearing or determination of any industrial dispute an organisation may be represented by a member or officer of any organisation’

⁵⁴ Shae McCrystal, *The Right to Strike in Australia*, Labour history (Canberra) (Federation Press, 2010), p 53

reconcile the parties' industrial disputes (including prevention and settlement) particularly when mediation was in the public interest.⁵⁵

Firstly, as Creighton and Stewart note, the arbitration system's 'compulsory' character implied that in the event of a dispute, a party could be forced to partake in arbitration or centralised bargaining to achieve a resolution.⁵⁶ Furthermore, with a centralised agreement approach emphasised by the CA Act,⁵⁷ employers were bound to broad non-individualised conditions of employment based on sectors of industry or occupation. Traditionally, if one sector increased wages and conditions, this 'flowed on' to other sectors resulting in relatively compressed wage differentials over sectors.⁵⁸

The arbitration system did not dictate regulations that prioritised or opposed centralised agreement-making. However, for nearly 100 years the centralised approach was merely accepted by parties and preferred by tribunal members.⁵⁹ The CA Act identified that 'any organisation may make an industrial agreement with any other organisation'.⁶⁰ Thus, the legislation encouraged agreement-making and dispute settlement through the arbitration system, whereby unions played a highly active role. With knowledge of compulsory arbitration, unions would demonstrate their industrial position and strength by engaging in strike action prior to the commencement of negotiations. As a further consequence, unions were influential in government policy-making, and were well positioned for advocating members' interests. While this action was unlawful,⁶¹ it was common practice for unions to demonstrate dissatisfaction (even for minor disputes) by organising strike action to 'pressure' employers into accepting

⁵⁵ CA Act s 16 - The Jurisdiction of the President and the Court; and *Industrial Relations Reform Act 1993 (Cth)*, Commonwealth of Australia; Canberra s 9 'Commission to take into account the public interest'

⁵⁶ CA Act ss 38 (j)-(s) provides the Court with the power to summon and compel parties to appear

⁵⁷ CA Act - Part VI - Industrial Agreements; an agreement could bind multiple organisations (industry) and unions. An agreement could be operational for a period of up to three years.

⁵⁸ Creighton and Stewart, n 15, pp 34-38

⁵⁹ Ibid

⁶⁰ CA Act s 73

⁶¹ *Conciliation and Arbitration Act 1904 (Cth)* s 6(1); unless s 6(2) where leave was obtained by the President or s 6(3) the action was for a good cause independent of the industrial dispute

claims. This in turn resulted in a significant reduction of days worked by employees due to drawn out industrial action. In effect, parties 'did not need to take ultimate responsibility for finding a solution to their dispute'⁶² as parties relied on the tribunal to either issue a resolution or conciliate with parties to achieve a resolution.

The second characteristic safeguarded 'public interest'. Here, the tribunal went beyond merely bringing parties together for dispute resolution.⁶³ It was not enough for parties to be satisfied, the interests of the community also had to be served. This particularly applied for matters where the tribunal played a 'guardian of public interest' role when considering the minimum conditions of industrial awards (awards) against whether or not to approve the drafted terms of a proposed agreement.⁶⁴ As awards covered most Australian workers, the tribunal regulated these conditions of employment in considerable detail through annual award reviews.

Furthermore, 'while there was no explicit mechanism for union recognition'⁶⁵ within the laws, unlike that which is provided for in the US,⁶⁶ unions still had open access to the tribunal. The union had strength to convene agreement-bargaining with an employer. If an employer refused to negotiate, the tribunal would order a compulsory conference. Thus, the union's *comfort* within the arbitration system may have meant that it failed to recognise the urgency to alter strategies in preparation for the possibility that a changing government may abolish compulsory unionism.

The end of the arbitration system

During the 1980s, the arbitration system was subject to increased criticism from academics, employer associations, and conservative commentators. It was said that the arbitration system produced unnecessarily high labour costs and failed

⁶² Creighton and Stewart, n 15, p 37

⁶³ *CA Act* ss 9, and 16

⁶⁴ *CA Act* s 16; and Creighton and Stewart, n 15, pp 37-8

⁶⁵ Bray and Stewart, n 4, p 25

⁶⁶ Rae Cooper and Bradon Ellem, 'Less than zero': union recognition and bargaining rights in Australia 1996-2007' (2011) 52(1) *Labor History* 49

to provide sufficient incentives to improve productivity. Furthermore, it was potentially ‘incapable of economically efficient outcomes’.⁶⁷

Leading into the 1990s, various stakeholders (the Labor party, the Coalition party, and employer associations) voiced a preference for decentralised agreement-making to boost productivity and international competitiveness. With the Labor party holding government office from 1983 to 1996, they introduced the *Industrial Relations Reform Act 1993* (IR Reforms).⁶⁸ The IR reforms amended the IR Act introducing s 170MA-MM enterprise level agreements called ‘certified agreements’ that contrasted with existing ‘industry level agreements’. These reforms implemented numerous subsections to s 170 detailing ‘minimum conditions of employment’, introducing statutory entitlements that were generally negotiated during the agreement-making period. Yet, there was minimal uptake of the certified agreements as employers, unions, and the tribunal continued to opt for industry-based agreements. This may be explained because the certified agreement-making process continued to require union involvement as a compulsory party⁶⁹ so there was no impetus for change. The main significance of the IR Reforms was the ‘legislative ability’ to make individual agreements. How this agreement type and the individualism approach would impact on unions’ involvement in collective bargaining would not be a concern for the movement until the 1996 reforms. This will be discussed in the next chapter.

2.3 Union membership

Until the 1990s, the arbitration system secured high membership as unions were a quasi-secured actor as a privileged collective voice for members.⁷⁰ Table 1 reveals that union members significantly reflected the unions’ strength and influence on policy-makers. The arbitration system resulted in trends of strong

⁶⁷ Creighton and Stewart, n 15, p 38

⁶⁸ These amendments were incorporated into *IR Act*

⁶⁹ *CA Act* s 170MC(1)(g), only one union can be recorded as the workers’ representative

⁷⁰ Bray and Stewart, n 4, p 24

membership density levels that remained above 40% from 1912 to 1992, and peaked at 60% in the 1950s.⁷¹

Table 1 – Union membership 1912-1996⁷²

	Males ('000)	%	Females ('000)	%	Persons ('000)	%
1912		44		8		30
1925		58		34		
1950s						60
1960s						55
1976					2,510.00	51
1982					2,570.00	49
1986	1,685.10	50	908.8	39	2,593.90	46
1988	1,640.20	46	895.7	35	2,535.90	42
1990	1,683.80	45	975.8	35	2,659.60	41
1992	1,536.10	43	972.7	35	2,508.80	40
1993	1,437.70	41	939.2	33	2,376.90	38
1994	1,375.80	38	907.5	31	2,283.40	35
1995	1,349.70	36	902.0	29	2,251.80	33
1996	1,307.50	34	886.8	28	2,194.30	31

However, a slight decline in union membership commencing in the late 1980s may be explained by the concurrent financial crisis and recession that continued into the early 1990s. This recession resulted in considerable instability within the workforce with unemployment reaching 10.9% in December 1992.⁷³

Table 1 also identifies gender differences in members. The gender density of membership remained higher among male than female members. In the early 1900s, male workers were the more dominant gender within the workforce. However, it may also reflect that male dominated industries were more exposed to compulsory unionism provisions of closed shop and union security preference

⁷¹ From 1912-1986, ABS statistics did not record the number of members, or gender. Surveying was not regularly conducted. From 1986-1992, surveys were conducted bi-yearly.

⁷² ABS, n 38; and ABS, n 39; ABS, 'Labour forces, Australia - Catalogue no. 6202.0' (2014)

⁷³ ABS, n 72; in comparison the Australian unemployment rate was 5.8% in April 2014

arrangements. These arrangements were particularly operational in the heavy industries, which continue to remain male dominated.⁷⁴

It may be said that unions heavily relied on such arrangements to maintain membership levels, focusing less on the strategies required to retain or recruit new members. In effect, the union movement had an absolute reliance on the labour laws⁷⁵ to maintain its function as an actor⁷⁶ through compulsory unionism that encouraged the servicing members approach. That being said, while Australia experienced a slight decline in density from 1976 to 1992, this decrease was consistent with other western countries experiencing instability from globalisation. Furthermore, the Australian union membership numbers held stable with over 2,500,000 members.⁷⁷

The Australian arbitration system internationally contextualised

When compared to other jurisdictions, the Australian union membership rates was substantially higher from 1912 to 1960s. During the same period, the UK's union membership represented 13% of the workforce in 1910. In 1920, union membership grew to 38%. However, membership dramatically declined from 1926 to 1940 to below 30%. Post World War II in 1945 membership experienced a significant growth increase of 8% in one year leading into a period of union stability from 1946 to 1969 slightly over 40%.⁷⁸

As shown in Table 2, Australian membership numbers peaked during 1974 to 1980 at 48% to 50%. From 1983, the next 13 years commenced a membership decline. This is in comparison to UK membership that peaked at nearly 50% from

⁷⁴ Australian Human Rights Commission, 'Women in male-dominated industries: A toolkit of strategies' (2013), in 2013, women account for only 12% of workers in construction, 15% of workers in mining, and 23% of workers in utilities

⁷⁵ CA Act Objects s 2(vi); and IR Act - Objects s 3(f) 'encouraged the organisation of representative bodies'

⁷⁶ See Committee of Review into Australian Industrial Relations Law and Systems, 'Report' (1985) 2 the tribunal observed that system could not operate without a registered union and employer association representing its constituents. Also see *R v Portus; Ex parte McNeil* (1961) 105 CLR 537

⁷⁷ ABS, 'Australian Social Trends- Catalogue 4102.0' (2000) 72

⁷⁸ Craig Lindsay, 'A century of labour market change: 1900 to 2000' (2003) *Labour Market Division, Office for National Statistics*, p 139

1980 to 1982. From the late 1970s to 1996 the Australian unions commenced a steady membership density decline, withdrawing from 50.2% in 1976 to 31.1% in 1996. The UK membership did not commence a steady decline until 1983. During this period of decline between 1983 and 1996, the UK and Australia numbers were similar within a variance of +/- 0.3 to 2.7%. Then in 1996, the UK union membership held at 31.2%; 0.1% higher than Australia.

Table 2 – Australia, UK, and US union membership 1970-1996⁷⁹

%	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983
Country														
Australia	44.2	45.4	46.3	47.2	48.8	50.1	50.2	49.5	49.7	49.6	48.5	47.4	47.5	47.9
UK	43.0	43.4	44.3	43.6	44.5	42.0	44.7	46.3	48.2	48.7	49.7	49.9	49.7	48.2
US	27.4	26.9	26.3	25.8	25.7	25.3	24.4	23.6	23.9	22.4	22.1	21.0	20.5	19.5

%	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996
Country													
Australia	47.1	45.5	46.0	42.3	42.0	39.4*	40.5	39.7*	39.6	37.6	35.0	32.7	31.1
UK	46.9	44.2	44.2	43.2	41.3	38.6	37.8	37.2	36.2	35.3	33.8	32.2	31.2
US	18.2	17.4	17.0	16.5	16.2	16.4	16.0	16.0	15.7	15.7	15.5	14.9	14.5

The US membership levels have not reached the same peaks of representation as experienced in Australia and the UK. In 1930, membership represented 8% of the workforce. In 1940, levels increased to 18% then peaked in 1954 at 28.3%. Following this year, membership levels slowly declined.⁸⁰ In 1974 and 1975, union membership was steady at 25%. Following this, US membership declined yearly by 0.3% to 1.5% (except for 1989, which increased by 0.2%). In 1996, membership was 14.5% representing an 11.2% decline in 20 years. When compared to Australia and the UK, this level represents around half the membership coverage in the working demographic.⁸¹

⁷⁹ Data from Organisation for Economic Co-operation and Development, 'Trade union density' (2014) *OECD's iLibrary*, with the exception of:

- 1989 to 2012 Great Britain data from Department for Business Innovation & Skills and Office of National Statistics, 'Trade union statistics 2013' (28 May 2014) *UK Government*,
- 1989 to 2012 United States data from U.S. Bureau of Labor Statistics, 'Union Membership' (24 January 2014) *Division of Labor Force Statistics*, and
- 1986, 1988, 1990, 1992 to 2012 Australian data from ABS, 'Employee Earnings, Benefits and Trade Union Members, Australia - Catalogue no. 6310.0' (August 2012)

⁸⁰ Cornell University ILR School, 'Union Membership Trends in the United States' (31 August 2003) *DigitalCommons@ILR*

⁸¹ Organisation for Economic Co-operation and Development, n 79

2.4 Industrial disputes

While analysing union membership decline could be one measure of impacting reforms on the union movement, reforms that regulate organising strike action can be another. In analysing strike action regulations, elements such as the number of industrial disputes, working days lost, and workers' involvement will be considered.⁸² During the arbitration system, the union movement resorted to the taking of industrial action to advance members' conditions above the minimum legislated entitlements, or to bring the tribunal's attention to an issue. From the commencement of records concerning industrial disputes, industrial disputes remained above 1,000 per year until 1992 with significant member involvement leading to high working days lost (Table 3).

Table 3 – Industrial disputes from 1985-1995⁸³

Year	No of Disputes	Employees involved ('000s)	Total working days lost ('000s)
1985	1,895	570.5	1,256.2
1986	1,761	691.7	1,390.7
1987	1,519	608.8	1,311.9
1988	1,508	894.4	1,641.4
1989	1,402	709.8	1,202.4
1990	1,193	729.9	1,376.5
1991	1,036	1181.6	1,610.6
1992	728	871.5	941.2
1993	610	489.6	635.8
1994	560	265.1	501.6
1995	643	344.3	547.6

Indeed, when contrasted to other countries, Australia's working days lost as a result of strike action was relatively high.⁸⁴ However, industrial action declined from 1992. This period experienced considerable workforce instability during the early 1990s recession with record unemployment. Another explanation for the decline in industrial disputes in 1992 may align with the Keating Labor

⁸² The ABS has recorded industrial disputes since 1985

⁸³ ABS, n 39

⁸⁴ Creighton and Stewart, n 15, p 37

government IR Reforms.⁸⁵ These amendments regulated the bargaining of certified agreements ensuring they would not be 'disadvantageous' to the workers' conditions of employment as a whole. Thus, provided unions with a stronger position at the bargaining table and may explain the decline in industrial action from 1992-1995.

2.5 Impact on the union movement from the Accord agreement

It is important to briefly discuss the Accord agreement and its implications for the union movement. The union movement's majority influence during the arbitration system led to the creation of an awards-based system for securing minimum wages and conditions of employment based on industry or occupation. However in 1983, the price paid for this corporatist inclusion and a high proportion of the workforce represented (46% union membership rates) led to the ACTU and Labor government entering into a price and income policy agreement called *the Accord*.⁸⁶ Australia was in economic crisis and the government was under significant pressure due to the country being in recession. Real wages outpaced productivity growth and unemployment was at an unprecedented high of 10% (only surpassed during the great depression of the 1930s). Consequently, this agreement was negotiated with the ACTU as they held such an influence as an actor in 'managing the economy'.⁸⁷

The purpose of the Accord was to minimise inflation and improve social welfare, such as maternity leave, working conditions, and workplace safety. The ACTU agreed to the fixed wages terms in exchange for reforms in economic, social, and industrial policy. Furthermore, as a policy of strategic unionism, the ACTU negotiated within the Accord to amalgamate 300 unions into 20 'super unions'.

⁸⁵ *IR Act* - Division 3A 'Certified Agreements', which was repealed by *IR Reforms* - Part VIB that increased flexibility to enter into non-union agreements provided the 'no disadvantaged test' was satisfied

⁸⁶ David Peetz, *Unions in a contrary world: The future of the Australian trade union movement* (Cambridge University Press, 1998), pp 145-9

⁸⁷ *Ibid*, p 3

To achieve union registration, a minimum of 1,000 members was required as introduced under s 189 of the IR Act. It was further increased to 10,000 members.⁸⁸ Consequently, the Accord reduced registered union numbers from 150 in 1983 to 51 in 1995.⁸⁹ This restructure shifted the union movement's agenda from emphasising strength at an individual workplace level to sector groups or industries level.⁹⁰

Impact of the Accord on membership

On balance, this agreement may have been an error by the union movement. Analysis of union membership numbers against the commencement of the Accord by academics concluded unions may have contributed to their own demise by agreeing to the Accord.⁹¹ Simultaneously with the Accord's operation, membership numbers started an unrelenting decline. The Accord brought secured fixed wage increases and improved social conditions, resulting in a reduced number of conditions requiring bargaining.⁹² As indicated in Table 1, membership fell from 46% in 1986 (membership was steady at around mid-40% to 50% from 1912 to 1986) to 41% in 1992, then to 32.7% in 1995. Not only was there a decrease in density, there was also a mirroring decline in actual numbers.⁹³

Peetz analysed the impact of the Accord on the union movement.⁹⁴ He considered two potential factors wherein the Accord may have led to member dissatisfaction. Firstly, members may have taken issue with the decline of 'real' wages (from the fixed agreement). Secondly, members may have experienced an 'alienation effect' of removing rank and file members from the movement's decision-making process. Yet, such an explanation implies that union membership should have declined more during the 1980s during the

⁸⁸ IR Act s 189 amended in 1991

⁸⁹ Bills Digest, '96 1995-96 Workplace Relations and Other Legislation Amendment Bill 1996' (6 June 1996) *Commonwealth of Australia*

⁹⁰ Carter and Cooper, n 26, pp 725-9

⁹¹ Peetz, n 86, pp 145-56

⁹² Creighton and Stewart, n 15, p 687

⁹³ See discussion on membership impact in Peetz, n 86, pp 145-58

⁹⁴ *Ibid*, Chapter 7

deterioration of real wages, rather than the 1990s when real wages increased.⁹⁵ As shown in Table 1, the opposite effect was seen as the largest membership decline pre-1996 was in the early 1990s. Though, this may be explained as the actual operative impact of the Accord agreement. With fixed-wage increases on hold for eight to 10 years and inability to negotiate new social policy improvement, members may have been frustrated by the continuation of the Accord into the 1990s.

That being said, Peetz concluded that there may have been minor impacts from the Accord, but the introduction of de-unionisation legislation from 1990-1995 from State-based jurisdictional reforms could have been the more substantial influence.⁹⁶ At this time, five out of six State governments had the conservative Liberal party in office. These States introduced reforms that prohibited compulsory unionism in preference for individualism.⁹⁷ While the State governments' reforms may have had a minor impact on membership, the more serious implication from these changes was that they paved a way for some of the more influential Federal reforms from 1996.

As a result of the declining membership base, it was also perceived that unions had less power to influence regulations. Indeed, such a perception matched reality by the mid-1990s with membership declining by 13% from 1986-1995. While the Accord's amalgamation of unions shifted the unions' focus from individual workplaces to industry groups, the pending 1996 reforms prioritised individual workplaces by introducing a statutory preference for individual enterprise agreement-making and individual agreements.⁹⁸ This will be discussed further in Chapter Three.

⁹⁵ Ibid

⁹⁶ Not all employers group were bound to the Federal Government industrial relations jurisdiction. State Governments could also legislate industrial relations laws covering employer groups not affected by the arbitration of interstate industrial disputes

⁹⁷ See Peetz, n 86, pp 175-97

⁹⁸ Coalition Government, *Bills Digest 96 1995-96 Workplace Relations and Other Legislation Amendment Bill 1996*, 1996, Canberra

2.6 The union movement's strategic models

The union movements in developed countries adopt structure models as an approach to member representation. Such models address how to enhance union structure and membership recruitment, interact with laws, and influence governments. The following will discuss the two models largely used in Australia. Prevalent in the introduction of the CA Act, the *service* model or managerial servicing model was then followed in the mid-1990s by the emergence of the *organising* model, or known as the *organising works* model in Australia.⁹⁹

Service model

The service model is based upon a transactional relationship with members whereby the union provides certain services in exchange for fees. This approach delivered member support that was secured by providing representation to advance members' interests. It has been described as 'unionism in which the function of the union is to deliver collective and individual services to members who are dependent on the formal organisation and its hierarchy of officers to provide what they require'.¹⁰⁰

While the service model was prevalent, members became devoted to the union movement because of the significant benefits it brought, such as representation in social policy, results from collective-bargaining, and job security from preference clauses and closed-shop agreements. The movement could also influence policy-makers to advance workers' interests.¹⁰¹ Yet, members were generally not consulted for strategic decision-making or for advancing interests in policy. Members, as non-participants, witnessed that the success of the union movement delivered better and efficient services to members and improved social policy. Unions bore responsibility for the provisions relating to social services such as sick leave, literacy programs, unemployment benefits, workers

⁹⁹ See Peetz and Pocock, n 10

¹⁰⁰ Edmund Heery et al, 'Organizing unionism comes to the UK' (2000) 22(1) *Employee Relations* 38, p 38

¹⁰¹ Samuel Bacharach, Peter Bamberger and William Sonnenstuhl, *Mutual Aid and Union Renewal: Cycles of Logics of Action* (Cornell University Press, 2001), p 22-7; and Jack Metzgar, *An Organizing Model of Unionism* (Midwest Center for Labor Research, 1991)

compensation, and death benefits (until such aid was provided by the government). The relationship between the employer and labour (workers and unions) was based on formal institutional arrangements with grievances resolved by the union for members through the arbitration system.¹⁰² Thus, members played an inactive role in this model.

Within the service model, union advocacy took the form of bargaining representation, advocacy in legal matters, or for the supply for non-industrial materials. Paid union officials could 'solve' members' problems with minimal involvement by members. Therefore, during the arbitration system, unions became more than a party that represented members' interests. The union was an internal compulsory 'third party to the employment relationship'¹⁰³ involved *within* the workplace rather than an external advocator. In turn, unions heavily relied on the arbitration system to stake its place within the laws. Such reliance included the tribunal granting the annual award increases through a test case involving conditions and wages from meritorious arguments. Unions assured their claim in test cases with the threat of industrial dispute.

When considering how the arbitration system interacted with the service model, it could be said that the two complemented each other by mutual enhancement. The elements of the arbitration system - among them the compulsory-party dispute resolution, centralised agreement-making, and compulsory unionism provisions - ensued the unions' ability to retain high membership numbers. Thus, the service model ensured that unions prospered during most of the 20th century holding significant influence over policy-makers. While the service model and membership numbers were not inter-linked, numbers appeared to remain high as members felt that the workplace interaction that the service model provided made membership valuable. However, this model only thrived in the arbitration system because the legal framework encouraged servicing elements, which also aligned with the logic of influence.

¹⁰² Paul Jarley, 'Unions as Social Capital: Renewal through a Return to the Logic of Mutual Aid?' (2005) 29(4) *Labor Studies Journal* 1, p 1

¹⁰³ David Peetz, Carol Webb and Meredith Jones, 'Activism Amongst Workplace Union Delegates' (October 2002) 10(2) *International journal of employment studies* 83, pp 86-8

As discussed in Chapter One, such models integrate with opposing strategies of logic of influence and logic of membership. These logics define how an organisation's synergises with government policy, social policy, and economic interests.¹⁰⁴ Prior to 1996, the union movement aligned with a logic of influence. The movement's monopoly of workforce representation resulted in influence and strength over governments and policy-making. Such influence resulted in high membership with favourable policies and concessions for constituents.¹⁰⁵

However, the service model has given way to mutual destabilization with reforms. What was overlooked by the union movement was the possibility of a government change with the Howard Coalition party obtaining office. The Howard reforms abolished the arbitration system. This will be discussed in more detail in Chapter Three. Yet, with the arbitration system sustaining logic of influence, these reforms would no longer sustain this logic. The service model has been seen as the basis of the union movements' inability to adapt. There were several key faults to the servicing strategy. Hall and Harley identified that the approach could be aligned with 'managerialist-service' unionism, which discourages competition between unions in providing service. The service model was also resource intensive in satisfying member's service demands. Thus, it was difficult for unions to redirect resources from servicing to member recruitment¹⁰⁶ when the reforms required unions to adapt to a declining membership base.

A further criticism of the servicing approach related to the transactional relations element with membership fees being exchanged for the union resolving problems. With the 1996 reforms prohibiting union services in exchange for fees, unions were no longer considered a compulsory bargaining party. Thus, the transactional nature of the member-union relationship was perceived as being

¹⁰⁴ Streeck, n 34, pp 54, 64-6, and 94

¹⁰⁵ Streeck and Schmitter, n 31, p 19

¹⁰⁶ Richard Hall and Bill Harley, 'Organized labour in the borderless world: globalization, deregulation and union strategy in Australia' (2000) 6(3-4) *Asia Pacific business review* 54, pp 55-8; and see Michael Crosby, *Power at work : rebuilding the Australian union movement* (Federation Press, 2005)

less valuable by workers.¹⁰⁷ Other key criticism related to unions' involvement in the arbitration system was that it provoked 'union tactics, which are legalistic and remote from members' workplaces'¹⁰⁸ giving the union little incentive to inform members of union strategies or encourage activism.

Organising model

In the mid-1990s, the union movement prioritised the implementation of the organising model in response to the decline in membership.¹⁰⁹ The organising model focused on 'building membership', 're-examin[ing] organisational leadership', and 'facilitat[ing] effective workplace activism'.¹¹⁰ Thus, the relationship was reformed with members becoming actively involved in activities and even assuming union leadership roles. As Peetz et al argue, '[t]he philosophy behind the organising model is that empowering workers will enable them to find solutions to their problems'¹¹¹ through the promotion of activism amongst workers and union delegates.

As a result, the logic of membership approach became the predominant characteristic as a part of organising model as it encouraged an organisational structure with active members who unite in solidarity.¹¹² This will be discussed further in the next chapter.

2.7 Conclusion

Until 1996, the traditional arbitration system with its components of collective bargaining and compulsory unionism bequeathed influence and strength to the union movement. Unions became dependent on compulsory membership that the

¹⁰⁷ Andy Banks and Jack Metzgar, 'Participating in Management: Union Organizing on a New Terrain' (1989) 1(14) *Labor Research Review*, p 49

¹⁰⁸ Michael Crosby (2002) 'Down with the dictator: the role of trade unions in the future'. In Ron Callus and Russell Lansbury, *Working futures : the changing nature of work and employment relations in Australia* (The Federation Press, 2002), pp 115-30

¹⁰⁹ Carter and Cooper, n 26, pp 726-7

¹¹⁰ Rae Cooper, 'Getting Organised? A White Collar Union Responds to Membership Crisis' (2001) 43(4) *Journal of industrial relations* 422, pp 423-4

¹¹¹ Peetz, Webb and Jones, n 103, p 87

¹¹² Streeck and Schmitter, n 31, p 19

arbitration system bestowed resulting in steady membership rates in the high-40%. In return, members were serviced with benefits and protection. The 10-years of political economic change prior to 1995 led to a slight decline in union membership. Some of this decline has been linked to the outcomes of the Accord, political changes, and economic changes.

As the change in government instigated reforms, the union movement shifts in structure, approaches, and character were necessary to counteract against political economics, and policy changes. In effect, corporatism gave way to pluralism. The service model was no longer supported by the legal framework spurring the union movement to adopt the organising model. The logic of influence gave way to the member preference logic of membership. However, the initial implementation of the organising model in the 1990s failed to address the decline in membership or growth strategies.

Chapter Three: The impact of the Howard government's reforms on the union movement

3.1 Introduction

Howard led the Coalition party to defeat the Keating Labor government on 11 March 1996. The election was heavily debated around the Coalition's industrial relations policy of *Better pay for better work*. In office, the Coalition government objectives aimed at reducing the regulation of the labour market by introducing a new industrial relations framework. They did this through marginalising union involvement by prioritising employers' interests under the guise of enterprise competitiveness.¹¹³ In effect, these reforms would restrict the union movement's ability to organise members, and deny workers' human rights. The government defended its stance on reforms and strongly denied critics labelling them as *anti-unionist*.¹¹⁴

The purpose of this chapter is to discuss the extent to which the reforms were a systematic assault on the union movement. Since this dissertation aims to analyse the impact of legal reforms on unions, the binding laws must be examined first. This law review will serve a purpose of identifying the functional changes imposed on unions as well as illustrating the obstacles encountered in shifting from the service model. The focus lies therefore with the period 1996-2007, starting with the introduction of the WR Act followed by Work Choices.¹¹⁵ In evaluating these reforms, particular focus will be given to the provisions concerning freedom of association, workplace right of entry, unions' involvement in collective bargaining, introduced individual workplace agreements, and unions' scope for advocating for members.

¹¹³ Creighton and Stewart, n 15, p 155

¹¹⁴ Margaret Ellen Lee and David Peetz, 'Trade unions and the Workplace Relations Act' (1998) 9(2) *Labour & Industry* 5, p 5; Joellen Riley, 'Industrial Legislation in 2002' (2003) 45(2) *Journal of industrial relations* 151, p 151; and Andrew Forsyth and Carolyn Sutherland, 'From 'Uncharted Seas' to the 'Stormy Waters': How Will Trade Unions Fare under the Work Choices Legislation?' (2006) 16(2) *The Economics and Labour Relations Review* 215, p 216

¹¹⁵ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amended the WR Act

Following the law review, this chapter will question whether these amendments were essential reforms, or should be criticised from a domestic and international perspective. Consideration will identify whether these reforms contravened Australia's international obligations under International Labour Organization (ILO) Conventions. Then, ABS statistical data will be compared to analyse the decline in union membership and industrial action. In analysing these reforms, it seems that multiple factors contributed to membership and industrial action declines from 1996 to 2007. While the government reforms would be considered as having had significant impact on the movement, these reforms did not happen in a vacuum and other influences have intervened. Certainly, the broader context of globalisation should not be ignored.

Finally, this chapter will draw conclusions as to whether the Howard government reforms impacted on the union movement. It will determine whether these reforms were an intentional attack on the union movement's ability to organise workers. It will question whether the government had a policy agenda where reforms would influence union membership by confining advocacy, workplace presence, and collective freedom of association rights.

3.2 *Better pay for better work policy*

Leading into the 1996 election, the Coalition party released the *Better pay for better work* policy.¹¹⁶ The policy endeavoured to undermine unions' strength and domination of the workplace. It also focused on encouraging competition across the super-union groups by permitting registration of smaller unions. The agenda pursued the abolishment of compulsory unionism provisions (trade union security and preference clauses) handing *free* membership to unions. This individually focused right denounced compulsory 'conveniently belong'¹¹⁷ membership so far that the tribunal would no longer permit compulsory membership unionism terms within agreements. If such clauses existed in operational agreements, they would be considered illegal and non-binding. These provisions provided

¹¹⁶ Liberal-National Coalition party, n 6

¹¹⁷ Ibid

overwhelming strength and compulsory presence to unions, particularly in blue collar industries, which was difficult for employers to displace.

Further, policy elements sought to deregulate the union movement and promoted inter-union competition to service workers. It emphasised *individual* freedom to disassociate and a right to not join a union, which was propagandised as ‘freedom of association’ rights. It also sought to limit unions’ accessibility to workplaces by implementing stricter right of entry provisions. Union officials would require advance written notice when entering the workplace. It further pursued reforms to agreement-making and workers’ individual rights to enforce conditions. Priority was given to the creation of individual agreements called Australian Workplace Agreements (AWAs). Additionally, the employer and workers would be able to self-bargain non-unionised collective agreements. The policy limited the unions’ ability to enforce these agreements or exercise a right to strike (with AWAs there was no right to take strike action).

In contrast with the Keating government’s cooperation with unions, which created an environment conducive to the arrival of super-unions, this policy sought to reverse the unification by dis-amalgamating super-unions. It encouraged inter-union competition by encouraging smaller employee speciality associations to register.

Finally, the policy sought to abolish the Trade Union Training Authority. The authority was a government funded scheme providing education and training to union officials. The Coalition party believed that taxpayers should be spared the expense of union training schemes, transferring the burden to unions.

3.3 *Workplace Relations Act 1996 (Cth) and Work Choices* amendments

Workplace Relations Bill

In the second reading speech of the *Workplace Relations and Other Legislation Amendment Bill 1996* (WR Bill)¹¹⁸ the reforms sought to deliver a framework that ensured ‘the imperatives of world competition’ that balanced with ‘Australian values of ensuring a ‘fair go’ for all’ that included ‘...fair competition, by removing monopoly rights and compulsory membership of industrial organisations’.¹¹⁹ The Minister of Industrial Relations, Peter Reith, addressed criticisms of *anti-union* reforms during his second reading speech, stating that the ‘legislation is not an attack on unions. The legislation will assist unions who are seeking to be effective in providing a good service to their members’.¹²⁰

However, given Australia’s bicameral parliamentary system, the government experienced a repelling *block* against the Bill’s objectives as they did not have majority party Senate control. At this time, the government required the Australian Democrat Party’s support to obtain Senate majority for the passing of legislation. Thus, due to lack of wholesale support for the proposed reforms, the initial WR Bill reforms were barred from embracing the entire policy objectives. Yet, the successful 2004 election results (giving Howard a fourth term) secured majority control in the Senate and there was then no limitation to what law reforms could be passed.

Workplace Relations Act 1996 (Cth) and Work Choices

Section 3 of the WR Act defined the principle objective: ‘to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia’.¹²¹

¹¹⁸ Amending the WR Act

¹¹⁹ Peter Reith, ‘Workplace Relations and Other Legislation Amendment Bill 1996 - second reading speech’ (23 May 1996) *Minister for Industrial Relations - Parliament of the Commonwealth of Australia Hansard*

¹²⁰ Ibid

¹²¹ WR Act s 3

This objective prioritised *individual* freedom of association rights to disassociate and the introduction of AWAs, thus *removing* from the previous legislation some of Australia's international obligations concerning freedom of association as defined in *ILO Convention No. 98* on the Right to Organise and Collective Bargaining, and *ILO Convention No. 87* on Freedom of Association and Protection of the Right to Organise, both ratified in 1973.

In 2005, with the government holding the Senate majority, Howard announced the Work Choices reforms that would 'provide the long overdue framework to drive future productivity growth, create jobs and increase the standard of living of working Australians'.¹²² In the second reading of the *Workplace Relations Amendments (Work Choices) Bill 2005*, Minister Eric Abetz¹²³ introduced the laws as 'economic reform the Australian way—evolutionary and in a manner that advances prosperity and fairness together'. Work Choices' objectives gave preference to individual workers' freedom of association, implemented stronger right of entry provisions on union permit holders, and move power for compliance to a regulatory-controlled government monitoring agency system, the Workplace Authority. The agency would provide a tough compliance stance against unprotected industrial action including issuing of financial penalties and potential prosecution.¹²⁴

Work Choices implemented a further 35 provisions impacting on the unions functioning ability and involvement in agreement-making. The following discussion will analyse provisions that significantly impacted on unions, such as AWAs, collective bargaining, union registration, the remarkable narrowing of freedom of association powers, unions' ability to exercise right of entry, and the granting union permit holders.

¹²² John Howard and (Prime Minister of Australia), 'Prime Ministerial Statement: Workplace Relations' (26 May 2005) *Parliament of the Commonwealth of Australia*, pp 11-12

¹²³ Eric Abetz, 'Workplace Relations Amendments (Work Choices) Bill 2005 - second reading speech' (10 November 2005) *Special Minister of State - Parliament of the Commonwealth of Australia Hansard*

¹²⁴ Ibid

Individual agreements

The government's objectives for agreement-making sought to expand options and simplify the bargaining process by 'not discriminate[ing] in favour of one form of agreement over another—collective or individual, union, or non-union'.¹²⁵ Part VID of the WR Act introduced significant reforms regarding worker's right to bargain as an individual by introducing AWAs. AWAs enabled the individual employee to negotiate directly with the employer regardless of an operational union collective agreement and eliminated compulsory union involvement in bargaining. Although s 170VL(1) permitted AWAs negotiations on a group basis, the agreement had to be entered into on a one-to-one basis (employer-worker). Further, AWAs would supersede any operational tribunal-approved unionised collective agreement, even if the AWA was absent of minimum award conditions of employment.

AWAs were publicised as offering workers *real choice* and *negotiating power*¹²⁶ in their employment, but the balance of power was generally held by the employer. Essentially, AWAs permitted employers to offer an agreement on a 'take it, or no job' basis.¹²⁷ It has been said that the AWAs main purpose was to entirely remove the union from agreement-making and compliance. Once the agreements were registered with the Office of the Employment Advocate (OEA), the OEA was responsible for monitoring AWA compliance. Unions were prohibited from offering any AWA compliance advocacy to employees, including the taking of industrial action. The AWA uptake pre-2006 Work Choices represented only 5% to 7% of the workforce, predominately within the mining, telecommunication and finance sectors.¹²⁸

Collective bargaining

Part VIB of the WR Act contained the procedure for agreement-making. Several reforms intended to limit unions' involvement. Section 170LC required unions to negotiate with the individual employer at an *enterprise level* by outlawing

¹²⁵ Reith, n 119

¹²⁶ Ibid

¹²⁷ *Work Choices* s 330

¹²⁸ Creighton and Stewart, n 15

industry wide pattern bargaining.¹²⁹ Pattern bargaining involved unions selecting groups of employers within the same industry by instituting strike action and industrial bans. The industry could then be more accepting to collective bargaining as a majority. In effect, it exhausted unions' resources with the super-union amalgamation of the Accords focused on grouped employer negotiations (now prohibited), not resource intensive individual employer enterprise bargaining.

Additionally, s 298W of the WR Act (under Part XA - Freedom of Association) prohibited the inclusion of union preference provisions within collective agreements. It was believed that this reform would reduce demarcation disputes and encourage competition among unions to contest for representation of workers as opposed to being *gifted* or holding a *monopoly* over industries.¹³⁰ Effectively, the government sought to provide every employee with competitive representation and the freedom to disassociate.

Union registration and structure

With the Accord reducing the number of registered unions (from 150 in 1983 to 51 unions in 1995¹³¹), the government considered unions as over-privileged and uncompetitive which failed to represent workers' rights. Thus, Part IX of the WR Act contained the registered organisation provisions, which focused on 'encourage[ing] democratic control' and 'efficient management of organisations'. It encouraged the creation of new unions including autonomous enterprise branches of existing federal bodies.¹³² Section 189(1)(b) permitted the registration of a union with only 50 engaged employees.¹³³ This was vastly distinct to the minimum of 10,000 members legislated in 1990 by the repealed IR Act.

¹²⁹ Rae Cooper, Bradon Ellem and Patricia Todd, 'Workers' Rights and Labour Legislation: Reviving Collective Bargaining in Australia - Conference paper' (July 2012) *16th World Congress of the International Labour and Employment Relations Association*, p 4

¹³⁰ Lee and Peetz, n 114, p 9

¹³¹ Bills Digest, n 89

¹³² Ibid

¹³³ WR Act s 189(1)(b); and be free from control by, or influence from, an employer.

In the WR Bill's second reading speech, workers were encouraged to 'set up an enterprise union of their own... special skills and service delivery to suit them, without artificial limits that protect current union monopolies'.¹³⁴ The WR Act endorsed the dis-amalgamation of super-unions if the purpose of the union through the former government's amalgamation became inadequate and dysfunctional.¹³⁵ Finally, Schedule 19 of the WR Act abolished the Trade Union Training Authority.¹³⁶

Freedom of association

Section 3(j) Objects and Part XA of the WR Act provided 'freedom of association' powers for individual employees to *strengthen* an individual's right to choose whether or not to join a union.¹³⁷ Further, if the employee sought to exercise the rights to disassociate, s 298Q prohibited unions from bringing any action against the employee.¹³⁸ In addition, s 298L prevented an employer from undertaking 'prohibited action'¹³⁹ against an employee because of their right to freedom of association or for reasons that include a prohibited reason.¹⁴⁰ With the reverse onus test applied, the conduct was deemed to have occurred unless proven otherwise.

In regards to the right to strike, the WR Act made two notable reforms. First, s 170VU of the WR Act extended the right to strike restrictions to cover non-unionised agreements being AWAs and non-unionised collective agreements. Second, ss 170ML-MO permitted an employer to lockout workers in all strike action circumstances. Effectively, employers would be able to use the lockout

¹³⁴ Reith, n 119

¹³⁵ WR Act Division 7A

¹³⁶ The authority and the operational legislation *Trade Union Training Authority Act 1975* (Cth)

¹³⁷ WR Act s 3(f); and Reith, n 119

¹³⁸ WR Act s 298; and see Lee and Peetz, n 114; and Richard Naughton, 'Sailing into Uncharted Seas: the Role of the Unions under the Workplace Relations Act 196 (Cth)' (1997) *Australian journal of labour law* 112

¹³⁹ WR Act s 298L

¹⁴⁰ WR Act s 298J, including a reverse onus to proof the conduct where it was assumed unless proven otherwise

scenario to support their proposal to negotiate non-unionised collective agreements.¹⁴¹

The WR Act's objects failed to refer to Australia's international treaty obligations for freedom of association. In fact, any reference to international treaty obligations was intentionally left absent from the objectives.¹⁴² The *Bill Digest*¹⁴³ review of the WR Act recognised this absence, in particular concerning freedom of association, and questioned that the WR Act 'may not conform' to international treaty obligations or ILO's recommendations.¹⁴⁴ The review made particular reference to ILO Convention No. 98 regarding collective bargaining. In effect, individual AWAs were considered outside of Australia's international obligations under ILO Convention No. 98 regarding rights to collective bargain.

Workplace rights of entry

The government increased regulation aimed at gravely restricting unions' ability to freely access workplaces by limiting all access unless an employee had requested the union to attend the site. First, s 127AA of the WR Act abolished any operational right of entry provisions within collective agreements or awards. These terms largely provided the union with flexible rights of entry powers. This departure resulted in the WR Act being the sole remaining provision enabling right of entry.¹⁴⁵ Second, s 285A tightened controls upon union officials who pursued access to an employer's premises by requiring officials to be registered with a permit (permit holder); a holder was an authorised person by the tribunal after security and police checks.¹⁴⁶

Restrictions in s 285D(2) narrowed the union's ability to freely access an employer's premise in a *timely manner* by only being granted access to

¹⁴¹ McCrystal, n 54, pp 79-81

¹⁴² Bills Digest, n 89

¹⁴³ Published by Department of the Parliamentary Library's Parliamentary Research Service that interprets the legal stance on legislation

¹⁴⁴ Bills Digest, n 89

¹⁴⁵ Forsyth and Sutherland, n 114, pp 6-7

¹⁴⁶ WR Act s 285A; the Registrar has the power to issue permit

investigate breaches,¹⁴⁷ such as underpayment of wages, conditions, award compliance, or safety. To satisfy these requirements, unions were required to demonstrate a 'subjective belief or suspicion' that a breach may have or had resulted. Alternatively, if a permit holder intended to access a premise, 24 hours' notice with a detailed explanation was required.¹⁴⁸ This provision also prevented entry to the workplaces where unions had no members.

3.4 Criticism of the reforms

In light of the exhaustive scale of the legal amendments, these reforms can be objectively viewed as 'the most fundamental revolution in industrial relations since federation'¹⁴⁹ 'with the purpose to weaken unions'.¹⁵⁰ During the government's term in office, an excess of 50 amending Bills were tabled (though the number of amendments that were enacted were significantly reduced as they failed to obtain sufficient Senate support until 2004).¹⁵¹

Academics and unions harshly criticised the reforms - and particularly the Work Choices amendments - as being anti-unionist. The push for the 1996 reforms focused on instigating 'workplace freedom' or 'freedom of association' by enacting 'individualised' rights for employees *over* the rights of group (or union organisations). The WR Act 'facilitated a shift of industrial power' to the employers that *bypassed* unions.¹⁵²

Notably, Howard was exceptionally vocal in his wish to move away from the arbitration framework and unionised collective bargaining.¹⁵³ Work Choices was

¹⁴⁷ WR Act s 285B, investigating suspicions of suspected breaches

¹⁴⁸ WR Act s 285D, provides for when conduct for right of entry is not authorised

¹⁴⁹ Richard Hall, 'Australian industrial relations in 2005 - The Work Choices Revolution' (2006) 48(3) *Journal of industrial relations* 291, p 292

¹⁵⁰ Lee and Peetz, n 114, p 1

¹⁵¹ McCrystal, n 54, p 83

¹⁵² A Hodgkinson and R Markley, 'Assessing the Impact of the Workplace Relations Act From 1996 to 2004: Increasing Flexibility or Decreasing Collectivism? Working paper 05-30' (2005) *Department of Economics - University of Wollongong*, p 2

¹⁵³ McCrystal, n 54, p 78

criticised as a system that undermined workers' entitlements and defied the 'fair go' within the workplace concept.¹⁵⁴ In addition, Work Choices was perceived by many as 'over-reaching' due to its intention to rely upon the 'corporations' power in the *Constitution* to cover all employees engaged by corporations by taking over State government worker coverage. This was viewed as erosion of State government powers¹⁵⁵ and ultimately led to an unsuccessful High Court challenge.¹⁵⁶ Notably, at a State government level, unions held most of their influence in State-based agreements.

Freedom of association

The term 'freedom of association' describes the collective right of employees to freely associate with unions without being discriminated against. These amendments destabilised the traditional functioning of such freedoms as the WR Act and Work Choices laws primarily focused on rights for the individual employees by redirecting freedom of association as a collective organisation.¹⁵⁷

In the second reading of the WR Bill, Minister of Industrial Relations, Reith stated that 'the legislation 'puts the emphasis on direct workplace relationships' and 'promotes a legislative framework without unnecessary complexity and *unwanted third party intervention*' [emphasis added].¹⁵⁸ His speech referred to principles of freedom of association, however only in terms of an individual's right to disassociate. Thus, it was contentious that the government failed to recognise that unions may be a positive party for intervention rather than 'unwanted' (with the inference being that neither party welcomed the 'interference'). Critics argued that by giving preference a negative right to *disassociate*, the government had *twisted* the concept of freedom of association as defined by international law.¹⁵⁹

¹⁵⁴ Reith, n 119

¹⁵⁵ CA Act s 109

¹⁵⁶ See *New South Wales v Commonwealth of Australia* (2006) 229 CLR 1 ("Work Choices case"); and Andrew Stewart and Anthony Forsyth, *Fair Work: the new workplace laws and the Work Choices legacy* (The Federation Press, 2009), p 1

¹⁵⁷ Freedom of Association provisions are with *Workplace Relations Act 1996* (Cth) Part XA or *Work Choices Act* (Cth) Part 16

¹⁵⁸ Reith, n 119

¹⁵⁹ Naughton, n 138, p 118-9; Stewart and Forsyth, n 156, pp 174-5; and Peetz, n 86, p 193

Naughton criticised the government's *proclamation* that the reforms were 'not anti-unionist' as the objectives accentuated individual employees' arrangements. Thus, the unsupported proclamation could not fool the public as it directly implied a reduced active role for unions.¹⁶⁰ He summarised that the reforms were a direct impact on unions' ability to function and were incompatible with genuine freedom of association principles.

The WR Act s 298L prevented an employer from undertaking 'prohibited conduct'¹⁶¹ against an employee for 'prohibited reasons'. Section 298K regulated conduct by employers as:

'...must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

- (a) dismiss an employee;
- (b) injure an employee in his or her employment;
- (c) alter the position of an employee to the employee's prejudice'.

Initially, under the WR Act the tribunal was required to determine prohibited action by using the reverse onus test where the conduct was assumed to have occurred unless proven otherwise.¹⁶² In the landmark victory case against *Patrick Stevedores waterfront*,¹⁶³ the union brought an action for reinstatement of dismissed union workers under s 298K. Here, Patrick (supported by government) restructured operations, liquidated the company employing unionised workers, terminated 1,400 unionised workers, and engaged non-unionised workers from Dubai.

When ordering the workers reinstatement, North J stated:

'By dividing the functions of employing workers and owning the business between two companies, the Patrick group put in place a structure which

¹⁶⁰ Naughton, n 138, pp 119-21

¹⁶¹ WR Act s 298L or Work Choices Act s 792; prohibited conduct being carried out for prohibited reasons includes conduct based on the employee being or not being a member of a union.

¹⁶² WR Act s s 298K-L, including a reverse onus to proof the conduct where it was assumed unless proven otherwise.

¹⁶³ *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 77 FCR 456

made it easier for it to dismiss the whole workforce. It is arguable on the evidence that this was done because the employees were members of the union... the Patrick employers acted in breach of s 298K(1) of the Act'.¹⁶⁴

This matter did not result in a flawless union victory. Within months, Patrick and the union reached a new workplace agreement that halved the workforce (terminated by redundancies), replaced it with casual workers and contractors, and implemented major workplace operational changes. This was arguably a win for Patrick Stevedores and future employers seeking to restructure operations, change conditions, and reduce their workforce.

In response to the union's victory in *Patrick*,¹⁶⁵ the government amended Work Choices s 792(4) to require the 'prohibited reason' to be the 'sole and dominant reason'.¹⁶⁶ This reform was criticised as a narrowing of unions' ability to protect their members and an exclusion of workers' right to freedom of association. Effectively, the employer's adverse conduct against a worker because they were a union member had to be proven as a *sole* or *direct* action of the membership consequently requiring a higher onus of proof. It provided employers with a way of *operating around* the definition of prohibited conduct if they sought to limit union representation in the workplace.¹⁶⁷

Unions were very vocal in their backlash against narrowing of the workers' protection of prohibited conduct. The unions believed 'effective freedom of association was compromised by these changes'¹⁶⁸ arguing that the provisions

¹⁶⁴ *Patrick Stevedores*; North J, [12]

¹⁶⁵ Also see *Australian Municipal Administrative Clerical Services v Greater Dandenong City Council* [2001] FCA 349

¹⁶⁶ *Work Choices* s 792(4)

¹⁶⁷ David Quinn 'To be or not to be a member - is that the only question? Freedom of association under the Workplace Relations Act' (2004) 17(1) *Australian journal of labour law* 1; Cooper, Rae and Greg Patmore, 'Trade Union Organising and Labour History' (2002) (83) *Labour History* David Peetz "Individual contracts, bargaining and union membership" (2002) *Australian Bulletin of Labour* 28(1), pp 39-52

¹⁶⁸ Cooper, Ellem and Todd, n 129, p 4

that protected workers' from the right to freely belong to a union were ineffective.¹⁶⁹

The tribunal

Academics condemned the tribunal's application of the WR Act and Work Choices amendments. Quinn criticised the tribunal for being led by WR Act's individual freedom of association provisions 'into error and that the alternative purposive and functional approach [freedom of association according to international law] is preferable as a matter of doctrine and policy'. He emphasised that the individual choice approach alters the agreement-making process by removing long standing collective choice protection for unionists.¹⁷⁰ To support his statement, Quinn quoted two separate judgments. Griffith CJ¹⁷¹ held that 'unions were treated as bodies simply created by and for the furtherance of the *'great purposes'* of the statute'. Then, Isaacs J,¹⁷² who acknowledged that the union's 'primary function [was] to help in the effort to maintain industrial peace'. He challenged the tribunal to adopt a broader collective choice approach to the WR Act, which would be consistent with Australia's historical application and international obligations.

Agreement-making

Cooper, et al¹⁷³ considered the AWAs to be '*the most profound and controversial change*' reforms since AWAs were able to override operational collective agreements and awards. They concluded that it is difficult to disprove that AWAs did not have some impact on the worker's need for union membership.¹⁷⁴ A union's abilities to represent workers during collective bargaining is a major element of its strength to protect the weak or disadvantaged, and mitigates

¹⁶⁹ Rae Cooper and Bradon Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' (2008) 46(3) *British journal of industrial relations* 532

¹⁷⁰ David Quinn, 'To be or not to be a member - is that the only question? Freedom of association under the Workplace Relations Act' (2004) 17(1) (05/01) *Australian journal of labour law* 1, p 2

¹⁷¹ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, [334]

¹⁷² *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 35 CLR 462, [475]

¹⁷³ Cooper, Ellem and Todd, n 129, p 2

¹⁷⁴ *Australian Workers' Union v BHP Iron Ore Pty Ltd* [2001] FCA 3

poverty.¹⁷⁵ By removing unions' representation, the reforms weakened the unions' ability to protect vulnerable workers.¹⁷⁶ This was demonstrated by political correspondence, Davis who revealed figures suggesting 45% of registered AWAs 'stripped away all award conditions' that the government promised to protect. He also criticised the government failure to release AWA statistics lodged with the OEA that would demonstrate that a third of the 2006 agreements provided no wage increase with an absence of minimum employment conditions.¹⁷⁷

In *BHP Iron Ore*¹⁷⁸ the union attempted to advance claims similar to those used in *Patrick* relating to prohibited conduct according to ss 298K-L of the WR Act attempting to link the employer offering AWAs, to the subsequent resignation of union membership. In highly criticised decision,¹⁷⁹ it was held that there was no causal link between the employer offering AWAs and public statements quoting that the employer was reluctant to enter into union agreement negotiations.¹⁸⁰ The union's submissions included workers' statements that their union '*was of little or no value after signing*' an AWA; and that it was '*no use being a member of a Union any longer*'. However, the union was not able to establish an intentional act (as prohibited conduct) to induce the ceasing of membership as a breach. It must be highlighted that five months following the decision and the implementation of AWAs at the Iron-Ore site, 62% of the workers had resigned their membership.¹⁸¹

¹⁷⁵ ILO, 'Asia and Pacific Conference on Right to form Unions and Right to Collective Bargaining: a campaign for ratification and implementation of ILO Convention No.s 87 and 98' (2009) (1 November 2006) *International Labour Conference*

¹⁷⁶ *Australian Workers' Union v BHP Iron Ore Pty Ltd* [2001] FCA 3

¹⁷⁷ Mark Davis, 'Revealed: how AWAs strip work rights' (17 April 2007) *Sydney Morning Herald*

¹⁷⁸ *Australian Workers' Union v BHP Iron Ore Pty Ltd* [2001] FCA 3, Kenny J

¹⁷⁹ Sarah Richardson, 'Freedom of Association and the Meaning of Membership: An analysis of the BHP case' (2000) *Sydney Law Review* 435 - criticised the decision as a narrow interpretation of the protection provision; Quinn, n 167 - criticised how it was inconceivable that the IR manager gave no thought to union membership; and Colin Fenwick and Ingrid Landau, 'Work Choices in international perspective' (2006) 19(2) *Australian journal of labour law* 127

¹⁸⁰ *Australian Workers' Union v BHP Iron Ore Pty Ltd* [2001] FCA 3; Kenny J [42] in breach of *Workplace Relations Act* (Cth) s 298M

¹⁸¹ Quinn, n 167

Workplace right of entry

The reforms curtailed the *open freedom* to access a workplace that was exercised by union officials.¹⁸² Officials were required to satisfy a raft of obligations prior to gaining entry. Ford compared the reforms against the 1973-1996 right of entry provisions, which were *uncomplicated* rights negotiated between parties.¹⁸³ He concluded that while it was difficult to obtain a balance between the interests of employers and unions, the interest of the employers was predominant in these provisions.

The ACTU condemned these reforms as they impacted on the union's ability to operate.¹⁸⁴ The core ability for a union to exercise rights of entry to an employer's premise ensures that the union (or officials) can perform its primary function as the workers' representative¹⁸⁵ by monitoring compliance of the law, conditions, and rights. It also aided in recruiting new members. One union even alleged that one employer only permitted the union to hold meetings in a car park under camera surveillance.¹⁸⁶

To access the workplace to investigate breaches, firstly the permit holder had to provide a written 24 hours' notice of intention for entry (pre-1996 oral notice was sufficient). If the union sought to gain access to employment records, it was required to seek an order from the tribunal.¹⁸⁷ This prevented the unions' exercising entry in a timely manner.

Under s 742, to be granted a permit, the official had to be assessed as a 'fit and proper person'. They required training on the rights and responsibilities, must be clean of any criminal or industrial conviction, and could not had a similar permit

¹⁸² *ANZ Banking Group Ltd v Finance Sector Union of Australia* (2004) 134 IR 426

¹⁸³ William Ford, 'Being there: changing union rights of entry under federal industrial law' (2000) 13(1) *Australian journal of labour law* 1, p 21

¹⁸⁴ Australian Council of Trade Unions, n 27

¹⁸⁵ Stewart and Forsyth, n 156, p 169

¹⁸⁶ Australian Mines & Metals Association, 'Resource Industry Workplace Relations Election Paper: Trade union access to workplaces' (June 2013)

¹⁸⁷ *WR Act* s 748(9)

cancelled.¹⁸⁸ A tribunal registrar or workplace inspector had discretionary powers to suspend or revoke permits on a contravention or misrepresentation of provisions.¹⁸⁹ The complication of these provisions meant that if an official was implicated in the smallest of industrial disputes, they would not qualify to obtain a permit.

The new system also restricted union access if the workplace was entirely covered by AWAs. As workers could enter into an AWA without union representation, unions were restricted from investigating breaches.¹⁹⁰ Thus, there was a group of workers unrepresented even if representation was justified. Effectively, permit holders could only access a workplace with operational collective agreements or greenfields agreements.¹⁹¹ Finally, a permit holder was restricted in what area they could access within the premises. The employer could limit the official to a room and insist on escorting them while on site.¹⁹²

3.5 International obligations

The Howard government attracted international attention as the reforms failed to maintain workers' human rights. The reforms included a range of provisions that contravened key ILO Conventions.¹⁹³ Australia is a signatory and a ratifying State of international treaties and instruments aimed at the protection of human rights. These instruments include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and ILO Conventions, of which Convention No. 87 and Convention No. 98 will be the principal focus.

¹⁸⁸ *WR Act* s 742

¹⁸⁹ See *Australian Building and Construction Commission v McLoughlin* (2007) 165 IR 369

¹⁹⁰ *Workplace Relations Act 1996* (Cth) s 747(2) as employee must make a written request to investigate.

¹⁹¹ Forsyth and Sutherland, n 114, pp 223-6

¹⁹² *Transport Workers' Union of Australia v Virgin Blue Airlines Pty Ltd* [2008] AIRC 113, the employer's right to direct the union to a particular room

¹⁹³ In 1951 the ILO established a Committee on Freedom of Association for the purpose of examining complaints about violations of freedom of association, whether or not the State concerned had ratified the relevant conventions

ILO Convention No. 87 lays out the right for workers and employers to establish and join organizations of their own choosing without previous authorization to further and defend their interests (Arts 2 and 10). It further provides, inter alia, that ‘workers and employers’ organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes’ without interference by public authority (Art 3).¹⁹⁴ *ILO Convention No. 98* requires a State to protect workers against anti-union discrimination (Art 1) with parties also being protected against acts of interference in their establishment, functioning or administration from others (Art 2). In adhering to this convention, the State should provide appropriate machinery, such as independent monitoring (Art 3). Furthermore, laws are to promote the full development and utilisation of machinery for voluntary collective bargaining (Art 4).¹⁹⁵ The ICCPR and the ICESCR enshrine the right to form and join a union (ICCPR, Art 22 and ICESCR, Art. 8), and the right to strike (ICESCR, Art 8). The ICESCR further protects, inter alia, the right to work (Art 6), the right to fair working conditions (Art 7), and the right to social security (Art 9).¹⁹⁶

ILO supervisory bodies, in particular the Committee of Experts on the Application of Conventions and Recommendations (CEACR), criticised the government for its failure to comply with both Conventions No. 87 and No. 98. When evaluating the AWA provisions against the standards set by Convention No. 98, the CEACR criticised the government for its failure to protect workers who did not agree to, or felt duress in accepting the AWA conditions. They noted the government’s failure to offer adequate discrimination protection. Further, the fact that an employer had the right to refuse to bargain collectively with unions and offer AWAs instead was criticised as it did not *promote free and voluntary collective bargaining*. Finally, no protection was afforded to workers entering into an AWA as they gave up their right to collectively bargain. The CEACR

¹⁹⁴ ILO, *C087 - Freedom of Association and Protection of the Right to Organise Convention* (1948)

¹⁹⁵ ILO, *C098 - Right to Organise and Collective Bargaining Convention* (1949)

¹⁹⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights - United Nations, Treaty Series*, vol. 993 (1966)

*pointed out that these workers were at risk of being penalised by dismissal or by not being afforded employment, in particular because the employer was able to take an ‘AWA or nothing’ approach.¹⁹⁷

In considering article 3 of Convention No. 87, the CEACR also condemned the reforms’ ability to protect workers exercising a right to strike, in particular because the provisions heavily restricted industrial disputes during collective-bargaining. Notably, disputes did not necessarily resolve at the end of agreement-bargaining. The CEACR noted that the reforms prohibited industrial action of pattern bargaining, secondary boycotts, sympathy strikes, and bargaining over prohibited content, which are protected under Convention 87.¹⁹⁸

Fenwick and Landau highlighted the government’s unwillingness to conform. They cited the significant gap between the reforms’ freedom of association provisions, and international obligations. Noting that the amendments had ‘far-reaching implications for the human rights of workers in Australia, as those rights are protected by Australia’s international legal obligations to protect and promote fundamental human rights’,¹⁹⁹ they noted that the government took no active steps from 1999 to 2007 to adopt the CEACR’s recommendations to ensure Australia complied with its international obligations. In fact, Work Choices imposed tougher provisions taking Australia further away from meeting its international obligations.

3.6 The impact of the reforms on the union movement

The following will evaluate whether the reform impacted on the union movement by considering statistical data. If the reforms aimed at encouraging the unions’ demise, then the legislation could potentially be considered a

¹⁹⁷ ILO, ‘Report of the Committee of Experts on the Application of Conventions and Recommendations - ILC, 93rd session, Report III (Pt 1A, 2005 (CEACR Report 2005)’ (2006) *International Labour Conference*, pp 35-37, and 223

¹⁹⁸ ILO, ‘Report of the Committee of Experts on the Application of Conventions and Recommendations - ILC, 96th session, Report III (Pt 1A, 2006 (CEACR Report 2006))’ (2007) *International Labour Conference* 9

¹⁹⁹ Fenwick and Landau, n 179, p 128

success if statistical data supported an actual decline in union membership and industrial action, concomitant to the legislative change.

Decline in union membership

In 1996, union membership represented 31.1% of the total workforce.²⁰⁰ Table 4 illustrates the impact of the reforms on the union movement resulting with membership declining from 31.1% in 1996 to 18.9% in 2007. This equates to a 12.2% decline over a period of 12 years, which represents nearly a halving in density of membership and largest historical fall in recorded membership. The average loss of membership over this period equals 1.02% each year.

Table 4 – Union members from 1996-2006²⁰¹

Year	Males ('000)	%	Females ('000)	%	Persons ('000)	%
1996	1,307.5	34	886.8	28	2,194.3	31.1
1997	1,266.7	33	843.7	27	2,110.3	30.3
1998	1,188.9	30	848.5	26	2,037.5	28.1
1999	1,103.7	28	774.5	23	1,878.2	25.7
2000	1,095.0	26	806.7	23	1,901.8	24.7
2001	1,088.8	26	813.9	23	1,902.7	24.5
2002	1,045.4	25	788.3	22	1,833.7	23.1
2003	1,051.1	24	815.6	22	1,866.7	23.0
2004	1,051.6	24	826.5	22	1,842.1	22.7
2005	1,070.7	24	841.2	21	1,911.9	22.4
2006	993.6	21	792.4	19	1,786.0	20.3
2007	937.1	20	759.3	18	1,696.4	18.9
Variance	-370.4	-14%	-127.5	-10%	-497.9	-12.2%

Further, actual member numbers fell by 497,900 from 1996 to 2007. The declines in both union membership and numbers was predominantly among male members. This may be linked to the abolishment of the compulsory unionism arrangements that were widely operational in male dominant industries such as construction, forestry, mining, manufacturing and transport.

²⁰⁰ ABS, 'Trade Union Members, Australia - Catalogue no. 6325.0' (1996)

²⁰¹ ABS, n 38; and ABS, 'Employee Earnings, Benefits and Trade Union Members, Australia - Catalogue no. 6310.0' (2007) Catalogue no. 6310.0

Peetz made the observation that this period of decline was due to three factors: labour market change, an institutional break from compulsory unionism, decollectivising bargaining, and the failure of some unions to provide infrastructure or act in cohesion.²⁰² A demonstration of the impact of agreement-making reforms was the rollout out of AWAs in *BHP Iron Ore*.²⁰³ Here, workers linked membership value and retention to the union's abilities to participate in collective bargaining as a service.

Peetz and Pocock remarked the union density decline during this government as the 'most seen in any comparable period'.²⁰⁴ Following the 1996 reforms, union membership figures commenced a dramatically declined. In 2000 membership declined to 24.7%.²⁰⁵ Then, membership declined to 22.4% in 2005,²⁰⁶ representing an 8.7% decline over nine years since the 1996 reforms. Yet, the downward trend in membership had not stabilised in 2007 with membership falling to 19%.²⁰⁷ This represented one in five workers retaining membership with a decline of 12.1% when compared to 1996. As an alarming concern, 19% was less than half the density rate when compared to 21 years earlier in 1986 when membership stood at 46%.

Peetz and Pocock believed that the membership and density decline could be contributed to many influences.²⁰⁸ They cited influences such as the loss of institutional protections, changes in the public sector, and increased employer hostility to unions. That being said, the reforms curtailed and led to discouraging collective agreements, promoting individual agreements, promoting anti-unionism among the government, and led to widespread resources reduction. Arguably, these factors must have some instrumental influence to the weakening of union movement.

²⁰² Peetz, n 86, p 3

²⁰³ *Australian Workers' Union v BHP Iron Ore Pty Ltd* [2001] FCA 3

²⁰⁴ For further analysis on union density see Peetz and Pocock, n 10; and Peetz, n 86, pp 3-8

²⁰⁵ ABS, n 77

²⁰⁶ ABS, 'Employee Earnings, Benefits and Trade Union Members, Australia - Catalogue no. 6310.0' (2005) Catalogue no. 6310.0

²⁰⁷ ABS, n 200

²⁰⁸ Peetz and Pocock, n 10, pp 627-8

The Australian system internationally contextualised

When comparing Australia to other jurisdictions during 1996 to 2007, the Australian union density had ominously declined at triple the rate of the US and UK (Table 5). During these 12 years, UK's membership declined by 3.6% from 31.2% to 27.6%, while the US declined by 2.4% from 14.5% to 12.1%. Yet, Australia significantly declined by 12.2% from 31.1% to 18.9%.

Table 5 – Australia, UK, and US union membership 1996-2007²⁰⁹

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Variance
Country													
Australia	31.1	30.3	28.1	25.7	24.7	24.5	23.1	23.0	22.7	22.4	20.3	18.9	-12.2%
UK	31.2	30.2	29.7	29.5	29.5	29.0	28.5	29.1	28.5	28.3	28.0	27.6	-3.6%
US	14.5	14.1	13.9	13.9	13.4	13.3	13.3	12.9	12.5	12.5	12.0	12.1	-2.4%

Decline in industrial action

Table 6 demonstrates the reforms' regulation of the unions' ability to undertake industrial action. The number of disputes ranged from 202 to 767, only peaking in 1999 and 2002 at over 700.

Table 6 – Industrial disputes from 1996-2006²¹⁰

Year	No of Disputes	Employees involved '000s	Total working days lost '000s
1991*	1,036	1,181.6	1,610.6
*benchmark			
1996	542	577.4	928.7
1997	447	315.4	534.2
1998	520	348.4	526.3
1999	731	461.2	650.6
2000	700	325.4	469.1
2001	675	225.7	393.1
2002	767	159.7	259.0
2003	643	275.6	439.4
2004	692	194.0	379.8
2005	472	241.0	228.3
2006	202	122.7	132.6
Variance against 1996	-340	-454.7	-796.1
Variance against 1991	-834	-1,058.9	-1,478.0

²⁰⁹ U.S. Bureau of Labor Statistics, n 79; ABS, n 206; and Department for Business Innovation & Skills and Office of National Statistics, n 79

²¹⁰ ABS, n 39

This equates to a 50-90% reduction on the undertaking of industrial disputes when compared with the arbitration system pre-1992 as a benchmark. Further, during this time, members' involvement dramatically declined by 454,700. In 1996 there were 577,400 members involved in the undertaking of industrial action. Yet, this significantly declined in 2006 where only 122,700 members were involved in industrial action. The number of lost working days also declined by 796,100, from 928,700 in 1996 to 132,600 in 2006. The momentous decline of days lost contrasts to the pre-1992 total days lost of over 1,250,000.

As explained above, the 2006 Work Choices provisions further restricted the unions' ability to organise legitimate industrial action during agreement-bargaining and the impact of this is very much reflected in the data. Such controlling regulation is reflected in the reduction of industrial disputes representing only 202 in 2006.

Freedom of association and agreement-making

The reforms limited, if not removed, union members' protection under freedom of association principles and *labelled* individual's 'freedom of association' as a right to disassociate.²¹¹ These provisions were adopted within the policy objective as 'stamping out compulsory unionism'.²¹² It constricted the unions' effort to undertake industrial action as it was prohibited until after any operational collective agreement's terms expired, and during the bargaining period. The timely execution of taking any industrial action was further slowed under Work Choices when unions were required to make an application to the tribunal for a secret ballot. This financially burdened the union with the bringing of the application and for the tribunal's appointment of an approved agent to monitor the ballot. Then if industrial action was approved, the union had to give the employer seven days' notice. Workers were also opposed to taking industrial action as the employer had the right to deduct a minimum of four hours of pay regardless of the time allocated to the industrial action.²¹³ Effectively, unions were restricted from acting in a timely manner and were financially burdened.

²¹¹ Stewart and Forsyth, n 156, p 175

²¹² Forsyth and Sutherland, n 114, p 8

²¹³ McCrystal, n 54, p 78

The reforms limited unions' involvement in the agreement bargaining process. With the employer's discretionary preference for using AWAs and non-unionised collective agreements, unions were completely removed from bargaining. They were also removed from monitoring compliance on agreements that excluded its involvement. Thus, unions had a narrowed ability to represent and service members. It also dramatically impacted on workers' ability to protect themselves, particular with low paid or vulnerable workers.

The reforms ominously limited unions from exercising right of entry. Officials had to be trained as permit holders in tougher entry obligations. When exercising right of entry, the union had to establish reasonable grounds for any suspected breach, then was required to provide the employer with 24 hours' notice of entry. Accessibility within the workplace was limited to a holder being escorted by the employer to a designated employer nominated room (generally small in size) with constrained access to freely communicate with members.

If the union breached any of the provisions, they were exposed to increased risk of legal action that could now be brought in the Federal Court. The difference was that the State tribunals excluded financial penalties. Yet, now the Federal Court could prosecute and issue financial penalties in cases where a contravention was found.²¹⁴ The action of unions and their delegates exposed them to a higher risk if the law was not abided with, regardless if the act was an exercise of international freedom of association principles or not. Further, unions risked being held vicariously liable for agents, officials and members or a group of members' actions when they failed to meet legislative obligations.

From a service to organising model

Leading in to 1996, the union movement was structured to provide a 'service' delivery approach with unions guaranteed a role in compulsory arbitration to service *protected* members.²¹⁵ Union representation in unionised-agreements provided assurance of value with their membership. Nonetheless, the

²¹⁴ Naughton, n 138, p 19

²¹⁵ Peetz and Pocock, n 10, pp 628-9

amendments altered the union movement's traditional workplace involvement. Unions were no longer primarily required to be a party to collective-bargaining, compulsory unionism clauses were abolished, and unions could no longer retain a fee for providing a bargaining service to non-members.²¹⁶ Essentially, the reforms crippled the unions' service approach. Resulting from the constricted offering of service (membership decline or inability charge for services), unions' resources were stretched with bargaining negotiations encouraging an individual company approach, rather than the organisation of collective industries.²¹⁷

To counteract the declined membership and the weakened workplace structure, the union movement was left looking for a new model to manage meagre resources and grow membership. In the late 1990s, the union movement adopted the US 'organising' approach to offer a more dynamic membership, activist involvement, overhauling recruitment strategies outside of the traditional domains and adopting a renewed campaigning approach in the face of opposition. The approach included training a younger group of organisers, which by 2000 had produced 300 trainees.²¹⁸

The ACTU secretary Greg Combet conceded that the 'shifting resources from servicing to organising has had variable success'. Yet, the new approach did not address the declining membership or reduced collective involvement.²¹⁹ Notably, the organising approach placed substantial weight on the union movement's strengthening power of workplace delegation and activism. Such action required the backing of a strong union with accessible resources for recruitment on non-union sites, and dependable workplace delegates. However, a strong union was a contradiction when membership numbers continued to decline, workplace participation was suppressed by reforms, and resources were reduced.

²¹⁶ Phillipa Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (The Federation Press, 1995), pp 229-34

²¹⁷ Bray and Stewart, n 4, p 26

²¹⁸ Peetz and Pocock, n 10, p 629

²¹⁹ Greg Combet, 'Australian Council of Trade Unions conference, Sydney' (8 May 2003) *Speech on the Launch of Future Strategies*

Union movement's response

In response to unions' destabilisation from 1996 to 2007 by the Howard government, the union movement gave its support to the opposition Labor party led by Rudd for the 2007 election.²²⁰ Industrial relations was the most debated policy during the election. Unions grouped together and heavily campaigned with the slogan 'Your Rights at Work: worth fighting for' and organised one of the largest national rally days experienced in Australia. The unions' campaign highlighted employers' exploitation of the reforms with the removing of employment conditions and the unjustified termination of employees. The unions' campaigning was given credit for the Labor party 2007 election win. In fact, Howard was only the second Prime Minister to lose his own seat during an election.²²¹

3.7 Conclusion

The Howard government reforms contributed to a large extent to the decline in union membership and industrial action. The reforms challenged the appropriateness of the service model approach as to whether it would support the longevity of the union movement. In response, the movement adjusted to the reforms and changing economics by adopting an 'organising works' model.

Undoubtedly from 1996-2007, the union movement's capacity to represent as a collective 'voice' was marginalised. The government dramatically altered the industrial relations framework by stripping unions and their members of union security, freedom of association protection, the ability to collective bargain, and restricted right of entry.

While the government announced that the reforms were not made in the spirit of anti-unionism, they were a dramatic recast of the framework that overwhelmingly favoured the employer's vested interests. Further, the

²²⁰ Stewart and Forsyth, n 156, p 7

²²¹ See Bradon Ellem, Sarah Oxenbridge and Bede Gahan, "The Fight of Our Lives" An Evaluation of Unions NSW and the Your Rights at Work Campaign, 2004-2007' (2008) (November) *Report prepared for Unions New South Wales*

government failed to acknowledge ILO Conventions by *freely* executed reforms without any due consideration to the CEACR observations.

As an accumulative effect, the reforms condensed financial resources and staffing resources obtainable to unions. Resources were stretched to capacity as unions were collectively weakened, while membership declined and prohibited acts for the undertaking of industrial dispute was narrowed. Limited accessibility to the workplace confined recruitment of new members. With such impact upon the union movement, it would be difficult to not conclude that the Howard government's reforms were based on anti-union sentiments.

Chapter Four: The impact of the Rudd and Gillard government's reforms on the union movement

4.1 Introduction

The union movement became significantly involved in the Labor party's 2007 election campaign under the slogan 'Your Rights at Work'.²²² Within Labor party ranks, many members were former unionists. The unions hoped that political support would manifest in influence within the party, and that a new Labor government would introduce favourable reforms such as the repeal of Work Choices and return of the arbitration system. Much to the unions' disillusionment, the *Fair Work Act 2009* (Cth) (FW Act) failed to provide the relief that they had expected given their government connections and influence.

The purpose of this chapter is to discuss whether the Rudd and Gillard Labor government reforms continued with the strict provisions introduced by the former government. It will initially analyse the Labor party's industrial relations policy and reforms, considering whether the government provided any relief to the union movement from the WR Act provisions focussing on the period 2007 to 2013. In addition, this chapter will analyse how the FW Act measures against Australia's international obligations stemming from ILO Conventions and the UN ICESCR. It will conclude by considering whether these reforms impacted on the union movement, questioning whether the reforms prejudiced union representation, particularly workplace right of entry, right to strike, collective bargaining, and collective freedom of association rights.

The introduction of the FW Act stemmed from extensive consultation with employer associations, unions, and the wider community, in hopes the reforms would strike 'an appropriate balance between the needs of business and the protection of employees' (in preference to offering a period of industrial relations stability).²²³ Despite the implicit 'fairness' intention of the reforms,

²²² Ibid

²²³ Carolyn Sutherland, 'Making the "BOOT" fit: Reforms to Agreement-Making from Work Choices to Fair Work' in Stewart and Forsyth, n 156, p 119

relevant ABS statistical data analysed in this Chapter demonstrates a continued decline in union membership and industrial action statistics during 2007-2013.

4.2 *Forward with Fairness* policy 2007

The Rudd Labor party publicly embraced an industrial relations policy that signalled the ‘ripping up’ of Work Choices (‘Forward with Fairness’).²²⁴ To address the needs of both employer associations and unions, Labor compromised by releasing two separate policy documents focused on each group’s priorities.²²⁵ The policy objectives provided for ‘cooperative workplace relations’ that balanced ‘flexibility’ for employers and ‘fairness’ for employees.²²⁶ Intrinsically, the reforms reflected a middle ground stance between the opposing unions and employer associations, rather than offering any strategic favour to the union movement, and did not aim to reinstate the former arbitration system.

While the policy did abolish AWAs, it continued to promote *individual* freedom of association principles. It also restricted unions’ industrial activities, emphasising ‘clear, tough’ rules and access to remedies for those affected by unprotected industrial action.²²⁷ In 2007, Gillard, as Minister for Industrial Relations and Deputy Prime Minister, made several public statements that underlined the intention to be ‘tough on illegal strikes’.²²⁸ In line with this position, the government fundamentally retained most of the Work Choices rules for regulating industrial action.

The policy also sought to provide some extended protection to individual employees, rather than to the union as a collective organised group. This included widening unfair dismissal provisions, introducing anti-discrimination

²²⁴ Kevin Rudd and Julia Gillard, ‘Forward with Fairness - Policy Implementation Plan’ (2007) Australian Labor Policy’ (2007)

²²⁵ Ibid; and Kevin Rudd and Julia Gillard, ‘Forward with Fairness: Labor’s Plan for Fairer and More Productive Australian Workplaces’ (2007)

²²⁶ Rudd and Gillard, n 224

²²⁷ Ibid, p 16

²²⁸ Ben Schneiders, ‘Gillard vows Labor will take hard line on illegal strikes’ (4 January 2008) *The Age*

protection, and establishing a 'safety net' of employment conditions. Further, it encouraged collective bargaining between parties in 'good faith'. However, the policy mostly retained the Work Choices right of entry provisions.²²⁹

Effectively, the new policy was implemented in two stages. In the first government sitting, Gillard tabled the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*, which was proclaimed on 28 March 2008.²³⁰ The second stage tabled the *Fair Work Bill 2008* in November 2008.²³¹ It is important to note that during the passing of the Fair Work legislation, the Opposition Coalition party continued to hold the majority vote in the Senate. However, as the Coalition's election loss was aligned to voters' resentment towards Work Choices, the Opposition did not make the tactical decision to block the FW Act passing through the Senate.²³²

4.3 *Fair Work Act 2009 (Cth)*

The objectives of the FW Act purposes:

'a balanced framework for cooperative and productive workplace relations... By achieving productivity and fairness through an emphasis in enterprise-level collective bargaining and clear rules governing industrial relations'.²³³

The aims therefore seek to strike a balance between employers and unions. Yet, the FW Act fails to recognise unions as distinctive organisations, encompassing them in the definition of 'industry association', which also covered informal

²²⁹ Rudd and Gillard, n 224, p 23

²³⁰ Julia Gillard, 'Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 - second reading speech' (13 February 2008) *Minister for Education, Minister for Employment and Workplace Relations and Minister for Social Inclusion - Parliament of the Commonwealth of Australia Hansard* ; and see *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth)*, Commonwealth of Australia; Canberra (Australian Government)

²³¹ The *Fair Work Bill 2008* (FW Bill) introduced in November 2008 replaces the *WR Act* with *FW Act*

²³² Greg Jennett, 'Opposition backs new IR laws' (25 November 2008) *Australian Broadcasting Corporation (ABC) News*

²³³ *FW Act* s 3(c)

employee groups and employer organisations.²³⁴ The following sections will highlight the relevant provisions that impacts on the union movement's ability to freely advocate

Protecting workers' rights and industrial action

The FW Act extends rights of protection to workers,²³⁵ particularly concerning minimum conditions of employment,²³⁶ and general protections (unfair dismissals²³⁷ and freedom of association²³⁸). The FW Act in Part 2-2 introduces 10 *statutory* minimum conditions of employment called the 'National Employment Standards' (NES) as a safety net underpinning all industrial instruments (awards and agreements). The NES terms re-state the no disadvantage test as the 'better off overall test', as per s 193 of the FW Act. In accordance with the FW Act, awards are now referred to as 'Modern Awards'. Notably, Modern Awards cannot be amended unless the worker would be in a *better-off* position as a result of the modification, nor could the NES be undermined at all. Previously, minimum employment conditions, including minimum wage increases, would be issued by way of an order from the tribunal after the trial of a test case, occurring every 12 months. In contrast, the FW Act in Division 4 reviews the NES and Modern Awards only once every four years. However, any National system employer, employee or industrial organisation can apply for variation of a Modern Award at any time.

Provisions concerning employee protection and minimum conditions of employment are monitored by Fair Work Australia²³⁹ (tribunal) and the Office of the Fair Work Ombudsman (government agent).²⁴⁰ The FW Act streamlines the industrial relations court structure by uniting the previously operational AIRC

²³⁴ FW Act s 363

²³⁵ FW Act s 3(e) 'enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association..., protecting against unfair treatment and discrimination'

²³⁶ FW Act s 3(b) 'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions'

²³⁷ FW Act Part 3-2

²³⁸ FW Act Parts 3-3 Industrial Action, and 3-4 Right to Strike

²³⁹ The tribunal was renamed *Fair Work Commission* on 5 January 2013

²⁴⁰ FW Act Chapter 5 powers of administration, compliance and enforcement

and Industrial Relations Court into one tribunal. Part 3-1 of the FW Act defines 'general protection' for employees.²⁴¹ Part 3-2 of the FW Act provides employee protection from unfair dismissal, which obligations are significantly more onerous on employers when compared to the WR Act. Unfair dismissal provisions in s 381 embodies a 'fair go all round' principle²⁴² to be utilised by the tribunal in the determination whether the employer's decision to terminate an employee was 'harsh, unjust or unreasonable'.²⁴³

A further objective of the FW Act (s 3(c)) abolished individual agreements, opting instead to protect employment conditions on the basis that parties:

'...cannot longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace system'.

The FW Act extends worker advocacy powers to the tribunal as an 'employee's voice' to protect low paid employees under the 'public interest' provisions.²⁴⁴ The government agency can also act as a worker advocate, enabling it to replace the union in underpayment of wages matters. It was not until 2012 amendments²⁴⁵ that s 44 of the FW Act acknowledges the union as a party who could bring an application to the tribunal regarding a breach of the NES.

Part 3-3 of the FW Act regulates the taking of industrial action by establishing when 'protected industrial action' is permitted, which in effect is restricted to

²⁴¹FW Act ss 340 'Protection' from being adversely treated from exercising a workplace right; 344 'undue influence or pressure; and 351 'Discrimination'

²⁴² The term 'fair go all round' was termed in *Re Loty and Holloway v Australian Workers' Union [1971] AR (NSW) 95* by Sheldon J at [99] 'The objective [of]... industrial justice and to this end weight must be given in varying degrees according to the requirements of each case to the importance but not the inviolability of the right of the employer to manage his business, the nature and quality of the work in question, the circumstances surrounding the dismissal and the likely practical outcome if an order or reinstatement is made'

²⁴³FW Act ss 385 'What is an unfair dismissals' a dismissal that is considered to be 'harsh, unjust or unreasonable; and 387 assessment criteria for harsh, unjust or unreasonable

²⁴⁴FW Act ss 425 public interest to 'suspend protected industrial action'; and 532(1) 'Orders that the FWC may make... in the public interest' to put the employee or union in the 'same position' as if the employer had complied'

²⁴⁵*Fair Work Amendment Act 2012 (Cth)*, Commonwealth of Australia; Canberra (Australian Government); and FW Act s 539 applications for orders for contraventions of civil remedy provisions - table: item 1 s 44(1)

the bargaining period for a single-enterprise collective agreement.²⁴⁶ Once the agreement is made, no industrial action can be taken. Pursuant to s 414(4), protected industrial action also requires stringent notice requirements alerting the other party. These provisions only slightly expand upon the list of permitted circumstances provided by the WR Act.²⁴⁷ Sections 409 to 412 prohibits industrial action (unprotected) for Greenfields Agreements, pattern bargaining, and multi-enterprise agreements.²⁴⁸ In a significant deviation from Work Choices, the requirement to deduct a minimum of four hours of earnings for industrial action has been removed. The FW Act ss 416 and 470 prohibits the employer from paying wages during any industrial action,²⁴⁹ including partial bans.²⁵⁰

Workplace right of entry

The right of entry provisions are fundamentally a re-enactment of Work Choices. Part 3-4 of the FW Act marginally broadens the unions' ability to exercise their right of entry to investigate suspected non-compliant workplaces for breaches that affected union members,²⁵¹ to hold discussions with employees who are covered under the union's rules,²⁵² or to investigate safety breaches.²⁵³ A significant departure from the WR Act is the reinstatement of the permit holder's abilities to hold broad discussions with workers. The WR Act prohibited union access to the workplace if there were operational non-union collective agreements or AWAs in place. Here, a permit holder may enter the workplace to hold discussions with workers provided that just one worker is covered by the union's rules.²⁵⁴

²⁴⁶FW Act ss 408-11

²⁴⁷FW Act s 409 Employee claim action permitting industrial action relating to for advancing claim during bargaining, unlawful terms, organised against the employer, [or] undertaken by bargaining representative covered by the agreement

²⁴⁸FW Act ss 412-3

²⁴⁹ *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36 prohibited the withdrawal of non-monetary benefits during industrial action

²⁵⁰FW Act s 416

²⁵¹FW Act s 481 'Entry to investigate suspected contravention'

²⁵²FW Act s 484

²⁵³FW Act ss 491; and 494 Official must be permit holder to exercise State... OHS right'

²⁵⁴FW Act s 484

If the employer refuses access to the union official, the union then can apply for a tribunal order granting access.²⁵⁵ This procedural requirement significantly impedes on the union's ability to gather evidence of statutory breaches, is costly, and results in time delays. In *Hogan v Riley*²⁵⁶, the Full Court of the Federal Court upheld permit holders' rights to enter a workplace without notice on the grounds of safety compliance suspicions. While in the first instance the matter was dealt with in a timely manner by the tribunal, on appeal the matter navigated the legal system for over three years.

However, the tribunal did not always afford unions freedom to access the workplace. In *Vlach v Electrolux Home Products Pty Ltd*²⁵⁷ the tribunal rejected the union's order application. The union sought to access the employer's premises to investigate allegations of an unfair dismissal several months after the event. The tribunal held that it did not have jurisdiction to grant such an order under these circumstances.

Fair Work system amendments

After the commencement of the FW Act several Senate inquiries led to further amendments. In 2011 a Senate inquiry²⁵⁸ focused on the FW Act's application in the textile, clothing and footwear (TCF) industry. The ACTU submitted that employers of outworkers in sweatshops would close their premises on receiving a 24-hour notice of intention for a union's right of entry,²⁵⁹ to avoid union presence in the workplace. Consequently, the Labor government passed legislative amendments allowing permit holders to access TCF workplaces without providing the 24-hour notice.²⁶⁰

²⁵⁵ FW Act ss 505 'powers of the FWC' to deal with a dispute; and 501 'a person must not refuse or delay entry'; or Part 4-1 civil remedy applies

²⁵⁶ *Hogan v Riley & Ors* [2010] FCAFC 30 per Finn, Lander and Jessup JJ

²⁵⁷ *Vlach v Electrolux Home Products Pty Ltd* [2010] FWC 2435 per SD President O'Callaghan [26] held that even if FWC had jurisdiction to grant such an order, in any event it is unlikely that such an order would be grant five months after the employee's dismissal

²⁵⁸ Senate Education, Employment and Workplace Relations Legislation Committee on 25 November 2011 for inquiry and report by 27 February 2012, see Bills Digest, 'Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 - No. 92 2011-12 ' (31 January 2012) *Department of Parliamentary Services - Commonwealth of Australia*

²⁵⁹ FW Act s 518, must include date, purpose, name of union, permit holder details

²⁶⁰ FW Act s 487(5)

Further amendments in 2012 broaden the unions' ability to extend the minimum right of entry provisions in Part 3-4 of the FW Act when negotiating terms of collective agreements.²⁶¹

In June 2013 final amendments²⁶² were made by the Labor government before it lost office in September 2013. These reforms extend the right of entry provisions in favour of the unions with effect from 1 January 2014, including making the workplace's nominated lunch room the default venue for workplace union meetings. Other amendments that obliges the employer to provide reasonable accommodation²⁶³ and transport²⁶⁴ to permit holders when the union visits remote workplaces at the employer's expense, attracted significant criticism.

Collective agreement-making

Part 2-4 of the FW Act redefines a collective agreement as an 'enterprise agreement'. It introduces a set of reforms which were subsequently described by Breen Creighton as 'an attenuated return to collectivism'.²⁶⁵ These provisions outline minimum content requirements that must be included in an agreement before the tribunal would approve it.²⁶⁶ Content must include consultative mechanisms, workplace flexibility, employment conditions, and rates of pay. The FW Act also extends new bargaining representative rights to unions as a party involved in the agreement-making process. Sections 236 and 237 introduces a significant reform whereby unions could compel employers to enter into bargaining for agreement-making if a Majority Support Determination could be obtained.²⁶⁷ One of the fundamental changes contained in s 228 of the FW Act compels an employer to negotiate with bargaining representatives in 'good

²⁶¹ FW Act ss 172(1) and 194(f)

²⁶² *Fair Work Amendment Act 2013 (Cth)*, Commonwealth of Australia; Canberra (Australian Government)

²⁶³ FW Act s 521C(1) the occupier must make arrangements for the permit holder

²⁶⁴ FW Act s 521D(1)

²⁶⁵ Breen Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Recollectivisation of Australian Labour Law' (2011) 40(2) *Industrial Law Journal* 116, p 134

²⁶⁶ FW Act ss 186 and 187, there is no reference to public interest

²⁶⁷ FW Act s 237(2), the criteria before making an Order

faith'. Failure of any parties to abide by the good faith bargaining obligations could result in a tribunal order. For example, if the employer refuses, the union could seek a bargaining order from the tribunal forcing it to bargain. The employer's failure to follow a tribunal order could result in civil penalties.²⁶⁸

Section 174(3) of the FW Act nominates the union as the 'default bargaining representative' for employees under new enterprise agreements. This would apply even if the workplace only employed one union member. A Greenfields Agreement is defined as an agreement for an employer with a new enterprise who has not yet engaged any employees, under which one or more relevant unions may cover the future employees. Section 172(4) reinstates the union as a compulsory bargaining representative in negotiations.²⁶⁹ As the bargaining representative, the union is also covered by the enterprise agreement, meaning that it could enforce terms or commence legal proceedings for any breach.

The default bargaining representative provisions significantly narrows the circumstances in which the union could not be a party to negotiations for an enterprise agreement to two situations: where no union members are employed and the employer did not appoint the union as their bargaining representative, or when all union members at the workplace exercised the right to appoint an alternative non-union bargaining representative.²⁷⁰ Nevertheless, these reforms failed to return the union to its position as a compulsory agreement-making party as it had been during the arbitration era.

4.4 Criticisms of the Labor government reforms

Forward with Fairness and the FW Act reforms fell short of the professed objective of '*ripping up* Work Choices and creating a fairer, simpler system'.²⁷¹

²⁶⁸ FW Act s 233

²⁶⁹ FW Act ss 175, employers must give the union notice to make a Greenfields Agreement; and 182, cannot be made without the union's approval

²⁷⁰ FW Act s 174; and see *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Re: Inghams Enterprises Pty Ltd* [2011] FWA 6106

²⁷¹ Julia Gillard, 'Introducing Australia's New Workplace Relations System' - speech to the National Press Club' (17 September 2008) *Minister for Education, Minister for Employment*

The government speeches signalled that Work Choices would be ‘eradicated’ or ‘dead and buried’. Yet, in effect some Work Choices provisions, such as the right to entry, elimination of the adversarial system, proscribed industrial action, and abolishment of the security and preference clauses, were retained by Labor. Consequently, these reforms pleased no one. The union movement criticised²⁷² the government for not repealing Work Choices, pushing the government ‘to go much further in undoing the effects of Howard’s 11 years in office’.²⁷³

In contrast, employer groups²⁷⁴ sought to retain the Work Choices regime. They vocalised their disapproval of the *Fair Work Act 2009* (Cth) ‘for constraining employer flexibility and choice, emboldening unions, [and] increasing labour costs’.²⁷⁵ Employer associations held that the FW Act created uncertainty and instability. Further concerns included the extended freedom of association (rights broadening representation, advocacy and consultation), and unions’ exploitation of the right of entry provisions to disguise ‘discussions’²⁷⁶ for marketing and recruitment purposes.

Richard Clancy from the Victorian Employers’ Chamber of Commerce and Industry, stated that the Labor government reforms ‘very much tilted the balance in favour of employees’,²⁷⁷ noting the increase of 10,000 unfair dismissal claims per year. This led to a significant increase in ‘go away money’²⁷⁸ paid by employers to dismissed workers in order to avoid the costs of defending themselves before a tribunal. In support of employers, Shadow Industrial

and Workplace Relations, Minister for Social Inclusion, Deputy Prime Minister, Parliament of Australia

²⁷² See D Mighell, ‘Mr Rudd not much of a true believer’ (5 June 2008) *The Australian* , p 14

²⁷³ Stewart and Forsyth, n 156, pp 1-3, and 7

²⁷⁴ Company chairpersons BHP Billiton Jac Nasser, his predecessor Don Argus, Rio Tinto Tom Albanese, Qantas chief executive Alan Joyce, and former Future Fund David Murray, see Annabel Hepworth and Sarah-Jane Tasker, ‘BHP chief Jac Nasser lashes work laws’ (17 May 2012) *The Australian*; and Peter Sheldon and Louise Thornthwaite, ‘Employer and employer association matters in Australia in 2012’ (2013) 55(3) (06/01) *Journal of industrial relations* 386, p 388

²⁷⁵ Sheldon and Thornthwaite, n 274

²⁷⁶ CCH Australia Limited, *Understanding the Fair Work Act* (CCH Australia Limited, 2011), p 32

²⁷⁷ Belinda Williams, ‘Do staff have more power than bosses?’ (17 October 2013) *Sydney Morning Herald*

²⁷⁸ Sheldon and Thornthwaite, n 274, pp 387-8

Relations Minister Abetz, stated that these provisions merely provided workers with an opportunity to ‘milk some more money out of an employer’.²⁷⁹

While the right of entry provisions were initially unchanged from Work Choices, *Fair Work Amendment Act 2013* amendments nominate the lunch room as the default meeting room. They also make employers financially obligated to fund unions when they attended workplaces in remote areas. This was strongly objected to and criticised by employer associations. The Australian Industry Group (AiG) opposing submissions to the Senate highlighted ‘lunch rooms (and other break areas) are used by all employees, including those who are not union members and those who do not wish to participate in union discussions.’ In support of this argument, AiG submitted that only 13% of private sector employees were affiliated with a union. Therefore, this provision impedes on the privacy of the majority of employees (non-unions members) that sought to rest in the lunch room.²⁸⁰

Sheldon and Thornthwaite evaluated the Fair Work Review 2012 from an employer’s perspective. They noted a strong consensus of criticism of the Fair Work framework amongst employers, who were disgruntled about the bargaining provisions that limited the employer’s flexibility, competing unions embroiled in controversy within the workplace, and increased workplace union presence that decreased productivity. In essence, employer associations believed that the increased union presence at the workplace led to increased labour costs. A particular focus was on the lack of ‘reasonably priced’ labour in the resources sector.²⁸¹

The leading employer associations made Submissions to the Senate for consideration in the Fair Work 2012 Review.²⁸² Most criticised the FW Act bargaining agreement provisions as a ‘weakening of the employer’s freedom to

²⁷⁹ Ben Schneiders, ‘Fair Work Act: unfair dismissal claims rising’ (1 February 2012)

²⁸⁰ Australian Industry Group, ‘Submission to the Senate Education, Employment and Workplace Relations Legislation Committee’ (2013)

²⁸¹ Sheldon and Thornthwaite, n 274, pp 387-8

²⁸² See Business Council of Australia, ‘Business Council of Australia submission to the Review of the Fair Work Act’ (February 2012) *Business Council of Australia*

contract'. As the legislation enhances the unions' bargaining power, prolonged negotiations resulted in reduced agreement options and flexibility. This position was particularly evident in relation to Greenfields Agreements, in which the union is legislated as a compulsory bargaining representative. Here, employers alleged that such compulsory provisions only promoted 'outbreaks of union militancy'.²⁸³

In the lead up to the 2013 election, the Australian Mines & Metals Association released an extensive reform submission entitled 'Trade union access to workplaces'.²⁸⁴ The report strongly criticised the government reforms as 'continued efforts to place unions between employers and [their] employees irrespective of their [workers'] wishes'. The reforms resulted in unwarranted disruptions in the workplace by union officials, difficulties ascertaining the covering union for employee groups, the unions' undesirable abilities to expand industrial action scope in agreements, and increased aggression in the workplace by competing unions at the expense of productivity. Predominantly, employers sought a framework that returned the WR Act provisions for agreement-making, right of entry, and regulated industrial action.

4.5 International obligations

This section will consider the FW Act provisions alongside Australia's international treaties and obligations. Particular consideration will be given to CEACR appraisal of Australia's compliance with ILO Conventions No. 87 and No. 98. In light of Convention No. 87, the CEACR noted that the FW Act retention of the WR Act provisions regarding the 'absence of protection for industrial action'²⁸⁵ for multi-business agreements,²⁸⁶ pattern bargaining,²⁸⁷ and rights to

²⁸³ Sheldon and Thornthwaite, n 274, p 394

²⁸⁴ Australian Mines & Metals Association, n 186

²⁸⁵ ILO, 'Report of the Committee of Experts on the Application of Conventions and Recommendations - ILC, 101st session, Report III (Pt 1A, 2012)' (2012) *International Labour Conference*, p 58

²⁸⁶ FW Act s 413(3)

²⁸⁷ FW Act ss 409(4), 412, 422, 437(2)

strike;²⁸⁸ and prohibited negotiations was on ‘unlawful terms’.²⁸⁹ They observed that the ‘right to strike is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests’. Therefore, the CEACR requested the government ‘to take all appropriate measures... with a view to bringing them into full conformity with the Convention’.²⁹⁰

Regarding the right to strike procedure, the CEACR also noted the ACTU concerns relating to time delays and reported frustrations, particularly s 459 of the FW Act requirements for majority strike secret ballot. The CEACR requested the government to observe ongoing outcomes of the application of the right to strike procedure to ensure workers and unions are ‘not restricted by unduly challenging and complicated’ procedures with ‘excessive delays’.²⁹¹

While not arising in the CEACR observations of Convention No. 87, McCrystal also questioned conformity regarding strike action in relation to prohibited ‘coercion’²⁹² under FW Act s 343. As coercion could be extended to workers or bargaining representatives coercing other workers by threatening or acting upon peaceful picketing during protected industrial action, picketing may be considered prohibited. Thus, McCrystal noted that workers could lose their right to any protected industrial action as ‘failure to comply with the... provisions will almost automatically constitute coercion’²⁹³ as an unlawful act.

Concerning Convention No. 98 for the right of parties to voluntarily bargain collectively with protection from acts of interference, the CEACR referred to the FW Act s 172 limitation on protected industrial action pursuant to lawful content

²⁸⁸ FW Act ss 408-411

²⁸⁹ FW Act ss 172, 194, 353, 409(1) and (3), and 470-475

²⁹⁰ ILO, n 285, p 60

²⁹¹ Ibid 285, p 60

²⁹² See *Electrolux Home Products Pty Ltd v Australian Workers' Union (2004) 221 CLR 309* - High Court of Australia held the union coercion (meaning a person must not take or threaten to take action) of a party in leading to the taking of industrial action in support of impermissible bargaining claim resulted in unprotected industrial action

²⁹³ McCrystal, n 54, p 266

during agreement-making.²⁹⁴ Lawful terms²⁹⁵ were limited to ‘*matters pertaining to the employment relationship*’.²⁹⁶ Thus, claims for the deduction of union membership fees from workers’ wages, compulsory bargaining fees,²⁹⁷ right of entry,²⁹⁸ wider socio-economic interests, or adjustments to unfair dismissal qualification terms,²⁹⁹ were considered impermissible claims or unlawful content and prohibited for the undertaking of industrial action.³⁰⁰ According to McCrystal, these provisions had ‘the capacity to undermine the right to strike in practice because it increases the cost and time involved with ensuring strict compliance with the legal formalities’.³⁰¹ Further, both unions and workers may be held liable for civil penalties for undertaking any act of unprotected industrial action.³⁰² The CEACR Direct Request of 2014 recommended that the government should reconsider these legislative restrictions and ‘broaden the scope of collective bargaining’.³⁰³

FW Act s 470(1) prohibits the employer from paying wages if the worker has participated in industrial action. The CEACR had made objections to this provision and similar mandatory non-payment provisions since 1998, preferring the involved parties to negotiate such terms³⁰⁴ rather than being bound by a statutory provision.

²⁹⁴ FW Act s 172

²⁹⁵ FW Act s 409, employee claim action ‘organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters’

²⁹⁶ FW Act s 172(1)

²⁹⁷ FW Act s 353

²⁹⁸ FW Act ss 194, meaning of unlawful terms; and 195, meaning of discriminatory

²⁹⁹ FW Act s 194 unlawful regarding Part 3-2 unfair dismissal periods of employment

³⁰⁰ ILO, ‘Direct Request (CEACR) - adopted 2013: Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia’ (2014) *International Labour Conference*

³⁰¹ McCrystal, n 54, p 266

³⁰² FW Act s 417

³⁰³ ILO, n 300

³⁰⁴ ILO, n ; ILO, ‘Report of the CEACR, 86th session - Report III (1A)’ (1998) *International Labour Conference* ,[224]; and ILO, n 285, p 58

The UN CESCR also measured Art 8 of the ICESCR Convention against the multiple-employer³⁰⁵ and pattern bargaining³⁰⁶ agreements related to the FW Act provisions prohibiting strike action. The UN CESCR recommended that the government ‘lift the restriction on pattern bargaining [and] multiple-employer agreements’ regarding prohibited industrial action because ‘in law and practice, [as] obstacles and restrictions to [a worker’s] right to strike, [they] are inconsistent with the provisions’ of ICESCR Convention.³⁰⁷

As discussed above, specific provisions of the FW Act have failed to comply with ICESCR Convention and ILO Conventions No. 87 and No. 98. The FW Act has placed burdensome constraints on workers’ rights to strike including strict procedural steps and prohibition of the payment of wages during industrial action. Any industrial acts committed outside of these parameters would be considered unlawful action, and could potentially result in civil penalties. However, the FW Act is failing to conform to Australia’s international obligations. To resolve this, the government must undertake necessary reforms that will advance workers’ workplace rights.

4.6 Impact on the union movement

Despite the hopes of the union movement, the Labor government failed to provide full relief from the Work Choices anti-union provisions. Yet, the government did not hide the fact that the union movement would not obtain the desired support. In 2007 Rudd stated:

‘it was not the job of a Labor Government to help arrest union membership’ as ‘trade unions will survive or die based on their ability to compete - that means being able to offer working Australians services to represent them which they can’t obtain elsewhere’.³⁰⁸

³⁰⁵ *FW Act* s 413(3)

³⁰⁶ *FW Act* ss 409(4), 412, 422, 437(2)

³⁰⁷ United Nations, ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights - International Covenant on Economic, Social and Cultural Rights - UN doc no E/C.12/AUS/CO/4’ (22 May 2009) *UN Committee of Economic, Social and Cultural Rights* [19]

³⁰⁸ Megalogenis, n 7

The government openly confirmed the retention of the ‘tough’ laws on industrial action, right of entry, and freedom of association provisions. Further, it extended protection to small businesses,³⁰⁹ providing special consideration with unfair dismissal claims. Such provisions restrict the unions’ *fight* and the circumstances in which the union movement can be visibly seen or heard by the community as an advocate for workers’ economic and social interests.

Modern Awards and NES were introduced alongside the FW Act. Effectively, these conditions minimise the necessity for employers to engage in collective bargaining, as employers would prefer to adopt the terms of a Modern Award than negotiate a collective agreement. The FW Act provided that Modern Awards are reviewed every four years,³¹⁰ rather than the former 12 month reviews. The legislation of the NES impacts on unions by reducing public eminence and the capacity to advance workers’ social interests.

Freedom of association

The government resisted adopting the international principles of freedom of association. Freedom of association was broadly dealt with in the Objects of the FW Act,³¹¹ however it narrowed such rights to the context of fairness, right to representation, and prevention of discrimination.³¹² What was completely absent from the FW Act Objects was any reference to union recognition. The approach of the FW Act is instead to confer rights to an individual ‘as the individual is at the centre of the freedom’.³¹³ Thus, unions as organised groups are not afforded any rights.

³⁰⁹ FW Act s 23, defines a small business employs fewer than 15 employees

³¹⁰ Richard Naughton and Marilyn Pittard, 'The Voices of the Low Paid and Workers Reliant on Minimum Employment Standards' (2013) 34(119) *Adelaide Law Review*, pp 131-9

³¹¹ FW Act s 3

³¹² FW Act s 3(f)

³¹³ Victoria Lambropoulos and Michael Wynn, 'Unfair labour practices, trade union victimisation and voice: a comparison of Australia and the United Kingdom' (2013) 34(1) *Adelaide Law Review* 43, pp 52-3

Individual rights are bestowed in Part 3-1 of the FW Act, which protects workers from anti-union discrimination based on involvement in industrial action.³¹⁴ A shortcoming of this provision is its failure to protect a collective union. Previously under Work Choices, the tribunal determined that such collective protection was provided for under the WR Act freedom of association provisions.³¹⁵ However these broad provisions were replaced by the narrow FW Act s 341 ‘workplace rights’ and s 342 ‘adverse action’ provisions.

With the unions adopting the organising model,³¹⁶ a union official within the workplace is protected by adverse action against discrimination, yet failed to offer any comprehensive protection.³¹⁷ The High Court of Australia adopted a narrow interpretation of the causation element as an adverse action breach. A worker is protected if adversely treated *because* they were also engaged as a union official who may or may not be involved in industrial activities.³¹⁸ The High Court rejected a broader reading of this provision on the basis that if the causal link of ‘because’ could not be established, then if protection was afforded in the capacity of union official such protection would provide an advantage not enjoyed by other workers. Further, the proscribed reason for action by the employer must be the immediate or operative reason for the conduct for this breach to be made out.³¹⁹

Lambropoulos and Wynn criticised the High Court approach, concerned that protection may not be afforded to a union official where their position conflicts with their position as an employee.³²⁰ Furthermore, when undertaking unprotected industrial action, unions jeopardised breaching provisions that could potentially lead either to civil penalties, or have right of entry permits revoked.

³¹⁴ FW Act Part 3-3

³¹⁵ See *Dauids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463; and *Finance Sector Union of Australia v Australia and New Zealand Banking Group* (2002) 120 FCR 107

³¹⁶ Peetz and Pocock, n 10, p 629

³¹⁷ FW Act ss 340 and 346

³¹⁸ FW Act ss 342 and 347

³¹⁹ See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 per French CJ and Crennan J, [11], [30-1], and [60-1]

³²⁰ Lambropoulos and Wynn, n 313, pp 53-4

Right to strike

Part 3-1 of the FW Act ‘general protection’ and Part 3-4 ‘right to strike’ have significantly narrowed the worker’s abilities to exercise a right to strike. The provisions define a list of approved circumstances under which the worker may undertake action, such as under enterprise agreements and during the bargaining phase, and only when prescribed procedures are strictly followed. In these narrow circumstances strike action may be considered ‘protected industrial action’. These restrictions expose unions to significant risks including limited protection for workers (from being victimised or discriminated against), tribunal orders, and civil penalties stemming from unprotected industrial action.

The reforms continue to adopt the heavily regulated WR Act provisions. Table 7 illustrates that from 2007-2012, the number of industrial disputes continued to decline, ranging from 135 to 236 disputes per year when compared to the pre-1992 arbitration system of 1,036 disputes. Effectively, the number of industrial disputes occurring was reduced by 70% to 95% during the Fair Work reforms. Further, the number of union members involved in industrial disputes continued to significantly decline ranging from 36,000 to 172,000 members per year. Such reductions are substantial when compared to members involved in the 1980s and 1990s, which ranged from 608,000, peaking at 1,181,600 members.

Table 7 – Industrial disputes 2007-2013³²¹

Year	No of Disputes	Employees involved ‘000s	Total working days lost ‘000s
1991*	1,036	1,181.6	1,610.6
*benchmark			
2007	135	36.0	49.7
2008	177	172.9	196.5
2009	236	89.3	132.7
2010	227	54.8	126.6
2011	192	134.4	241.5
2012	204	143.3	273.2
2013	219	132.2	131.0
Variance against 2007	+84	+96.2	+81.3
Variance against 1991	-817	-1,049.4	-1,479.6

³²¹ ABS, n 39

Another significant impact on the union movement are the time delays and costs required to satisfy the procedural requirements for undertaking protected industrial action. Here, unions incur significant expenses when organising an industrial dispute. Unions primarily conduct strike action to draw attention to the significance of an issue, as it was the only remaining option that signalled the strength and ‘the *willingness* of the union to impose economic costs on the employer if its demands are [were] not met’.³²² As a consequence of being faced with difficulties in satisfying the requirements of protected industrial action, unions are undertaking short unprotected industrial action, yet limited the action to less working days lost. By taking short periods of unprotected industrial action, unions minimise the risks associated with unlawful strike action.³²³

The process of seeking a ballot to ascertain the majority’s support of an industrial action led to an imposed timing obstacle and unjustified expense to unions. The undertaking of the ballot undermines the union movement’s autonomy. In effect, these provisions remove the union movement and workers’ right to freely advance members’ interests. Yet, while the impact of the reforms has significantly narrowed the unions’ ability to organise lawful industrial action, the failure of the unions to abide by the legislation has resulted in negative media attention. More significantly, it resulted in judicial dissent of the union movement’s action.

In 2011, the volatile construction industry experienced drawn out industrial action by the CFMEU with significant media coverage and community picketing as negotiations broke down at the Myer Emporium Grocon development in Victoria, and children’s hospital project in Queensland. The CFMEU involved in the children’s hospital project was issued with an unusually long six months’ order by the tribunal against the taking of any industrial action. The union was also fined \$400,000 for work stoppages.

³²² David Peetz, ‘Industrial Conflict with Awards, Choices and Fairness’ in Creighton and Forsyth, n 22, pp 173-4

³²³ Ibid, p 180

In a landmark decision against unions, in March 2014 the Supreme Court handed down its decision against the CFMEU's coordination of condoned unlawful action in the Myer Emporium dispute that ran for 16 working days. The Court handed down a fine of \$1.25 million with 30 convictions of criminal contempt of court. In his decision, Justice Cavanough stated that the conduct of the CFMEU amounted to 'perverse and obstinate resistance to authority' as the union continued behaviours that demonstrated 'the pattern of repeated defiance' of the Court.³²⁴

Effectively, the right to strike provisions have dramatically narrowed the union movement's ability to organise timely protected action. Yet, some unions are prepared to breach provisions and risk tribunal imposed civil penalties to advance workers' social and economic interests.

Decline in union membership

The union membership decline during the FW Act did not match the trend experienced during WR Act. Yet, it could be said that the statistics have bottomed-out. Table 8 shows that the period of the Labor government from 2007 to 2013 marginally stabilised membership density with 18.9% in 2007 to 17% in 2013, an average loss of 0.32% in membership each year, being less when compared to the 1.02% average loss during the Howard government. As such, the reforms failed to assist in the union movement's growth strategy to recruit or increase density.

Table 8 – Union membership 2007-2013³²⁵

Year	Males ('000)	%	Females ('000)	%	Persons ('000)	%
2007	937.1	20	759.3	18	1,696.4	18.9
2008	940.8	19	812.2	19	1,752.9	18.9
2009	989.4	20	845.7	19	1,835.1	19.7
2010	930.3	18	857.6	19	1,787.8	18.3
2011	976.5	18	858.2	18	1,834.7	18.4
2012	939.8	18	900.6	19	1,840.4	18.2
2013	884.8	16	862.7	18	1,747.6	17.0
Variance	-52.3	-4%	+103.4	+/-0%	+51.2	-1.9%

³²⁴ *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2014] VSC 134

³²⁵ ABS, n 79

While union membership density slightly declined, member numbers increased. During the last year of WR Act in 2007 there were 1.696 million total members, while in the most recent recorded year of FW Act in 2012 there were 1.840 million total, which then declined by nearly 100,000 in 2013 to 1,747,600. This is an increase of 51,200 members or 3% over a period of seven years. That being said, the 3% increase is not equivalent to the represented increase of the total workforce. During this period, the number of persons in the workforce increased by 1,269,300 workers or 14% from 8,989,200 in 2007 to 10,258,500.³²⁶

While private sector membership had declined from 13.7% to 12.0% from 2007 to 2013, public sector membership had slightly increased from 41.1% to 41.7%. Notably, the public sector membership peaked to 43.4% in 2012. The majority of the public sector are employed by the State governments where the jurisdictions are bound by State laws. The slight increase in the public sector membership may be a consequence of most State government offices being held by the Coalition party. Particular during 2012 in Queensland and New South Wales, the Coalition State governments implemented dramatic restructures and redundancies across all functions, particularly the large health sector. Thus, unions received considerable positive publicity as a collective voice defending employment and termination conditions.

An impact on union membership that would not yet be represented in the above figures was the substantial negative media publicity received from 2012 to 2014. Further to the abovementioned Court decisions on unlawful industrial action by the CFMEU, former Labor Member of Parliament and National Secretary of the Health Service Union Craig Thomson was imprisoned in 2014 due to fraud and theft charges relating to misuse of union funds.³²⁷ Consequently, the Health Services Union was suspended by the ACTU who subsequently set up a union governance and accountability panel. Other damaging publicity involved union leaders misusing 'slush funds' in the Australian Workers Union, and the alleged

³²⁶ Ibid

³²⁷ In 14 March 2014 Craig Thomson was found guilty of 65 dishonesty charges over the misuse of union funds for \$24,538 AUD

‘thuggery’ of a construction union picket line by the CFMEU.³²⁸ Recently in 2014, Prime Minister Abbott ordered a Royal Commission to investigate union corruption and misuse of funds, which has involved former Prime Minister Gillard being questioned.³²⁹

The Australian system internationally contextualised

Table 9 shows that UK declined in union membership density by 2.3% from 27.9% in 2007 to 25.6% in 2013. Australia declined by 1.9% from 18.2% to 17.0%, yet rose to 19% in 2009. The US declined by 0.8% from 12.1% to 11.3%, yet also peaked at 12.4% in 2008.

Table 9 – Australia, UK, and US union membership 2007-2013³³⁰

	2007	2008	2009	2010	2011	2012	2013	Variance
Country								
Australia	18.9	18.9	19.7	18.3	18.4	18.2	17.0	-1.9%
UK	27.9	27.1	27.1	26.4	25.6	25.8	25.6	-2.3%
US	12.1	12.4	12.3	11.9	11.8	11.3	11.3	-0.5%

When comparing Australia against the UK and US, the UK experienced the highest decline. However, it could be proposed that Australia and the US had much lower starting levels and thus may have bottomed out, with limited further declines expected.

In operation, the FW Act has not provided an avenue or strategy for the union movement to increase recruitment initiatives that would create a surge in membership numbers. In the private sector, the union movement is considered a minority group. The FW Act provides unions with the opportunity to return to the bargaining table as employers could no longer refuse to bargain with unions. This by no means guarantees unions a bargaining representative position as workers

³²⁸ Janis Bailey and David Peetz, 'Unions and collective bargaining in Australia in 2012' (2012) 55(3) *Journal of industrial relations* 404, pp 404, and 410-11

³²⁹ Jason Om, 'Gillard denies misusing union money' (10 Septmeber 2014) *Australian Broadcasting Corporation (ABC) News*

³³⁰ U.S. Bureau of Labor Statistics, n 79; ABS, n 79; and Department for Business Innovation & Skills and Office of National Statistics, n 79

could appoint a non-union bargaining representative. Ultimately, the FW Act fails to prioritise collective bargaining, giving preference to individualism and statutory industrial instruments.

Collective bargaining

The FW Act scales back some of the WR Act decollective provisions, yet fails to reinstate the unions' favoured compulsory unionism terms. Further, it legislates the NES minimum conditions and Modern Awards. Thus, the bargaining of collective agreements was seen as a top-up to these minimum conditions, and agreements were viewed by employers as not being fundamentally required. While these reforms provide unions with restricted access to the bargaining table that was closed off by the WR Act, they still promote individual bargaining rather than a collective approach.

The FW Act restrictions for the undertaking of industrial action minimise unions' ability to 'voice' the advancement of workers' social and economic interests during collective bargaining. The union movement:

‘surrendering the capacity to take protected industrial action appears to be the price to be paid for entry into the low-paid bargaining stream and the capacity to require employers to bargain at an industry or multi-enterprise level’.³³¹

Rather than undertaking industrial action when parties are in dispute, the tribunal could impose a workplace determination order³³² that would bind parties to a resolution for the term that was in dispute. Further, the union was not a secure party to agreements. While unions are legislated as the ‘default’ bargaining representative, they could also be displaced from this position.³³³ This is because an employee had the right to appoint their own bargaining representative, which may or may not be a union official. Effectively, this distracts from the ‘collective’ bargaining approach to agreement-making with

³³¹ McCrystal, n 54, p 247

³³² *FW Act* ss 262-3

³³³ *FW Act* s 176(1)(c)

the FW Act encouraging an 'individual' bargaining approach, allowing multiple potential bargaining representatives.

4.7 Conclusion

The Rudd and Gillard government largely achieved their 2007 policy intentions for the industrial relations sphere aimed at 'fairness'. Yet, they questionably also anticipated a 'cooperative workplace', which is difficult to impose on incompatible parties. As publicly stated by Rudd, the government would not assist the union movement. Consequently, the union movement's optimism for a return of the arbitration system, with majority workforce representation, would not prevail. In contrast to the union demoralising reforms of the WR Act, the Labor government reforms resulted in minor gains for the union movement. They provided a framework that widened unions' powers to represent, ability to bargain as representative, access to the workplace, and extended protection to individual members. These slight gains were highly criticised by employer groups. That being said, these reforms continue to fail to underwrite predominant international obligations. Furthermore, the FW Act did not halt the union membership decline to 17% in 2013. While actual member numbers slightly increased, this did not equate to the number of persons entering the workforce.

It could be said that in symmetry with the functions of the mediator, the Fair Work system drew a line between the demands from unions against the opposing position of the employers, and remained impartially removed from any vested parties' interests.

Chapter Five: Conclusion - the impact of law reforms on the union movement

5.1 Introduction

The beginning of this dissertation introduces a government's sway over the power struggle between employees and unions, with employers. Before 1996, unions were a compulsory party to this relationship. Yet, recent reforms over-regulating the framework under the guise of enhancing individual freedoms have detached unions from the employment relationship. This dissertation provides a chronicle analysis of these reforms. Consideration has been presented on the machinations of power and how changes in industrial systems through policy, rhetoric, and legislation have ultimately undone the equitable power relationship between the employer and the employee. In effect, the reforms systematic chipped away at the function of unions as the protectors of individual rights and freedoms, thereby constraining unions to representing a minority of the workforce. This final chapter provides a summary of the research and key findings of the impacts of law reforms on the union movement. To conclude this evaluation, it will review the reforms that shifted freedom of association to individual disassociation, and collectivism to individualism. Additionally, ABS statistical data will examine declines in industrial action and union membership.

5.2 Models and approaches

The arbitration system encouraged a 'service' model operating within 'corporatism'. Unions flourished from compulsory membership. Union membership represented a majority of the workplace, thus strengthening unions to influence the government and employers. Governance and membership reflected a 'logic of influence' approach.³³⁴

The 1996 reforms introduced a decentralisation period with the WR Act, followed by the FW Act. During this time, the union movement shifted into

³³⁴ See Rae Cooper and Greg Patmore, 'Trade Union Organising and Labour History' (2002) (83) *Labour History* 3167

‘pluralism’, adopting an ‘organising works’ model. This model focuses on workplace mobilisation and interactive member involvement, consequently reflecting a ‘logic of membership’ approach. Member participation and activism became central to the unions’ strategic response to reforms. This enabled unions to avoid the characterisation and perception of becoming an external third party (inherent to the servicing approach) by focusing on direct worker mobilisation, organisational structures, and delegates.³³⁵ That being the said, the adopted model and strategies did not counteract or overcome the impacting limitation of the changing regulations as anticipated by stabilising, let alone grow, a declining union membership.

5.3 Industrial relations systems

1904-1996 arbitration system

From Australia’s early industrialisation beginnings, the union movement had been an influencing actor within the regulation of the labour market during the period of ‘labourism’. The 1904 arbitration system meant that unions were a secure party (compulsory unionism), which represented a majority of the workplace and a recognised party. The system had minimal regulations regarding the unions’ ability to organise members, access the workplace, negotiate better conditions, or undertake industrial action. Unions relied heavily on the arbitration system to provide security to somewhat freely function with the power to threaten or take strike action at will.

1996-2006 Workplace Relations - Coalition government

In 1996, the Howard government favoured capital growth and international competition over labour and was disinterested in union influence. The party policy and objectives led to the WR Act and Work Choices reforms, which eradicated the arbitration system. The reforms were heavily criticised by unions and academics³³⁶ as being ‘anti-union’ as they aimed to eliminate unions from the workplace.

³³⁵ Peetz, Webb and Jones, n 103, p 87

³³⁶ Australian Council of Trade Unions, n 27; Lee and Peetz, n 114, p 5; Riley, n 114, p 151; and Forsyth and Sutherland, n 114, p 216

As the government opposed collectivism, individualism reforms implemented non-union agreements and abolished union recognition. Legislation supported the employer's right to refuse to enter into a collective agreement with unions. Statistical evidence supports that these reforms impacted on the union movement's ability to function with dramatic decline in union membership and strike action. They also heavily regulated the unions' ability to organise and access the workplace. Civil penalties provisions were introduced for breaching regulations that could be brought against the union and its officials. In response, unions fought against the Howard government by influencing public opinion during the 2007 election.³³⁷

2007-2013 Fair Work - Labor government

The Rudd Labor government proclaimed a 'ripping up' of Workplace Relations. Unions had hoped for reforms that would return arbitration and compulsory unionism as a reward for their electoral campaigning. Yet, Rudd denounced support of the unions.³³⁸ In effect, the *ripping up* of Workplace Relations was 'exaggerated',³³⁹ being more correctly identified as a continuation of the majority of WR Act system. Fair Work was criticised by employee advocacies, minority political party,³⁴⁰ unions,³⁴¹ and academics.³⁴² Furthermore, the Greens party³⁴³ and unions³⁴⁴ criticisms the reforms as being a lost opportunity for the re-introduction of the arbitration system. Employers also criticised the reforms. Steve Knott, Employer Association CEO,³⁴⁵ claimed the reforms gave unions 'their greatest increase in power in more than a century'. Consequently, neither employer groups nor unions were satisfied with the government's balanced

³³⁷ Ellem, Oxenbridge and Gahan, n

³³⁸ Megalogenis, n 7

³³⁹ Bray and Stewart, n 4, p 32

³⁴⁰ Rachel Siewert, *The Minority Report* (Australian Greens party, October 2008), p 160

³⁴¹ David Robinson, *Committee Hansard* (UnionWA, 29 January 2009)

³⁴² Bray and Stewart, n 4, pp 32-9; Stewart and Forsyth, n 156

³⁴³ Siewert, n 340, p 160

³⁴⁴ Robinson, n 341, p 41

³⁴⁵ Steve Knott and Australian Mines & Metals Association, 'Unions thrilled to see the back of Work Choices' (21 March 2009) *The Australian*, p 4

approach. Indeed, unions were more restricted from collective bargaining advocacy because of the expanded safety net (NES and Modern Awards). These minimum conditions were set without union influence,³⁴⁶ giving unions less activism opportunities. Failure to recognise unions also continued. However, there was some elimination of the WR Act, such as AWAs and employers could no longer refuse to bargain with the union when there was majority support. Overall, the reforms slightly deregulated union centralised functioning, including workplace right of entry, industrial action, and collective bargaining.

2007-2013 Fair Work - Coalition government

Elected in September 2013, the Abbott Coalition government policy *Improve the Fair Work laws*³⁴⁷ quickly abolished the Labor government 2013 amendments³⁴⁸ favouring unions. These included the employer's obligation to pay for officials travel and accommodation for remote workplace right of entry. However, an obstacle for the government was the inability to freely pass reforms, as the Green and Labor parties held Senate control until July 2014.³⁴⁹ It has been said that Abbott is being too cautious considering the public backlash and heavy criticism of Workplace Relations. He has been criticised by business groups that the delays in making strategic reforms are taking too long.³⁵⁰ Yet, the government has strategically taken two tactical steps to ensure future reforms encounter minimal resistance. First, in February 2014 Abbott announced a Royal Commission³⁵¹ into unions to investigate alleged financial irregularities, governance and corruption.³⁵² If these claims are substantiated, this may result in some retribution for the union movement. Second, the government appointed a Productivity Commission to review the economic and industrial relations,

³⁴⁶ Cooper and Ellem, n 66, pp 64-5

³⁴⁷ Coalition party, *Improve the Fair Work laws* (2013)

³⁴⁸ *Fair Work Amendment Act 2013* (Cth) abolished s 521

³⁴⁹ Andrew Stewart, *Supplement for Stewart's Guide to Employment Law* (Federation Press, Fourth edition ed, 2014)

³⁵⁰ Jared Owens, 'Tony Abbott cautious on Martin Ferguson's IR reform appeal' (28 February 2014) *The Australian*

³⁵¹ Tony Abbott, 'Royal Commission into trade union governance and corruption - media release' (10 February 2014) *Prime Minister of Australia*

³⁵² Bourke and Griffiths, n 8

which is due to report in 2015.³⁵³ It has yet to be determined how far the Abbott government's proposed reforms will alter the industrial relations laws. At a minimum, tougher regulations will be introduced further restraining the union movement.

5.4 Union membership decline

The 1996-2013 reforms correlated with a decline of 15.7% in union membership density, with the most significant decline during the Workplace Relations period. Membership stood at 32.7% in 1995, falling to a record low of 17.0% in 2013. As evident in Figure 1, union membership has almost halved in approximately 18 years following the abolishment of the arbitration system.

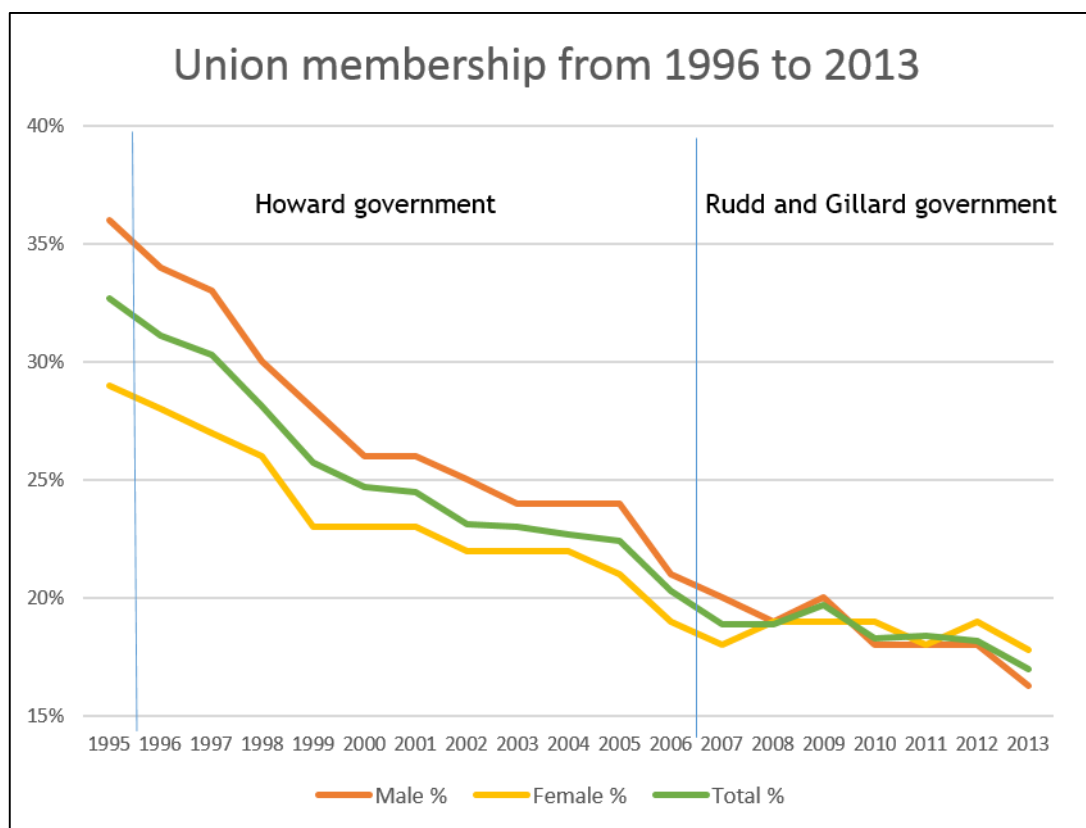


Figure 1 - Summary of union membership 1996-2013³⁵⁴

³⁵³ James Massola, 'Tony Abbott puts changes to workplace law on back burner' (25 June 2014) *Sydney Morning Herald*

³⁵⁴ ABS, n 38; and ABS, n 72

In addition to membership density, the total number of actual union members also decreased. Prior to the Workplace Relations, there were 2,251,800 recorded union members. Nearing the end of this system in 2007 there were 1,696,400 union members. This represents a 555,400 decline in actual members, or 25% decrease. In contrast, in 1995 there was 6,882,200 recorded persons engaged in the Australian workforce, which increased in 2007 to 8,776,800. Therefore, while unions lost 25% of its actual members; the total workforce grew by 25% with 1,894,600 new persons.

Overall the impact of the reforms from 1996-2013 (when compared against 1995 data) on the union movement resulted in a union membership decline of 15.7% with actual members declining by 504,200 members or 22%. During the same period the total workforce grew by 49% (from 6,882,200 to 10,258,500).

The Australian system internationally contextualised

Union membership trends have declined worldwide. Whereas Australia's union membership declined by 15.7% from 2007-2013, the UK declined by 6.8% from 32.4% to 25.6%.³⁵⁵ The US declined by 2.7% from 14% to 11.3%.³⁵⁶ While the US membership rates are approximately half that of Australia and the UK, since 1904 neither the US nor the UK have experienced such a momentous declines in membership over any 18-year period. Up until the mid-1990s, the US and the UK (to varying degrees) operated under a voluntarism approach with limited regulation of labour laws. In 2000, the UK's new statutory recognition procedure came into force, enabling union recognition on majority support.³⁵⁷ The Australian framework during this time moved from compulsory unionism with union recognition, to a system that provided no recognition and individualism. It could be said that the arbitration system potentially provided excessive security to the Australian unions. Post 1996 union membership declines indicate that unions were drawn into false securities.

³⁵⁵ UK Government Office for National Statistics, 'Trade union membership statistics 2013: tables' (28 May 2014) *Department for Business Innovation and Skills*

³⁵⁶ U.S. Bureau of Labor Statistics, n 79

³⁵⁷ See Moore, McKay and Veale, n 23

To conclude, it can be statistically demonstrated that a contributing link exists between the Workplace Relations and Fair Work systems impacting on union membership. The consequence of these governments' reforms was a decline from a majority representative organisation to a 17% minority.

5.5 Strike action decline

An analysis of 1996-2013 demonstrates the unions' capacity to organise strike action was heavily regulated by the reforms resulting in significant declines (Figure 2). The earliest recording of industrial disputes was in 1985. This year was also the highest recorded peak with 1,895 disputes. In contrast, during the Howard government, disputes peaked at 731. When comparing these points, the Howard reforms demonstrate a decline of 1,163 disputes, or 61%. While the Labor government further suppressed industrial disputes to a peak of 236. When compared to the 1985 arbitration peak, this resulted in a decline of 1,659 industrial disputes, or 88%.

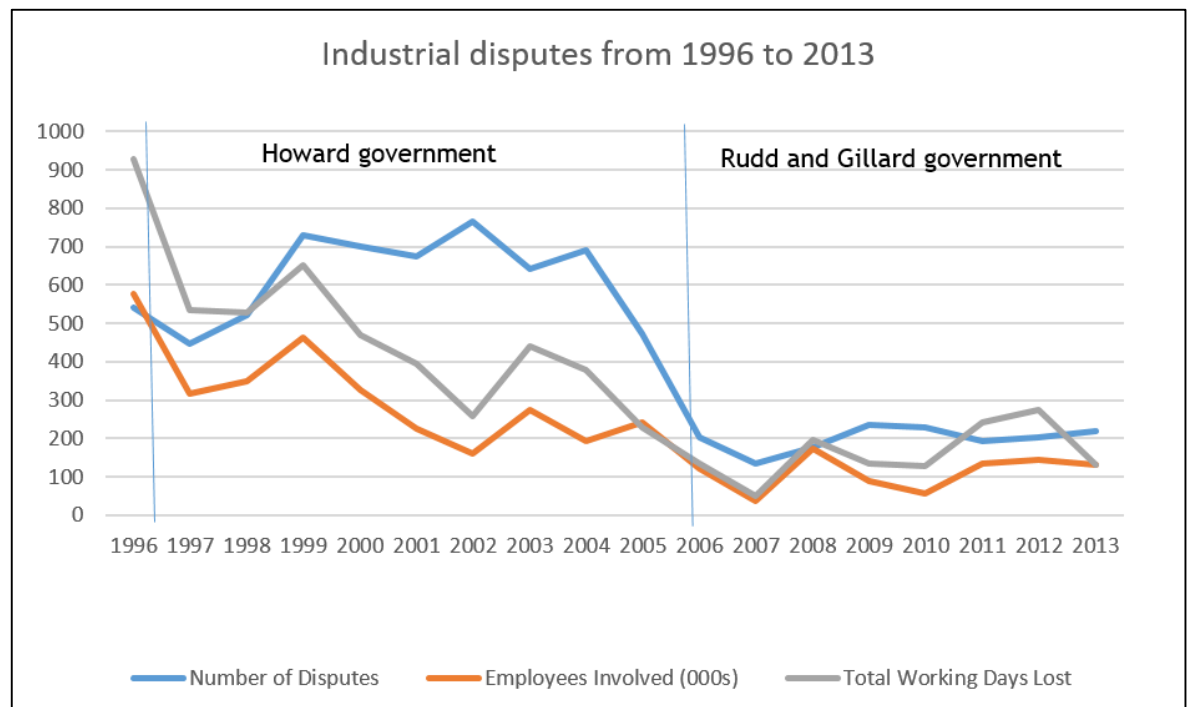


Figure 2 - Summary of industrial disputes 1996-2013³⁵⁸

³⁵⁸ ABS, n 39

This can establish that the regulation of industrial action by the WR Act and FW Act had a causative impact on the union movement's ability to organise industrial action demonstrated by declines of 61% to 88%.

5.6 From freedom of association to disassociation

Freedom of association promotes organised collective activity with unions being the institutional organ that facilitates this right. As a function, unions undertake employee representation, service, government lobbying, and regulation. Thus, the effectiveness of unions could be measured by exercising these activities under the freedom of association rights.

Under these reforms, the freedom to disassociate created a new category of individual protection separate from union membership. It disembodied the notion of union membership. The reforms dictated that independent of its members, unions no longer have an interest in collective bargaining, right of entry, and dispute advocacy. Thus, the role of unions has been narrowed to member's representation, in contrast its former function as an institution of collective workers' voices³⁵⁹ as a recognised party in the employment relationship.

Ewing considers that the promotion of voluntary unionism relies on free market principles to justify the protection of an individualist freedom not to associate. Hence, unions will be more likely to take up service and limit individual representative functions.³⁶⁰ For Ewing, the key union function is regulatory,³⁶¹ yet union membership is not necessary to obtain this benefit. However, employees seeking the lesser activities of representation and servicing access this through membership. As Ewing discussed in the UK,³⁶² unions' regulatory role is also

³⁵⁹ See Shae McCrystal, 'The Fair Work Act 2009 (Cth) and the right to strike' (2010) 23(1) *Australian journal of labour law* 3

³⁶⁰ K Ewing, 'The Function of Trade Unions' (2005) 34 *Industrial Law Journal* 1, p 13

³⁶¹ Ibid

³⁶² Ibid, pp 13-5

diminishing. This sentiment equally applies to the effects of recent Australian reforms due to government agency advocating for workers, and bargaining restrictions of content in agreement, non-union agreements, and the operation of Modern Awards. Hence, the concern of a declining membership could result in diminishing regulatory activity.

As a whole, these reforms fail to protect workers' rights. They are not consistent with Australia's international obligations and removed unions from the workplace. This highlights the importance of the organising model approach to increase activism, whereby ensuring unions maintain a workplace presence. It also suggests the prominence of future reforms returning to traditional freedom of association principles, so that to protect workers' involved in activism.

5.7 From collectivism to individualism

The Howard, Rudd and Gillard governments' reforms focused on individualism by instigated agreement-making without union representation through non-unionised individual and collective agreements. Bray and Stewart confirmed regulation supporting 'individualisation of rule-making processes and employee voice' as the dominant trend.³⁶³ Such an approach is far removed from traditional collectivism. In fact, individual employees now carry the onus to exclusively pursue individual rights in bargaining and representation.

For Peetz, non-union involved agreements undermine genuine collective bargaining and generate poor outcomes for workers.³⁶⁴ In effect, unions can no longer be 'a party' to an agreement (with the exception of Greenfields Agreements), as they can only *represent* a union member.³⁶⁵ Unions have no greater rights of protection than non-union bargaining representatives. Furthermore, unions cannot prevent employers from approaching employees

³⁶³ Bray and Stewart, n 4

³⁶⁴ David Peetz, *Brave New Workplace* (Allen & Unwin, 2006), p 200

³⁶⁵ Bray and Stewart, n 4, p 40

directly to form non-unionised agreements.³⁶⁶ Notably, it is unlikely that the Abbott government will address such criticism through future reforms.

In summary, individualism diminishes the strength of collectivism (workers as a united voice) for the advancement of employment conditions. Consequently, unions need to work harder to overcome individualism through exercising the organising model by promoting mobilisation, activism, and solidarity.

5.8 The future of the union movement

The recent 18-years of reforms has weakened the union movement, impacting on its ability to function. Individualism and freedom to disassociate methodologies has distanced unions from the employment relationship. Individualism has restricted unions' collective strength and involvement in agreement-making. Disassociation has alienated group protective rights. The reforms also constrained unions from advocating, organising, and accessing the workplace. Quantitative ABS statistical data summarised that the reforms caused significant declines in industrial action and union membership. Thus, these factors could evidently advocate this dissertation's aim in substantiating that the post-1996 reforms had a significant impact on the union movement.

Undoubtedly, the Australian union movement faces difficult times ahead. Its ability to operate collectively will hinge on the Abbott government. It could be theorised that the government is taking steps to strategically secure future reforms with minimal opposition from unions. However, any positive future for the unions is clouded by potential public damages resulting from the Royal Commission and the Productivity Commission.

Unions are in a dubious position to drive the movement into organisational gains in the near future unless aided by reforms, or economic and political change. The union movement's historical relationship with the Coalition party has been fraught, thus positive reforms returning unions to a majority workplace

³⁶⁶ See *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWA 3510

representative is improbable. Indeed, unions must pursue and prioritise the organising works model. Peetz and Pocock support this progression indicating that increased democratic power within unions, leading to more members being able to influence union decision-making, would result in a stronger movement.³⁶⁷ While this leaves the union movement with much work ahead, there is scope for cautious optimism. To renew efforts in membership growth with the organising model, unions must increase workplace activism through the recruitment of workplace delegates. They must be supported with grass-roots training, mentoring, and union-to-official networks. To build strength, members must be involved across all aspects of the union. Yet, renewed strength is contingent on the members' willingness to act collectively, so direction is essential. In return, unions must critique their delivery service to ensure benefits provide valued membership. Communication between unions, officials and members must be systematic. It is hoped that this may address the decline of unionisation by encouraging member participation, membership retention, and recruitment.

³⁶⁷ Peetz and Pocock, n 10, p 648

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