Submission to Productivity Commission Inquiry into the Workplace Relations Framework

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As the time available to prepare a submission was short, and bearing in mind my other responsibilities, this submission does not seek to cover the majority of issues raised in the Issues Papers. Rather, it focuses on some limited specific matters:

- aspects of the relationship between competition policy and industrial relations policy;
- the relationship between productivity and industrial relations policy;
- aspects of the regulation of bargaining and industrial action;
- individual contracting and individual flexibility arrangements;
- aspects of minimum wages and the interaction with pension and benefit withdrawal rates;
- aspects of flexibility
- gender pay gaps.

1. Collective action and competition policy

One issue being investigated by the Commission is whether industrial relations law should take on more of the characteristics of competition law - that is, by prohibiting certain types of collective behaviour by labour.

Other submissions will, I presume, deal with the unique features of labour and the inappropriateness of regulating labour markets as if they were product markets. Others may also make arguments about the importance of protecting the right to strike and Australia's obligations under international law in this area. I would agree with such arguments but will not expound on them here, for reasons of time. However, I wish to make another point: that even in relation to capital, only certain types of collective behaviours are prohibited, and the collective behaviour at the core of capital is not only protected but given special status. To understand this, we need to understand the two key collective institutions in the world of work: the 'collective of capital' and the 'collective of labour'.

The first, a *collective of capital*, occurs when generally speaking, an individual holder of capital is constrained in what he or she can do with it. To increase his or her ability to generate further wealth from their capital—to increase the power of their capital—an owner of capital likes to be able to aggregate their capital with that of other owners of capital. Most importantly, this is done through the vehicle of the 'corporation'.

A corporation is 'an artificial person created by royal charter, prescription or legislative act and having the capacity of perpetual succession'.[1] More importantly, in our context, it is a collective of capital, a means by which individual capitalists aggregate their capital and greatly increase the economic capabilities of that capital. The owners of the capital each have shares in the corporation; they are 'shareholders'.

The corporation provides another important collective benefit to owners of capital: limited liability. Shareholders need not accept full responsibility for adverse consequences of actions undertaken for their benefit. Instead, if the corporation engages in risky behaviour leading to its collapse, the shareholders can only lose the value of their shares; the rest of the liability is, in effect, borne by the suppliers, creditors, customers and employees of the corporation. The corporation is an artefact of capitalism. As Joel Bakan, Mark Achbar and Jennifer Abbott, the people behind the movie *The Corporation*, point out:

> One hundred and fifty years ago, the corporation was a relatively insignificant entity. Today, it is a vivid, dramatic and pervasive presence in all our lives. Like the Church, the Monarchy and the Communist Party in other times and places, the corporation is today's dominant institution.[2]

Although corporations are 'artificial persons', with most of the rights of natural persons (for example, to sue and be sued), they behave differently to natural persons. This is because corporations have a single objective: the maximisation of profit and, hence, of returns to shareholders. In many countries this objective is laid down by the law. By contrast, people have complex, multiple objectives. Corporations will behave differently to how their shareholders would, on average, behave; but through the corporation, owners of capital act collectively and collusively towards a single objective.

The second collective is the collective of labour, where workers form unions to increase their power in dealing with capital. Individual employees have relatively little power in their relationship with their employer, be it an individual capitalist or, more commonly, a corporation.

A union is a continuous association of workers 'for the purpose of maintaining or improving the conditions of their working lives' that is free from influence by an employer or employer organisation.[3]

Unions have members, not shareholders. Thus unions have multiple and complex objectives, which may be in conflict with each other and may need to be weighted or compromised. Unions aim to improve their members' economic

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[1] Oxford English Dictionary.

[2] Bakan, J. (2004). *The Corporation: The Pathological Pursuit of Profit and Power*. London: Constable & Robinson.

[3] S. Webb and B. Webb, *The History of Trade Unionism*, Longman, London, 1920; *Workplace Relations Act 1996* (Cth), s189(4).

conditions, such as wages, hours of work and leave entitlements. They aim to improve the safety and the comfort of the physical conditions under which work is performed. They aim to protect the job security of their members. They aim to enable members to have some understanding of and control over issues that affect them at work. Many unions also aim to achieve changes in the society in which they operate, to make it somehow 'fairer'. Such objectives aim to benefit not only the union's members but often also the members of other unions and even people who do not currently belong to a union. (Thus many of the social wage improvements, such as pension and family allowance supplements for the low paid, under the Accord between Australian unions and the Labor governments of 1983–96 principally benefited non-members of unions.)

This capacity for altruistic behaviour among unions sharply contrasts with that of the corporation, whose objectives preclude altruistic behaviour. It must aim solely to maximise profit, as Joel Bakan argues.[4]

The collective organisation of employees into unions is as fundamental as the collective organisation of capital into corporations. It is not a realm into which competition law should stray with the intent or effect of inhibiting or prohibiting the collective organisation of employees.

2. Productivity

This section focuses on micro and macro influences on productivity, the influence of industrial relations policy, and the relationship between productivity and the potential for wages growth.[5]

2.1. Macro level influences on labour productivity

Factors that influence productivity can conveniently be categorized as operating at the macro or micro levels. Matters at the macro level include issues like: the geography of suppliers and markets; the nature of product markets including the extent of producer competition; education and skill levels; the relative cost of capital and labour; business cycles; and climate and the physical environment. Significant parts of trans-Tasman or trans-Pacific gaps in labour productivity are due to differences in economies of scale, geographic isolation or industrial structure.[6] Technology and innovations within it are critically important.[7]

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[4] Bakan, *The Corporation*,p.37.

[5] This section has benefited substantially from the work of Olav Muurlink and Katherine Ravenswood.

[6] McCann, P (2009) 'Economic geography, globalisation and New Zealand's productivity paradox' *New Zealand Economic Paper*, 43 (3) pp. 279-314, de Serres, A, Yashiro, N & Boulhol, H (2014) 'An International Perspective on the New Zealand Productivity Paradox'. Mason, G (2013) *Investigating New Zealand-Australia productivity differences: New comparisons at industry level*. Working Paper 2013/02, New Zealand Productivity Commission Wellington.

Indeed, several observers (including private sector economist Ric Simes and Professor John Quiggin) have argued that debate on productivity would be improved if we instead used a different term, 'technological progress' – 'that is, the introduction of technological innovations such as new products and improved production technologies'.[8] So another part of that trans-Tasman productivity gap is explained by differences in capital-intensity – that is, capital invested per worker.[9] The skills (obtained through education and training) to be able to design, maintain and use technology are also therefore important.[10]

Labour productivity is influenced by the relative costs of labour and capital. If labour is relatively cheap compared to capital, then firms are more likely to employ labour than capital. This will impede labour productivity growth. Countries with low wages have low labour productivity.[11] China's wages and labour productivity are a fraction of Australia's. Few would suggest that Chinese employees work only a fraction as hard as Australian ones; rather, there is no benefit for Chinese employers to use highly capital-intensive production techniques with high labour productivity when labour is cheap. As wages increase in China, labour productivity must rise in response, and inefficient and labour-intensive industries move to lower cost countries. When Australia's centralised prices and incomes Accord of the 1980s caused a drop in real award wages, there was a sharp drop-off in labour productivity growth.[12] (At the time, changes in minimum wages in awards largely drove changes in actual wages for most workers.)

Low minimum wages may allow inefficient employers to remain in business and facilitate a 'low cost, low skill "equilibrium"'[13]. In the short to medium term, how much higher minimum wages would lead to higher productivity might be constrained by how much low-wage employers are willing to invest in training

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[7] eg Engelbrecht, H-J (1997) 'International R &D spillovers, human capital and productivity in OECD economies: An empirical investigation' *European Economic Review*, 41 (8) pp. 1479-1488, Hall, B H (2011) *Innovation and productivity*, National Bureau of Economic Research.

[8] Gittins, R (2014) 'More lifting going on that we realise', *Sydney Morning Herald*, 30 August, also at 'Digital revolution transforms productivity debate', 30 August, http://www.rossgittins.com/2014/08/digital-revolution-transforms.html

[9] de Serres, A, Yashiro, N & Boulhol, H (2014) 'An International Perspective on the New Zealand Productivity Paradox'. Mason, G (2013) *Investigating New Zealand-Australia productivity differences: New comparisons at industry level*. Working Paper 2013/02, New Zealand Productivity Commission Wellington.

[10] MacCormick, J (2008) *Working Smarter: Driving Productivity Growth Through Skills*. Productivity Paper 08/06, New Zealand Treasury Wellington. <www.treasury.govt.nz >., Sloman, M & Malinen, D S (2010) 'One size doesn't fit all: The skills debate and the New Zealand economy' *New Zealand Journal of Human Resource Management*, 10 (2) pp. 83-98.

[11] Krugman, P J, Obstfeld, M & Melitz, M (2006) *International Economics: Theory and Policy,* 9th Edition, Upper Saddle River NJ, Prentice Hall, p38.

[12] Peetz, D (2012) 'Does Industrial Relations Policy Affect Productivity?' *Australian Bulletin of Labour*, 38 (4) pp. 268-292. See Appendix B of this submission.

[13] Rasmussen, E, Foster, B & Murrie, J (2012) *The decline in collectivism and employer attitudes and behaviours: facilitating a high-skill, knowledge economy?* Proceedings of the 16th ILERA World Congress, Philadelphia, PA, 16th International Labour and Employment Relations Association World Congress.

and technology,[14] a result of a 'free rider' problem in coordination of training.[15] The relationship is unclear, however, as there is some evidence that wage compression increases training[16] and that the British minimum wage may have increased (or at least not decreased) training.[17]

The business cycle also matters. In the shorter run, labour productivity is very sensitive to movements in the business cycle.[18] When economic activity starts to decline, firms tend to hoard labour, reducing labour productivity. This is because there are high costs involved in retrenching and rehiring and firms do not want to lose skilled employees.[19]

Finally, as labour productivity is reduced during periods of high humidity and heat, labour productivity will be damaged in many countries as a result of climate change.[20]

Overall, there are many influences on productivity that are outside the scope of the workplace relations system.

2.2. Micro level influences on labour productivity

What workplace factors influence productivity? Some of these relate to workplace industrial relations (IR), and some simply are a function of decisions of management that are outside the traditional framework of 'industrial relations'. These issues help us appreciate the relative contribution of IR matters to productivity.

Workplace influences include: design;[21] product innovation; product choice; workplace economies of scale; exporting; the quantity, quality and age of

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[14] McLaughlin, C (2006) 'Achieving labour market equity and efficiency in low-paid sectors: The minimum wage and sectoral collective bargaining.'. International Industrial Relations Association Conference, Lima.

[15] Buchanan, J & Evesson, J (2004) *Creating markets or decent jobs? Group training and the future of work*, National Centre for Vocational Education Research, Adelaide.

[16] Brunello, G (2002) 'Is training more frequent when wage compression is higher? Evidence from 11 European countries', Munich, Center for Economic Studies & Ifo Institute for Economic Research, *CESifo Working Paper No. 637 (4),* http://www.cesifo-group.de/portal/page/portal/DocBase_Content/WP/WP-CESifo_Working_Papers/wp-cesifo-2002/wp-cesifo-2002-01/637.PDF

[17] Arulampalam, W, Booth, A L & Bryan, M L (2004), 'Training and the new minimum wage', Economic Journal, 114(494), C87-C94.

[18] Hagedorny, M & Manovskiiz, I (2011) 'Productivity and the Labor Market: Co-Movement over the Business Cycle ' International Economic Review, 52 (3) pp. 603-619.

[19] Ljungqvist, L (2002) 'How Do Lay-off Costs Affect Employment?' The Economic Journal, 112 (482) pp. 829-853.

[20] Dunne, J P, Stouffer, R J & John, J G (2013) 'Reductions in labour capacity from heat stress under climate warming' Nature Climate Change, DOI: 10.1038/NCLIMATE1827.

[21] Love, P E D, R. Lopez, Y.M Goh, C.M. Tam (2011),What Goes up, Shouldn't Come down: Learning from Construction and Engineering Failures', *Procedia Engineering*, The Proceedings of the Twelfth East Asia-Pacific Conference on Structural Engineering and Construction − EASEC12, 14, 844-50, doi:10.1016/j.proeng.2011.07.107.

workplace equipment; how appropriate technologies are; how well-engineered work flows are; how effective inventory control or marketing strategies are; quality control procedures; and management information systems.[22] Management and luck[23] are directly, and often exclusively, responsible for these factors, unless some form of employee voice (discussed below) is in place.[24] Again, these issues are largely outside the workplace relations framework. Workplace training practices will also have an important impact on productivity.[25]

Then there are some factors that come within the purview of industrial relations. Work organisation—including how equipment is used, the layout of a workplace, the extent of down time, the flexibility in the use of labour – is inherently important in shaping workplace productivity.[26] Labour flexibility is discussed in a later section.

Research on the relationship between performance pay systems (sometimes called 'contingent pay') and productivity suggests that a link exists,[27] but with some important complicating factors. A positive relationship depends on there being strong ties between individual effort, measured productivity and pay, without intervening factors, and that is not so common. Some complicating issues include the potential for short cuts, health and safety problems, and restrictions on output, multiskilling or cooperation[28]—as well as the critical role

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22 Balasubramanian, N & Sivadasan, J (2011) 'What happens when firms patent? New evidence from US economic census data' *The Review of Economics and Statistics*, 93 (1) pp. 126-146.; Bernard, Redding and Schott Bernard, A B, Redding, S J & Schott, P K (2010) 'Multiple-product firms and product switching' *American Economic Review*, 100 (1) pp. 70-97.; Andersson, M & Lööf, H (2009) 'Learning-by-Exporting Revisited: The Role of Intensity and Persistence' *The Scandinavian Journal of Economics,* 111 (4) pp. 893-916; Workplace Productivity Working Group (2004) *The Workplace Productivity Challenge*, Department of Labour, Wellington.

23 Kahneman, D (2011) *Thinking, Fast and Slow,* Farrar, Straus and Giroux, New York.

24 See references in footnote 38.

25 Dearden, L & van Reemen, J (2005) 'The impact of training on productivity and wages: evidence from British panel data', London, IFS Working Paper W05/16, Institute for Fiscal Studies.

26 Workplace Productivity Working Group (2004) The Workplace Productivity Challenge, Department of Labour, Wellington.; Benkard, C L (2000) 'Learning And Forgetting: The Dynamics Of Aircraft Production' *American Economic Review*, 90 (4) pp. 1034-1054..

27 Whyman, P B, Baimbridge, M J, Buraimo, B A & Petrescu, A I (2014) 'Workplace Flexibility Practices and Corporate Performance: Evidence from the British Private Sector' *British Journal of Management.* DOI: 10.1111/1467-8551.12051.

28 Miozza, M L & Wyld, D C (2002) 'The carrot or the soft stick?: The perspective of American safety professionals on behaviour and incentive-based protection programmes' *Management Research News*, 25 (11) pp. 23-41., Bowey, A M & Thorpe, R (1986) *Payment Systems and Productivity*, St Martins, New York, Hickson, D J (1981) 'Motives of Employees who Restrict Their Output'. in M M Gruneberg & D J Obourne. *Psychology and Industrial Productivity.* Macmillan, London.; Kahneman, D (2011) *Thinking, Fast and Slow*, Farrar, Straus and Giroux, New York.

of perceived fairness.[29] Significant conflict between individual and organisational objectives in incentive schemes became starkly evident, and massively debilitating, during the global financial crisis.[30] Generally speaking, few jurisdictions have sought to regulate contingent pay. Where it has happened, it has generally been through the mechanism of tax concessions. Designing a tax provision that would only genuinely encourage such combinations without leading to rorting would be a very difficult task, one prone to revenue loss. From a taxation policy perspective, the tax treatment of different forms of remuneration should not advantage one over another. Given the potential costs to revenue and the likely small benefits, there does not seem to be a strong case for extending tax concessions. Direct regulation through other means has met little support.

A key question in this context is that of employee voice. There is mounting evidence that employee voice, or say over workplace matters, has a positive impact on economic performance.[31] When managers seek to create 'bundles' of productivity–enhancing human resource management measures, sometimes known as 'high performance work systems', employee voice is critical to making that work.[32] Both direct and indirect participation by employees in decision-making lead to lower absenteeism, lower labour turnover, higher morale and employee satisfaction, as well as higher productivity and improved work organisation.

One critical point that emerges in research over profit sharing, share ownership, productivity sharing and other forms of variable pay is that consultation over the introduction of schemes, and employee say over decisions once the schemes are in place, are key determinants of success.[33] Unionism is a common mechanism by which employees seek to obtain voice, but here the results are more ambiguous, with the evidence suggesting that the direction and size of the net effect depends

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29 Isaac, J (2001) 'Performance Pay: The Importance of Fairness' *Journal of Industrial Relations*, 43 (2) pp. 111-123.

30 Peetz, D, Le Queux, S & Frost, A (2011) 'The global financial crisis and employment relations'. in A Wilkinson & K Townsend. The Future of Employment Relations: New Paradigms, New Approaches. Palgrave MacMillan, Basingstoke, pp. 193-214.

31 eg Lansbury, R (2014) An elusive quest: Effective communications and employee engagement in Australia. Invited Paper 1/2014, Fair Work Commission Workplace Relations Education Series Fair Work Commission Melbourne; Cable, J R & Fitzroy, F R (1980) 'Co-Operation and Productivity: Some Evidence from West German Experience' *Journal of Economic Analysis and Workers Management*, 14, Deakin, S & Koukiadaki, A (2008) Governance processes, employee voice and performance outcomes in the construction of Heathrow Terminal 5, Centre for Business Research, University of Cambridge. Kim, J, MacDuffie, J P & Pil, F K (2010) 'Employee voice and organizational performance: Team versus representative influence' *Human Relations*, 63 (3) pp. 371-394; Subramony, M (2009) 'A meta-analytic investigation of the relationship between HRM bundles and firm performance' *Human resource management*, 48 (5) pp. 745-768.

32 eg Appelbaum, E (2000) *Manufacturing advantage: Why high-performance work systems pay off,* ILR press; Wood, S (2010) 'High involvement management and performance' *The Oxford Handbook of Participation in Organizations* pp. 407-26..

33 eg Bowey, A M & Thorpe, R (1986) *Payment Systems and Productivity*, St Martins, New York. , Peetz, D (1988) Financial Participation by Employees (II): A Preliminary Survey of the Australian Metals Industry. *DIR Research Paper Series*, Industrial Relations Policy Division, Department of Industrial Relations, Canberra.

on circumstances, in particular the degree of cooperation involving both parties, for example whether management has facilitated joint decision-making.[34]

On average it appears employee voice is likely to lead to greater productivity. The question then arises as to whether this is a case for policy intervention and if so, what form that intervention might take. If productivity gains accrue privately, what rationale might there be for public intervention? There are social interests in promoting productivity growth that might go beyond the aggregation of private decisions on whether to implement decisions that might improve productivity in this area. In the case of this issue, managers may be reticent to introduce greater employee voice because of the implications for the distribution of power in the workplace: managerial power would be reduced, employee power would be increased. Such a shift in power structures might lead both to a flattening of organisational structures (leading to a reduction in managerial job opportunities) and a lessening of the gap between managerial and non-managerial pay. Thus it may be rational behaviour for managers to resist the enhancement of employee voice if the potential outcome is reduced power, opportunities and rewards for managers, and a sub-optimal level of employee voice might well result. Likewise, trade unions (as occurred in Australia) might resist the introduction of generalised voice right for employees if these are seen as diluting the power of unions to represent employees and undermining unions. A range of mechanisms have been introduced in different countries to promote or require a capacity for employee voice. In several countries such as Germany, employees in firms above a certain size have a right to elect members to works councils, which have a say on designated areas. These issues tend to fall outside the scope of collective bargaining, institutions for which exist alongside works councils. At the regional level companies above a certain size that straddle more than one European country must establish European Works Councils with employee representatives. At the other extreme, Australia provides some examples of very soft policy in this area, with amendments to industrial legislation discussed in the latter part of section 3.1.

Diversity and equity amongst employees and amongst boards, appears to improve organisational performance;[35] it probably benefits productivity, though most studies do not explicitly examine that separately. Policy issues regarding gender gaps are discussed in the last section of this submission. In regard to the

34 Black, S E & Lynch, L M (2001) 'How to compete: the impact of workplace practices and information technology on productivity' The Review of Economics and Statistics, 83 (3) pp. 434–445.; Alexander, M J & Green, R (1992) 'Workplace productivity and joint consultation' *Australian Bulletin of Labour*, 18 (2) pp. 95-118.

35 McPherson, M (2008) 'Workforce diversity: Evidence of positive outcomes and how to achieve them. A review of the literature'. *Labour, Employmen and Work*, Wellington, Victoria University of Wellington; Von Bergen, C W, Soper, B & Parnell, J A (2005) 'Workforce diversity and organisational performance' *Equal Opportunities International*, 24 (3/4) pp. 1-16; Erhardt, N L, Werbel, J D & Shrader, C B 'Board of Director Diversity and Firm Financial Performance' *Corporate Governance: An International Review*, 11 (2) pp. 102-111. Smith, N, Smith, V & Verner, M (2006) 'Do women in top management affect firm performance?A panel study of 2,500 Danish firms' *International Journal of Productivity and Performance Management*, 55 (7) pp. 569-593; Peetz, D, Gardner, M, Brown, K & Berns, S (1999) A Gender Equity Index and Workplace Performace. *AIRAANZ 99 conference*, University of Adelaide, Adelaide.

higher levels of organisations, gender quotas (minimum 40 per cent female representation on boards, in order to access listing on the stock exchange) were introduced in Norway in the 2000s. In Australia, the Business Council of Australia recently launched an initiative designed to encourage firms to voluntarily take action on gender equity in boards and senior management positions, partly because of the 'business case' for doing so, and perhaps partly to pre-empt the possibility of prescriptive legislation in this area, as there has been growing debate around the failure of firms to attract women to boards.

There are other ways of increasing productivity, through more direct managerial control. An old but still popular approach is to try having employees work harder or faster. Eventually, however, employers find that increases in work intensity or working hours become unsustainable.[36] Resistance grows, both organised—through unions and industrial action—and unorganised, through absenteeism, quits, losses in loyalty, problems in quality of output, even possibly sabotage. The employee goodwill or 'organisational citizenship' that firms come to expect and indeed rely upon (often without realising it) may disappear. Australia experienced one brief surge in productivity growth in part of the 1990s, but as John Quiggin argued, the higher productivity growth rate achieved in Australia in just one growth cycle was probably a statistical illusion anyway. That is, it was not a signal that reforms had delivered a 'new economy' that could produce permanently higher productivity growth rates, but rather, a blip caused by overestimation and, most importantly, an unsustainable increase in work intensity that was subsequently wound back, at least partly.[37]

2.3. Productivity and the potential for wages growth

In Issues Paper 1, the Commission comments (p17) about the desirability of one-off increases in labour productivity, including: 'even if gains from any change 'only' show up as a modest one-off permanent upward shift in incomes (a possibility raised by Peetz 2012), these can be important to people's lifetime incomes, but hard to discern empirically among the noise in the economy'. If a temporary increase in labour productivity growth is followed by a decline, for example as a result of the unsustainability of increases in work intensity (a possibility raised by Quiggin), then it is questionable whether any increases in people's lifetime incomes genuinely result from a one-off productivity improvement (let alone their quality of life, after taking account not only of their incomes but also of their working conditions including the intensity of work). Indeed, there is no guarantee l that the incomes of ordinary people (as opposed to the owners of capital) are increased at all as a result of a temporary increase in labour productivity, let alone over their lifetimes. While higher productivity increases the *potential* for higher incomes, it does not guarantee they occur.

At the aggregate level, if this were to happen, the relative shares of wages and profits in national income would remain broadly constant (assuming no major change in the government share of national income). However, since the 1980s

36 Quiggin, J (2006) 'Stories about productivity' Australian Bulletin of Labour, 32 (1).
37 Quiggin, J (2006) 'Stories about productivity' Australian Bulletin of Labour, 32 (1) p.18.

this has not occurred. That is, in a number of countries (albeit to varying degrees) including Australia, the relative share of income going to capital (profits) has increased and that going to labour (wages) has declined, leading to what has been called the 'decoupling' of wages and productivity and debate over the implications of this 'decoupling'.[38]

Two implications flow. First, if the aim of policy is to raise wages through higher labour productivity, then there need to be mechanisms to ensure workers have the power to capture an appropriate share of the gains. Second, when assessing proposals that claim to be directed at increasing productivity, it is necessary to also assess whether their main impact may instead be on the relative power of capital and labour. There have been occasions when dubious claims about productivity have been made in order to advocate policies that are fundamentally about changing this balance of power.[39] So it should not be assumed that higher productivity is either necessary or, in particular, sufficient to create higher wages and hence living standards.

2.4. Public policy in industrial relations and labour productivity

There have been repeated claims by some of a recent "productivity slump".[40] Yet the data do not support a slump, and many of the most controversial public policies in industrial relations, like laws promoting individual contracting or collective bargaining overall make little difference to productivity. What matters most is not what public policy-makers do but what happens at the workplace.

It is difficult to make judgements about productivity over short periods of time. As the ABS says, "year-to-year changes in measured productivity may reflect changes that are conceptually distinct from the notion of productivity." This is because any year's productivity growth is very sensitive to the stage of the economy's growth cycle. It slumps as the economy reaches a peak in the business cycle or slows down; and it surges when the economy emerges from a trough. So the ABS deals with this by averaging productivity growth rates over the whole of a "growth cycle" lasting several years. This tells us about underlying productivity growth.

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[38] Ellis, L & Smith, K (2007) *The global upward trend in the profit share*. BIS Working Paper No 231, Bank for International Settlements, Basel; Rosenberg, B (2010) 'Real wages and productivity in New Zealand'. Labour, employment and work, Wellington, Victoria University of Wellington; Cowgill, M (2013) A Shrinking Slice of the Pie, Melbourne, Australian Council of Trade Unions; Parham D (2013), *Labour's share of growth in income and prosperity*, Visiting Researcher Paper, Productivity Commission, September.

[39] Gittins, R (2007) 'Dark art of econometrics.' *Sydney Morning Herald.* 27 August. , Allan, C, Dungan, A & Peetz, D (2010) 'Anomalies', Damned 'Anomalies' and Statistics: Construction Industry Productivity in Australia' *Journal of Industrial Relations*, 52 (1) pp. 61-79, Martin, P (2013) 'Is Tony Abbott's 'cop on the beat' worth $6 billion?' *Sydney Moring Herald.* 28 August.

40 eg Willox, I (2012) 'Debate: Growing the Australian Economy: an Industry & Union Perspective - Address by Innes Willox, Chief Executive, Australian Industry Group', National Press Club, Canberra, 22 August; Frydenberg, J (2013), Abbott must seize the mantle on industrial relations reform, The Australian, 9 January.

The growth cycle during which individual contracts reached their peak, and WorkChoices was introduced, was also a period with very low labour productivity growth. In fact, it had the lowest productivity growth of any of the nine cycles since measurement started. This is the exact opposite of what would be predicted if individual contracts were the way to boost productivity. There was, as mentioned previously, a brief spurt of increased productivity growth in the 1993-94 to 1998-99 period, following the introduction of collective enterprise bargaining and the passage of Paul Keating's Industrial Relations Reform Act 1993. But it only lasted one growth cycle. After that, productivity growth slowed to be below the level achieved before 1984. Indeed, the longest period of sustained productivity growth happened before the shift to enterprise bargaining or the old prices and incomes accord. It occurred under the traditional award system, it lasted two decades from 1964-65 to 1984-85, and it delivered average productivity growth of 2.4 per cent. Those halcyon decades of the traditional award system, which delivered far greater privileges to unions than the Fair Work Act, but with no AWAs, also delivered double the 1.2 per cent productivity growth of the WorkChoices growth cycle.

This is not to argue that the slump in productivity growth in the WorkChoices growth cycle was principally caused by industrial relations deregulation. While it may have depressed productivity a little – waitresses whose penalty rates were cut would not exactly have been motivated to work harder – other influences were likely more important, such as plummeting productivity in mining (incidentally, the heaviest user of AWAs) and in the privatised electricity and gas sector. Those sectors have been a drag on labour productivity growth. But the point is this: if industrial relations "reforms" like individual contracting are the key to higher productivity, there would have been a surge in productivity under WorkChoices. There was not such a surge.

At various times it has been argued that retailers face a crisis because of penalty rates, and at least one MP agreed that penalty rates stymied productivity.[41] Labour productivity is the quantity of output (say, the number of meals produced by a restaurant's staff) divided by the quantity of hours worked (in producing those meals). Productivity is not about wages, nor penalty rates for working nights or weekends. If the cost of paying waitresses goes up, it has no direct immediate impact on measured productivity. Higher wages may reduce profits, but they do not reduce productivity. Nor is productivity about the price of the product.

The relationship between pubic policy and productivity is discussed extensively in Attachment B, 'Does Industrial Relations Policy Affect Productivity?', and so is not expanded upon further in this section. That attachment consists of an article published in *Australian Bulletin of Labour*, and considers the link between productivity, fairness, and industrial relations (IR) policy at workplace, national, and international levels using data from micro- and macro-level empirical

[41] eg J Alexander MP quoted in Coorey, P (2011), 'Alexander targets penalty rates in workplace revamp', *Sydney Morning Herald*, 15 August.

studies as well as data from the Australian Bureau of Statistics (ABS), the OECD, and other sources. It shows that there is some evidence that policies that enhance fairness enhance economic performance. But the effects are conditional; they are neither consistent nor universal. Government policies to encourage or discourage unions, to restrict the extent or scope of collective bargaining or related action, or to encourage or discourage non-unionism or individual contracting, will not do a great deal in net terms to improve economic performance. However, in any specific workplace, industrial relations and the decisions management makes can have a notable effect on productivity. While welfare and industrial relations systems do not make a large inherent difference to economic efficiency, they make a very large difference to social outcomes. The decisions management makes and the relationship it has with employees and unions will shape what happens in the workplace and can have a notable effect on productivity. The workplace relations policy framework, overall, has a very limited impact on productivity. It is workplace parties, not political parties, who ultimately determine how IR influences productivity.

2.5. Attachments relevant to this section

- **Attachment B:** Peetz, D, 'Does Industrial Relations Policy Affect Productivity?', *Australian Bulletin of Labour*, 38 (4), December 2012, 268-292.

3. Bargaining & Industrial action

Various measures have been proposed to intervene in the bargaining relationship, ostensibly to promote productivity. This section briefly discusses this issue, focusing on proposed interventions in the bargaining process, and general patterns of industrial conflict.

3.1. Proposed interventions in bargaining processes

One recent example of a proposed intervention in the bargaining relationship, said to be targeted at promoting productivity, is the Fair Work Amendment (Bargaining Processes) Bill 2014, which proposes to create additional criteria for the certification of an agreement and, before that, for the allowance of protected industrial action. Again, I expect that other submissions may make arguments about the importance of protecting the right to strike and the relevance of Australia's obligations under international law to issues such as this. For reasons of time, I do not specifically address these issues and instead merely focus on the relationship between such proposals and the philosophy of enterprise bargaining,

In particular, item 4 in the Fair Work Amendment (Bargaining Processes) Bill would give the Fair Work Commission (FWC) a role in determining whether a

claim was 'manifestly excessive' or 'have a significant adverse effect on productivity' before allowing a protected action ballot to occur.

This proposal is of concern because it essentially returns wage bargaining to a situation like that existing over two decades ago.

For a brief period after the Australian Industrial Relations Commission approved the introduction of enterprise bargaining in October 1991, it had played a key role in the vetting of agreements for productivity and wage increases.

Yet all parties tired quickly of this. Employers, unions and the government all felt it slowed the adoption of bargaining, and led to a third party intervening in matters that were rightly the preserve of employers and workers: what outcomes in terms of wages and productivity were most suited to the conditions in that enterprise? The direct parties were in a much better position to determine these than the Commission.

So with widespread support in June 1992, the Government removed the Commission's power to vet agreements for productivity and wage increases, as the participants were "accepting greater responsibility for finding their own solutions",[42] and introduced the "no disadvantage test" for agreements. The latter remained until removed by WorkChoices in 2006 (before being reintroduced and strengthened as the "better off overall test" under the Fair Work Act). But no government sought to take responsibility away from the parties for determining workplace productivity and wage increase outcomes, until now.

The Coalition parties, which for many years sought to "prevent unwarranted interference by third parties in agreement making"[43] (a phrase endorsed by Minister Abbott when introducing a 2004 Bill), now appear to plan in government to promote such interference. It is against the philosophy underpinning the shift to enterprise bargaining.

Indeed, it is unclear what problem the Bill, or other proposals for intervention in bargaining, is seeking to solve. A couple of anecdotal examples were used in the second reading speech to demonstrate allegedly excessive wage claims made by particular unions in particular disputes, and thereby demonstrate the need for wage restraint and productivity improvements by using the offices of the FWC. However, a couple of anecdotes do not demonstrate a general problem which requires legislative intervention, especially when the general philosophy of enterprise bargaining is to leave the parties to accept greater responsibility for finding their own solutions and to prevent unwarranted interference by third parties in agreement making. Inevitably, when parties are left to their own devices, there will be some outcomes that are not what those in government would prefer. But that is simply what happens, and unless the system as a whole is delivering adverse outcomes in terms of productivity, wages and industrial conflict that would require a major rethink, or there are adverse equity consequences, it is unclear why such interference should occur.

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42 Eg Brown, R, Hansard, House of Representatives, Second Reading: Industrial Relations Legislation Amendment Bill, Canberra, 24 June 1992, p3793.

43 Abbott, T, Explanatory Memorandum, Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2002, House of Representatives, Canberra.

At the time the policy was developed and legislation presumably being prepared, the Minister was warning that "we risk seeing something akin to the 'wages explosions' of the pre-Accord era, when unsustainable wage growth simply pushed thousands of Australians out of work".[44]

However, at present:

- wages growth is low – indeed it is at historically low levels, the lowest since the wage price index commenced in the mid 1990s (Attachment A, Figures 1), far lower than during the pre-Accord period (Attachment A, Figure 2), and numerous predictions of wage explosions[45] have failed to materialise;
- wage increases through enterprise agreements are also subdued, sitting around the lowest rates in two decades (Attachment A, Figure 3);
- working days lost through industrial disputes are at historically low levels (Attachment A, Figure 4);
- productivity growth has recovered from the slump during and following the WorkChoices era (see Attachment B);
- moreover, the evidence cited earlier suggests that industrial relations policies of governments, particularly those aimed at shifting power towards or away form employers or unions, have little impact on productivity anyway (see Attachment B).

If anything, public policy is more likely to influence productivity growth in a sustainable way by promoting employee participation in decision making, for which the evidence of a link to productivity is considerably stronger (see earlier section). If any additional requirements are to be added to agreements, it would be more appropriate to strengthen requirements regarding mechanisms for ongoing consultation. A weak version of such a requirement was in the Industrial Relations Reform Act (it required the parties to consider such a mechanism but enabled them to opt out if they wanted to) but it was removed after a short period through the Workplace Relations Act. The Fair Work Act 2009 contains a slightly stronger provision (s205), requiring agreements to include a clause requiring employers to consult the employees covered by the agreement about major workplace changes that are likely to have a significant effect on the employees, and allowing for employee representation for that consultation.

To summarise, the Bill and other attempts at intervention in the bargaining process appear to be unnecessary, addressing a problem that does not exist, and counter-productive to the philosophy of the enterprise bargaining system.

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44 Abetz, E, "Industrial Relations After the Thirty Years War" Address to the Sydney Institute, Sydney, 28 January 2014, http://resources.news.com.au/files/2014/01/28/1226812/248439-aus-web-file-news-after-30-year-war-speech-pdf.pdf

45 McCrann, T 'Beware a wage explosion', Courier-Mail, 7 May 2008; AAP, 'ACTU denies $70m IR campaign', Daily Telegraph, 16 April 2007; 'Memo world: Wake up and smell the debt', The Australian, 8 February 2010; 'Avoiding a wages breakout', The Australian, 26 November 2010; 'IR Rigidity eroding confidence', The Australian, 2 February 2011; 'Unions threaten a wages war', The Australian, 22 February 2011; 'Gillard's intervention risks a wages breakout', The Australian, 12 November 2011; 'Productivity strategy is missing', The Australian, 25 November 2011.

3.2. General patterns of industrial conflict

To properly understand contemporary patterns of industrial conflict it is necessary to place them in their historical and national context. Attachment C to this submission, published as a chapter in a 2012 book, does this by analysing industrial conflict at the macro level under the Fair Work Act and its predecessor in the context of long term trends. It considers patterns in the incidence of disputes, their causes, duration and method of settlement, distinguishes between contingent and unconditional strikes and considers the implications for how changes to bargaining regimes have affected bargaining behaviour. It shows how, in recent years disputes have become less common, more concentrated in the times during which new collective agreements are negotiated, and longer. The role for negotiation in ending strikes has not increased.

The easing of restrictions on union actions under the FW Act has so far had little impact on strike activity. Short, unconditional strikes were never just about grievances and protests; they were always an important tactic in bargaining campaigns. They have now increased in duration, and importance, because of procedural requirements around disputation. Despite nearly two decades of enterprise bargaining, there are still a significant number of short disputes and disputes on non-enterprise bargaining matters, though the Fair Work Act has been accompanied by a fall in the level and significance of unprotected action. Unprotected strikes remain shorter than protected strikes, as unions and members need to minimise the risks associated with them.

The patterns of conflict reflect the institutional history of Australian industrial relations and the way that parties, habituated by former systems, have adapted the rules of successive legislative regimes.

3.3. Attachments relevant to this section

- **Attachment A:** Charts on wages and industrial conflict
- **Attachment C:** Peetz, D, 'Industrial Conflict with Awards, Choices and Fairness', Anthony Forsyth & Breen Creighton (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, New York: Routledge, 2012, 159-181.

4. Individual flexibility arrangements and individual contracts

There have been two statutory individual working arrangements in recent years: Australian Workplace Agreements (AWAs), introduced in the Workplace Relations Act in 1997, and amended by the WorkChoices legislative amendments

from 2006 before being abolished (with some transitional arrangements) in 2008; and Individual Flexibility Arrangements (IFAs), introduced through the Fair Work Act in 2009. To comprehend IFAs it is first necessary to understand the experience with AWAs.

4.1. Australian Workplace Agreements

In introducing the 'WorkChoices' reforms the then federal government argued that they would encourage increased wages, particularly through Australian Workplace Agreements (AWAs) which it actively encouraged. Indeed, Australians were told that AWAs paid higher wages than collective agreements and nearly double what awards paid. Alison Preston and I obtained unpublished data from the Australian Bureau of Statistics (ABS) Employee Earnings and Hours (EEH) Survey for May 2006 (released March 2007), to examine whether this was the case – in what circumstances and in what ways do AWAs affect earnings, particularly by comparison with collective agreements, which are actively discouraged by the WorkChoices legislation. The EEH survey was the most reliable (indeed, the only) source of data on earnings of employees under AWAs. The most representative data in this survey were those concerning average total hourly cash earnings of non-managerial employees. The text of an article containing some of our findings is at Attachment D. A summary of our findings follows.

Only limited quantitative data on changes in conditions under WorkChoices AWAs were published by the then Office of the Employment Advocate (OEA). However, data leaked to Mark Davis of the *Sydney Morning Herald* revealed that in May-September 2006, 68 per cent of AWAs abolished penalty rates (up 26 per cent on 2002-03), 52 per cent abolished overtime pay (up 107 per cent on 2002-03) and 76 per cent excluded shiftwork loading. They also gave the first indication of the extent to which many conditions had been 'modified' through AWAs. For most 'protected' award conditions, even amongst those AWAs that do not abolish that condition, the majority would 'modify', that is reduce it. Hence *around nine tenths of AWAs either abolished or reduced penalty rates*. Similarly, 88 per cent of AWAs abolished or 'modified' overtime rates; 89 per cent either abolished or 'modified' shiftwork loading; 82 per cent abolished or 'modified' public holiday payments; and 83 per cent abolished or 'modified' rest breaks.

In the face of widespread public concern about the loss of conditions under WorkChoices, the then federal government on 4 May 2007 announced amendments to WorkChoices, including a new 'fairness test' on agreements. However, this test was weaker than the former 'no disadvantage' test, covering fewer award conditions. The data in our analysis probably painted a more positive picture toward AWAs than if the survey had been undertaken in 2007, as many AWAs still valid in 2006 had been finalised before the WorkChoices amendments took effect.

One limitation was that most of the wage data were expressed as averages, which could be biased by the inclusion of a small number of observations with very high earnings. Some 69 per cent of AWA employees earned less than

average AWA hourly earnings. A more representative indicator of the situation of the 'typical' worker was provided by median earnings, and we used these data wherever available.

We decided to test some possible hypotheses explaining the use of AWAs. If AWAs were used predominantly for flexibility to benefit both employees and employers, then they should have pretty consistently provided for higher hourly pay than registered collective agreements, across different employer types. Conversely, if AWAs were predominantly used for cutting labour costs and avoiding unions, we would have expected to see wide variations in the relationship between AWA earnings and earnings under registered collective agreements. The highest AWA premiums would be in situations where union avoidance strategies were important, while there would be shortfalls for AWA employees where union avoidance strategies were not important. Where cost-minimisation strategies were preferred, we would expect shortfalls for AWA employees to be most severe amongst workers with low skills levels or in low demand, highly competitive areas. At the same time, institutional and market arrangements in each industry and occupation would be expected to also influence outcomes. For example, particular occupations within an industry may be traditionally non-union. We had to take this into account in understanding the patterns of earnings by industry and occupation.

We found the ABS data showed that median AWA earnings were below median earnings for CA employees. Thetypical (median) AWA worker earned 16.3 per cent less than the median CA worker. The distribution of earnings under registered individual contracts was more unequal than under collective agreements and the gender pay gap for workers on AWAs was greater than for workers on collective agreements or awards. There was little evidence that individual contracting raised wages through raising productivity. The link between contracting and pay appeared contingent, varying between occupations, industries and firm size bands, and dependent upon employees' position in the labour market and employers' use of union avoidance strategies.

We found a very stark relationship between firm size and the earnings ratio. In organisations with less than 500 employees, AWAs paid less than CAs. The wage shortfall widened as organisations get smaller. Hence the shortfall was 3.5 per cent amongst organisations with 100-499 employees, rose to 12.4 per cent in organisations with 50-99 employees, 13.6 per cent in organisations with 20-49 employees and was a very substantial 26.3 per cent in organisations with less than 20 employees. Amongst large organisations with more than 1000 employees (the majority of whom are covered by collective agreements), there was a wage premium for AWAs of 30.8 per cent.

AWA employees in the majority of industries received a lower average hourly rate than their counterparts did on CAs. The industry with the highest average wage premium for AWAs (worth 50 per cent) was communication services, the second highest premium was in government administration and defence (33 per cent) and the third highest premium was in finance and insurance (22 per cent). These were all industries with well documented efforts by at least some

organisations to use AWAs to reduce union influence, where employees in the more highly remunerated parts of an organisation are hired on individual contracts. In mining, however, AWA employees earned 3.6 per cent less than CA workers. This was probably influenced by bifurcation between coal and metals mining. AWAs paid on average well below CAs in manufacturing, construction, transport and storage, health and community services; property and business services; and 'personal and other services'.

For the top three occupational groups, AWA employees earned more on average than CA employees. Professionals were clearly a group with high labour market power. At the other end of the labour market, labourers and related workers experienced a consistent AWA pay shortfall – their wages were 17 per cent lower than wages of workers on CAs. In all, five of the six lowest occupational groups revealed an AWA pay shortfall compared to CAs. The most disadvantaged group appeared to be female labourers and related workers – those on AWAs were paid 26 per cent less than similar women on CAs. Indeed, female labourers and related workers on AWAs were receiving 20 per cent less even than the award-reliant average for that occupation.

Overall, the data supported the hypothesis that AWAs were frequently used for cost cutting or union avoidance. Very large firms and federal government departments faced the real prospect of unionisation and had the resources and sophistication to mount concerted union avoidance strategies. They could use AWAs as part of that, offering wage premiums to induce workers to sign AWAs and/or financially penalising those who sought to remain on collective agreements by refusing to promote them unless they sign an AWA. Smaller firms were not likely to follow this approach, as unions found them logistically difficult to organise anyway. So smaller firms were more likely to use AWAs as a cost minimisation tool, presumably through cutting penalty rates, overtime pay and other 'protected' award conditions. The industry pattern was also consistent with this proposition, with AWAs generally paying above CAs in industries where union avoidance strategies were important and below CAs in industries where labour cost minimisation was important. Structural factors within industries also played a role in explaining some industry patterns.

Had AWAs been used as a device for promoting flexibility for the mutual benefit of employees and employers, we would have expected that employees in small and medium firms would have gained in roughly similar proportions to those in large firms, and AWA gains would have been seen across all or at least in most industries. This clearly was not the case.

The pattern of earnings by occupation was consistent with the hypothesis that workers with low bargaining power in the labour market arising from low skill levels are most adversely affected by individual bargaining through AWAs, while occupations with high skill and short demand appear able to maintain high wages under AWAs and possibly attract a union avoidance premium in some cases.

Given the known loss of conditions under WorkChoices AWAs, outcomes for WorkChoices AWAs would very likely be worse, even with the operation of the 'fairness test'. The data likely understated the gap between AWAs and union CAs, as the CA data include non-union CAs (which had, on average, lower wage increases than union CAs) and were also depressed by the impact of free riders on bargaining power of unionised workers negotiating new CAs.

Although the award-reliant group was not representative of award rates, being in most industries disproportionately concentrated at the lower end of the award pay structure, two related groups of workers (in which a large proportion of workers are award-reliant) give us an insight into the effect of AWAs compared to awards. In hospitality, AWA workers received an average of 2 per cent less than average award wages. Female casual workers on AWAs received average earnings some 7.5 per cent below average award earnings. These figures suggest that AWAs could often lead to earnings falling below the award average. They also reinforced that individual 'bargaining', through AWAs, was especially detrimental for women, particularly when they lacked labour market power.

Overall, AWAs were commonly associated with poorer outcomes for typical employees than registered collective agreements. While AWAs sometimes attracted wage premiums, associated with union avoidance strategies, these mainly affected a small number of industries and some very large organisations. Where union avoidance was not a common issue, for example in small organisations, the negative impact of AWAs on earnings became very stark. The impact of AWAs was worst for those people without unique skills, who did not have strong bargaining power in the labour market.

4.2. Individual Flexibility Arrangements

As mentioned, IFAs were introduced in the Fair Work Act. They were not portrayed at the time by the then government as a replacement or substitute for AWAs, as they had a different legislative base and far more protections and limitations than had AWAs.

The current government has proposed amendments to the operation of IFAs. The amendments are attracting a lot of attention, including from unions, some of whom claim they will make IFAs like the Australian Workplace Agreements (AWAs) that were prominent in the WorkChoices period and that famously cut overtime pay, penalty rates and other "protected" award conditions. (Further details on the effects of AWAs are in Attachment D.)

The Government claimed that this was merely implementing recommendations of the Review of the Fair Work Act[46] that was commissioned by the previous Labor government, as per its election commitment.

The Fair Work Act abolished AWAs and required that all awards include a standard "flexibility term". This provision enables the establishment of IFAs between individual employees and an employer, identifies which terms of a modern award may be varied by an IFA, specifies that the employee and the employer must genuinely agree and that the agreement must satisfy a "better off overall test" (BOOT) for the employee, along with various other procedural requirements. Enterprise agreements must also contain a flexibility term, but unlike awards the flexibility term may be negotiated between the parties. IFAs are not lodged with any agency, but can be inspected on site by the Fair Work Ombudsman (FWO). If the IFA is below the legislative standard, the employer is then liable at law.

A useful source of information on IFAs was a survey undertaken by Fair Work Australia in 2011.[47] The key points of relevance were:

- Very few employers (about one in nine) used IFAs, because most said they do not need them. Less than 1% believed the provisions are too inflexible. Overall, probably fewer employees were on them than were on AWAs at their peak.

- Most IFAs were initiated by employers, not employees. So the flexibility is predominantly for the benefit, in the first instance, of the employer.

- Many employees on them were required to sign as a condition of getting or keeping their job – this was the case in half the employers who used IFAs. This appears a frequent breach of section 344[c] of the Fair Work Act.

- Many IFAs (three quarters) were used to formalise what were previously informal and, by implication, illegal practices.

- Many employees (about four fifths) believed they are better off as a result of an IFA, but we could not objectively tell, and over a quarter of employers did not scrutinise them against the BOOT test.

So, many IFAs operated to formalise previously illegal practices and many erre then formalised illegally. We have to think about IFAs in the context of the overall problem with compliance with the minimum wages and conditions in awards.

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46 McCallum, R., Moore, M., & Edwards, J. (2012). Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation, Report of the Fair Work Act Review. Canberra: Department of Education, Employment and Workplace Relations.

47 O'Neill, B (2012), General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements 2009–2012, Fair Work Australia, Melbourne, November.

AWAs were routinely scrutinised by a government agency, the "Employment Advocate". Scrutiny was sometimes weak,[48] but it was a constraint on badly designed AWAs. IFAs are not routinely scrutinised by anybody. They are held in the payroll office of the employer. If the FWO comes to a workplace to inspect the wage records, and an IFA is below standard, then the employer is in breach of the award. But this only happens if they are found out. Either the employee has to know to make a complaint (and if they knew they were being ripped off, they might not have signed) or the FWO has to know to do an inspection of that workplace.

There is little doubt that compliance with industrial law has improved since 2005,[49] through both the Workplace Ombudsman and the FWO, and FWO focuses its efforts on the industries where workers are more likely to be vulnerable.[50] But it cannot be everywhere.

The proposed changes that gained attention were those to extend full IFAs to enterprise agreements (EAs), whether unions agree or not. About half of EAs have unrestricted IFAs, the other half have some restriction on them. But even if they have no formal role, unions in workplaces with agreements will be keen to ensure that any new IFAs do genuinely satisfy the BOOT test. It is the IFAs in workplaces that do not have unions – especially where pay is set mostly by awards – that are of greater concern.

The bigger issues are two lightly heralded changes to IFAs. The current government claims these are implementing the recommendations of the Review of the Fair Work Act that occurred under Labor, but this is not quite the case.

One amendment makes it easier for employers to avoid prosecution for IFAs that are sub-standard. This is done by requiring the employer and employee to sign a "genuine needs" statement indicating that both agree the employee will be better off. This is then prima facie evidence that the parties genuinely believed the IFA met the BOOT test and typically prevents the employer from being prosecuted if it is sub-standard. No doubt, consultants that advise employers on making agreements will advise them that, if they get their employees to sign this, employers will be safe, no matter what is in the agreement.

The Fair Work Review recommended that employers have some improved defences against alleged breaches but that, importantly, this should only occur where employers have notified the FWO they have signed IFAs with employees,

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[48] Peetz, D. (2006). Brave New Workplace: How Individual Contracts are Changing our Jobs. Sydney: Allen & Unwin.

[49] Maconachie, Glenda J. and Goodwin, Miles (2009) Enforcing minimum labour standards in Australia from 2010 : correcting or compounding problems. In: Labour, Capital and Change – Proceedings of the 23rd Conference of the Association of Industrial Relations Academics of Australia and New Zealand, 4 – 6 February, Newcastle, Australia; Howe, J, Hardy, T & Cooney, S (2014), *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012*, Melbourne: Centre for Employment and Labour Relations Law, Melbourne Law School.

[50] James, N (2014), 'Risk, reputation and responsibility', speech to ALERA 2014 National Conference, Fair Work Ombudsman, Canberra.

how many and with whom. There is no such employee protection in the new Bill and this condition is not mentioned in the explanatory memorandum. Yet the Coalition's pre-election policy promised to implement the recommendation that contained this condition. The Review team thought long and hard about making its recommendations here, and regarded all of them to be necessary to prevent exploitation. Cherry-picking parts of a recommendation while ignoring other parts is a recipe for heightened exploitation.

The second major change is allowing non-monetary benefits to be taken into account in assessing whether workers are better off. Although done by a "legislative note" rather than a substantive amendment, it has led to claims that employees could be paid in pizza.[51] The Fair Work Review dealt with this issue, but it recommended that in such circumstances "the value of the monetary benefit foregone is specified in writing and is relatively insignificant". No such limitation appears in the legislative note.

IFAs cannot be too like AWAs because that would be politically too risky for a Government keen to avoid any mention of WorkChoices.[52] But nor do the changes simply implement an election promise or Labor's Fair Work Review. It is not correct to say that the government is reintroducing the WorkChoices AWAs. Instead its proposals are something quite different, something that focuses much more on vulnerable workers' lack of knowledge of their rights and entitlements under industrial law, and the difficulty that enforcement agencies, unions and others have in reaching, advising or protecting them.

It is something that would make exploitation of vulnerable workers through underpayment easier to undertake than at present, while being much harder to research and detect than it was with AWAs. The proposed amendments involve heightened risk for vulnerable workers

4.3. Attachments relevant to this section

- **Attachment D:** Peetz, D, 'How well off are employees under AWAs? Reanalysing the OEA's employee survey', in M Barry & P Brosnan (eds) *New Economies: New Industrial Relations,* Proceedings of the 18th AIRAANZ conference, Volume 1: Refereed Papers, Association of Industrial Relations Academics of Australia and New Zealand, Noosa, February 2004, pp371-380.

- **Attachment E:** Peetz, D & Preston, A, 'Individual contracting, collective bargaining and wages in Australia', *Industrial Relations Journal*, 40(5), September 2009, 444-461.

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[51] Price, J (2014), 'Fair Work Amendment Bill is a recipe for exploitation', *Brisbane Times*, 1 September.

[52] eg 'The phrase WorkChoices is dead. No one will ever mention it ever again', in ABC, 'ETS Bill Voted Down', *7.30 Report*, 2 December 2009, http://www.abc.net.au/7.30/content/2009/s2760191.htm.

- Peetz, D, *Assessing the impact of 'WorkChoices' – One Year On*, Report to Department of Innovation, Industry and Regional Development, Melbourne, 19 March 2007, 100pp.

5. Minimum wages

I do not attempt here to summarise the extensive literature on minimum wages and employment, one of the most researched issues in labour economics, but one with no clear consensus regarding the bottom line. Other submissions will no doubt cover this issue. This section will instead cover just one issue: the proposals by the Commission of Audit regarding the minimum wage.[53]

5.1. The Commission of Audit recommendations on minimum wage fixing

The Commission of Audit recommended fundamental changes to the fixing of the minimum wage including, over time, cuts averaging 21% across the workforce, and up to 31% for South Australian workers and 33% for Tasmanians. (Minimum wages should fall, it recommended, from 56% to 44% of average weekly earnings, and vary between states.) It also recommended (but in an Appendix,[54] not the main volume of recommendations on which most readers focused) that the responsibility for fixing minimum wages be removed from the independent tribunal, the Fair Work Commission, and be made "administrative"; that is, put in the hands of government.

With minimum wage fixing transformed in this way, the setting of award wages for all workers on classifications above the minimum wage would also be affected, as award wage relativities are integrally related to minimum wages. Indeed, it is difficult to see an independent industrial relations tribunal surviving such change. Other aspects of pay, such as penalty rates, overtime and allowances – previously the target of the WorkChoices legislation (as discussed earlier) – would eventually be in the hands of government wage setters. The tribunal might end up just handling unfair dismissals and other disputes, as permitted by statute.

The recommendation was odd because, other things being equal, a cut in minimum wages will lead to an increase in Commonwealth expenditures and the Commission of Audit was asked to make recommendations on (reducing) government expenditures. At any given level of benefits, spending on benefits or pensions is higher when minimum wages are lower. This is because people on a lower minimum hourly wage, especially those working only part-time hours, would likely be eligible for higher partial pensions or benefits. This would

[53] *Towards Responsible Government: The Report of the National Commission of Audit*, February 2014.
[54] *Towards Responsible Government: Appendix to the Report of the National Commission of Audit*, February 2014, p324.

increase, not reduce, the deficit - counter to the stated purpose of the Audit Commission.

The Audit Commission cited one reason for abandoning independent minimum wage fixing – that cutting minimum wages would reduce unemployment. It cited one piece of evidence in support of this claim – that minimum wages are higher in Australia than in most other countries. It demonstrated this with a chart[55] depicting 2012 minimum wages in US dollar purchasing power parities in six countries chosen by the Commission. Yet Australia had one of the lowest unemployment rates amongst developed countries – and the lowest amongst the six countries in the Commission's selected comparison group.
Australia's youth unemployment rate is also the lowest of the six. The USA, with the lowest minimum wage, had the second highest unemployment rate among the six. There, over 600 economists, including seven Nobel laureates, petitioned for an increase in minimum wages.[56]

How did the Commission deal with the budgetary consequence of this recommendation? By recommending a tightening of the withdrawal rate for pensions and benefits. That is, if a person was on a pension or benefit and working part-time, the Commission proposed that the government claw back 75% of each extra dollar earned (rather than the present 50% or 60%). It would mean pensioners and beneficiaries pay much higher "effective marginal tax rates" than even millionaires.[57] The situation where people lose most of the additional income you earn is often referred to as a "poverty trap" and seen as a barrier to labour force participation. There is little point in working an extra five hours a week if, after the government clawed back its take, someone only receives $3 per hour? It would not cover transport costs, let alone child care.
The Commission claimed that these increased barriers to working will "improve incentives to work".[58] Yet earlier in its report it recognised that withdrawing family tax benefits as you earn more, along similar lines, "reduces the incentive to work".[59] Such self-contradiction was remarkable and illustrated the shallow thinking on minimum wage thinking when considered in the context of the fiscal implications.

6. Flexibilibilty

If there is one buzzword that, despite its vagueness, has dominated industrial relations debate over three decades, it would be "flexibility". It is undeniably

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[55] Chart 9.1.4 in the Commission of Audit report, p147.
[56] Economic Policy Institute (2014) Over 600 Economists Sign Letter In Support of $10.10 Minimum Wage: Economist Statement on the Federal Minimum Wage, 14 January, http://www.epi.org/minimum-wage-statement/
[57] Martin, P (2014), 'Hockey's Commission of Audit anything but responsible', *Age*, 5 May.
[58] *Towards Responsible Government: The Report of the National Commission of Audit – Phase One*, February 2014, p146.
[59] *Towards Responsible Government: The Report of the National Commission of Audit – Phase One*, February 2014, p115.

good, seen beside its evil twin "rigidity". Labour flexibility, 'like beauty or taste', can 'mean all things to all people' and is a 'catch-call for improving labour productivity'.[60] Words convey emotions that legitimise the user's perspective. One person's flexibility is another person's uncertainty; just as one person's stability is another person's rigidity. So flexibility might be "good" or "bad". First, we need to distinguish between flexibility *for* workers and flexibility *by* workers.

Flexibility *for* workers occurs when companies change work practices or working time to better suit worker needs. Allowing workers to take time off to attend school concerts, enabling job sharing, permanent part-time work, '48/52' arrangements[61] – these are all examples of employers being flexible for workers. These things are mostly effective in enabling better work-life balance,[62] and are often aimed at increasing job satisfaction, attraction, or retention[63] of valuable employees. Flexibility *for* employees - when companies change work practices or working time to better suit worker needs – may be associated with improved firm performance via measures such as better employee morale, reduced absenteeism and turnover, and a larger and higher quality talent pool, and many employers see these as positively affecting productivity.[64] I return to this topic shortly.

But when employers or politicians complain about a lack of flexibility, they usually mean flexibility *by* workers. The following sub-section deals with that issue.

6.1. Flexibility by workers

Here researchers distinguish between two types of flexibility *by* workers. One is *functional flexibility* – the employer's ability to move workers between activities and tasks, in line with changing workloads or production methods. It often requires multi-skilling of workers. It may lead to employees doing more work because they do more varied work. The other is *numerical flexibility* – the employer's ability to adjust labour inputs to changes in output. That means cutting or increasing the number of workers or their hours worked, classifying them as casuals or contractors, or varying the wages they are paid.

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[60] Burgess, J & Macdonald, D, 'The labour flexibility imperative', Journal of Australian Political Economy, 27, 15-35.

[61] '48/52 weeks per year working arrangements (48/52) is a scheme under which a full-time academic or professional employee may work 44 weeks of a negotiated 12 month period. An employee participating in the 48/52 scheme has effectively had four weeks leave without pay approved but rather than lose the value of the four weeks salary in one period, the employee has obtained approval to spread the salary impact of four weeks leave without pay over 26 pay periods.'. University of Southern Queensland, '48/52 working arrangements', Toowoomba, https://www.usq.edu.au/hr/empcond/catemploy/4852

[62] Skinner, N & Chapman, J (2013), Work-life balance and family friendly policies, *Evidence Base*, 4, 2013, https://journal.anzsog.edu.au/publications/10/EvidenceBase2013Issue4.pdf

[63] Hesse, J (2014) 'Ignore flexible working at your peril', *Real Business,* 5 February, http://realbusiness.co.uk/article/25418-ignore-flexible-working-at-your-peril

[64] Heathrose Research (2010) Flexible Work Arrangements Literature Review Report to the National Advisory Council on the Employment of Women (NACEW), NACEW, Wellington.

However, advocates of flexibility[65] often mean flexibility *by* employees. Functional flexibility—the ability of management to deploy labour to different tasks—typically increases labour productivity, as it means the same worker is able to undertake more activities and, most likely, generate more output.

It is not quite so clear-cut for numerical flexibility—that is, the employer's capacity to easily adjust the quantity of labour inputs. On the one hand, if 'quiet' periods for labour are reduced, an employer can avoid falls in labour productivity in those periods, especially where employees want casual work. On the other hand, insecurity and uncertainty also associated with casual work are likely to have negative impacts on morale, commitment and retention; training and skill development may also be reduced.[66]

Numerical flexibility is sometimes linked to loss of quality in output, and often to loss of job quality[67] – because workers typically don't like uncertainty in wages, hours or job security. Unions actively oppose cuts in pay and conditions, because that's what workers want them to do. There is nothing unusual about resistance to having things taken away from you. Losses are felt far more strongly than gains. It is an innate part of human and indeed animal nature. It is a phenomenon repeatedly found in psychological experiments and, indeed, in nature. [68] Resistance to losses is not restricted to workers; but workers have the least they can afford to lose.

So is "flexibility" in labour markets (which, for many of those who write about it, means flexibility by workers) necessarily a good thing? In the lead up to WorkChoices, and since its repeal, there were claims our industrial relations system lacked flexibility.

Yet by objective measures, the level of flexibility *by* employees in Australia is amongst the highest. The Organisation for Economic Co-operation and Development (OECD) analysed a number of aspects of "inflexibility", referring to them as "employment protection legislation". It found (even before 'WorkChoices') that Australia had one of the lowest levels of job protection in the OECD.[69] Several countries had high job protection and low unemployment, including Norway and the Netherlands. Overall, compared to other OECD

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[65] eg Engineering Employers Association, South Australia (2002) Submission to Productivity Commission's Review of Automotive Assistance Position Paper, Adelaide, 2 August, http://www.pc.gov.au/inquiries/completed/auto/submissions/engineering_employers_association,_south_australia2/subpp100.pdf

[66] Day, M & Buultjens, J (2007) 'Casual employment and commitment: a case study in the hospitality industry', AIRAANZ conference, Auckland; Buchanan, J, (2004) 'Paradoxes of significance: Australian casualisation and labour productivity', ACIRRT working paper no. 93, ACIRRT, Sydney, University of Sydney, Australian Centre for Industrial Relations Research and Training, 2 August 2004.

[67] Bamberry, L (2011) '"As disposable as the Next Tissue Out of the Box ...": Casual Teaching and Job Quality in New South Wales Public School Education', *Journal of Industrial Relations,* 53(1), 49-64.

[68] Kahneman, D. (2011). *Thinking, Fast and Slow*. New York: Farrar, Straus and Giroux.

[69] Organisation for Economic Co-operation and Development (2004), Employment Protection Regulation and Labour Market Performance, OECD Economic Outlook, Paris: OECD, July, eg Chart 2.1

countries, Australia also has high rates of part-time employment, temporary employment and people working very long hours. Most countries do not allow long-serving employees to be denied sick or recreation leave. We call it casual employment, and it affects a quarter of employees.

The OECD was one of the strongest advocates of labour market "flexibility". Yet during the global financial crisis, something happened to force a rethink of its position. Across the North Atlantic, gross domestic product (GDP) fell as the crisis deepened. Theory said the US labour market, with its far greater flexibility than that in Europe (for example, workers could be fired "at will" in the US), should adapt better than its European counterpart. Reality was the reverse. The US experienced a smaller fall in GDP between 2008 and 2009 than did Europe yet it suffered a greater drop in employment. In response to the economic crisis, average employment in the US fell by 3.8 per cent between 2008 and 2009, over double the fall in EU employment of 1.7 per cent. Yet GDP fell by considerably more in the EU (4.2 per cent) than in the US (2.4 pet cent).[70] The different employment outcomes were not a reflection of underlying differences in productivity growth trends – between 1987 and 2007, average labour productivity growth in the US was only 0.1 percentage points above Europe's.[71] The different employment outcomes principally resulted from very different approaches to the retention or abandonment of labour. The OECD, in 2009, found no evidence that "reforms" to promote flexibility had made labour markets "less sensitive to severe economic downturns than was the case in the past". It recommended improvements in income security it had previously dismissed as inhibiting flexibility.[72]

We can no longer say that flexibility by employees is necessarily a good thing. But we can say that the rhetoric of flexibility is often a device for transferring risk onto workers – who can least afford it.

The remainder of this section therefore focuses on flexibility *for* employees, and in particular the 'right to request' provisions.

6.2. The 'right to request' a change in working arrangements

The Fair Work Act contains a "right to request" enabling some employees to request changed working arrangements. Under s65 of the Fair Work Act, employees are entitled to request a change in working arrangements if they either: are parent of a school-age or pre-school child; are a carer; have a disability; are aged 55 or older; or are experiencing, or caring for someone suffering from, domestic violence. Employees with less than a year's service, and

[70] Organisation for Economic Cooperation and Development (2010). OECD.StatExtracts. online database. Paris. <http://stats.oecd.org/>.

[71] Organisation for Economic Cooperation and Development (2010). OECD Productivity Database: OECD.Stat Extracts. (spreadsheet). Paris, OECD. <http://stats.oecd.org/Index.aspx?DatasetCode=PDYGTH>.

[72] OECD (2009) 'The Jobs Crisis: What Are the Implications for Employment and Social Policy?', *OECD Employment Outlook*, Paris: OECD, July, chapter 1, p39.

most casuals, are excluded from eligibility. The change in working arrangements might include different start or finish times, shorter hours, or a changed location of work. But it is merely a "right to request", not a "right to have". There is no appeal from the employer's decision. It reflected preceding ALP policy and echoed, but was "generally weaker" than, legislation in various European countries,[73] though some amendments since the original Bill have increased the range of employees eligible to access the right to request.

Consultation

The steps involved in assessing an employee's request are inadequate. Although the Exposure Draft of the National Employment Standards referred to how the

> United Kingdom experience has demonstrated that simply encouraging employers and employees to *discuss options* for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees[74]

and stated that, on this issue, the

> proposed flexible working arrangements…sets out a process for encouraging discussion between employees and employers[75]

the law contains no obligation on the employer to discuss options, or even the request, with the employee. All that is required is a written response from the employer setting out the reasons for refusal (which must meet certain criteria) if it has been refused. The UK right to request flexibility includes the following procedural rights for employees:

> An employer must hold a meeting to consider the request within 28 days after the date an application is received. (This is not necessary if the employer knows enough from the paperwork to fully agree to the employee's request without a meeting.)
>
> An employee can, if they wish, have a companion (another worker employed by the same employer) to accompany them to the meeting.
>
> > The companion must be a worker employed by the same employer, but not necessarily working at the same premises, and he or she can be the workplace trade union representative.
> >
> > The companion can address the meeting or confer with the employee during it, but is not allowed to answer questions on the employee's behalf.

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[73] Charlesworth, S & Campbell, I (2008) 'Right to Request Regulation: A Panacea for Work/Family Imbalance?' Paper presented to AIRAANZ conference, Melbourne, http://www.mngt.waikato.ac.nz/departments/Strategy%20and%20Human%20Resource%20Management/airaanz/proceedings/melbourne2008/nonref/papers/S.%20Charlesworth,%20I.%20Campbell.pdf

[74] p10, emphasis added

[75] p12

> > If the companion is unable to attend the meeting, the employee should re-arrange the meeting for a date within seven days of the originally proposed time, ensuring the new time is convenient to all parties; or, consider an alternative companion.
>
> The employer must write to the employee informing them of their decision within 14 days after the date of the meeting.[76]

If there is no obligation on an employer to meet with the requesting employee, then the employer is much less likely to understand the circumstances of the request. This is especially the case for workers who might be disadvantaged in the labour market, including younger workers, and workers from a non-English speaking background, who may have difficulty in clearly expressing in writing all the aspects of their case.

To fully explain their needs, or to enable the employee to properly understand the implications of what is being said or proposed by the employer in response to the request, many employees will need the support of an accompanying person. This is especially the case for employees who are less confident, less articulate, less familiar with English, or less experienced.

Similarly, if there is no obligation on an employer to meet with the requesting employee, then the employer is much less likely to take the request seriously, or to feel a sense of obligation to attempt to meet the employee's request within the needs of the business. A meeting will reinforce the employer's appreciation of the personal circumstances of the employee concerned.

Accordingly, a right to a meeting, including a right to bring along a companion, should be included in the right to request, and should be modelled on the UK framework. This would go after subsection 65(3) and say:

> > If the employer does not know enough from the paperwork to fully agree to the employee's request without a meeting – the employer must hold a meeting to consider the request within 21 days after the date an application is received.
> >
> > The employee can, if they wish, have another worker employed by the same employer accompany them to the meeting.

Refusal

The UK provisions provide for an internal right of appeal by the employee, if the employer rejects the application and the employee believes that the request has not been properly considered. The appeal procedure is simple, and is as follows:

> > An employee has 14 days to appeal in writing after the date of notification of the employer's decision;

[76] BERR (2007a). Flexible working: the right to request and the duty to consider. Part 1. *URN No: 07/1390/A1*. London, Department for Business Enterprise and Regulatory Reform.

> If an appeal is made, the employer must arrange an appeal meeting to take place within 14 days after receiving notice of the appeal;
>
> The employee can be accompanied;
>
> The employer must inform the employee of the outcome of the appeal in writing within 14 days after the date of the meeting.
>
> When appealing against a refused request, an employee will have to set out the grounds for making the appeal and ensure that it is dated. There are no constraints on the grounds under which an employee can appeal.[77]

An appeal right ensures that a right to request will be taken seriously by the employer, and not dismissed on dubious grounds by lower level supervisory employees. In short, it encourages good business practice by employers. The UK legislation leaves it up to the employer to determine what mechanisms to put in place in case of appeals.

The Act should include a right of employees to appeal an adverse decision, along the lines of the UK model.

Thus section 65 should be amended by the inclusion of a new sub-section along the following lines:

> An employee has 14 days to appeal in writing to the employer after the date of notification of the employer's decision.

Unresolved applications (subsections 739(2) and 740(2))
The Act provides no indication as to what should happen if the employee believes, rightly, that their application has been unreasonably rejected, in particular if they feel that the employer has not followed proper procedure in assessing the application. Indeed it explicitly prevents the FWC from settling a dispute over whether an employer had genuine business grounds (subsections 739(2) and 740(2)).

The UK standard does not provide for third party arbitration of a dispute over whether the employer's business reasons are appropriate. However, it does allow for external formal complaints to be made for conciliation, mediation or arbitration (to an employment tribunal or ACAS arbitration) where either:

> the employer has failed to follow the procedure properly; or
>
> the decision by the employer to reject an application was based on incorrect facts.

Such mechanisms help ensure that the employer follows sound procedures and bases decisions on the facts of the case, without allowing a third party to determine the business decisions of the employer.

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[77] Ibid.

The Act should include a right of employees to apply to The FWC for resolution of a dispute over a request for flexible working arrangements, where the employer has failed to follow the procedure properly or the decision by the employer to reject an application was based on incorrect facts. This right is presently only available under section 739(2) where an enterprise agreement or other agreement or contract of employment specifically allows his to occur.[78]

6.3. Parental leave

The parental leave provisions are in sections 78-85 of the Fair Work Act. An employee should have a right of internal appeal against a decision to refuse a 12 month extension of unpaid parental leave, along the lines canvassed above (section 76).

The Act should include a right of employees to apply to The FWC for resolution of a dispute over a request for an extension of unpaid parental leave, where the employer has failed to follow the procedure properly or the decision by the employer to reject an application was based on incorrect facts (section 739 and 740), even if this right is not specified in an award or agreement.

6.4. Redundancy pay and long-term casual employees

The Act excludes casual employees, including long term casual employees, from entitlement to redundancy pay (section 123). This reflects the exclusion of casuals from the current FWC standards, an exclusion that dates back to the original 1984 termination, change and redundancy decision by the then Australian Conciliation and Arbitration Commission (ACAC, now the FWC). At the time of the 1984 decision, casuals represented only a small proportion of workers and they tended to occupy predominantly short-term (and part-time) jobs. But by November 2001 76 per cent of casuals still expected to be with the same employer in twelve months time.[79] And in 2006, some 37 per cent of casual workers were employed full-time.[80] This emergence of long-term casual employment is a 'recent phenomenon'.[81] Many casuals (perhaps over half) are not 'genuine' casuals in the sense of being people who are only engaged irregularly and for intermittent, short periods.[82] Rather, many are merely employees with regular work but insecurity of tenure, no redundancy pay and no rights to annual or sick leave.

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[78] The notes to sections 146 and 186 curiously claim that

> The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

In fact, under subsections 739(2) and 740(2), FWA may settle such a dispute *if* it is agreed in a contract of employment, enterprise agreement or other written agreement or is in a Public Service Determination.

[79] Australia (2003). Commonwealth Government Submission to Australian Industrial Relations Commission Redundancy and Termination of Employment Case. Canberra, Department of Employment and Workplace Relations.

[80] Australian Bureau of Statistics (6310.0). Employee Earnings, Benefits and Trade Union Membership, Australia. Canberra. various years.

[81] Australia Commonwealth Government Submission to Australian Industrial Relations Commission Redundancy and Termination of Employment Case.

[82] Murtough, G. & M. Waite (2000). The growth of non-traditional employment: Are jobs becoming more precarious? *Staff Research Paper*. Canberra, Productivity Commission. July.

Data from the ABS Retrenchment and Redundancy survey indicate that persons aged 25 and over accounted for the vast majority – 82 per cent – of retrenched 'long term' casuals (those with 12 months or higher tenure).[83] Indeed, 56 per cent were aged 35 or over. In 2001 'long term' casuals accounted for 42 per cent of retrenched casual employees. Some 23 per cent of retrenched casuals had been employed in the same job for at least two years; 15 per cent had been employed in the same job for at least three years; 9 per cent had been employed in the same job for at least 5 years; and a remarkable 4 per cent had been employed in the same job as casuals for at least 10 years.

Some 51 per cent of long term casuals who had been retrenched sometime in the preceding three years were still unemployed or out of the labour force in July 1997, compared to 37 per cent of retrenched permanent employees. In 2001, the gap was smaller but still to the disadvantage of long-term casuals. Retrenched casuals are disadvantaged relative to retrenched permanent employees in all age groups except the over 55 age group, in which the experiences of casuals and permanents are almost equally poor.[84]

Similarly, when measured by unemployment duration, retrenched long term casuals are more disadvantaged than are equivalent retrenched 'permanent' employees. In 2001, while 26 per cent of unemployed, previously permanent employees had unemployment duration of at least 26 weeks, the same was the case for about 41 per cent of unemployed, formerly long term casual employees.[85]

With casual employment possibly becoming 'more secure in terms of regularity of earnings and predictable working patterns, along with high expectations of continued employment for casual employees with their current employer',[86] it seems that the larger difference between long-term casuals and permanents is not in their expectations of continuing employment but in the degree of disadvantage they face when retrenched – and, given the low costs of doing so, the incentive on employers to retrench them.

The data demonstrate that the position of retrenched long term casuals is at least as difficult as that facing retrenched permanent employees with similar job tenure and in most respects is more difficult. They face longer periods of unemployment than equivalent permanent employees, and lower probabilities of finding work. Yet they receive no severance benefits except when union pressure is successfully applied (for example, in a 2002 dispute concerning the closure of Sydney's Hilton Hotel).

Implicitly, policy makers expect long term casual employees to put money aside each week to cover the potential hardship associated with redundancy, just as

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[83] Australian Bureau of Statistics (6266.0). Retrenchment and Redundancy, Australia, unpublished data. Canberra. July 2001.

[84] Peetz, D. (2005). "Retrenchment and Labour Market Disadvantage: The Role of Age, Job Tenure and Casual Employment." *Journal of Industrial Relations* 47(3): 294-309. September.

[85] Ibid.

[86] Australia Commonwealth Government Submission to Australian Industrial Relations Commission Redundancy and Termination of Employment Case.:174

they are expected to do the same in relation to annual leave and sick leave. Whatever the merits of requiring them to save up for their relatively predictable annual leave each year, it is quite unrealistic to imagine this happens for the unpredictable contingency of redundancy. Even if the casual loading encompasses compensation for lack of access to redundancy pay – and outside of the Metals case it is highly debatable as to whether this is the case – it represents an inefficient distribution of compensation and is of no practical benefit to casuals when they are retrenched.

Whatever the significance of the casual loading, it is difficult to see how older workers with ten or more years service to an employer, retrenched into difficult labour market circumstances, facing even greater difficulties than permanent employees with similar age and tenure, should be denied severance benefits merely because they are classified as a casual employee – that is, not given annual and sick leave – by their employing organisation. Clearly there are such employees. With many casual employees not being 'genuinely' casual, the proliferation of long term casual employment has become a mechanism by which over a quarter of the workforce are defined outside of the safety net that ostensibly provides rights of access to recreation leave, sick leave and redundancy benefits to Australian employees.

Accordingly, redundancy benefits should be payable to long term casual employees. Whether the line should be drawn at the traditional definition of long term casuals – 12 months service – or a longer period is debatable. For policy consistency, a 12 month period should define 'long term casual' for the purpose of redundancy pay, but as a transitional mechanism a longer period could initially be defined. Hence section 123(c) should be amended by the addition of the words "other than a long term casual" after "casual employee"

7. Gender gaps

The Issues Papers suggest that the Productivity Commission's review will give little attention to gender issues, but if this were the case it would be very unfortunate. In the issues papers, "penalty rates", "dismissal", "minimum wages" and "awards" – all sources of employer complaint – get 45, 50, 142 and 123 mentions respectively; "women" gets three (mostly historical), "gender" another three, "inequality" two and "poverty" one. There are 40 mentions of "flexibility" and 50 of "productivity", but only three of "equity", while "justice" is only mentioned in others' titles. The gender gap in pay is substantial, exists even after human capital characteristics are controlled, and may be growing (even if recent change in the gender gap is a result of compositional change in the labour market, it still means a significant inequity between male and female workers

exists). Several studies by this author have suggested significant inequities between male and female employees in varying situations.[87]

7.1. The role of regulation and regulation distance in explaining gender gaps

It is important for the Commission to recognize the important role of regulation in shaping the magnitude of the gender gap. Existing theories on human capital, labour market segmentation and discrimination fail to fully explain gender gaps—for example, the large gender gap in elite occupations where women apparently possess high labour market power. In light of a review of the literature and theory, the paper from *Cambridge Journal of Economics* in Attachment F seeks to extend understanding of the causes of gender gaps, through the interaction between labour segmentation, regulation content and regulation distance. The last refers to the extent to which employment of particular workers is (un)regulated, including by collective agreements, legislation or other instruments. Regulation distance encompasses a continuum from 'regulation proximity' to 'market proximity'. A greater reliance on the 'market' does not necessarily remove pay distortions; rather, it might increase their impact through the mechanism of gendered norms. Empirical evidence in that paper is drawn from studies in several countries, most commonly Australia. That approach more clearly specifies the roles of under-valuation, labour segmentation, group norms and human and social capital; it illuminates public sector and union effects; it explains why the gender gap is greatest for a group of women with the most labour market power; and it illustrates some non-pay aspects of gendered experience at work.

There are a number of policy implications. Advancing gender equity requires several things: drawing occupations *into* regulation (including via collective action and the role of the state); breaking down barriers between segments of the labour market; ensuring regulation values women's work, precludes discrimination and harassment and enables equal career access; and minimising the scope for interference by the domestic sphere in career development. The great gains for women have been made, and are made, through collective action, but that action has lasting impact only where it produces regulation that favours women's employment opportunities and rewards, brings workers within the scope of such regulation and can only be said to be truly effective when segmentation in the labour market is broken down. That is no short term task, but in the meantime it would be inappropriate for there to be policy recommendations that would reduce regulation or increase regulation distance in ways that can potentially heighted gender gaps. The regulation referred to here is not exclusively gender-based regulation (eg requirements of equal pay for equal work); it may also be regulation that objectively shapes the pay or

[87] eg Peetz, D, 'Collateral damage: women and the WorkChoices battlefield', *Hecate*, 33 (1), May 2007, 61-80; Peetz, D & Murray, G & Muurlink, O, 'Work-life interference, gender and unionism in the mining and energy industry', *Labour and Industry*. 24(4), 2014, 286-301; Peetz, D & Murray, G, 'The "powerful women paradox": why women at the top still miss out', in H Hossfeld & R Ortlieb (eds) *Macht und Employment Relations. Festschrift für Werner Nienhüser*, Rainer Hampp Verlag, Mering, Bayern, 2013, 181-186.

conditions of male and female workers without any explicit reference to their gender.

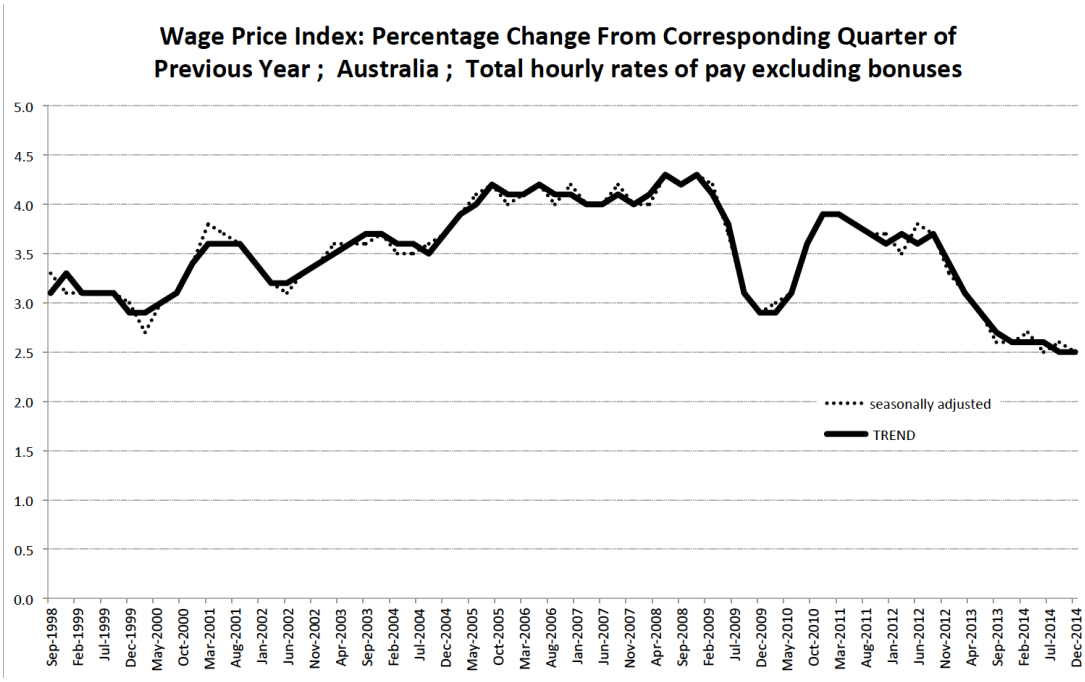
7.2. Attachments relevant to this section.

- **Attachment F:** Peetz, D, 'Regulation distance, labour segmentation & gender gaps', *Cambridge Journal of Economics*. November 2014, doi: 10.1093/cje/beu054.

8. ATTACHMENTS

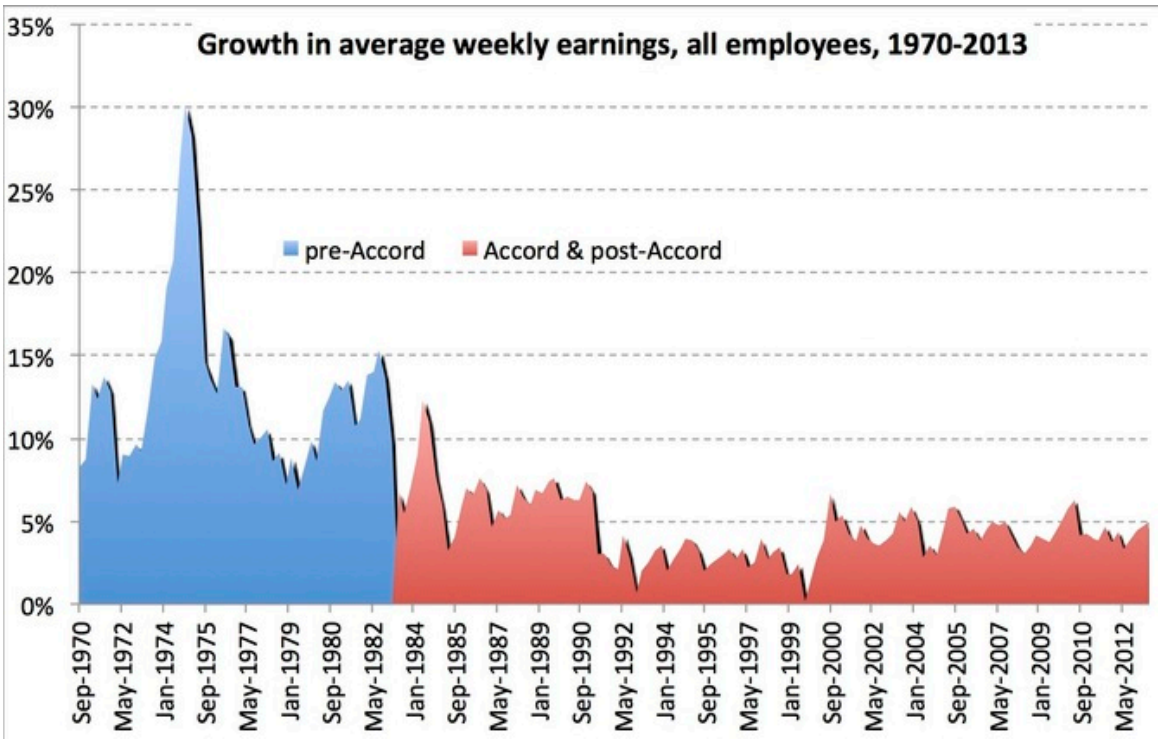
Attachment A: Charts on wages and industrial conflict

Figure 1



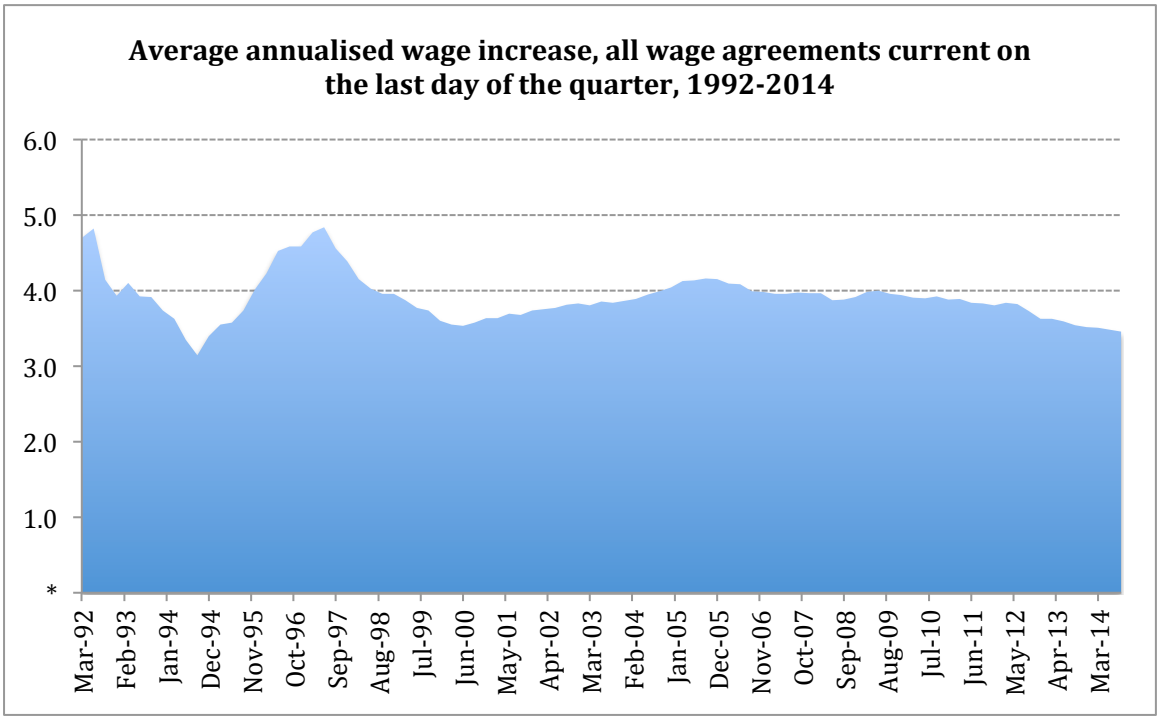
Source: ABS Cat No 6345.0, Wage Price Index, Australia Table 1. Total Hourly Rates of Pay Excluding Bonuses: Sector, Original, Seasonally Adjusted and Trend, December 2014.

Figure 2



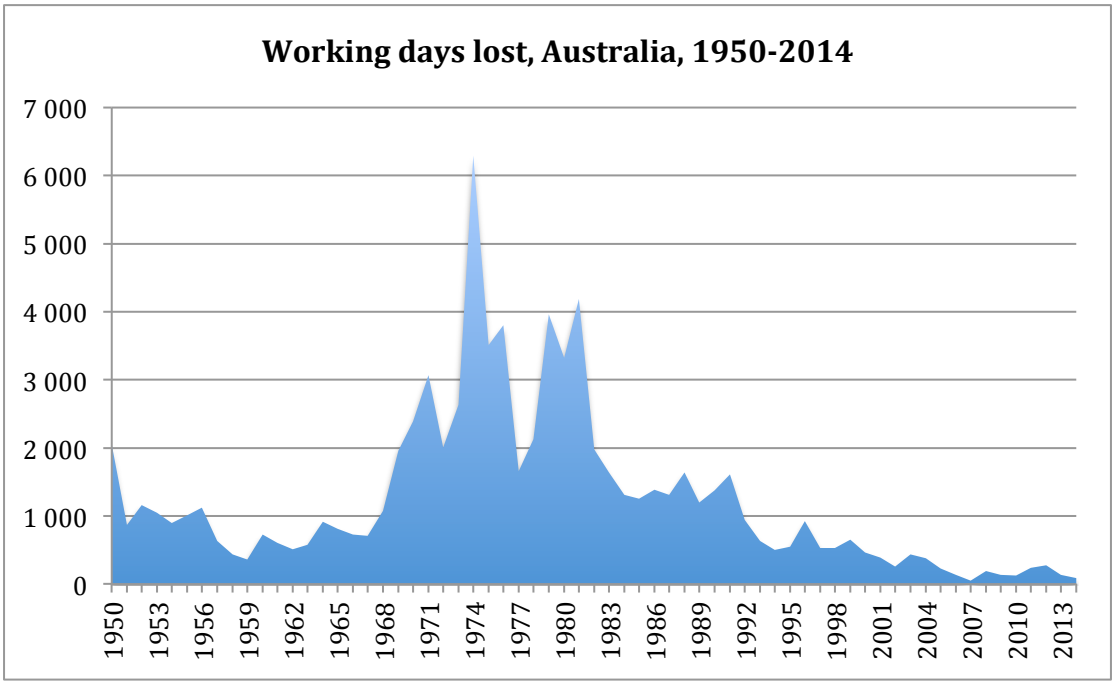
Source: Reserve Bank of Australia, using ABS data. (Note: The Wage Price Index [Figure 1] is considered the more reliable indicator of wages growth)

Figure 3



Source: Department of Employment, Trends in Federal Enterprise Bargaining, Historical series.

Figure 4



Source: ABS Cat No 6321.0.55.001 *Industrial Disputes*, *Australia*, Table 1: Industrial disputes which occurred during the period, September 2014; and ABS Cat No 6321.0, *Industrial Disputes, Australia*, Canberra, monthly, reproduced by Reserve Bank of Australia in Table 4.21, http://www.rba.gov.au/statistics/xls/op8/4-21.xls. Data for 2014 are 12 months to September 2014.

Attachment B: Does Industrial Relations Policy Affect Productivity?

Peetz, D (2012) 'Does Industrial Relations Policy Affect Productivity?' *Australian Bulletin of Labour*, 38 (4) pp. 268-292.

For the definitive version of this paper, see the source cited above.

Does Industrial Relations Policy Affect Productivity?

David Peetz*

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Abstract

This article considers the link between productivity, fairness, and industrial relations (IR) policy at workplace, national, and international levels using data from micro- and macro-level empirical studies as well as data from the Australian Bureau of Statistics (ABS), the OECD, and other sources. There is some evidence that policies that enhance fairness enhance economic performance. But the effects are conditional; they are neither consistent nor universal. Government policies to encourage or discourage unions, to restrict the extent or scope of collective bargaining or related action, or to encourage or discourage non-unionism or individual contracting, will not do a great deal in net terms to improve economic performance. However, in any specific workplace, industrial relations and the decisions management makes can have a notable effect on productivity. While welfare and industrial relations systems do not make a large inherent difference to economic efficiency, they make a very large difference to social outcomes.

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Does Industrial Relations Policy Affect Productivity?

David Peetz

A thread running through much economic policy discourse in the late 20th century was the alleged trade-off between equity and efficiency (Okun 1975). In the labour market, this is typically underpinned by the idea that the optimal allocation of resources will be achieved by the operation of a totally free labour market (Manning, 2004). Any divergence from that ideal in the interests of promoting 'equity' would be seen as harming efficiency. Yet the idea that efficiency and equity are opposed has been challenged by more recent developments in economics, which have led to the argument that more equal societies grow faster than less equal ones (Osberg 1995; Wilkinson and Pickett 2009).

In debate on industrial relations, in Australia and elsewhere, this conflict is manifested as arguments that policies should, and can, focus on productivity improvement, rather than equity. In recent times, a campaign to make fundamental changes to the *Fair Work Act*, on the grounds of improving productivity, has been pursued (Hewett 2011; Ridout 2011; Business Council of Australia 2012). This article questions the extent to which industrial relations policy affects productivity. Productivity is the *quantity* of output per *unit* of input. *Labour* productivity is output per hour worked. It is *not* measured by the value of that output, or the cost of that input, or the amount of output not produced when there are no hours worked due to strikes. Debate is often complicated by confusion over the meaning of productivity.

More importantly, proponents of particular IR policies often *portray* their preferred systems as being designed to enhance economic performance. The reason for that is straightforward. Almost everyone agrees that, other things being equal, people are better off in an economy with high productivity, high employment, and low inflation than the opposite. It is not possible to obtain the same sort of consensus about the distribution of income and power. So arguments about the allocation of resources and power will tend to be couched in terms of its benefits for the economy.

This article argues that IR policy often appears aimed at more objectives than it can meet and that with few exceptions, it has much more of an impact in the long run on fairness, however defined, than on economic performance. If claims are made that a particular industrial relations policy is going to have very large (positive or negative) consequences for economic performance, such claims should be examined sceptically, as there is a reasonable probability that the effects may be small, even non-existent, or perhaps the opposite of what is claimed. The rest of this article considers the link

between productivity, fairness, and IR policy at (in order) workplace, national, and international levels.

Micro-level evidence

The major policy questions in IR focus around the extent to which policies advantage or disadvantage unionism, individual contracting or collective bargaining, and the taking of industrial action by unionised workers as part of collective bargaining, or the protection of employment. That is what contemporary debate on the *Fair Work Act* has been mostly about, and it is what much of the debate on WorkChoices was about.

There is a long history of studies in Australia and especially internationally that looked at the impact of unions on economic performance. There is a much smaller group of studies that look specifically at individual contracting.

First, we refer to the studies on union effects. The ways in which unions can impede economic performance of a firm are by imposing restrictive work practices or by impeding the introduction of innovations such as new technology. I set aside the question of defining just what a restrictive work practice is. (Is it something that tempers unfettered managerial prerogative or a practice that management was willing to accept in the past but which it is no longer willing to accept?). There is some international evidence from the 1970s showing that restrictive practices had harmful effects (Elbaum and Wilkinson 1979; Lazonick 1979; Pencavel 1977). Such practices were common in Australia in that period up until the mid and late 1980s, but were mostly removed by the two-tier wage system, and then award restructuring and nearly two decades of enterprise bargaining. Restrictive practices were typically associated with demarcations arising from multiple unionism, but union amalgamations, single bargaining units, and the processes mentioned above substantially diminished or ended the impact of demarcations. As to whether unions restrict the introduction of new technology, while there were some cases of this, the evidence even from the 1980s was that, in general, unions did not substantially restrict new technology (for example Batstone and Gourlay 1986; Daniel 1987 McLaughlin 1979; Nichols 1986, p. 232).

Still, it was generally thought amongst conventional economists that unions had a negative impact on economic variables until the emergence in the 1980s of a new literature, based principally around Richard Freeman and James Medoff's book *What Do Unions Do?* (Freeman and Medoff 1984). This showed that unions could have a *positive* effect on productivity through two mechanisms. One was through what they called the union 'monopoly' effect: unions raise wages and the higher wages lead employers to invest in labour-saving technology. This leads to higher labour productivity—though not necessarily higher multi-factor productivity. The second mechanism was the 'voice' effect: employees express their voice through unions and this leads to

lower covert conflict at work and to improved techniques of production. In *non-union* workplaces, dissatisfied workers leave, causing turnover costs for employers; in *union* workplaces, they stay and seek to change the problems they identify. There is a body of evidence collected over the years that shows benefits from employee *voice* for economic performance. Direct and indirect participation by employees in decision making—preferably in combination—on average lead to lower absenteeism, lower labour turnover, higher morale and employee satisfaction, and higher productivity, though this may be conditional upon favourable workplace and institutional circumstances (Jones and Svejnar 1982; Strauss 1992; Zwick 2004; Grimsrud and Kvinge 2006).

Whether unionism increases productivity is really a question of how far these competing factors offset each other. It is an empirical question that is likely to produce different results at different times and in different places. After Freeman and Medoff's book came out, there was mixed evidence from the United States. Some were in support of their argument (Allen 1985; Ben-Ner and Estrin 1986; Phipps and Sheen 1994) some were counter to it (Addison, John, and Barnett 1982; Drago and Wooden 1992). Initial British evidence was adverse (Edwards 1987), but by the 1990s negative productivity effects from unionism appeared to have disappeared (Addison, John, and Belfield 2004). There *was* consistent evidence that unions reduced quits and increased job tenure (Freeman 1980; Addison, John, and Belfield 2004).

More recently, three studies in Australia published in the last decade provide some evidence to support Freeman and Medoff. A *positive* relationship was found between unionism and productivity at workplaces where unions are active (Wooden 2000, p. 173). Collective bargaining coverage was associated with *higher* levels of self-claimed productivity (Fry, Jarvis, and Loundes 2002). Firms with high rates of union membership were more productive than firms with no union members (Tseng and Wooden 2001). Another study from the 1990s showed that the intensity of *collaboration* between management and workers (through unions) had a positive effect on workplace performance (Alexander and Green 1992). More recently again, and in contrast, a consultant's report was commissioned to show that reform of the building industry achieved 10 per cent productivity gains through reducing union influence (Econtech 2007). Its core data have since been discredited, as either false or subject to selective or inappropriate interpretation (Allan, Dungan, and Peetz 2010).

Two decades after the publication of *What Do Unions Do?,* the general consensus amongst those who reviewed the literature was that there was *no consistent relationship* evident between unions and productivity, with a wide variety of results; but the direct impact of unions on productivity tended towards *zero*. The impact, it appears, depends on circumstances (Addison, John, and Belfield 2004; Hirsch 2004; Freeman 2005; Kaufman 2005). Overall, studies from Australia and internationally suggest that unionised

workplaces with good union-management relations and high employee participation or involvement will probably have *higher* average productivity than non-union workplaces. However, for those with adversarial and non-participatory union-management relations, the *reverse* is probably the case. Probably the most influential study is that of Black and Lynch, which found that

> Unionized establishments that have adopted human resource practices that promote joint decision making, coupled with incentive-based compensation, have higher productivity than other similar non-union plants; whereas unionized businesses that maintain more traditional labor management relations have lower productivity. (Black and Lynch 2001)

With respect to the evidence specifically on individual contracting, several studies are relevant. New Zealand workplace researchers (Gilson and Wagar 1997, p. 230) reported that they could find no 'significant or reliable relationship between organisations pursuing individual contracts and [their] exhaustive measures of firm performance'. This helps to explain why the *Employment Contracts Act*, often perceived at the time as unlocking productivity gains, was associated with no higher growth in labour productivity than occurred in Australia over the same period (Dalziel 2002; Dalziel and Peetz 2008). A British study found that firms that derecognised unions and pursued individualisation 'did not gain any flexibility advantage over those that retained collective bargaining' (Brown et al. 1998, p. ii). A study of 'excellent workplaces' by researchers from the University of New South Wales found that whether employee representation was collective, or whether individual arrangements were in place, had no impact on whether workplaces could achieve excellent performance (Hull and Read 2003, p. 8).

One reason that non-unionism and individual contracting often do not work out as predicted is that they are often associated with problems of fairness. If workers perceive unfairness, they will sense relative deprivation and feel the wage-effort bargain has been breached; and they will then respond with absenteeism, exit, reduced effort, or direct conflict (Baldamus 1961; Walker and Pettigrew 1984). Six decades of research demonstrate a phenomenon called 'dual commitment' (Dean 1954; Purcell 1954; Gallagher 1984; Fukami and Larson 1984; Angle and Perry 1986; Magenau, Martin, and Peterson 1988; Bamburger, Kluger, and Suchard 1999; Snape and Chan 2000). It means that, on average, workers who are more committed to their union are also *more committed* to their *employer*. So effort that goes into breaking employees' commitment to their union is often counterproductive.

On the other hand, the evidence that individual contracting and non-unionism has an adverse effect on fairness is strong (for example Elton et al. 2007; Bertone, Marshall, and Zuhair 2008; Peetz and Preston 2009). Earnings distribution is closer to equal when union density is higher (Card 2001;

Charlwood 2007; Gittleman and Pierce 2007). In most Australian industries, union members receive higher wages than non-members, more so when membership density is higher or unions are more active (Wooden 2000; Baarth, Raaum, and Naylor 1998); and workers on union collective agreements received higher wages than workers on registered individual contracts under WorkChoices. The exceptions are where individual contracts are used as a union-avoidance device or are in those mostly professional and managerial occupations where workers have lots of individual bargaining power anyway (Peetz and Preston 2009). Especially, but not exclusively, when the no-disadvantage test was removed from registered individual contracts, they were used to remove penalty rates, overtime pay, shift premiums, redundancy benefits, and job security from employees, especially from those without strong labour market power. So even though only a small minority of workers were ever employed on registered individual contracts under WorkChoices, surveys indicated that 30 to 40 per cent of people personally knew someone who had been made worse off (Silmalis 2006; Farr 2007). Individual contracts had a substantial impact on fairness, but very little impact, and not necessarily positive, on productivity.

Table 1: Labour Productivity Growth in 16 Market-sector Industries: WorkChoices (2005–06 to 2007–09) and *Fair Work Act* (2008–09 to 2010–11)

Industry	2005–06 to 2007–08 %	Industry	2008–09 to 2010–11 %
J Information, Media and Telecommunications	16.3	A Agriculture, Forestry and Fishing	13.6
N Administrative and Support Services	14.4	J Information, Media and Telecommunications	8.2
K Financial and Insurance Services	13.6	I Transport, Postal and Warehousing	7.9
G Retail Trade	4.2	M Professional, Scientific and Technical Services	6.4
C Manufacturing	2.8	C Manufacturing	4.8
I Transport, Postal and Warehousing	1.8	G Retail Trade	4.6
F Wholesale Trade	1.7	E Construction	3.7
E Construction	1.3	R Arts and Recreation Services	2.6
H Accommodation and Food Services	-1.6	K Financial and Insurance Services	2.0
B Mining	-2.1	F Wholesale Trade	-0.1
R Arts and Recreation Services	-2.3	S Other Services	-5.3
M Professional, Scientific and Technical Services	-3.4	L Rental, Hiring and Real Estate Services	-6.4
S Other Services	-5.4	H Accommodation and Food Services	-6.7
D Electricity, Gas, Water and Waste Services	-8.8	N Administrative and Support Services	-9.0
L Rental, Hiring and Real Estate Services	-11.4	D Electricity, Gas, Water and Waste Services	-9.6
A Agriculture, Forestry and Fishing	-14.7	B Mining	-13.8
median	-0.1		2.3
mean	2.2		2.4

Source: ABS cat. 5204.0.

Claims have been made that the changes made by the *Fair Work Act*, compared to the industrial relations framework of WorkChoices, have damaged productivity growth. So a key question to examine is how bad the damage is, how consistent is it across industries, and can the country sustain it? The left-hand panel of Table 1 looks at which industries experienced productivity growth in the WorkChoices period from 2005–06 to 2007–08. It shows that during WorkChoices eight market-sector industries had productivity growth, eight had productivity falls, the mean was 2.2 per cent growth, and the median was a decline of 0.1 per cent. (There followed a transition year, during which most provisions of WorkChoices remained but the core features of individual contracting had been removed). The right-hand panel of Table 1 shows which industries sustained productivity growth under the *Fair Work Act*, from 2008–09 to 2010–11. In that period, nine industries had productivity growth, seven had falls, the mean growth rate was slightly higher at 2.4 per cent and the median was substantially higher than WorkChoices at 2.3 per cent. The most noteworthy drop was in the growing mining sector, where high commodity prices have made it worthwhile to extract lower-grade ores with more waste rock to remove and therefore lower productivity (ore produced per worker hour).

The productivity 'crisis' of the *Fair Work Act*, then, is no worse than the productivity crisis of WorkChoices. Yet the voices expressing concern over the alleged productivity costs of the *Fair Work Act* were not concerned about productivity under WorkChoices.

That said, the above is not the whole story. This is because productivity is very sensitive to the stage of the business cycle and needs to be placed in historical context. The ABS considers that the relevant comparisons are of productivity over whole growth cycles, each of which lasts for several years. Growth cycles are shown in Figure 1.[88] The current growth cycle, which started in 2008–09 and includes the *Fair Work Act*, is not complete. However, in the previous growth cycle trend labour productivity growth was also low. Indeed, it was one of the two weakest cycles since records began—nearly half a century ago—in the mid-1960s. The gap between productivity growth in that cycle and previous ones started to widen at the time Work Choices commenced.

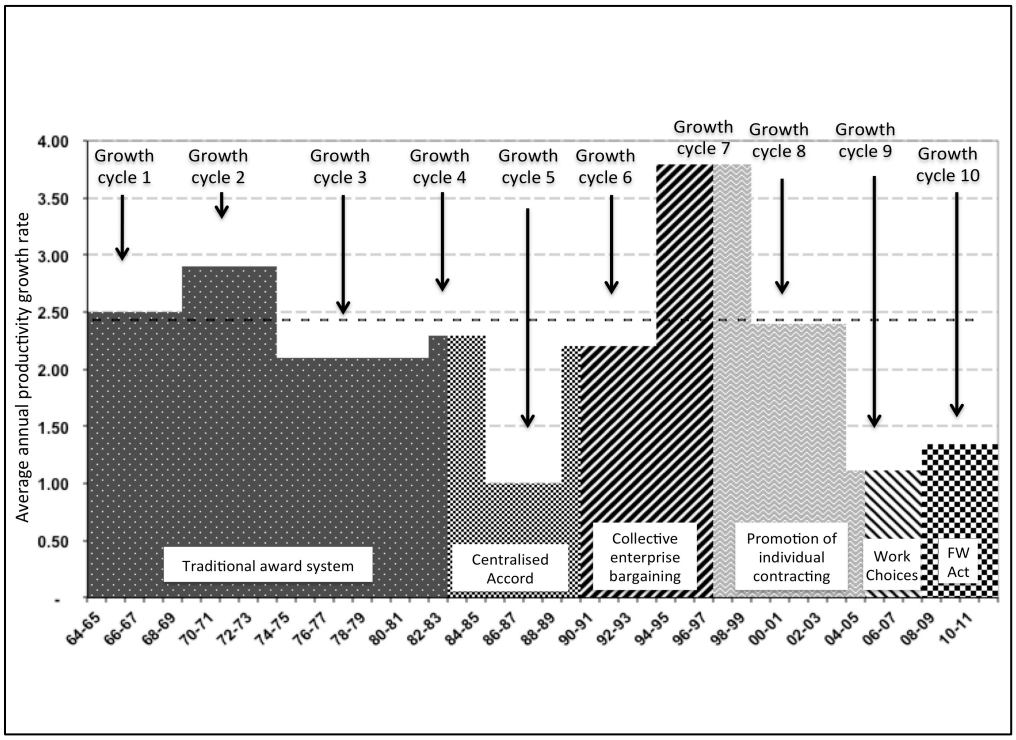
Some argued that poor productivity growth under WorkChoices was because 'the statute allowed marginal workers to contract into the labour market, which reduced the observed growth of labour productivity' (Sloan 2011; also Pearson 2007). However, the ABS also produces a measure of labour productivity that takes account of changes in the aggregate quality of labour due to changes in average educational attainment and experience amongst employees. If labour productivity growth had been dragged down by the entry of low-skilled, low-productivity workers, this 'quality-adjusted'

[88] Figure 1 refers to 12 industries, whereas Table 1 refers to 16 industries. This is because the data for the 16 industries are not available over the whole of the period from the mid-1960s.

measure of labour productivity would have shown a greater increase than the conventional measure. In reality, this quality-adjusted measure of productivity grew even more slowly in growth cycle 9 than the conventional measure—at only 0.7 per cent over that cycle, compared to 1.1 per cent for the conventional measure, and down by more than half from the recorded 1.9 per cent in the previous growth cycle.

WorkChoices was not the only factor influencing productivity in this cycle, if it had any influence at all. But it is noteworthy that, in the first complete growth cycle under the *Workplace Relations Act*, labour productivity growth was merely 2.4 per cent per year, across the 12 market-sector industries for which data go back more than a few years. In the whole *Workplace Relations Act* period, which extends across two and a half growth cycles and encompasses the tail end of the strongest cycle, labour productivity growth averaged 2.5 per cent annually. Those numbers are in effect no tangible improvement on the 2.4 per cent a year averaged during the antiquated, inefficient, traditional *award* system of the 1960s and 1970s. The traditional award system that was associated with restrictive work practices, demarcations, and inefficiencies operated at a time when Australian industry was protected by high tariffs, with many important enterprises in the public sector, and many highly regulated industries. The award system was associated with productivity growth rates of similar magnitude to the years of the *Workplace Relations Act*, and considerably better than the WorkChoices era of the *Workplace Relations Act*.

Figure 1: Labour Productivity Growth over Productivity Cycles, 12 Market-sector Industries, 1964–65 to 2010–11



Source: ABS cat. 5204.0; 5206.0, various years

This is not to say that the *Fair Work Act* has necessarily delivered a markedly better outcome. So far, the current growth cycle has been produced slightly higher labour productivity growth than the growth cycle that preceded it—even though the IR policy regime is said to be vastly different. This suggests that industrial relations policy has made little difference to productivity growth.

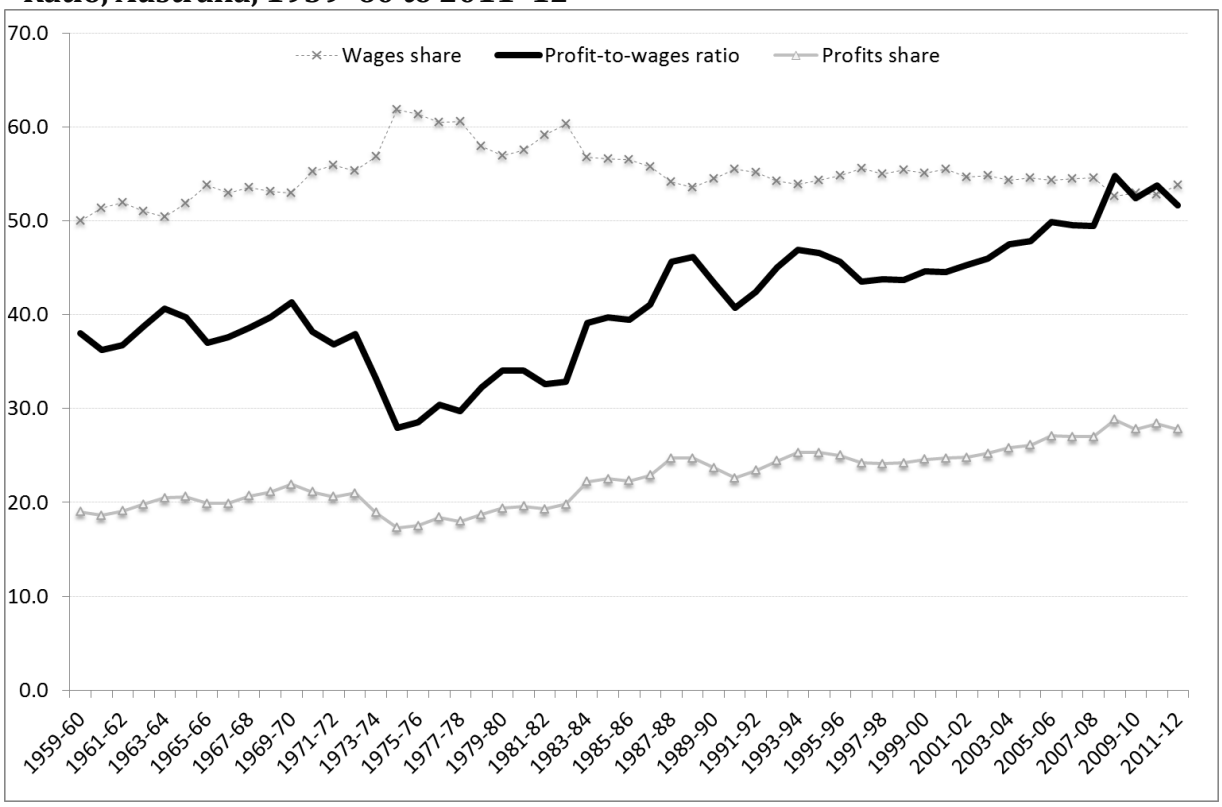
Indeed overall, looking back at the growth cycles over nearly half a century, there are not many occasions on which in can be said that IR policy had a notable impact. One was probably the centralised period of the Accord, when real wages dropped significantly (growth cycle 5). That meant there was no longer much incentive for firms to invest in labour-saving technology, as labour was cheap, and so labour productivity growth appeared to stall. The other was one cycle in the mid-1990s (growth cycle 7) which showed accelerated growth, coinciding with the consolidation of enterprise bargaining over the latter part of the *Industrial Relations Reform Act* and the early part of the *Workplace Relations Act*, before the shift to individual contracting gathered momentum. But the acceleration of productivity was only for one cycle, it did not have a lasting impact, and there were a number of other economic reforms going on at the time. If the move to enterprise bargaining had an effect, it was small, one-off, perhaps removing most of the remaining inefficiencies in the IR system, but that was all. This is probably about all that can be expected. Whatever 'surge' in productivity growth occurred in that one cycle was not sustainable and not sustained. Indeed Hancock (2012), analysing productivity growth across industries as well as nationally, found no evidence of any effect from enterprise bargaining. Earlier, Quiggin (2006) had argued that the higher productivity growth rate achieved in just that one cycle in the mid-1990s (cycle 7 in Figure 1) was a statistical illusion anyway—not a signal that reforms had delivered a 'new economy' that could deliver permanently higher productivity growth rates, but rather, a blip caused by overestimation and, most importantly, an unsustainable increase in work intensity that was subsequently wound back, at least partly. Evidence in support of this included the very ordinary productivity growth in the subsequent period, growth cycle 8. Six years later, with the hindsight benefit of observing the even weaker productivity growth rates of cycles 9 and 10 that followed the WorkChoices reforms, the weight of evidence supports Quiggin even more strongly.

Indeed, the data do not really suggest that the long period of 'liberal market' or 'neoliberal' economic reforms that Australia has experienced since the early 1980s has really done anything to boost productivity growth, starting with the deregulation of financial markets in December 1983. These included the deregulating of financial markets and product markets, and the privatising of public assets. Rather, productivity growth has been slightly lower under 'neoliberalism'.

However, there have been some fairly significant changes in the distribution of income. In the early 1980s, there was a popular idea of a 'real wage overhang': the notion that the wages share of national income had risen above its long-term average after 1972, and the profits share had fallen below its long-term average. This was squeezing profits and a major cause of the economic problems of the time. One of the implicit ideas behind the Accord was to return those factor shares to their previous levels. Figure 2 shows the share of trend national income going to profits, and the share going to wages. They do not add to 100 per cent because some also goes to government, so the key line is that which shows the ratio of total profits to total wages. Until 1972, the long-term average profit-to-wages ratio was 38 per cent. The centralised Accord brought it back up from its 1970s trough and then some more.

The move to collective enterprise bargaining led to a slight shift in favour of wages, but from 1997 onwards there was a relatively sustained increase in the profit share. It reached a record of slightly under 50 per cent in 2005–06 under WorkChoices, dropped back slightly, then reached another record through 2010—under the *Fair Work Act*—of just under 55 per cent, before dropping more recently to below 52 per cent in 2011–12. (To use the parlance of the late 1970s and early 1980s, it represented a 'profit overhang', though less so now than three years ago.)

Figure 2: Wages and Profit Shares in Factor Incomes and Profit-to-wages Ratio, Australia, 1959–60 to 2011–12



Source: ABS cat. 5206.0

Of course, industrial relations policies like the Accord were not the only thing going on over that long period. As mentioned, there was also a series of liberal market economic reforms from December 1983, and since then (and probably in consequence) there has been an underlying upwards movement in the ratio of profits to wages. This was also the time that the boom in salaries of chief executive officers (CEO) commenced. Through the 1970s and into the early 1980s, the ratio between CEO pay and average earnings had been fairly stable. However, from the mid-1980s, CEO salaries started to grow much faster than average earnings. Indeed, the growth in CEO earnings relative to wages was much greater than the growth in the ratio of profits to wages. It was also substantially greater than the increase in national productivity (Peetz 2009). This has been a major contributor to the widening gap between very high-income earners and the rest of the workforce from the mid-1980s. By contrast, the level of inequality between very high-income earners and the rest had actually declined across a period well over half a century before the 1980s (Atkinson and Leigh 2007). This suggests that there has been nothing natural or inevitable about widening inequality post-1980.

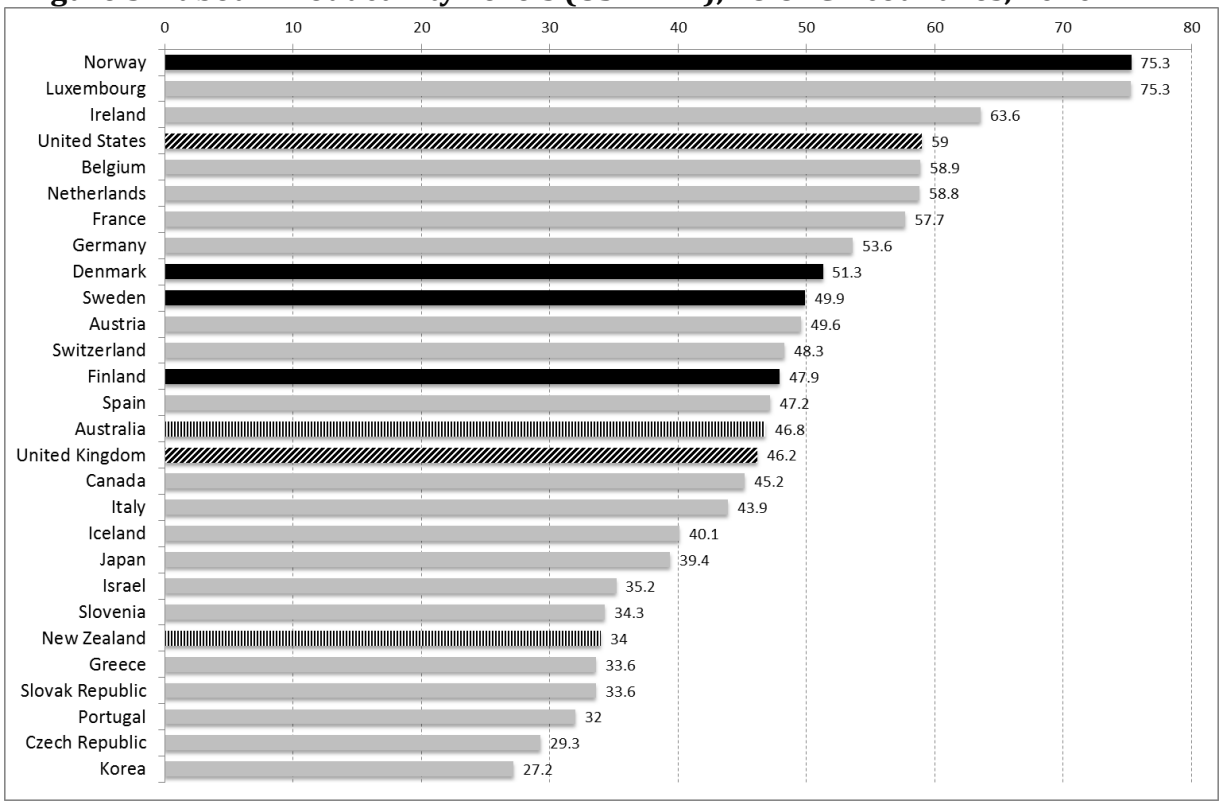
International Level

Some interesting and insightful patterns emerge through cross-national comparisons. In this respect, the 'varieties of capitalism' literature is quite useful in the contrasts it draws between different types of governance systems for developed capitalist economies (Hall and Soskice 2001). For our purposes it is not so important whether there are two 'varieties' of capitalism, as Hall and Soskice originally suggested, or several varieties, or a continuum with many nuances, as some critics have argued (for example Crouch 2005). My interest is in comparing the more extreme ends of the continuum, those with a high commitment to equality—a subset of what Hall and Soskice called the 'coordinated market economies'—and those with a high commitment to the market—a group of the 'liberal market economies'. The latter, liberal market economies, rely to a high degree on market forces, and have low protections for workers and a low welfare safety net. At the other end, to varying degrees the coordinated market countries are characterised by markets constrained through government intervention, a stronger welfare net, workers having higher protections, and the labour force being more unionised. The United States and to a lesser extent the United Kingdom epitomise the liberal market economies (while New Zealand has had several of their characteristics since the late 1980s). The Scandinavian countries of Norway, Sweden, Finland, and Denmark epitomise the egalitarian end of the coordinated market countries.

Figure 3 compares labour productivity *levels* across countries. It is apparent that there was no consistent, uniform pattern. The highest productivity (at 75.3 USD per hour) was achieved by Norway, a coordinated market country (solid black in Figure 3). There was quite a gap to the United States (59), a liberal market economy (diagonal stripes in Figure 3), then Denmark (51),

Sweden (50), and Finland (48), all coordinated market countries, and then the liberal market United Kingdom (47). (Also shown, in vertical stripes, are: Australia (46) with similar productivity to the United Kingdom; and New Zealand (34), well below the others.)

Figure 3: Labour Productivity Levels (USD PPP), 28 OECD countries, 2010



Source: Organisation for Economic Cooperation and Development (OECD) productivity database (data extracted on 17 Feb 2012 from OECD.Stat)

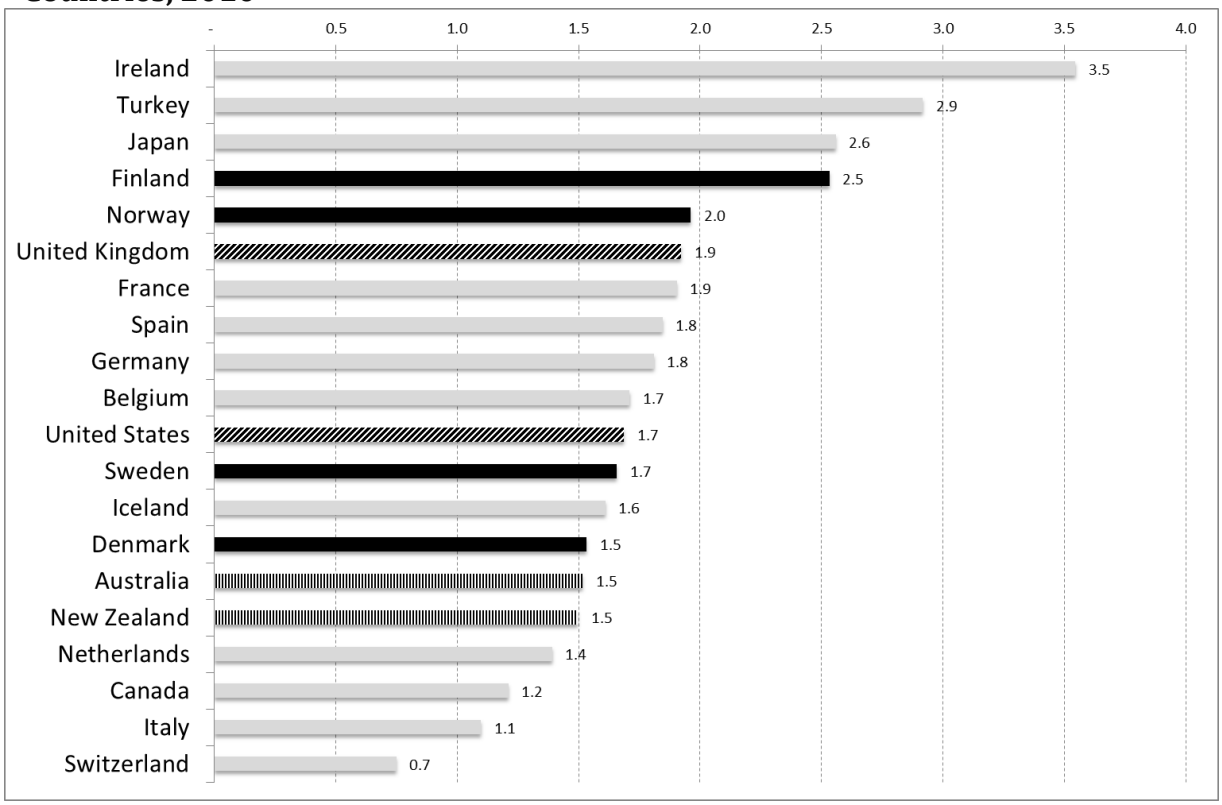
Another way to look at the question is to consider productivity *growth rates* over a 30-year period, 1980–2010, rather than levels (Figure 4).[89] By this criterion, the coordinated market countries Finland (2.5 per cent annual labour productivity growth) and Norway (2.0 per cent) did best, followed by the liberal market United Kingdom (1.9 per cent). Then the liberal market United States (1.7 per cent) is in a group with the coordinated markets Sweden (1.7 per cent) and Denmark (1.6 per cent). Australia and New Zealand are in a comparable cluster (with 1.5 per cent each), suggesting that the 'gap' between US and Australian productivity levels has not narrowed over that period. The latter is especially disappointing for advocates of industrial relations reform as the basis for productivity growth, since the Business Council of Australia (BCA) had claimed in the 1980s that the productivity of Australian workplaces 'was between 20 and 50 per cent below their overseas competitors' and a 25 per cent productivity improvement could be achieved through reform of the industrial relations system (Business Council of Australia 1989a, p. 25; Business Council of

[89] For some countries, data this far back are not available. Figure 4 covers 20 countries compared to the 28 countries in Figure 3.

Australia 1989b). This reform has subsequently occurred without its promised impact. Over two decades later the BCA claimed that project productivity was 30 per cent or more lower in Australia than the United States, without any reference to the failure of its previously sponsored productivity reforms (Business Council of Australia 2012).

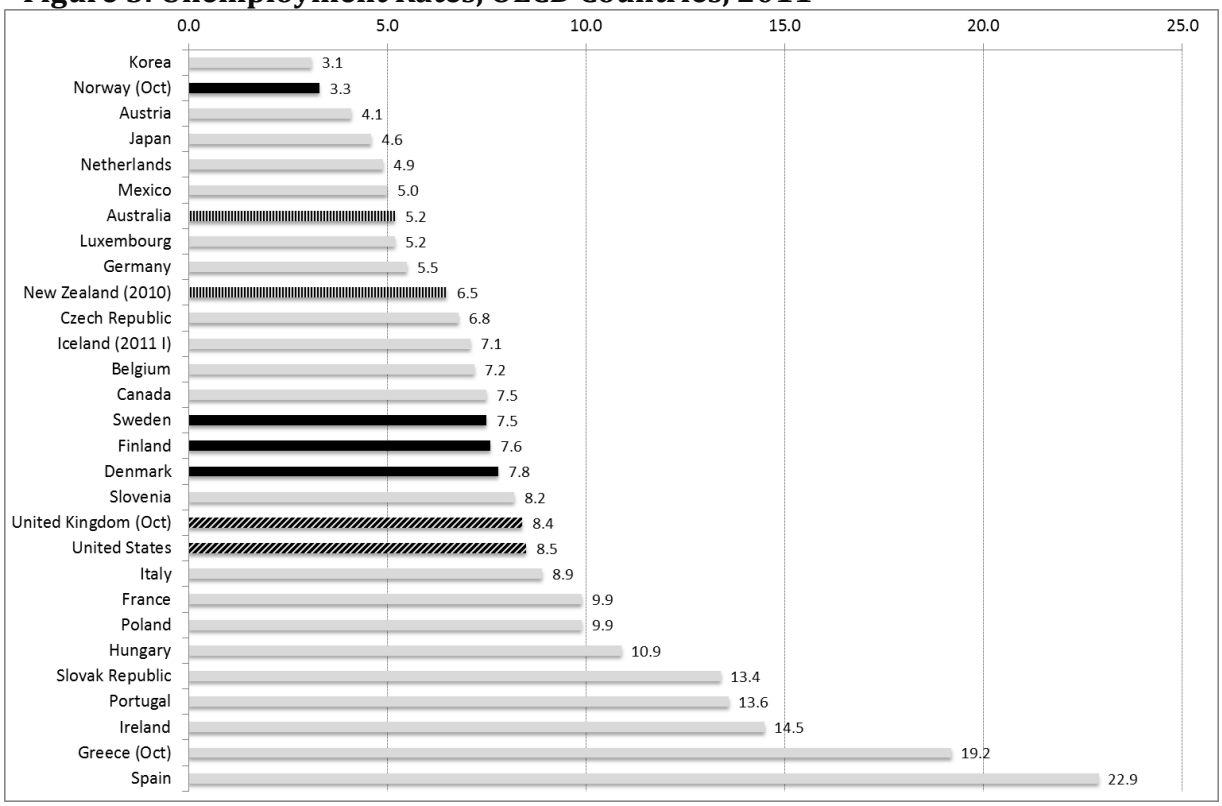
While unemployment is not necessarily reduced in the short term through higher productivity, it is nonetheless often used as an indicator of economic performance. Though outcomes here are heavily influenced by responses to the global financial crisis, it is worth referring to these data simply because the topic is often incorporated into debate about IR systems and economic performance. Unemployment rates at the end of 2011 are shown in Figure 5. Norway performed considerably better than the other countries that have been discussed, while Sweden, Denmark, and Finland were ahead of liberal market United Kingdom and United States. However, unemployment rates are influenced by labour force participation, so many consider the employment rate to be a better indicator of labour market performance. Employment rates (the ratio of employment to population in the 15-64 age group) are shown in Figure 6. Here the three major coordinated market countries, Norway (with an employment rate of 75per cent), Denmark, and Sweden (both 73 per cent), all performed best, though Finland (68 per cent), while ahead of liberal market United States (67 per cent) was behind the United Kingdom (70 per cent).

Figure 4: Labour Productivity Growth Rates (USD PPP), 20 OECD Countries, 2010



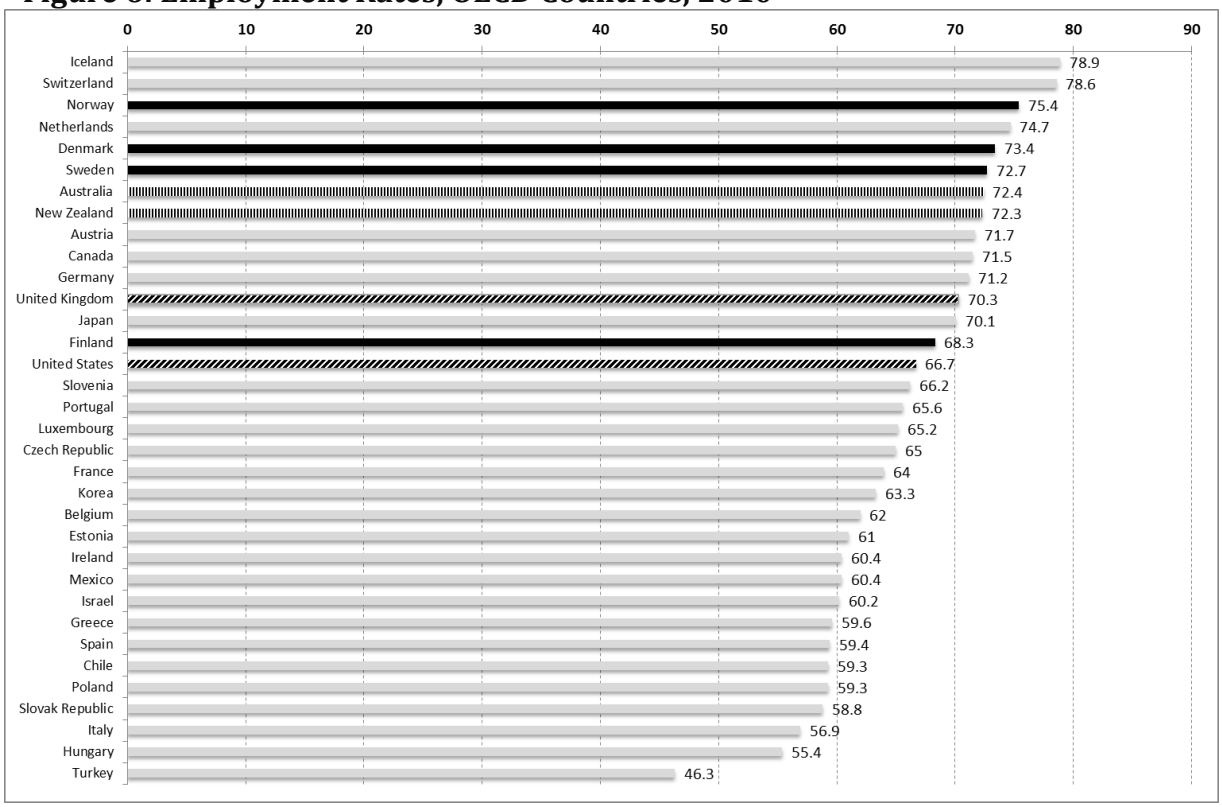
Source: OECD productivity database (data extracted on 17 Feb 2012 from OECD.Stat)

Figure 5: Unemployment Rates, OECD Countries, 2011



Source: OECD, Labour Force Statistics, Main Economic Indicators (database) doa 23/2/12

Figure 6: Employment Rates, OECD Countries, 2010

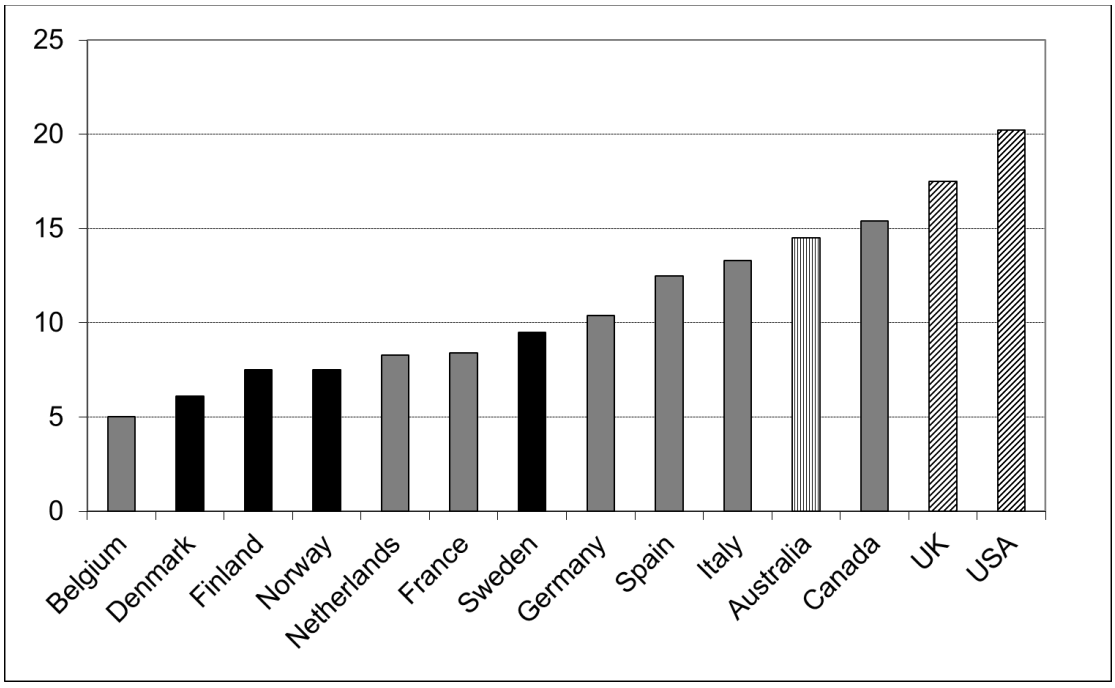


Source: OECD StatExtracts database, doa 17/2/12

Overall, what does it mean? It would be possible to make an argument that on average the *coordinated market countries* perform better. But on productivity there is not an overwhelming pattern—there is quite a lot of diversity between countries and indicators. It may be preferable to take the cautious conclusion that there is not a massive difference: that one cannot say categorically that coordinated market economies perform better or worse than liberal market ones in terms of productivity and employment. Productivity is driven more by technology, innovation, skills, and education (Engelbrecht 1997; Greenwood, Hercowitz, and Krusell 1997)—and in Australia's case, even geographical isolation (Battersby 2006)—than by industrial relations or welfare policy arrangements.

However, a quite different pattern emerges when consideration is given to indicators of social cohesion. I focus here on just one: poverty rates. This is the proportion of people in poverty in each of 14 countries. The data are from a 1998 study. As can be seen in Figure 7, there is no ambiguity: the coordinated market countries had far lower poverty rates than the liberal market economies, particularly the United States where poverty is three times higher.

Figure 7: Poverty Rates, 14 OECD Countries, 1998



Source: Marx and Verbist (1998), cited in Rubery and Grimshaw (2003), p. 94.

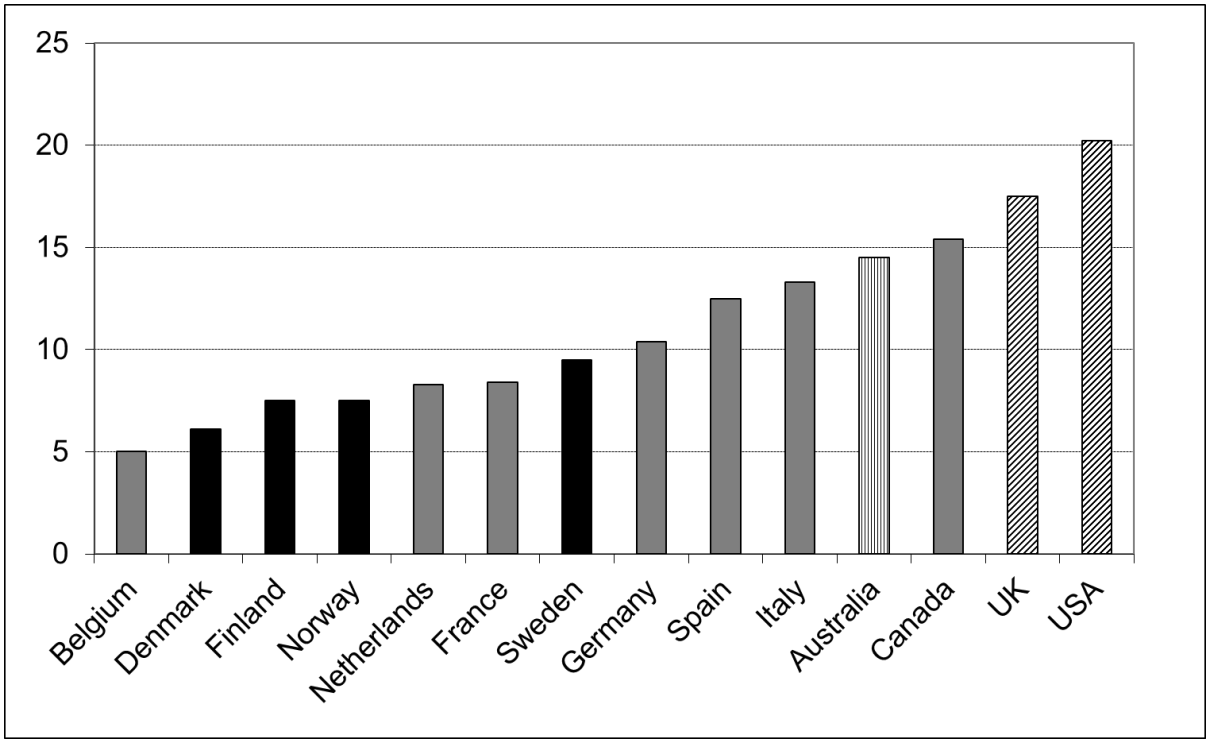
But the particularly notable feature is in Figure 8. This shows poverty rates in two-adult households, according to how many adults in the household are working. Poverty is in part a function of households' access to employment, so, in *every* country, poverty was lower among dual-earner households (shown in solid black in Figure 8), than in single-income households (in diagonal stripes), or in

no-earner households (grey horizontal stripes). Hence, a single-income household in the United States was more likely to be in poverty than a single-income household in any of the other countries here.

But notice also how in the United States, a *single*-income household was more likely to be in poverty than a household with *no* employed income earners in Denmark, Finland, Norway, Sweden, or even the Netherlands or Belgium. And a *two*-income household in the United States was more likely to be in poverty than a *single*-income household in each of those countries plus Germany. And indeed, it was roughly as likely to be in poverty as an unemployed household in Denmark.

A more recent and more wide-ranging German study that assessed five dimensions of social justice (poverty, labour market inclusion, education, health, social cohesion, and non-discrimination, and inter-generational justice) across 31 countries ranked Iceland, Norway, Denmark, Sweden, and Finland in the top five positions, with the United Kingdom 15th and the United States 27th (ahead of only Mexico, Chile, Greece, and Turkey) (Schraad-Tischle 2011). In short, welfare and industrial relations systems do not make a large inherent difference to economic efficiency, but they make a very large difference to social outcomes.

Figure 8: Poverty Rates in Two-earner Households, 14 OECD Countries, 1998



Source: See Figure 7.

Moving to a global, temporal scale, in each industrialised country there has been a shift away from the policies of the 'post-war Keynesian compromise',

that had seen incremental improvements in the conditions of workers, industrial protections, and the welfare state, towards 'liberal market' or 'neoliberal' policies. With that, across much of the OECD, the share of income going to profits has risen, although this is also something that varies between countries (Ellis and Smith 2007). However, productivity growth was higher before the neoliberal reform period gained momentum. Across the developed nations in Europe and elsewhere, growth in GDP per hour worked was lower in the period from 1973 to 1992 than it had been from 1950 to 1973 (Maddison 1995). Growth in GDP per hour in the G7 nations was much higher in the 1970s than in the decades from the 1980s onwards (OECD productivity database).

The period of neoliberal reforms has not brought about a period of unrivalled prosperity in terms of productivity advancement, but it has brought about a shift in income as the relative bargaining power of capital and labour has changed. Especially since the mid-1980s, the share of the top 1 per cent of income earners increased substantially in Australia, something that has been also seen in the other major English-speaking nations—the United Kingdom, Canada, and by most of all in the United States (Kapur, Macleod, and Singh 2006). Yet this share had been stable in the preceding period. Indeed, in the United States, as in many other countries, inequality between the top few and the rest had declined over much of the twentieth century (Kapur, Macleod, and Singh 2006).

Most recently, the global financial crisis has debunked the myth of efficient markets, the idea that markets 'self-correct' and find stable equilibrium, and the idea of 'trickle down' (or 'a rising tide lifts all boats') (Quiggin 2010). Also debunked was the myth of the superiority of numerical labour market flexibility. The United States experienced a worse deterioration in employment than Europe. The greater labour market flexibility in the United States that was meant to protect employment ended up more readily destroying it. Average employment in the United States fell by 3.8 per cent between 2008 and 2009, over double the fall in EU employment of 1.7 per cent. Yet GDP fell by considerably more in the European Union (4.2 per cent) than in the United States (2.4 per cent) (OECD 2010).

Thus the OECD in 2009 found no evidence that structural reform policies aimed at promoting flexibility had made labour markets 'less sensitive to severe economic downturns than was the case in the past'. It now recommended that governments improve income support and unemployment insurance benefit systems, though it had previously said these would decrease flexibility (OECD 2009, p. 40). Instead, active intervention by unions and governments, negotiating and facilitating firm-level agreements for adjustment, helped moderate the effects of a crisis created elsewhere (Peetz, Le Queux, and Frost 2011).

Indeed, before the global financial crisis the OECD—once an enthusiastic supporter of labour market deregulation—had already begun hedging its position on employment-related policies. In 2004 it acknowledged that the evidence for a link between high wages or compressed wage structures and lower employment was 'fragile' (OECD 2004, p. 165.). In its 2006 *Employment Outlook*, the OECD analysed its own research and that of others and observed that: the effect of employment protection legislation on overall unemployment 'was probably small'; there is little or no significant union impact on overall labour market performance; a high degree of centralisation in bargaining was associated with lower unemployment; and evidence on the link between minimum wages and employment was 'ambiguous'. Several countries with highly regulated labour markets and active labour market programs had on average better employment rates than 'market reliant' countries. It conceded 'there is no single combination of policies and institutions to achieve and maintain good labour market performance' (OECD 2006, pp. 18,12,13.).

Implications

Overall, then, what can be said? There is some evidence that industrial relations *policies* that enhance fairness enhance economic performance. However, although this is a trend on average, the effects are conditional; they are not consistent or universal. What can be said with more certainty is that, *in any specific* workplace, *industrial relations can* make a difference to productivity. The decisions management makes, and the relationship it has with employees and unions, will shape what happens in the workplace and can have a noticeable effect on productivity.

That is not the same as saying, though, that if IR policy is altered at the national level, it is going to have a widespread or noticeable impact on productivity. It is what happens at the *workplace* that matters—and some managers will make decisions under a new framework that will make things better than they would have been, and some will make things worse. Some will consult with and involve their employees, and some will exclude or exploit them. Many seek a holy grail in employment or industrial relations policy that is going to give a magic boost to the economy. But there is none—certainly not to be found in policies that aim to shift the balance of power in industrial relations one way or the other.

That does not mean that *no* IR policies can influence productivity. The results of research suggests that government policies to encourage or discourage unions, to restrict the extent or scope of collective bargaining or related action, or to encourage or discourage non-unionism or individual contracting, will not do a great deal in net terms to improve economic performance. Policies aimed at giving employees more say or more voice at work may well improve economic performance. This is an area where Australian policy still

lags many other industrialised countries, but one largely beyond the scope of this article.

Interestingly in this context, the name of the present law is the *Fair Work Act*. As discussed above, advocates for various policy positions often argue that changes should be made to legislation because of the impacts on economic efficiency and productivity, when often what is being sought will have little impact on economic efficiency and productivity, but will have significant implications for the distribution of power and hence income—that is, for fairness. While there are problems of confusion arising from naming the associated *institution* Fair Work Australia (McCallum, Moore, and Edwards 2012, p. 249), it can be said that labelling the statute the 'Fair Work' was at least a tacit recognition that fairness is the principal issue with which industrial relations legislation can deal. Fairness is not the only consideration, but it is certainly an important one, and very probably the one that that legislation has the better chance of affecting.

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Attachment C: 'Industrial Conflict with Awards, Choices and Fairness'

Peetz, D, 'Industrial Conflict with Awards, Choices and Fairness', Anthony Forsyth & Breen Creighton (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, New York: Routledge, 2012, 159-181.

For the definitive version of this paper, see the source cited above.

INDUSTRIAL CONFLICT WITH AWARDS, CHOICES AND FAIRNESS

When all else fails, under the logic of an arbitral system, you go to the independent umpire. When all else fails, under the logic of a collective bargaining system, you strike. The shift in Australia from an arbitration-based model to a bargaining-based model would be expected to have had some major effects on strikes: their number, causes and duration and how they were resolved. Likewise, the re-collectivisation of employment relations through the *Fair Work Act 2009* (FW Act), after the Coalition's policy of individualisation, could be expected further to affect strike patterns. This chapter examines changing patterns of industrial conflict in Australia under a number of different policy regimes, including the early period of the FW Act. It first, briefly summarises some of the economic literature on strikes, then posits an alternative model which attempts to integrate economic and institutional explanations, relates the model to the historical characteristics of phases in Australian industrial relations policy, discusses data sources and methods, analyses aggregate trends in strike density and considers patterns regarding their causes, duration and termination.

Theorising industrial conflict patterns

A series of economic models have been used to try to explain strike activity. In Hicks' (1966) early model of demands and offers, the majority of strikes arise from inadequate appreciation by each side of the other's situation. Ashenfelter and Johnson's (1969: 36-7) model introduced a separate role for union leadership as in effect a mediator between members and the employer. Later Kennan (1980) and Reder and Neumann (1980) separately and simultaneously proposed the 'joint cost theory', in which strike duration was inversely related to the sum of its cost to the firm and union. Theories of strikes were based on unilateral asymmetric information: the firm knows more about its profits than does the union, which uses strikes to test the firm's response and thereby infer information about profits – or the firm signals its (un) willingness to pay by how long it is willing to endure a strike (Hayes 1984; Tracy 1986,1987; Booth and Cressy 1987; Cramton and Tracy 2003). While subject to various critiques (Paldam and Pedersen 1982; Shalev 1980; Ehrenberg and Smith 1988:471), each of these models offers something of interest to the theory of strikes. Yet none of the above models appear to offer an adequate explanation of strike activity in the Australian context. Most focus heavily on wage related disputes, ignoring the possibility that there may be very different forces at work in the determination of non-wage disputes. Moreover, none of the models seriously considers the possibility of unconditional, fixed duration strikes - that is, strikes without any negotiation between the parties or any wage increase (or other form of settlement) being agreed between or conceded by the parties. Each model essentially assumes that the strike continues until a new agreement or contract is reached between the parties.

These models' relevance to the Australian situation is further complicated by the historical role played by arbitral tribunals in dispute settlement in this country. Although there is a body of literature concerning the use and effects of arbitration (eg Farber and Katz 1979; Hirsch and Donn 1982), it has neither been integrated into the above strike models nor applied to Australia, even in Australian studies that have made use of the above models (eg Bentley and Hughes 1970; Phipps 1977; Paldam and Pedersen 1982).

This chapter addresses some of these deficiencies by use of a simple model of industrial conflict that incorporates institutional influences on behaviour. It posits that strikes occur when, for both parties, the expected costs of the strike are lower than the expected benefits, and will continue until, for one of the parties, the marginal expected costs of continuing exceed the marginal expected benefits. A thorough overview of all the factors involved is beyond the scope of this chapter, though factors affecting the expected costs and benefits to workers and the union would likely include: the expected *wages foregone* while labour is withdrawn; expected *penalties* associated with the strike (the likelihood of possible penalties multiplied by their size); expected *gains* (eg better wages and conditions) from resolving the dispute (influenced *inter alia* by perceptions of an 'intensity' – that is, the firm's intent, depth of feeling and militancy in its approach to resolution of the strike); expected (dis)utility from the *experience* of participating in a strike (sense of solidarity, retaliatory harassment, additional (or foregone) leisure etc); the expected impact on *employment*; and the impact on *future bargaining power* (Hicks 1966). An important benefit from a strike may be to indicate the union's own *intensity*: to impart a message about the costs it is willing to impose on the employer. The expected benefits will also be dependent on the *mobilising ability* of the union. If employees lack the institutional mechanisms to mobilise effective industrial action the costs of taking strike action will be too high (eg Kelly 1998).

For firms, the costs and benefits of a dispute will be influenced by its impact upon profits, inventories and goodwill; the proportion of the workforce who strike; the ability to replace striking workers; the expected financial cost of conceding compared to that of not conceding; and the firm's expectations as to the union's intensity. The firm and the union have imperfect knowledge of each other's positions, particularly their intensity, and the greater the uncertainty (or the misalignment of perceptions), the greater the chance of a dispute occurring. Through the behaviour of their opponent during a dispute (and, for the union, their own members) they have inferred information about the likely outcome of the strike, which may cause them to revise the expected outcome.

This chapter is about policy, and as some of the factors described above are not directly affected by policy, they are not examined further here. However, some of them are clearly influenced by policy. For example, the expected level of penalties for taking industrial action affects costs facing unions and hence their members and their likelihood of taking industrial action. So too will the scope of activities which are likely to incur penalties, and the procedural costs parties must incur to avoid penalties. The expected cost to unions of taking strike action is influenced by policies

that affect their ability to mobilise, the insecurity of employees or the propensity of employers to be belligerent in their dealings with unions.

That said, the behaviour of parties in disputes reflects ingrained patterns of behaviour – 'cultures' – that develop and are reinforced over years, indeed decades. Major policy changes are frequently aimed at changing the culture of industrial relations. For example, the 'two tier' wage system of 1986-87 (under which wage increases were available at both the local level, to facilitate bargaining over productivity, and the national level) was aimed in part at promoting a union culture that was more supportive of workplace efficiency. The period of the WR Act, including the intended demonstration effect of confronting key unions (such as the Maritime Union of Australia in the waterfront dismissals of 1998), and the Work Choices legislation of 2005 (with its prohibitions on union-friendly clauses in agreements between consenting parties, as discussed by Cooper and Ellem in this volume), were implicitly aimed at changing employer culture, away from accommodation with unions and in favour of union avoidance. But culture is not so easily changed, and even under new policy regimes dispute behaviour may retain elements of cultures developed at earlier times.

A union benefits from imparting information about its 'intensity' provided it means the firm revises upwards the minimum outcome it expects to concede. At the same time, the union would like to reduce uncertainty about the duration and hence cost of strikes. Accordingly, the union has an incentive to undertake short, fixed-duration strikes that impart information about its intensity and minimise the level of and uncertainty about its own costs. Consequently, some strikes, on both wage and non-wage matters, would be short and end without immediate resolution of the issues concerned. These can be called *unconditional* strikes. In contrast, when *contingent* strikes commence there is uncertainty about likely strike duration. The regulatory and cultural environments may influence the balance between the two.

The Australian systems

Under the traditional award system, the federal industrial tribunal had powers of compulsory conciliation and arbitration. An award made in settlement of an industrial dispute had a fixed term, but continued in force after its expiry until it was subsequently varied or replaced. Any party had the capacity to reopen the dispute, the settlement of which had led to the award in the first place. Consequently, many believed there was no real commitment to implementing the provisions of an award or agreement once it was made. In theory, penalties for breaches of awards (including by taking industrial action) applied at any time, so there was no distinction between when industrial action could be taken and when it could not. And penalties were rarely applied (especially after the jailing of union leader Clarrie O'Shea in 1969: Deery and Plowman 1980). 'Since all strikes are outlawed', wrote Niland (1978: 52), 'it is not possible to effectively prohibit those types of strikes which are seen as especially detrimental'. In effect, there was no significant distinction between interest disputes and rights disputes in Australia. There was little incentive for unions to

refrain from industrial action for any but a short time after an award had been created in settlement of a previous dispute.

In the mid 1980s, as the economy was subjected to greater competitive pressures, employers in some very public disputes (such as at the Robe River iron ore mine in Western Australia, the Mudginberri meatworks in Northern Territory, the Dollar Sweets confectionery factory in Melbourne and the State-owned South East Queensland Electricity Board) made full use of the multiplicity of forms of legal recourse available (McCarthy 1985; Creighton 1987). These could be used to halt industrial action or to recover any losses suffered during the course of the bargaining process. In this context, the ILO Committee of Experts observed that existing law 'appears to deny workers the right to take industrial action' and called for remedial action (ILO Conference Committee on the Application of Conventions and Recommendations 1989). Moreover, as enterprise bargaining took hold from 1991, there were contradictions in seeking to promote direct bargaining between the parties while employers had an array of common law and statutory weapons that could be used against a union taking industrial action over a direct bargaining claim. The *Industrial Relations Reform Act 1993* consequently established that parties engaged in an interest dispute negotiating a single-employer agreement now had a qualified right to take industrial action. The 1993 Act also clarified that penalties would apply for parties taking industrial action in a rights dispute in breach of an agreement.

The right to strike while negotiating an agreement was retained but amended in the Coalition's *Workplace Relations Act 1996* (WR Act) and again under the Work Choices legislation that took effect from 27 March 2006. Work Choices also shifted the balance of power in favour of employers. It strongly privileged individual Australian Workplace Agreements (AWAs) that could undercut award conditions. It improved the ability of employers to temporarily replace striking permanent workers with casual or labour hire staff or contractors by prohibiting restrictions on their use in agreements as well as in awards. It substantially increased the fines for unprotected industrial action and the requirements that must be followed for action to be protected while restricting union access to workplaces (McCallum 2006; Cooper and Ellem 2008). It reduced the confidence and hence bargaining power of workers in small and medium firms by abolishing protections against unfair dismissal – or in all firms where dismissals could, in part, be attributed to 'operational reasons'. This left many workers reportedly fearful of even challenging managerial decisions, let alone going further and organising industrial action against their employer (Elton et al 2007; Workplace Rights Advocate 2007), even if at law an employer could not dismiss striking workers.

As explained by McCrystal elsewhere in this volume, many of the features of Work Choices regarding sanctions for undertaking industrial action remained largely intact under the FW Act, though secret ballot procedures before taking industrial action were marginally streamlined. However, several features of the 2009 Act represent a significant break from Work Choices and could affect parties' behaviour in disputation. These include: the potential for Fair Work Australia (FWA) to make majority support determinations, issue scope orders, and make bargaining orders requiring parties to bargain in good faith; the removal of employers' ability to use

AWAs to marginalise unions and de-collectivise employment relations; the removal of employers' capacity to use individual agreements (in combination with the insecurity arising from the lack of unfair dismissal protections in smaller organisations) to reduce conditions to levels below those established in awards; and improved general protections, including for employees exercising their industrial rights (Sappideen, O'Grady, Riley and Warburton 2011:457-72; French, Harpur and Muurlink 2012 (forthcoming):47-51).

These legislative and policy developments raise a number of questions that can be addressed using data on industrial disputes, covering the period up to and including the commencement of the FW Act. Does the introduction of a capacity lawfully to take industrial action increase strike levels? Or by clarifying when action is and is not permissible, does it reduce strikes in those circumstances where it is no longer permissible? The potential for greater penalties under the WR Act, increased under Work Choices, and the impediments created to union mobilising, might be expected to lead to substantial reductions in strike activity under that regime. The same might be said for the reduced overall power of individuals due to unfair dismissal changes, even if they could contest sackings attributable to participating in protected industrial action. Did that happen? Was that reversed with limited liberalisation under the FW Act? In what ways do the impacts of policy changes differ, between different types of disputes? How important were unconditional strikes as a signalling device under the traditional award system, with its absence of distinction between contingent and unconditional strikes? After the introduction of the capacity lawfully to take industrial action, were unprotected strikes shorter than protected strikes, because employees undertaking unprotected action need to minimise the risk arising from the action? After the shift to enterprise negotiation, was there a major increase in the proportion of disputes ended through negotiation, consistent with policy makers' objectives? Or did the persistence of existing industrial relations culture mean unconditional strikes still had a significant role? Did the establishment of a right to strike regime lead to the virtual disappearance of unprotected strikes, or did the parties adapt to such a regime by continuing to use patterns of behaviour that had served them well in the past?

Data and concepts

The data for this chapter are derived from those published by the Australian Bureau of Statistics (ABS) and relate to the direct withdrawal of labour. That is, they cover strikes and stop work meetings, but make no distinction between the two. They do not encompass 'quasi-strikes': bans, limitations on work or boycotts that might not involve the employees losing wages (Dabscheck and Niland 1981: 41). The data used here come from several electronic and (discontinued) hard copy annual, quarterly and monthly ABS sources (Cat Nos 6322.0, 6321.0, 6321.0.55.01, 6101.0, 6310.0, 6323.0, and 6325.0). Because of the way in which the data are collected (the ABS relies on a range of intelligence sources to be alerted to industrial disputes, and then sends questionnaires to employers it knows are affected, but conducts no regular census or random survey of employers to identify whether strikes have occurred), some disputes are missed.

The data are presented below in different periods, corresponding to policy regimes in Australian industrial relations. They are:

- the traditional award system, which lasted up until the end of 1982;

- the centralised Accord period, from 1983 to 1990, during which an incomes policy involved the Labor government and Australian Council of Trade Unions (ACTU) negotiating over wage increases payable at the national level (covering four 'Accord' agreements known as Accords I to IV);

- the decentralised or 'enterprise bargaining' period of the ACTU-Labor Accord (the 'EB Accord'), from 1991 to 1996 (as centralised wage determination was abandoned under processes set out vaguely in Accord V and explicitly in Accords VI and VII);

- the early and mid phases of the Coalition government's WR Act, from 1997 to March quarter 2006 – the split between 'early' and 'mid' phases is driven by data availability: in 2003 the ABS changed its method of defining and publishing disputes data, fundamentally altering its definitions of 'cause of dispute' and, less radically, 'method of settlement' (renamed as 'reason work resumed') and began to distinguish between disputes over enterprise bargaining ('EB disputes') and disputes over other matters ('non-EB disputes');

- the 'Work Choices' (late) period of the WR Act, from June quarter 2006 to March quarter 2008;

- the transition period between Work Choices and the FW Act (June quarter 2008 to June quarter 2009), during which several of the most important elements of Work Choices (eg the capacity to make new AWAs) were no longer operative, but most of the remaining provisions of the WR Act remained in place;

- the FW Act period, commencing in September quarter 2009. The period encompassed by this chapter (the first eighteen months of the FW Act) is referred to as the 'early FW Act' period.

Data on the method of settlement of strikes, that is the reason work resumed, concern the ending of the *strike*, not the settlement of the underlying dispute. Several measures of industrial conflict are referred to for purposes of this chapter: strike *frequency* (the number of strikes); strike *duration*; strike *size* (the number of workers involved); strike *volume* (the number of working days lost as a result of strikes); and strike *density* (strike volume divided by the number of workers, typically measured as working days lost per thousand employees (WDL/1000 employees)). The ABS does not publish cross-tabulations of these various indicators of industrial action, but it is possible to use correlation or regression analysis to explore relationships between

such measures. Strike duration may be unweighted (all strikes are weighted equally, as per the data that appear in the officially published ABS tables) or weighted (according to strikes' size), that is total strike volume divided by total strike size (a measure commonly employed in statistical studies of strike patterns).

The data cover different time periods according to the availability and relevance of data. Due to the changes in definitions, adjustments were made by the author to splice data before and after 2003 to create some continuous series. Unconditional strikes were essentially encompassed by what the ABS termed those 'resumed without negotiation' and, after 2003, 'pre-determined return to work'. Data for the early FW Act cover the eighteen months to December quarter 2010.

Also, since 2006 (end especially since 2009), the ABS has become more concerned about not publishing data on strike size and volume in some categories (eg disputes due to a certain cause in a particular quarter, such as disputes over health and safety in June quarter 2010) where only small numbers of strikes have occurred, because of the fear of releasing data about a specific dispute which are treated as confidential. The categories with missing data vary from quarter to quarter, and where this occurs data have been interpolated.

Strike density

Up to March 1994, most strikes in Australia were technically unlawful and there was no formal right to strike or lockout. Australian law had followed English law which regarded strikes as a breach of contract (Ewing 1989). Moreover, the introduction of the conciliation and arbitration system at the turn of the 20th century had been aimed at making strikes redundant, and strikes had been explicitly illegal until 1930 (Deery and Plowman 1980). In practice, for most of the 20th century the absence of this formal right appears to have had little effect in reducing the level of industrial disputes; indeed, industrial conflict peaked in the 1917-1920 period while strikes were still explicitly illegal.

Under the traditional award system that operated until 1982, Australia had a relatively high rate of industrial disputation when compared to several other industrialised nations (Dabscheck and Niland 1981:69). From 1950 to 1982, an average of 415 working days were lost per thousand employees due to industrial action each year. This three-decade aggregate disguised a long term growth in strike density, from an average of 265 WDL/1000 employees in 1950-1966 to 575 WDL/1000 thousand employees per year over the period from 1967 to 1982, peaking at 1273 WDL/1000 employees in 1974.

The prices and incomes Accord between the ACTU and Labor Government led to a significant drop in strike volume, considerably greater than what could be explained by economic circumstances or by international trends (Beggs & Chapman 1987a, 1987b, 1988; Morris and Wilson 1994). As shown in Table 1, during the first, centralised Accord period, from 1983 to 1990, strike volumes more than halved to just

229 WDL/1000 employees, as wages were largely taken off the bargaining table at the industry or workplace level and replaced by nationally determined increases.

The second phase of the Accord saw the shift to enterprise bargaining. Notably, there was a substantial drop in the density of industrial conflict with the shift from the centralised Accord to the EB Accord. The downward impact on strike volumes, of clarifying the periods when strikes were permissible and impermissible and establishing clear periods when penalties would apply, outweighed any upward impact from removing penalties for striking during the negotiation of new agreements.

[INSERT TABLE 1 HERE]

The early and mid phases of the WR Act saw a further substantial drop in strike density, with further significant falls again during the Work Choices era. This is consistent with the idea that reducing the costs to employers of withstanding strike action and increasing the costs of industrial action to employees reduces the volume of strikes. Legislation encouraged casual, labour hire and contract employment. It made it more difficult for employees to mobilise in the first place and increased the likelihood of sanctions for taking unlawful action (McCrystal 2006). By the time of Work Choices, the procedural hoops that had to be jumped through were so numerous and formidable that some saw the law as 'virtually extinguishing the right to strike' (White 2005) while employers often had ready access to alternative labour.

There is also the possibility that the continuing falls in strike density through this period reflected the continuing effects of a cultural shift against readily taking industrial action, a shift that had commenced in the 1980s with the Accord. It is difficult to measure the relative importance of this factor.

Over the first 18 months of the FW Act, average strike density was 28 per cent higher than during the two years of Work Choices. This is not surprising, as the FW Act reduced some of the costs associated with strike action compared to Work Choices, particularly the costs associated with mobilising (eg by making 'good faith' bargaining orders available). Still, strike density under the early FW Act was only a quarter of the levels experienced under the early and mid phases of the WR Act. Compared to the previous period of enterprise bargaining under a Labor government (the EB Accord), strike density under the early FW Act was almost 90 per cent lower. The fall in strike density is much greater than the decline in union density (and by implication, union power), as illustrated by the lower row of Table 1, and has occurred despite lower unemployment, which is often linked to higher levels of disputation (Beggs & Chapman 1987a, 1988; Bentley & Hughes 1970; Paldam & Pedersen 1982).

There have also been major changes in the industry composition of disputation, with mining accounting for much less than in the past, education, health and community services for more, but no evidence of a sustained fall in the construction industry's

share, despite the extensive attempts at 'reform' in that industry (Forsyth, Gostencnik, Ross and Sharard 2007; Creighton and Stewart 2010:838-80). In sum, the level of industrial conflict under the early FW Act is more like that under Work Choices than like any system that preceded it, and is much lower than under the EB Accord or the period preceding the move to enterprise bargaining.

Types of strikes: contingent and unconditional

Table 2 shows the importance of unconditional strikes in Australia. Under the traditional award system, unconditional strikes (those where work was resumed without negotiation) accounted for 47 per cent of strike volume. Unconditional strikes have not always been a feature of the Australian system. Up until the 1930s they consistently accounted for less than one fifth of strike volume, but as union strategy changed they grew in significance through the 1930s and 1940s until they accounted for roughly half of strike volume from the 1950s onwards (Perry 2005).

[INSERT TABLE 2 HERE]

Although no cross-tabulations of 'type of strike' against 'cause of strike' are published, ordinary least squares (OLS) regressions can be used to indicate the dispute issues that are most important in explaining variations in dispute terminations. Using quarterly data over the period 1970-1982, the frequency of unconditional strikes (and of strikes of one day in length or less) was most strongly explained by variations in disputes over wages issues, and vice versa. This was contrary to the conventional but untested wisdom that short strikes, terminated without negotiation, were grievance-related, 'usually...protests against decisions and policies regarded as being detrimental to labour' (Oxnam 1971:55; see also Niland 1978:49; Bentley and Hughes 1970:152). Rather, unconditional strikes appeared part of normal industrial campaigning, largely explaining why unconditional, fixed duration strikes, like wage-related strikes, tended to be larger (717 workers/strike for unconditional strikes, compared to 337 workers/strike for contingent strikes). This result suggested an historical pattern of wage bargaining very different to US-inspired strike models, in which strikes continue until a wage agreement is achieved. Wage bargaining frequently, though by no means always, involved industrial campaigns (often multi-employer) in which strikes of fixed rather than indefinite duration were unions' most efficient weapon.

Under the traditional award system between 1963 and 1982, around a third of strikes were ended through the arbitration systems, and a little over a sixth through direct negotiation. Again, it was not always thus. Over the first three decades of the twentieth century, strikes that ended after negotiation accounted for approaching two thirds of strike volume, but they declined to just one fifth by the 1950s. Despite the establishment of arbitration systems in the 1890s and 1900s, strikes that ended through legislative mechanisms (conciliation and arbitration) constituted only around one sixth of strike volume till the 1930s, but rose to nearly one half by the 1940s, before dropping to a third in the 1950s and 1960s (Perry 2005). As the parties

acculturated to how the arbitration system could be made to operate, union practices changed. They placed less reliance on protracted strikes where the withdrawal of labour continued until one side or the other capitulated, or at least an agreement could be reached, after a period of negotiations (consistent with many of the US-inspired strike models). They increased their emphasis on methods (contrary to those models) in which the strike was used as a signalling device to indicate the intensity of union positions, and to activate the processes of conciliation and arbitration.

The move to enterprise bargaining has seen the expected decline in the use of arbitration to end disputes. Arbitration's share of strike volume fell to 23 per cent under the EB Accord, 19 per cent in the early and mid WR Acts, then only 8 per cent under Work Choices (under which the arbitration tribunals were largely neutered). Despite the increase in powers given to the tribunal under the FW Act compared to Work Choices, arbitration's share of dispute volume is unchanged, at 8 percent, under the early FW Act.

However, the other outcome envisaged in this area – a greater reliance on negotiation to end strikes – has not materialised. After allowing for the likely impact of changing definitions in 2003, it seems that no period since the shift to enterprise bargaining has had a significantly higher usage of negotiation to end disputes than occurred in the traditional award period. Indeed, the use of negotiation to end disputes fell to a low point of 9 per cent of strike volume under Work Choices, and just 10 per cent under the FW Act.

The slack instead appears to have been taken up by unconditional disputes. Strikes where work resumed without negotiation, *including* those with an identifiable pre-determined return to work, accounted for a majority of strike volume through each of the enterprise bargaining periods, and have reached over 80 per cent of strike volume under the early FW Act. It appears that the methods of handling conflict that evolved over a century of arbitration have not easily been swept away, and have instead been adapted to suit the new environment. Unconditional strikes are still commonly used as a major signalling device to establish the 'intensity' and power of employees.

This persistence of elements of the earlier culture is illustrated in Table 3, which shows the average size of disputes by method of resolution over the four periods since 2003. In each period, the largest disputes have been unconditional strikes. On average, over the whole period since 2003, unconditional disputes have had an average size over three times that of contingent strikes. This remains the case under the FW Act.

[INSERT TABLE 3 HERE]

The Coalition government of 1996-2007 encouraged the use of external mediation. Strikes that ended through mediation rose briefly to account for 9 per cent of strike volume in the Work Choices era. But they fell to non-significance after the demise of Work Choices, accounting for approximately 5 per cent of strike frequency and

around 1 per cent of strike volume under the FW Act. Since the demise of Work Choices, where mediation was used at all, it was for settlement of very small disputes.

Overall, the pattern of dispute settlement under the early FW Act is rather more like that under Work Choices than it was under the EB Accord period and is far removed from the patterns that existed before the shift to enterprise bargaining.

Duration

There were major shifts in strike duration through the first half of the twentieth century as the parties gradually adapted to using the arbitration system. In the 1910s and 1920s, average weighted strike duration was typically around 15 days. Unions then adapted their tactics to the arbitration system and moved away from 'knock-em-down-drag-em-out' strikes that persisted until a settlement was reached, to a more strategic engagement with the arbitration system, including using strikes primarily as signalling devices. Average strike duration plummeted to just 2 days by the mid 1950s and was below that level through the 1960s.

Table 4 shows the distribution of strike volume by duration of strike over the various periods since 1963. There was a fall in the importance of longer disputes (of 5 or more days unweighted duration) from 49 per cent of strike volume under the traditional award system to 15 per cent under the EB Accord. The contribution of longer strikes has fluctuated since then, but increased to 41 per cent under the early FW Act. Very short disputes peaked under Work Choices. This partly reflects several 'national days of action' protesting against Work Choices, though most participants took time off work or participated outside work hours and so did not count as strikers. The Work Choices figures include stop work meetings, which received more publicity, and hence were more likely to become known to the ABS, because of a number of incidents where workers were, as required by the statute, docked four hours' pay for unauthorised meetings, no matter how short their duration (eg ABC 2006; Koutsoukis 2006), so stop work meetings then sometimes 'lasted' for four hours. Overall, however, it is likely that this made only a marginal contribution to the figures.

Matching the move back towards longer disputes, the share of *WDL* due to disputes lasting a day or less, which grew to 63 per cent under Work Choices, fell to 13 per cent of WDL under the early FW Act, the lowest figure for any period since the 1950s. Nevertheless, 44 per cent of recorded *disputes* lasted one day or less under the early FW Act, while only 16 per cent lasted 5 or more days.

[INSERT TABLE 4 HERE]

Despite the dominance of enterprise bargaining for almost two decades, Australia retains a pattern of strike duration that is more like its own past than it is like other countries with bargaining-based systems. In Britain, for example, in 2007, 65 per

cent of working days were lost in disputes that lasted 5 days or over (Hale 2007), compared with previously mentioned figures of 15 per cent under Work Choices and 40 per cent under the FW Act. Indeed, long strikes were more common under the traditional award system than they are now. Recall that over the 1963-1982 period in Australia, 49 per cent of strike volume consisted of strikes lasting five days or more. This is well below the recent British figure, but still in excess of recent experience in Australia.

The comparison with Canada is even more stark. Between 1966 and 2001 an average of 53 per cent of strikes lasted 10 days or more (Briskin 2005). Under the early FW Act, the comparable figure was only 8 per cent.

Even under the FW Act, the strike is primarily used to signal intensity, alerting employers (and, very rarely, tribunals) to the significance of an issue and the *willingness* of the union to impose economic costs on the employer if its demands are not met (or the employer's demands not withdrawn). Only occasionally does a union use a strike directly to inflict sufficient economic damage on an employer to force its capitulation. That is, the strike is strategically used to create a clearer indication of the *expected* costs to the employer if they fail to negotiate, rather than to impose *actual* costs that force them to concede.

[INSERT TABLE 5 HERE]

As shown in Table 5, in recent years unconditional disputes have typically had a shorter average duration than contingent disputes – on average, over the pre-FW Act periods, by 2.5 days to 1.1 days. However, the difference was not as great as in the traditional award period, when the mean weighted duration of contingent strikes was 5.1 days, compared to 1.5 days for unconditional strikes.

Interestingly, under the FW Act, average duration of unconditional strikes has increased, to double previous levels and 50 per cent above the level under the traditional award system. In each quarter of 2010, the average duration of unconditional strikes exceeded that of contingent strikes. This happened only twice out of 13 quarters before Work Choices, once during Work Choices and then in two of the five transitional quarters.

Unions are adjusting their strike behaviour to the requirements of the FW Act, which in turn are a modification of those introduced under Work Choices. Under the FW Act, they must specify, well in advance, the nature and timing of proposed industrial action (Creighton and Stewart 2010:820-4). With the level of planning and procedural hurdles that must be cleared, it makes sense for unions to make these unconditional strikes as potent a signal as possible. To act as an effective signalling device, unconditional strikes must be longer than before, because they are harder to

deploy than before.

Cause of dispute

Throughout the greater part of the 20th century, the most common cause of disputes (in terms of strike volume) was wages. The principal exception (prior to the 1980s) was in the late 1930s and early 1940s, when managerial policy and working conditions were more common causes. In the late 1960s and early 1970s, the relative precedence of wages was accentuated as the wages system decentralised within an award framework, and the pressure leading up to the wages explosion of 1974 grew (Plowman 1981:23-4). As shown in Table 6, during the traditional award system period of 1966 to 1982, disputes over wages accounted for 56 percent of strike volume.

This changed markedly during the centralised Accord period, when wages disputes dropped to only 24 per cent of strike volume. In terms of absolute numbers, working days lost through wages disputes dropped by four-fifths. The fall in wages disputes accounted for 96 per cent of the total fall in WDL. They have remained a low proportion of total dispute volume – under one fifth – ever since (highlighting the weakness of strike models based solely around wages). By contrast, working days lost through disputes over managerial policy rose by more than half under the centralised Accord, with the implication that some of the conflict that was suppressed by the wages rules of the Accord was transferred into disputes over managerial policy. The EB Accord experienced a further drop in all types of industrial dispute apart from 'other disputes' (this last result reflecting the protests against the Victorian Government's industrial relations legislation in 1992). This reinforces the notion that there was a change in strike culture associated with the introduction of enterprise bargaining and formal recognition of the right to strike. Interpreting the transition between these periods is also complicated by the fact that enterprise bargaining disputes that encompassed disputes over managerial policy as well as wages were normally classified as 'managerial policy', so the drop in the relative share of wages disputes between those periods is probably overstated.

[INSERT TABLE 6 HERE]

At the time, no separate data were collected on EB disputes but in 2003 this was remedied and Table 7 contains data on causes of disputes from that time.

Several things are noteworthy about Table 7. First, under the early FW Act, around 24 per cent of working days lost were in disputes that were not related to enterprise bargaining.

There are two ways of looking at that number. Some may see it as remarkable that, given the sanctions that surround unprotected action, at least 24 per cent of working days lost were due to such disputes. Some behaviours that developed under arbitration

regimes were still effective under the FW Act (and, for that matter, Work Choices) despite being unlawful. Old cultures may change, but they do not necessarily disappear.

On the other hand, this number represents a significant drop in the incidence of unprotected disputes. Under Work Choices, 58 per cent of working days lost were in non-EB disputes. Under the FW Act, that proportion has more than halved. The FW Act is the first period in which a large majority of WDL are occurring only through the mechanism of disputes over EB. This may reflect several things, including greater enforcement of non-EB disputes by more heavily resourced inspection agencies, the slightly more generous availability of legitimate opportunities for industrial action under the FW Act, and access to beneficial elements of protected bargaining such as access to good faith bargaining processes.

That the majority of WDL during the Work Choices period were in non-EB disputes is especially noteworthy, as this regime brought about a much higher likelihood of sanctions against unprotected action (and hence higher expected cost) than had existed under the WR Act (McCrystal 2006). During the WR Act, 49 per cent of WDL were in non-EB disputes, so Work Choices, rather than abolishing unprotected action, saw a *relative* increase in its incidence (compared to that of protected action). Of course, this was in the context of a major reduction in total industrial action under Work Choices, but the fall in WDL in EB-related disputes (79 per cent) was greater than the fall in WDL in non-EB disputes (70 per cent).

[INSERT TABLE 7 HERE]

One factor in this is probably that some unions considered that it was so hard to engage legally in industrial action, they may as well do it unlawfully anyway. (Note, though, that strikes in support of EB claims that were deemed unprotected because they failed to meet technical requirements concerning notice or ballots, would have been defined by the ABS as EB-related disputes. So the level of non-EB strikes understates the level of unprotected industrial action. As well, unprotected strikes are less likely to come to the attention of the ABS than protected EB claims, leading to further understatement of the level of unprotected action.) In addition, a number of unions sought to finalise enterprise agreements before Work Choices took effect, bringing forward some EB-related disputation from the Work Choices period to the preceding period.

Table 8 shows average duration per employee by cause of dispute. Disputes over enterprise bargaining tended to be longer than disputes over non-EB matters. This is not surprising, as non-EB disputes, being typically unlawful, would need to be short to avoid inviting employers or authorities to take action in the tribunal and/or courts to terminate the action and (perhaps) penalise the union. Perhaps more surprising is that the difference in average duration between the two is not greater.

[INSERT TABLE 8 HERE]

Table 9 shows the average size (number of workers involved) of disputes since 2003. Disputes over matters relating to enterprise bargaining typically involved more workers than disputes over non-EB matters. This is especially the case for disputes over remuneration. Non-EB disputes over remuneration ranged from half to less than a quarter the size of EB disputes over similar issues, probably because larger disputes are more visible to authorities and the media and hence more demanding of legitimacy. Yet by the time of the FW Act, disputes over non-EB matters had a slightly higher average size than disputes over non-EB matters. This did not reflect substantial growth in the average size of non-EB disputes. Rather, average EB dispute size under the FW Act fell noticeably.

[INSERT TABLE 9 HERE]

This is in the context of a long term decline in average size of disputes related to EB – though one not as great as might be expected in the context of the shift in the locus of bargaining. In the period from 1970-1982, disputes over wages were quite large, averaging 736 workers per strike. Some of these were multi-employer or even industry level strikes. Perhaps surprisingly, in the mid WR Act period, the average size of disputes over remuneration was still 599 employees per strike, including 789 in EB disputes over remuneration. A substantial fall in the average size of wage disputes might have been expected as bargaining shifted from larger to smaller employers, but perhaps an offsetting factor was that workers in smaller enterprises may have been less likely to be strongly organised (there is a well-established positive relationship between size of workplace or organisation and union density: Millward and Stevens 1986; Visser 1991) and may have suffered a sufficiently large drop in bargaining power to make them unwilling to strike over wages. By the time of the FW Act, the average size of strikes over remuneration had fallen to 146 employees per dispute (150 in EB disputes over remuneration). This is unlikely to reflect a further shift in bargaining to lower levels. Indeed, the average size of enterprise agreements (the number of employees they cover) increased slightly in the private sector, and increased substantially in the public sector, between the Work Choices period and the early FW Act. The drop in average size of EB disputes is probably due to some improvement in power for workers in smaller workplaces and organisations. However, as with many matters, caution is required because these data concern only the first six quarters of the FW Act.

Conclusions

Australia has its own unique pattern of industrial conflict that is distinct from the North American and British patterns and which is not readily explained by US-inspired strike models. It reflects the institutional history of Australian industrial relations and the way that parties habituated by former systems have adapted the rules of successive legislative regimes.

The data suggest a number of preliminary conclusions about industrial conflict before and under the early FW Act, bearing in mind they are based on the experience of the

first eighteen months of the Act's operation. Several of these conclusions are consistent with the model discussed earlier, which focused on the institutional (and economic) factors and strategic issues influencing the expected costs and benefits of industrial action.

The introduction of a qualified right to strike clarified when action is permissible and when it is not. This led to a reduction in strikes in those circumstances where it was no longer permissible. This trend has continued under the FW Act. The impediments to effective union organisation and collective bargaining that were enshrined in the WR Act and then Work Choices resulted in substantial reductions in strike activity. The subsequent easing of those restrictions under the FW Act has so far had little impact on strike activity.

While the volume of strike activity under the early FW Act is more like that under Work Choices than any earlier period, the patterns of strike behaviour have changed. The volume of unconditional strikes is proportionately greater and they are *smaller* but last for substantially *longer*. Disputes are much more focused on enterprise bargaining.

Unprotected strikes under the FW Act and earlier bargaining regimes remain shorter than protected strikes, as unions and members need to minimise the risks associated with them. Perhaps one of the most notable things is that despite nearly two decades of enterprise bargaining, there is still a substantial number of short, unlawful disputes on non-EB matters. If this is an indication of lawlessness, however, then it is a form of lawlessness that was lower under the FW Act than under Work Choices or any other regime.

Under the traditional award system, unconditional strikes evolved into an important signalling device of unions' intensity, and became a frequent alternative to striking indefinitely until one party conceded. Even after the shift to enterprise bargaining, unconditional strikes still have a significant role. The introduction of burdensome procedural requirements under Work Choices, largely retained under the FW Act, favours unconditional strikes, as every aspect of industrial action, including timing, has to be planned well in advance. In consequence, unconditional strikes have become the dominant pattern under the FW Act. The procedural requirements emphasise to unions their need to provide a strong signal to employers when action is taken. As a result, the average duration of those unconditional strikes that do take place has increased under the FW Act. Unions have deployed longer, more potent unconditional strikes. That said, unconditional strikes still only averaging a couple of days in duration. Australian unions typically avoid becoming caught up in the much longer disputes, lasting two weeks or more, that have been more typical of the North American and, to a lesser extent, British systems. Short, unconditional strikes were never just about grievances and protests (cf Oxnam 1971), they were always an important tactic in bargaining campaigns. They have now increased in duration, and importance, because of the procedural requirements surrounding disputation.

One thing that did *not* happen was an increased role for negotiation in ending strikes, either under Work Choices or the FW Act. This is contrary to the implied expectations of policy makers. Enterprise-level bargaining might make parties focus more on enterprise-level negotiations, but once a strike has commenced negotiations play no greater role in termination them than they have in the past. Strikes simply do not usually last long enough for negotiation to become critical.

Changes in strike patterns take a long time fully to unfold due to the resilience of culture and tactical behaviours that develop under previous regimes. Over the long term, the patterns under the FW Act are consistent with the idea that Australia is gradually moving towards disputes patterns that are closer to those in other developed English-speaking countries. But the emphasis is on 'gradually' and full convergence seems unlikely. Disputes under the FW Act retain many of the characteristics that the Australian system developed over the preceding hundred years. Unions have responded to an enterprise-based bargaining system by adapting and modifying existing traditions and behaviour, in ways that suggest Australian dispute patterns might never resemble those in the North American enterprise-based systems.

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Table 1: Working days lost per thousand employees and per thousand union members, by period, 1967-2010

	Traditional award system	Centralised Accord	**EB Accord**	WRA Early & Mid	**Work Choices**	Transition	**FW Act**
	1967-1982	1983-1990	**1991-1996**	1997-2006(1)	**2006(2)-2008(1)**	2008(2)-2009(2)	**2009(3)-2010(4)**
Working days lost per thousand employees	**575.1**	229.0	**130.4**	54.8	**10.7**	17.9	**13.7**
Working days lost per thousand union members	**1,080.6**	516.1	**362.0**	219.7	**54.6**	92.9	**69.8**

Source: Reserve Bank of Australia, Historical Tables 4.21; ABS Cat Nos 6321.0.55.001; 6310.0; 6323.0; 6325.0.

Table 2: Reason work resumed, share of all working days lost, by period, 1963-2010

	Traditional award system	Centralised Accord	**EB Accord**	WRA Early & Mid	**Work Choices**	Transition	**FW Act**
Period	**1963-1982**	1983-1990	**1991-1996**	1997-2006(1)	**2006(2)-2008(1)**	2008(2)-2009(2)	**2009(3)-2010(4)**
Unconditional strikes	**47%**	43%	**65%**	58%	**72%**	89%	**82%***
- Pre-determined return to work				# 32%	**29%**	84%	**80%**
- Resumption without negotiation				# 30%	**43%**	5%	**2%***
Contingent strikes	**53%**	58%	**35%**	42%	**28%**	11%	**18%**
Negotiation	**19%**	16%	**12%**	19%	**9%**	6%	**10%**
Conciliation and arbitration	**34%**	39%	**23%**	19%	**8%**	5%*	**8%***
- State legislation	**10%**	12%	**3%**	5%	**1%**	1%*	**3%***
- Federal (plus joint Federal-State legislation, pre-2003)	**24%**	27%	**19%**	14%	**7%**	4%	**5%***
Other methods	**1%**	2%	**0.5%**	3%	**11%**	Ø*	**1%***
- Mediation				# 4%	**9%**	Ø*	**1%***
- Other				# 2%	**2%**	0%	**0%**
All	**100%**	100%	**100%**	100.0%	**100.0%**	100%	**100.0%**

These cells cover the period from 2003-2006 only, and hence do not add to their category subtotals.

* includes some interpolated data for at least one quarter

Ø Less than 0.5 per cent

Note: The change in definitions of method work resumed in 2003 means that there are some discrepancies in data between the pre-2003 and post-2003 estimates. Data were double-coded in 2003, and correspondence analysis suggests that, relative to the post-2003 definitions, the pre-2003 definitions led to the following understatements (-) or overstatements (+) of WDL: negotiation -2.7 percentage points; conciliation and arbitration +0.1 points; state legislation +2.1 points; federal legislation -2.0 points; unconditional strikes (resumption without negotiation) +1.0 points; other +1.6 points.

Table 3: Average number of workers involved per dispute per quarter, by method of resolution, by period, 2003-2010

	WRA (Mid) 2003-2006(1)	Work Choices 2006(2)-2008(1)	Transition 2008(2)-2009(2)	FW Act 2009(3)-2010(3)
Unconditional strikes	592	1129	1158	361
Pre-determined return to work	737	571	1532	380
Resumption without negotiation	533	2193	229	138
Contingent strikes	181	179	176	116
Negotiation without intervention of a third party	170	94	184	101
State legislation	119	109	160	120
Federal legislation	247	203	203	157
Mediation	192	348	17	50
Other methods	82			
Total Reasons	397	626	815	267

Note: excludes quarters where data suppressed from publication for a particular category

Table 4: Unweighted duration of dispute, share of total working days lost, by period, 1963-2010

	Traditional award system	Centralised Accord	**EB Accord**	WRA Early & Mid	**Work Choices**	Transition	**FW Act**
Period	**1963-1982**	1983-1990	**1991-1996**	1997-2006(1)	**2006(2)-2008(1)**	2008(2)-2009(2)	**2009(3)-2010(4)**
Up to and including 1 day	**16%**	23%	**27%**	26%	**63%**	25%	**13%**
Over 1 day and up to & including 2 days	**15%**	14%	**31%**	22%	**11%**	54%*	**19%**
Over 2 and less than 5 days	**20%**	18%	**27%**	27%	**11%**	12%	**27%**
5 and less than 10 days	**20%**	18%	**8%**	9%	**5%**	1%*	**15%***
10 days and over	**29%**	28%	**7%**	16%	**10%**	8%*	**26%***
Total all WDL	**100%**	100%	**100%**	100%	**100%**	100%	**100%**

* includes some interpolated data for at least one quarter

Source: ABS Cat No 6321.0.55.001 and 6321.0

Table 5: Average weighted duration of disputes per employee, by method of resolution, by period, 2003-2010

	WRA (Mid) 2003-2006(1)	Work Choices 2006(2)-2008(1)	Transition 2008(2)-2009(2)	FW Act 2009(3)-2010(4)
Unconditional strikes	1.2	0.9	1.2	2.2
Pre-determined return to work	1.7	1.1	1.1	2.3
Resumption without negotiation	0.9	0.8	1.4	0.8
Contingent strikes	2.6	2.3	1.8	2.2
Negotiation without intervention of a third party	2.7	3.4	2.2	2.9
State legislation	1.6	1.1	1.3	3.7
Federal legislation	2.6	1.6	1.4	1.3
Mediation	2.4	2.0	1.0	1.3
Other methods	12.2			
Total Reasons	1.5	1.1	1.2	2.2

Note: excludes quarters where data are suppressed from publication for a particular category. As a result, the average durations for particular categories may appear inconsistent with average duration for 'total reasons'.

Table 6: Cause of dispute (issue), share of total working days lost, by period, 1966-2010

	Traditional award system	Centralised Accord	**EB Accord**	WRA Early & Mid	**Work Choices**	Transition	**FW Act**
Period	**1966-1982**	1983-1990	**1991-1996**	1997-2006(1)	**2006(2)-2008(1)**	2008(2)-2009(2)	**2009(3)-2010(4)**
Managerial policy, hours and leave	**24%**	53%	**36%**	53%	**42%**	78%*	**79%***
Wages	**56%**	24%	**16%**	19%	**16%**	17%*	**13%***
Physical working conditions	**4%**	13%	**4%**	9%	**3%**	3%*	**4%***
Trade unionism	**4%**	6%	**4%**	3%	Ø	1%*	**4%***
Other	**12%**	5%	**40%**	17%	**39%**	Ø *	**1%***
Total	**100%**	100%	**100%**	100%	**100%**	100%	**100%**

* includes some interpolated data for at least one quarter

Ø less than 0.5 per cent.

Note: Definitional changes in cause of dispute in 2003 may affect some comparisons, though the effects are not likely to be large.

Table 7: Cause of dispute (enterprise bargaining versus non-EB), share of total working days lost, by period, 2003-2010

	WRA (Mid) 2003-2006(1)	**Work Choices 2006(2)-2008(1)**	Transition 2008(2)-2009(2)	**FW Act 2009(3)-2010(4)**
Enterprise Bargaining	51%	**42%**	56%*	**76%***
Remuneration	34%	**16%**	16%	**12%**
Employment conditions	14%	**25%**	40%*	**65%**
Other	3%	**2%**	Ø	Ø *
Non-enterprise Bargaining	49%	**58%**	44%*	**24%***
Remuneration	3%	Ø **%**	1%*	Ø *
Employment conditions	1%	**1%**	28%*	**11%***
Health and safety	11%	**3%**	3%	**4%***
Job security	5%	**7%**	1%*	**1%***
Managerial policy	8%	**8%**	9%	**1%***
Union issues	3%	Ø	1%*	**5%***
Other	17%	**39%**	Ø *	Ø *
Total	100.0%	**100.0%**	100.0%	**100.0%**

* includes some interpolated data for at least one quarter for a particular category

Ø less than 0.5 per cent.

Table 8: Average weighted duration of disputes per employee, by cause of dispute, by period, 2003-2010

	WRA (Mid) 2003-2006(1)	**Work Choices 2006(2)-2008(1)**	Transition 2008(2)-2009(2)	**FW Act 2009(3)-2010(4)**
Enterprise Bargaining	2.4	**1.5**	1.0	**2.6**
Remuneration	2.2	**2.0**	1.1	**2.4**
Employment conditions	3.2	**1.2**	1.0	**2.7**
Other	2.2	**3.5**	0.8*	
Non-enterprise Bargaining	1.1	**0.9**	1.5	**1.3**
Remuneration	2.2	**1.2***	1.3	**1.3***
Employment conditions	1.2	**1.0***	1.6*	**4.1***
Health and safety	1.3	**1.1**	1.1	**1.0**
Job security	2.2	**1.3**	1.2	**3.0***
Managerial policy	1.5	**1.4**	2.1	**0.6**
Union issues	0.9	**0.8**	0.9	**0.7***
Other	0.7	**0.8**	0.6*	**0.4***
All disputes	1.5	**1.1**	1.2	**2.2**

* These cells should be interpreted with great caution as they are based on observations from less than ten strikes.

Note: All cells except the bottom row excludes quarters where data are suppressed from publication for a particular category. As a result, the average durations for particular categories may appear inconsistent with average duration for all disputes.

Table 9: Average number of workers involved per dispute, by cause of dispute, by period, 2003-2010

	WRA (Mid) 2003-2006(1)	Work Choices 2006(2)-2008(1)	Transition 2008(2)-2009(2)	FW Act 2009(3)-2010(4)
Enterprise Bargaining	599	474	1339	259
Remuneration	789	261	798	150
Employment conditions	432	843	1954	306
Other	235	55	120*	
Non-enterprise Bargaining	303	186	517	280
Remuneration	157	60*	191	75*
Employment conditions	122	120*	4311*	617*
Health and safety	185	119	153	204
Job security	222	518	171	100*
Managerial policy	143	148	245	129
Union issues	263		225	850*
Other	2675		125*	320*
All disputes	397	626	815	267

* These cells should be interpreted with great caution as they are based on observations from less than ten strikes.

Note: All cells *except those in the bottom row* exclude quarters where data are suppressed from publication for a particular category.

Attachment D: 'Are Employees on AWAs Really Better Off Than the Rest of Us? Reanalysing the OEA's employee survey '

Peetz, D, 'Are Employees on AWAs Really Better Off Than the Rest of Us? Reanalysing the OEA's employee survey', in M Barry & P Brosnan (eds) *New Economies: New Industrial Relations,* Proceedings of the 18th AIRAANZ conference, Volume 1: Refereed Papers, Association of Industrial Relations Academics of Australia and New Zealand, Noosa, February 2004, pp371-380.

Are Employees on AWAs Really Better Off Than the Rest of Us? Reanalysing the OEA's Employee Survey

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While most studies have shown employees to be disadvantaged by individual contract regimes, a survey undertaken by the Employment Advocate purported to show that employees were at least as well off, and in some ways better off, under AWAs, particularly in large workplaces where 'high performance' strategies allegedly dominated. There are several possible reasons for this set of findings, but one clear factor is the failure to distinguish between managerial/professional and 'ordinary' employees in analysis of the effects of AWAs. Further analysis of the survey data indicates that, for ordinary employees, pay is less satisfactory, hours are more likely to increase, and the work-family balance is more difficult for AWA employees than for other employees, while there is little evidence of the higher trust claimed in large AWA workplaces – though there is a possibility that AWA employees have lower expectations than other employees.

Introduction

A large number of studies have suggested that individual contract regimes are associated with poorer outcomes for employees than collective bargaining (eg Oxenbridge 1999; Rasmussen and Deeks 1997; Dannin 1997; Watson 2001). There is, however, one research fly in the ointment. This is a survey undertaken in 2001 for the Office of the Employment Advocate (OEA) and analysed and written up by Paul Gollan of LSE.

The OEA is the body established by the Howard Government to administer two parts of the Workplace Relations Act: the 'freedom of association' provisions, and the provisions relating to AWAs. It is a highly controversial agency that the Labor Opposition has promised to abolish if it wins Government again, as it is seen as championing the anti-union agenda set out in those two parts of the WR Act (the 'freedom of association' provisions being primarily concerned with preventing compulsory union membership and prosecuting unions who seek to impose compulsory unionism). It is certainly the case that the OEA simultaneously has responsibility for ensuring AWAs satisfy legislative requirements while actively encouraging their use through media campaigns, and this appears to create an irresolvable conflict of interest for it. Having said that, it must be pointed out that, to the OEA's credit, access to AWAs for researchers is considerably easier than was access to individual contracts under the former New Zealand or Victorian legislation, and the OEA has funded several external research projects, one of which was the Gollan survey. The Gollan/OEA survey has been used by the OEA to refute claims in other research (eg by Roan et al 2000) that firms using AWAs adopt a 'hard' rather than 'soft' HRM approach. Again to its credit, the OEA has also allowed access to the survey dataset to outside researchers, enabling this paper to be written.

The Gollan/OEA study actually involved two parallel telephone surveys, each with about 1000 respondents: one of employees on AWAs, drawn from the OEA database; and one of a random selection of employees in the population at large. The 'random' sample mainly includes people on awards, unregistered individual agreements and registered collective agreements, but is unable to distinguish between them. Broadly speaking, the Gollan survey found little difference between the two samples on a range of issues. Where there were differences, they tended to favour the AWA-covered employees. For example, Gollan reported that

> *AWA employees are more likely to be working longer hours and to report working harder, but are less stressed and are more likely to report that their work and life balance has become easier because their workplaces have become more accommodating. This suggests that 'flexibility' may be a two way street in AWA workplaces and indicates a 'soft' HRM approach. (Gollan 2002:45)*
>
> *These figures confirm that AWA employees are in general no less satisfied with their pay than other employees and could be indicative of high performance workplace characteristics being more common within AWA workplaces. (Gollan 2002:45)*

The Employment Advocate, Jonathan Hamberger, has likewise argued that:

> *'These results suggest that in practice employees with AWAs are doing better than other employees in terms of control over their working hours and balancing their work with other aspects of their lives,' (Workplaceinfo 2002)*

and that:

'perceptions of management amongst AWA employees in larger workplaces are consistently much more positive than those of other employees (many of whom would be on collective agreements)...When it came to change in satisfaction with pay and conditions, AWA employees in larger workplaces were significantly more positive than the random sample employees' (Hamberger 2002)

One of the themes of these analyses is that the benefits of AWAs for employees are particularly apparent in large workplaces, where the people that AWA employees are being compared against are most likely to be covered by collective agreements. As implied above, Gollan refers to these large workplaces with AWAs as pursuing 'high performance' strategies.

Possible explanations for divergence

There may be several reasons why the Gollan/OEA survey produces findings at variance with the other studies reported above. First, there are problems with the survey itself. Cully (2001) in particular has criticised the first iteration of the study (Gollan 2001) for failing to report response rates, failing to consistently apply tests of statistical significance, questionable use of causal attribution and, most importantly, a series of biases in the data. The 'random' or control group over-represented white collar and well-educated workers, under-represented blue- and 'pink-collar' workers, over-represented the better paid and over-represented trade union members. There was no test of bias or representativeness in the 'AWA' sample. There was an in-built bias in the AWA sample as it only included employees who had an AWA approved from six months to two years prior to the survey, the upper limit being to 'minimise those employees who might have changed jobs or employers since their AWAs were approved'. There were twice as many employees in the AWA sample (47 per cent) who have worked for their present employer for less than two years than in the random sample (25 per cent), and to the extent that employment duration is a predictor of attitudes, this may explain some of the observed differences between the AWA group and the random group (Cully 2001). A year later, the OEA and Gollan responded to this critique by issuing a revised report (Gollan 2002) in which results were reweighted by occupational category using ABS employment data. In the end, this did not make large differences to many of the findings, in part because some of the other biases in the dataset (such as the under-representation of casuals) were not corrected or were even worsened (for example, the overrepresentation of union members (Gollan 2002:54)).

Second, even if we set aside these concerns, there may be substantial heterogeneity in the characteristics of AWAs. For example, many employees on individual contracts are senior managerial and other senior staff, and in the public sector in particular senior managerial staff are paid under formalised individual contracts; consequently many employees on individual contracts have high earnings because of their occupational position, and this distorts any comparison between workers on individual contracts and other workers. Thus, the ABS *Employment, Earnings and Hours* survey estimates that, in the public sector, earnings of employees on registered individual contracts are 35.7 per cent higher than those on collective agreements, reflecting the heavy concentration of individual contracts amongst senior public servants. Yet in the private sector, earnings of employees on registered individual contracts were 2.2 per cent less than those on collective agreements for males, and 10.0 per cent less than those on collective agreements for females. Overall, earnings of employees on formalised individual

contracts are higher simply because of this overrepresentation of highly paid senior public servants in the data.

Third, and relatedly, there may be variation in the purposes of employers in introducing AWAs. While there is a wide body of evidence that many employees under individual contracts are worse off than they would be under union-negotiated collective agreements or even, in some cases, under the low standards set by awards, it does not follow that employees on individual contracts will inherently have inferior terms and conditions of employment. Many recipients of individual contracts will be more senior or skilled staff in relatively high paid positions. Consistent with this, Schedule 1A workplaces in Victoria, were also more likely than workplaces under federal coverage to have high rates of pay (Watson 2001:142) – in addition to being (as mentioned) more likely to have low pay than workplaces under federal coverage. Contractualist arrangements were more likely to apply both to employees with substandard pay and to employees in occupations with strong labour market position.

Moreover, individual contracts may have a non-union premium attached to them. Because of the increased profitability that might apply through the greater exercise of managerial prerogative available through procedural individualism – that is, because individual contracts give management greater power to demand of labour as it sees fit – employers may offer employees a higher wage through individual contracts than is available through collective bargaining, in order to induce employees to foresake union coverage. CRA/Rio Tinto, for example, offered employees several thousand dollars per year – at Bell Bay, for example, equivalent to increases in wages of between 11 and 13 per cent - to move from award coverage to individual contracts (AIRC 1994; Hearn Mackinnon 1996:289; Waring 2000:47).

Fourth, there is a strong possibility of reverse causality. That is, employers may be most likely to succeed in introducing AWAs in workplaces with high 'trust' between management and employees. It would not follow that AWAs in any way enhance trust at the workplace.

Fifth, AWA employees may have lower expectations than other employees, leading to higher satisfaction for a given level of benefits or conditions.

Finally, the way in which the survey data were analysed by Gollan may disguise heterogeneity in AWA content and strategy. In particular, Gollan did not separately analyse the treatment of managerial, professional and non-managerial, non-professional employees. As mentioned above, the patterns in relation to managerial employees on AWAs may be very different to non-managerial employees, in particular because of the public sector effect. Moreover, employees in professional occupations, typically possessing high individual bargaining power in the labour market, may not be significantly disadvantaged through the introduction of AWAs and indeed may receive premia for taking up AWAs. Those in non-managerial, non-professional occupations will be more likely to lack the individual bargaining power or labour market position of managerial and professional employees, and may be less likely to be advantaged by AWAs. While, within non-managerial, non-professional employees, we cannot separately differentiate between those with strong labour market position, those subject to 'premium strategies' and those who are in weaker bargaining positions, it may

still be more useful to look at this 'ordinary' group and see if it follows the patterns ascribed to the population at large.

Accordingly, the rest of this paper represents a secondary analysis of the Gollan/OEA survey. Our main interest is in testing whether, for non-managerial, non-professional employees, the benefits of AWAs are apparent. For the sake of brevity, we shall call this group 'ordinary' employees. We test the significance of the difference between AWA employees and the control group by use of the χ^2 log-likelihood test. We use unweighted rather than weighted data, as the weighting system employed by Gollan did not overcome many of the biases in the sample and the application of weights would needlessly complicate the calculation of significance tests. We look at comparisons across all workplaces but also look at differences between AWA employees and the control group (the 'random' survey) within large workplaces (those with 100 or more employees) as the OEA and Gollan both suggest that it is in large workplaces that the benefits of AWAs and their link to a high performance management strategy are more apparent. However, because the large-workplace sample is necessarily smaller than the all-workplace sample, significance levels in the large workplace sample will be weaker even when the effects are the same as for all workplaces.

Are 'ordinary' employees as satisfied with their pay as other employees?
While Gollan reported that 'AWA employees are in general no less satisfied with their pay than other employees' it is apparent from Tables 1 and 2 that this statement is very dependent on the type of employee being considered. In particular, ordinary AWA employees were less satisfied than the control group with their pay', and with their 'pay and conditions'. This was so even in large workplaces, raising serious doubts about whether high performance pay was more common within large AWA workplaces.

Table 1
Satisfaction with pay

	AWA employees	Control group	Significance level of difference
	% satisfied	% satisfied	
Managerial and professional employees	51	45	ns
Ordinary employees	43	53	0.1%
Ordinary employees in large workplaces	41	53	1%

Source: Gollan/OEA survey, unpublished data. N=746 (ordinary AWA), 661 (ordinary control), 294 (mgl-profl AWA), 349 (mgl-profl control), 308 (ordinary AWA, large wkplaces), 209 (ordinary control, large wkplaces).

Table 2
Satisfaction with pay and conditions

	AWA employees	Control group	Significance level of difference
	% satisfied	% satisfied	
Managerial and professional employees	53	49	ns
Ordinary employees	46	52	10%
Ordinary employees in large workplaces	42	53	1%

Source: Gollan/OEA survey, unpublished data. N=746 (ordinary AWA), 661 (ordinary control), 294 (mgl-profl AWA), 349 (mgl-profl control), 308 (ordinary AWA, large wkplaces), 209 (ordinary control, large wkplaces).*)*

Do AWA employees have greater control over their hours, less stress and a better work/family balance?

The claimed benefits of AWAs for employee control over their working hours are questioned by the data in table 3. Very divergent trends are apparent between managerial/professional and other employees. In the managerial/professional category, AWA employees perceive greater control over working hours than do other employees. Amongst ordinary employees, however, the AWA employees have significantly less control over their hours than other workers. The pattern is in the same direction, but weaker (and non-significant) when we restrict it to the smaller sample of large workplaces.

Table 3
Satisfaction with control over hours

	AWA employees	Control group	Significance level of difference
	% satisfied	% satisfied	
Managerial and professional employees	67	53	5%
Ordinary employees	50	57	1%
Ordinary employees in large workplaces	49	52	ns

Source: Gollan/OEA survey, unpublished data. N=746 (ordinary AWA), 661 (ordinary control), 294 (mgl-profl AWA), 349 (mgl-profl control), 308 (ordinary AWA, large wkplaces), 209 (ordinary control, large wkplaces).

One reason why ordinary AWA employees were less satisfied with their control over working hours is that they were more likely to be working longer hours than the control group. This is apparent in Table 4, which shows data for full-time employees as well as all employees (as an increase in hours amongst part-time employees would be considered a good thing by many of them).

Table 4
Increase in hours worked

	AWA employees	Control group	Significance level of difference
	% working more hours	% working more hours	
Managerial and professional *full-time adult* employees	35	35	ns
Ordinary *full-time adult* employees	33	25	1%
Managerial and professional employees	40	42	ns
Ordinary employees	32	24	1%
Ordinary employees in large workplaces	36	25	10%

Source: Gollan/OEA survey, unpublished data. N=746 (ordinary AWA), 661 (ordinary control), 294 (mgl-profl AWA), 349 (mgl-profl control), 308 (ordinary AWA, large wkplaces), 209 (ordinary control, large wkplaces).

Similarly, ordinary AWA employees were more likely than the control group to report that they were working harder now than two years earlier (Table 5). This was not the case within the managerial/professional group – the sign was in the opposite direction, though the difference between AWA and control employees there was non-significant. In large workplaces, the gap amongst ordinary employees between AWA employees and the control group was smaller and non-significant.

Table 5
Changing work effort

	AWA employees	Control group	Significance level of difference
	% say difficulty of work is harder	% say difficulty of work is harder	
Managerial and professional employees	56	59	ns
Ordinary employees	53	47	5%
Ordinary employees in large workplaces	54	51	ns

Source: Gollan/OEA survey, unpublished data. N=746 (ordinary AWA), 661 (ordinary control), 294 (mgl-profl AWA), 349 (mgl-profl control), 308 (ordinary AWA, large wkplaces), 209 (ordinary control, large wkplaces).

Despite suggestions of lower stress amongst AWA employees by Gollan, the differences between AWA employees and the control group on this issue were non-significant.

All this meant that the alleged benefits of AWAs for the work-family balance did not materialise for many ordinary employees. As Table 6 indicates, in the ordinary group AWA employees were significantly more likely than control employees to report their work and family balance had become more difficult. The pattern was similar when restricted to large workplaces but, principally because of smaller sample size, the difference became non-

significant. Within the professional/managerial group, the pattern was once again different: AWA employees were significantly less likely than the control group to report balancing work and life had become more difficult.

Table 6
Balancing work and life

	AWA employees	Control group	Significance level of difference
	% say balancing work and life is more difficult	% say balancing work and life is more difficult	
Managerial and professional employees	44	56	1%
Ordinary employees	39	34	5%
Ordinary employees in large workplaces	41	37	ns

Source: Gollan/OEA survey, unpublished data. N=746 (ordinary AWA), 661 (ordinary control), 294 (mgl-profl AWA), 349 (mgl-profl control), 308 (ordinary AWA, large wkplaces), 209 (ordinary control, large wkplaces).

Do AWA employees have different expectations?

As mentioned, it is possible that AWA employees have different expectations of their workplace and management than do other employees. Robust data on expectations are not readily available from the survey. However, one factor that is likely to influence expectations is awareness. Employees who have knowledge about their rights in relation to particular issues are more likely to want to enforce their rights and more likely to have higher expectations of their conditions and management.

There is one question in the Gollan/OEA survey which tests awareness, though unfortunately is was not asked of all respondents. Female workers who were permanent employees (and hence would have access to maternity and family leave) were asked whether they were very aware, somewhat aware or unaware of their rights at work with regard to Pregnancy leave and work conditions, and maternity leave. Despite the small sample size, AWA employees were significantly more unaware of their entitlements in relation to both issues (Table 7).

Notably, they did not differ in terms of their satisfaction with the level of communication and information at their workplace – amongst female permanent employees, 37 per cent of AWA employees and 38 per cent of the control group were satisfied with communication and information. If AWA and other employees had similar expectations, then we might expect this lower level of awareness on a fundamental issue to translate into lower satisfaction with the information available to them. Although more research needs to be undertaken, the data suggest that it is possible the satisfaction levels of AWA employees might be 'boosted' by lower expectations.

Do AWA employees trust management more?

While Gollan (2002:8) thought that a higher level of trust recorded by AWA employees in large workplaces 'may be indicative of AWA workplaces exhibiting the characteristics of high performance / high trust workplaces, where there are more than 100 employees in the workplace', he failed to control for the effects of tenure. In large workplaces, shorter-tenure employees (those with less than two years service with the current employer) were much more likely to agree that 'management can be trusted to tell things the way they are' (47 per cent agreed) than were longer-tenure employees (just 32 per cent agreed). As mentioned, AWA employees had considerably lower average tenure than the control group. When we

controlled for tenure in a logistic regression for ordinary employees within large workplaces, differences between AWA employees and the control group became non-significant (Table 8). Similarly, when tenure was controlled in a logistic regression predicting whether 'management does its best to get on with employees', the significance of the AWA variable disappeared. Nor did AWA coverage help predict whether employees perceived that management gave them a say in how they do their job, once income and union membership were controlled. On the question of whether management was perceived to give employees a say in how the workplace was run, AWA coverage was weakly associated with a higher probability of agreement. Overall, there was little reason to believe a high trust approach was being perceived by ordinary employees in large workplaces covered by AWAs.

Table 7
Awareness of rights

	AWA employees		Control group		Significance level of difference
	% unaware of rights – pregnancy leave & conditions	% unaware of rights – maternity leave	% unaware of rights – pregnancy leave & conditions	% unaware of rights – maternity leave	
Managerial and professional employees	12	9	14	13	ns, ns
Ordinary employees	33	32	24	24	5%, 10%
Ordinary employees in large workplaces	28	28	20	24	ns, ns

Source: Gollan/OEA survey, unpublished data. N=240 (ordinary AWA), 251 (ordinary control), 113 (mgl-profl AWA), 175 (mgl-profl control), 125 (ordinary AWA large wkplace), 86 (ordinary control large wkplace).
Populations: female permanent employees

Perhaps the reason why attitudes are not more favourable to management lies in the earlier tables. In fact, given those disadvantages, it might have been expected that AWA employees may have been less positive towards management. Interestingly, when we predict responses to the statement ' Management does its best to get on with employees' by reference to various satisfaction questions, AWA employees are significantly more pro-management when satisfaction with aspects of work is controlled (Table 9). This is also the case even when variables measuring control or change in control are added to the equation. One possible explanation is again that AWA employees have lower expectations of management – that is, even if they are dissatisfied with aspects of their work, they might not attribute this to management to the same degree as other employees would. This may in turn reflect the possible reverse causality referred to in the early part of this paper: employees who trust management more may be more easily persuaded to sign AWAs in the first place.

Table 8
Trust and attitudes to management - logistic regression equations

	Management does its best to get on with employees	Management can be trusted to tell things the way they are	Management gives me a say in the way I do my job	Management gives me a say in the way things are run
AWA	0.280	0.178	0.327	0.391#
	(0.202)	(0.210)	(0.202)	(0.221)
Tenure < 2 years	0.399**	0.549**	0.064	0.078
	(0.203)	(0.206)	(0.203)	(0.216)
Blue collar	-0.228	-0.337	-0.225	-0.516**
	(0.214)	(0.227)	(0.216)	(0.243)
Union member	-0.235	-0.061	-0.577**	-0.256
	(0.206)	(0.215)	(0.208)	(0.227)
Income	0.093	-0.058	0.246**	0.338**
	(0.110)	(0.113)	(0.111)	(0.118)
Age under 21	0.613	0.411	-0.041	1.076**
	(0.442)	(0.411)	(0.417)	(0.425)
Constant	0.611	0.763	-1.119	-1.520**
	(0.704)	(0.721)	(0.708)	(0.765)
N	497	496	497	496
-2 Log likelihood	665.452	641.531	666.446	600.464
Cox & Snell R Square	0.034	0.035	0.044	0.046
Nagelkerke R Square	0.045	0.048	0.059	0.064
chi-squared	16.985	17.727	22.524	23.305
d/f	6	6	6	6
significance	0.009	0.007	0.001	0.001

Standard errors in parentheses. Populations: ordinary employees in large workplaces.
* significant at 5% level. ** significant at 1 level. # weakly significant at 10% level.
For each equation the dependent variable compares agreement with non-agreement.

Table 9
Predicting tolerance of management, using satisfaction – logistic regression equation

AWA	0.499**
	(0.216)
Satisfaction with pay	0.364**
	(0.144)
Satisfaction with communication and information	0.784**
	(0.154)
Satisfaction with recognition of work and effort	0.423**
	(0.150)
Satisfaction with the amount of work you do	0.204
	(0.156)
Satisfaction with the amount of training you receive	0.349**
	(0.137)
Satisfaction with your control over your hours of work	-0.045
	(0.138)
Constant	-3.496**
	(0.546)
N	517
-2 Log likelihood	546.448
Cox & Snell R Square	.178
Nagelkerke R Square	.249
chi-squared	158.779
d/f	8
significance	.000

Standard errors in parentheses. Populations: ordinary employees in large workplaces.
* significant at 5% level. ** significant at 1 level. # weakly significant at 10% level.
The dependent variable compares agreement with the statement 'Management does its best to get on with employees' to non-agreement (neutral and disagreement).

Conclusion

While the OEA/Gollan dataset has to be treated cautiously, because of the odd composition of the sample, a close analysis of the dataset suggests that the favourable findings regarding AWAs that arose from it had at least as much to do with the way the survey was analysed as with any sampling problems. The broad picture that emerges is consistent with the vast bulk of other evidence that has been uncovered to date on individual contracts. Individual contracts such as AWAs represent a weakening of the bargaining power of employees. For ordinary employees – those below the managerial and professional ranks – this is translated into increasing hours and work intensity, a poorer work-family-balance and lower satisfaction with pay and conditions; other studies have indicated the reasons for this lower satisfaction are grounded in poorer objective conditions, though it is also noteworthy that there are suggestions in the data that employees covered by AWAs might have had lower expectations than other employees.

Of course, some employees fare well under AWAs – those with strong individual market power, those whom employers wish to put onto generous AWAs to avoid union identification (eg senior public service managers). But there is little evidence that large workplaces are running a 'high performance' 'soft HRM' agenda with their ordinary employees. Rather, for ordinary employees the outcomes in large workplaces are what we would expect from all the other evidence: a weakening of the relative power of labour.

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Attachment E: Individual contracting, collective bargaining and wages in Australia

Peetz, D & Preston, A, 'Individual contracting, collective bargaining and wages in Australia', Industrial Relations Journal, 40(5), September 2009, 444-461.

For the definitive version of this paper, see the source cited above.

Individual contracting, collective bargaining and wages in Australia [90]

Abstract

We examine wages in Australia under federally-registered individual contracts and collective agreements using unpublished data from a national earnings survey. The distribution of earnings under registered individual contracts was more unequal than under collective agreements. Average and median earnings under registered individual contracts were lower than under collective agreements. There was little evidence that individual contracting raised wages through raising productivity. The link between contracting and pay appears contingent, varying between occupations, industries and firm size bands, and dependent upon employees' position in the labour market and employers' use of union avoidance strategies. This has implications for the interpretation of studies of union wage effects.

INTRODUCTION

Since the 1980s, employers in several countries have sought to decollectivise employment relations by moving from collective relations with employees to more 'individualised' arrangements. In Britain, coverage in workplaces with 25 or more employees by collective agreements fell from 54 per cent of the workforce in 1990 to 38 per cent in 1998 and 34 per cent in 2004 (Charlwood 2007). Regulatory changes have encouraged this process, nowhere more so than in Australia and New Zealand. In 1991, the conservative New Zealand government introduced the *Employment Contracts Act 1991* (ECA) which abolished tribunal wage determination, removed recognition of unions and promoted individual contracts. In Australia, with its federal system, change was more gradual. Laws inspired by, but milder than, the ECA were passed by conservative state and federal governments through the 1990s. The culmination, achieved only when a conservative government gained full control of the Upper House, was the 'WorkChoices' legislation which took effect from March 2006.

The general direction of change in Australia was consistent with the spirit of policies advocated for some time by the Organisation for Economic Cooperation and Development (OECD), which praised Australia for 'its remarkable progress from a very unsatisfactory starting point' (OECD 2004a). Many labour market reforms were in keeping with the 1994 OECD *Jobs Study*'s strategy (OECD 1994). Australia was 'among the OECD countries complying best' with it (OECD 2001:

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14). Amongst other things, Australian reforms aimed to: increase working time flexibility; boost employment participation by changing the welfare system; and further decentralise and individualise wage bargaining to increase wage flexibility. More recently, the OECD has hedged its position somewhat regarding policy effects. Its 2004 *Employment Outlook* indicated its previously asserted link between high or compressed wage structures and lower employment had 'plausibility' but the evidence was 'fragile' (OECD 2004b:165). Is 2006 *Employment Outlook*, analysing econometric literature, observed: the effect of employment protection legislation on overall unemployment 'was probably small'; most studies found no significant union impact on overall labour market performance; a high degree of corporatism (centralisation) was associated with lower unemployment; and evidence on the link between minimum wages and employment was 'ambiguous'. All these findings were confirmed by its own econometric analysis (OECD 2006b: 96,84,85,86,212,217). While observing that several countries with highly regulated labour markets and active labour market programs (Austria, Denmark, Ireland, the Netherlands, Norway and Sweden) had on average better employment rates than 'market reliant' countries such as the UK, USA, Australia and New Zealand, and conceding 'there is no single combination of policies and institutions to achieve and maintain good labour market performance', the OECD continued to advocate 'flexible working-time arrangements' and 'wage flexibility', with qualifications (OECD 2006a: 18,12,13). Such nuances in OECD analysis were not reflected in Australian government policy in the development and implementation of the 'WorkChoices' reforms. (Cowling & Mitchell 2006).

In this paper we use unpublished Australian data from a national earnings survey to understand the patterns, trends and effects of individual wage bargaining. How has individual bargaining affected wage relativities at particular levels including national, industry, occupational, firm and between men and women? Has individualisation promoted higher wages through improved productivity growth at national and industry levels? Is there a link between the wage effects of individualisation and management strategies regarding unions? In privileging individual bargaining over collective bargaining, the Australian industrial relations system provides a unique opportunity for this type of study.

SOME THEORETICAL CONSIDERATIONS

Rubery (1997) notes that wages serve three broad functions: (a) price allocation; (b) social stratification/social cohesion; and (c) management tool. The *price allocation* function (the traditional OECD position), discussed earlier, holds that wage differentials, when unimpeded by state distortions, reflect labour productivity differentials and promote an efficient allocation of labour resources. Within this framework individual contracting is typically seen as most beneficial (providing the greatest level of flexibility), although the recent OECD evidence raises questions about this. The *social* function derives from social wage theory, in which wage rates reflect both economic and social considerations – a combination of 'what the market will bear' and perceived 'fair' distributions of rewards (Blinder & Choi 1990). The *management tool* function emphasises

management's strategic pay decisions and factors shaping their choice of pay instrument. Here, wages present an important tool for manipulation of labour. In one form of the efficiency wage literature, for example, 'union threat models' have emerged to explain strategies of matching or exceeding conditions obtainable by unions, to remove workers' incentive to organise (Dickens 1986,Corneoa & Luciforab 1997). Individual contracting may provide a mechanism for paying a non-union premium and precluding collective bargaining (Brown et al. 1998; Dundon & Rollison 2004; Hearn Mackinnon 2007).

Centralised wage systems, unions and collective bargaining are generally associated with more compressed wage structures (Freeman 1980; Metcalf 1982; Charlwood 2007). Evidence from the OECD shows increased wages dispersion within most OECD countries in recent years. Consistent with theory, it is particularly present in countries pursuing more flexible wage setting arrangements such as Australia (OECD 2004b: ch 3). Between 1991 and 2005 the 90/10 earnings decile ratio increased by 11 per cent (from 2.8 to 3.1) in Australia while the incidence of low pay increased by 14 per cent (from 13.9 to 15.9 percent). Over the same period the 90/10 earnings decile in the UK widened by six per cent (to 3.6) while the incidence of low paid increased by eight per cent (to 20.9 per cent) (OECD 2008). Other aspects of the Australian wage structure show related trends, including a widening gender pay gap, particularly amongst part-time employees (Preston & Jefferson 2007).

But if greater individualisation of pay leads to greater pay dispersion, is this a bad thing? Does individualisation promote more efficient resource allocation, as per the 1990s OECD model, to unleash constraints on efficiency, leading to higher productivity and hence wages? This rationale was advanced by Australian policy makers to justify the 'WorkChoices' reforms (eg Andrews 2005,2006). This might appear counter to many studies from the USA, Britain, Australia and elsewhere showing unions obtain higher wages for members than non-members achieve, though the size of the union premium appears to be declining over time (Freeman & Medoff 1984; Miller & Rummery 1989; Christie 1992; Kornfeld 1993; Baarth, Raaum & Naylor 1998; Hildreth 2000; Wooden 2000; Fang & Verma 2002; Forth & Millward 2002; Blanchflower & Bryson 2003). British evidence from Charlwood (2007) suggested little difference in most performance indicators between workplaces that maintained and those that abandoned collective bargaining in favour of individualised approaches. Where there were differences, workplaces that had abandoned collective bargaining had weaker improvements in productivity. Does individual contracting offer an assumed 'efficiency wage' benefit, in that employers pay a premium in the belief that they will reap benefits from having a non-unionised workforce? Or does individualisation increase dispersion because workers with less skill and bargaining power lose out due to widening power gaps under individualisation?

Our study of Australian data does not seek in the space available to systematically answer all these questions, but it touches aspects of each and raises points about the interpretation of studies of union wage effects. We

undertake this analysis in the context of the 'WorkChoices' reforms, which took effect two months before the data were collected. These reforms are described elsewhere in this volume (Bailey, Mourell & Wilkinson 2009), so details are not repeated here. The key element relevant to this analysis is Australian Workplace Agreements (AWAs), individual contracts that can be inconsistent with award conditions and registered in the federal jurisdiction. These were introduced in 1997 by the new conservative government, which also created extensive opportunities for non-union 'collective' agreements. From March 2006 a new federal industrial relations framework, entitled 'WorkChoices' privileged individual contracting over collective bargaining, including by allowing individual agreements to over-ride collective agreements and abolished the no-disadvantage test for AWAs and collective agreements (by which agreements had been meant to provide conditions no worse in net terms than the relevant tribunal-determined award that applied to those employees). Various other statutory individual contracts had existed in state government jurisdictions, but by the time of 'WorkChoices' these had considerably stronger minimum standards than AWAs, due to the ascendancy of Labor governments at state level, and had mostly, but not entirely, disappeared.

DATA

Although we utilise published labour force and national accounts data from the Australian Bureau of Statistics (ABS), most of this paper relies on unpublished data from its Employee Earnings and Hours Survey (EEH) for May 2006. EEH collected information on 57,000 employees working for 9,000 Australian employers and separately identified the different types of formal wage fixing arrangements employees were paid under, including different types of individual contracts.

There are two types of individualisation observable in EEH: formalised, through the use of statutory individual contracts such as AWAs; and very broadly defined 'individual arrangements'. The former is a subgroup of the latter. The latter also includes 'common law' contracts where pay is above the minimum set out in tribunal awards or collective agreements and some employees who have no underpinning award. Common law contracts had existed since the foundation of the Australian system over a century ago, whereas AWAs were a new form of flexibility. While some employers since the 1990s have used common law contracts to try to circumvent union coverage, there were limits to their usefulness, because no aspect of their pay and conditions could legally be below those stated in awards or agreements. Because of this 'floor', Australian common law contracts do not offer a true insight into the impact of individual bargaining on pay and conditions, and are not really comparable to individual contracts in Britain. The flexibilities provided by AWAs are a closer approximation of the freedom of contracting available to British employers operating outside collective bargaining. So, while we use both indicators of individualisation in the first table, which summarises some general patterns, when we discuss earnings through the rest of the article, we focus on the effects of the statutory form,

AWAs, through which employers had freedom to choose or negotiate the conditions they sought. We wish to compare workers on AWAs with workers on collective agreements.

EEH is the most reliable source of data on earnings of employees under AWAs (McIlwain 2006). However, we need to interrogate unpublished data from it, as the published data do not separately identify workers on AWAs (ABS publications do not distinguish them from the far less common individual contracts registered under Labor-governed state systems, with far more stringent requirements). Our focus is on hourly cash earnings of non-managerial employees (the ABS does not collect data on hourly earnings for managerial employees). Unfortunately, the data did not permit us to undertake multivariate analysis that could for employee characteristics such as age, qualifications and experience .

We compare AWAs with registered collective agreements (referred to as CAs). However, another weakness in the data is that they do not distinguish between union and non-union collective agreements CAs. Unlike in most countries, a 'collective agreement' in Australia can be negotiated with a group of employees without union representation. It can just be presented to them, to vote on. Over one in ten employees on collective agreements are on non-union agreements. Non-union CAs incorporate, on average, lower wage increases than union CAs, and in industries such as retail trade and hospitality substantially weaker employment conditions. They were often used to substitute or provide transition onto AWAs (Department of Employment and Workplace Relations 2006; Workplace Research Centre 2006; Enterprise Initiatives 2007; Evesson et al. 2007). Hence average earnings of employees under CAs understate the earnings of employees under union collective bargaining, especially in retail and hospitality. Australia also has a relatively high rate of free riding – two fifths of employees covered by union collective agreements do not belong to a union (Teicher et al. 2007), reducing bargaining strength of unions negotiating CAs in many workplaces.

Because of potential sampling error, where possible we seek verification of trends by considering whether similar patterns are apparent in May 2004 data.

A final limitation is that most wage data are expressed as averages, which can be biased by inclusion of a few observations of employees with very high earnings. A more representative indicator of the situation of the 'typical' worker is provided by median earnings, and we use these where available – at the aggregate level.

FINDINGS

Productivity, earnings and individual contracting

Before examining hourly earnings under collective agreements and individual contracts, we first overview industry level patterns in individual agreement coverage, union density, and growth in hourly earnings and labour productivity. Results are in Table 1, which includes Pearson correlations of two measures of individual agreements – AWA coverage, and growth in all individual arrangements (including common law contracts), from the EEH survey – with union density, hourly earnings and productivity growth. The data cover from 2000 (when EEH survey data on individual agreements were first available) to 2006 (the latest EEH data we had access to at time of writing). Two sources of data on hourly earnings growth are used: EEH and the ABS Labour Price Index which, unlike EEH, controls for compositional changes within an industry and so is considered a more reliable indicator of change. Several observations can be made.

Variable:	AWA coverage	all individual arrangements[a]		union density		hourly earnings growth		labour productivity growth
Source:	EEH	EEH		Union membership survey		EEH	Labour Price Index	National accounts
Period:			Change[b] 2000-2006		Change[b] 2000-2006			2000-2006
Industry	2006	2006		2006		2000-2006	2000-2006	
Mining	16.2	67.8	13.5	22.9	-9.4	4.9	4.0	-5.6
Communication Services	15.6	37.8	8.7	25.1	-12.7	4.5	3.2	4.2
Transport and Storage	6.2	47.1	5.6	29.1	-7.3	4.8	3.4	3.0
Retail Trade	5.4	36.5	0.0	16.1	-1.6	4.2	3.1	2.1
Accommodation, Cafes and Restaurants	4.3	34.0	5.4	8.1	-2.2	4.0	3.1	2.6
Manufacturing	3.3	51.7	0.1	23.4	-7.8	5.3	3.6	2.6
Government Administration and Defence	3.1	7.6	0.8	34.2	-2.5	4.8	3.7	
Property and Business Services	3.1	61.3	-6.9	5.3	-3.9	4.8	3.9	
Finance and Insurance	2.8	52.3	7.9	13.4	-10.9	6.2	3.8	1.5
Wholesale Trade	2.1	77.7	0.6	8.0	-2.4	5.3	3.4	4.3
Construction	1.0	60.3	-0.9	21.5	-4.9	5.1	4.3	1.7
Personal and Other Services	1.0	30.1	0.0	26.4	-1.4	3.2	3.5	
Cultural and Recreational Services	0.9	40.1	-7.7	11.9	-5.1	5.2	3.5	1.4
Electricity, Gas and Water Supply	0.6	14.7	-7.4	43.3	-9.9	4.6	4.7	-4.5
Education	0.4	6.7	-2.6	40.3	-3.7	4.3	4.3	
Health and Community Services	0.3	16.2	-2.9	27.1	-5.2	5.3	3.8	0.9
Total	3.1	39.9	-0.1	20.3	-4.4	4.9	3.7	1.7
correlation with incidence of AWAs 2006	1.00	0.32	0.77	-0.06	0.53	-0.04	-0.32	-0.11
correlation with growth in individual arrangements 2000-2006	0.77	0.33	1.00	-0.09	0.44	0.07	-0.33	0.05

First, both measures of individual agreement-making were related to union density, consistent with workplace survey data suggesting a relationship between individual 'bargaining' and union membership 1999). Several industries with active union avoidance behaviour by e had both large drops in union density and a high incidence of AWA: communication) or at least significant growth in individual arra (finance). Extensive union avoidance strategies have been well docu mining, communications, finance and, in a more mixed fashion, go administration (Background Briefing 2000; Browne 2000; Workplac 2005; World Competitive Practices 1999b,a; Peetz 2006; Hearn M 2007; McDonald & Timo 1996). A number of studies have shown the in of union avoidance as a motivation for a shift to individual contracting Wagar 1996; Bickley, Jefferson & Travaglione 1999; World Competitive 1999a,b). There is extensive evidence of individual contracts being used in mining and communications to deunionise workforces, s through offering higher wages in return for signing individual cont refusing to promote or give pay rises to those who refuse (Van den Br Hearn Mackinnon 2007). In government administration, the fi muddied by the contradictory positions promoted by the federal, government, which embraced AWAs, and the state governments, all Lab all but abandoned individual contracting.

Second, neither the presence of AWAs nor growth in individual arra were systematically associated with higher rates of earnings growth. I of more reliable indicator of earnings growth, there were small associations. Third, industries with high rates of individual contracti show systematically higher productivity growth. Of course, such co are influenced by the choice of start and end years (though in our cas the maximum period for which EEH data were available). It is productivity effects take time to fully play out, if there are effects on flexibility, technology and investment, but six to eight years is a reason in which benefits of a policy should be observable. Extending the pr data to 2008 changes the correlation from -0.11 to +0.01, but still fails any positive relationship between individualisation and productivity. national labour productivity data reinforce this impression. From Jun June 2008, the peak period in which individualisation was encouraged, only 1.9 per cent per annum, below the average 2.4 per cent achieve preceding 35 years (ABS Cat 5204.0). During the eight quarters Wo was in force, annual labour productivity growth was only 0.6 per below rates normally achieved at that stage of the business cycle 5206.0). While this does not demonstrate WorkChoices had a negative productivity, there was nothing to suggest a positive policy i productivity at national or industry level.

Earnings distributions and gender

The distributions of hourly earnings for workers on AWAs and CAs in 2006 are shown in Figure 1. Two things emerge. First, earnings of non-managerial workers on AWAs are generally lower than for those on CAs, except at the top end of the distribution. Hence in 2006, employees on CAs earned an average of $27.30 per hour, compared to $25.30 per hour for employees on AWAs (Table 2). Employees on AWAs earned $2.00 per hour less, that is they faced a shortfall of 7.3 per cent compared to workers on CAs. However, averages can be deceptive, as they can be distorted by a small number of employees with high earnings: 69 per cent of AWA employees earn less than average AWA hourly earnings. A more representative indicator showed that median AWA earnings in 2006 were only $20.50 per hour, some $4.00 per hour below median earnings for CA employees. That is, *the median AWA worker earned 16.3 per cent less than the median CA worker in 2006.* This represented a slight deterioration on the median AWA shortfall in 2004, which was 14.8 per cent.

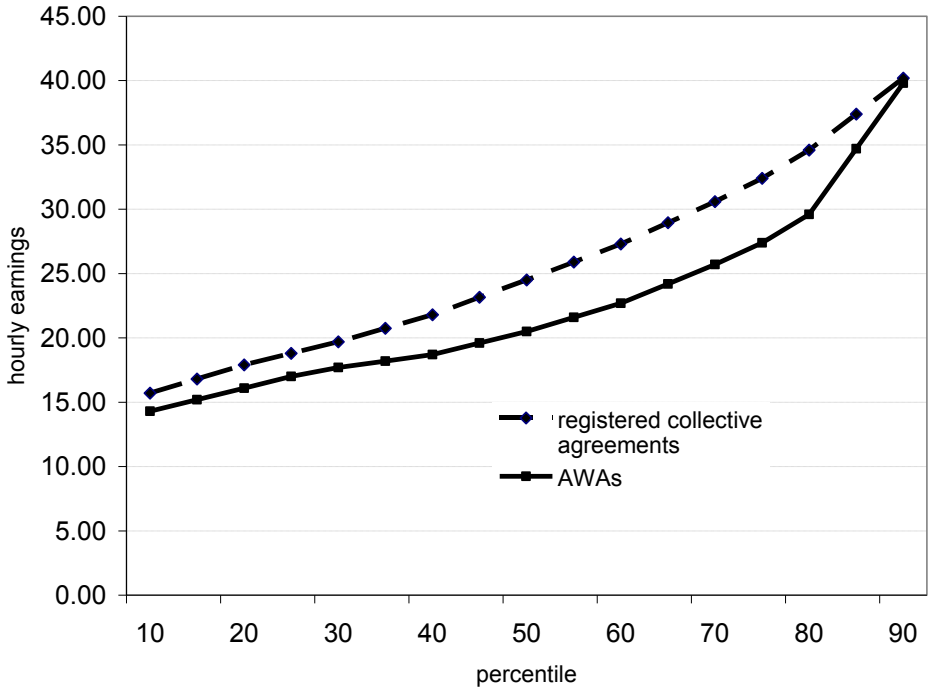

Figure 1: Average and hourly total cash earnings, by earnings percentile, CAs and AWAs, 2006, non-managerial employees
Source: unpublished data from ABS Cat No 6306.0

	CAs		AWAs		AWA/CA ratio	
	2004 ($)	2006 ($)	2004 ($)	2006 ($)	2004	2006
Average earnings						
Males	25.80	28.70	25.80	26.50	1.000	.923
Females	23.30	25.70	20.30	22.80	.871	.887
Persons	24.60	27.30	23.90	25.30	.972	.927
Median earnings						

Males	23.40	26.00	20.90	22.00	.893	.846
Females	21.40	23.00	17.30	18.70	.808	.813
Persons	22.30	24.50	19.00	20.50	.852	.837

Table 2: Average and median hourly total cash earnings, CAs and AWAs, 2004 and 2006, non-managerial employees
Source: unpublished data from ABS Cat No 6306.0

Second, the distribution of earnings of non-managerial employees on AWAs was more unequal than for collective agreements. The Gini coefficient on the distribution of non-managerial earnings was .18 for workers on CAs, compared to .21 for those on AWAs. (Both numbers would be higher if managerial employees could be included.) The gender pay gap was also greater for workers on AWAs than on CAs. In 2006, men on median AWA earnings earned 15.4 per cent less than men on median CA earnings in 2006. The median earnings for female non-managerial employees on AWAs was 18.7 per cent lower than corresponding median for females on CAs. In 2004 the corresponding female AWA shortfall was similarly large, at 19.2 per cent.

Firm size and agreements

There was a stark relationship between the ratio of earnings under AWAs to earnings under CAs (the 'AWA/CA ratio') and firm size. The wage shortfall widened as organisations got smaller (Figure 2). The 2006 shortfall is 3.5 per cent amongst organisations with 100–499 employees, rises to 12.4 per cent in organisations with 50–99 employees, 13.6 per cent in organisations with 20–49 employees and is a very substantial 26.3 per cent in organisations with fewer than 20 employees. Amongst large organisations with more than 1000 employees (the majority of whom are covered by collective agreements), there is a wage premium for AWAs of 30.8 per cent. The 2004 data follow a broadly similar pattern.

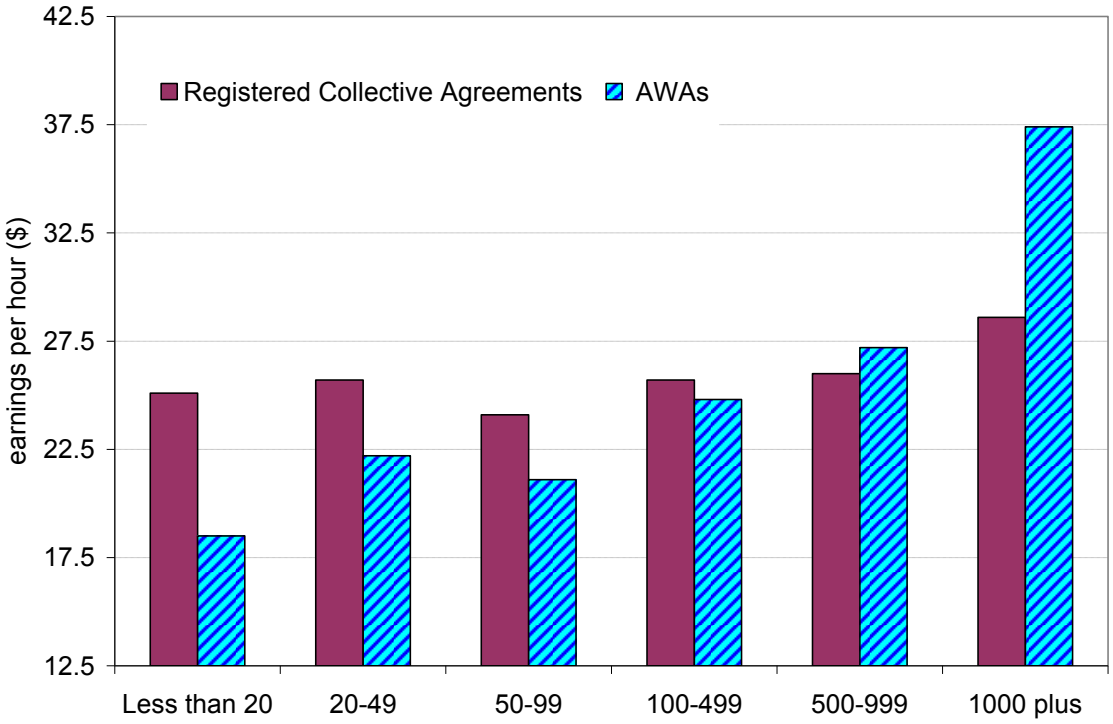

Figure 2: Average Total Hourly Cash Earnings by Firm Size and Method of Pay Setting, May 2006

Source: unpublished data from ABS Cat No 6306.0

Industry and agreements

Among the 16 one-digit industry groupings in Australia, at May 2006, the AWA/CA ratio was below 100 per cent in nine of the 16 industries. In other words, AWA employees in the majority of industries received a lower hourly rate on their AWA than their counterparts did on CAs.

In 2006 the industry with the highest AWA/CA ratio was communication services, at 1.50 (Figure 3). As mentioned, this is an industry where significant union avoidance behaviour has been underway. The second highest ratio (1.33) was in government administration and defence where, as previously indicated, a number of federal government agencies required the signing of an AWA as a precondition to advancement or a wage increase, again as part of a strategy aimed at reducing union influence. The third highest ratio (1.22) was in finance and insurance, where some companies were also attempting to use AWAs to reduce union influence, and where employees in the more highly remunerated parts (such as foreign exchange speculation) were hired on individual contracts. Electricity, gas and water (1.17), which had a significant drop in union density, also had a moderately high AWA/CA ratio in 2006 (Figure 4). We should be cautious in interpreting this, as it showed no AWA advantage in 2004. However, communication, finance and insurance and government administration and

defence all showed high AWA/CA ratios in 2004, confirming the 2006 observations. (Figure 3).

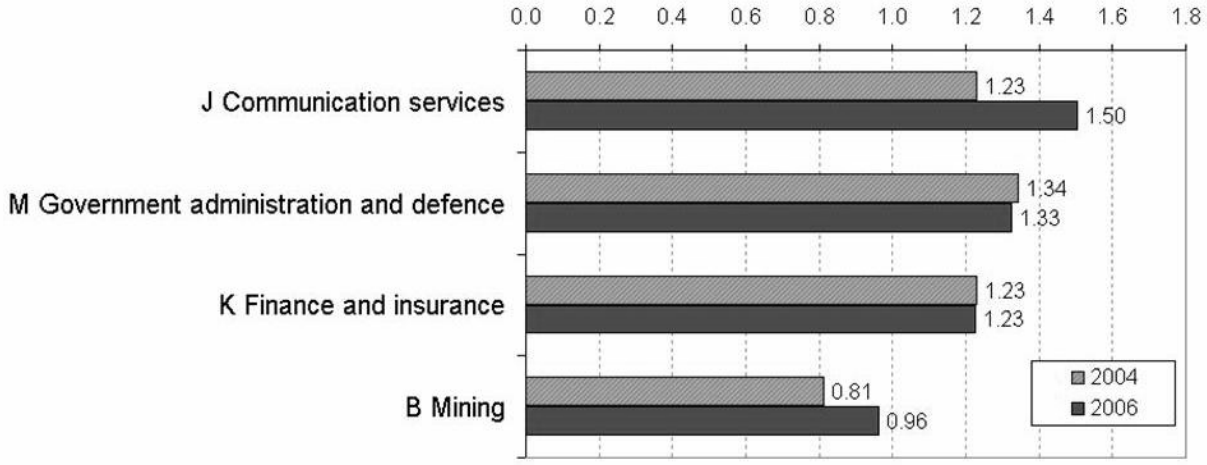

Figure 3: Ratio of AWA/CA Average Total Hourly Cash Earnings by Industry, industries with common union avoidance strategies, May 2004 and 2006
Source: unpublished data from ABS Cat No 6306.0

The only industry with extensive and well documented union avoidance strategies, but with no AWA advantage, was mining, where AWA employees earned 3.6 per cent less than CA workers. This is probably because of bifurcation between coal and metals mining. Union membership remained strong in coal sector, where the career path typically involves new entrants working for a contractor on an AWA until a permanent job in a mine, often covered by a collective agreement, can be obtained. In metals mining, by contrast, union density was so low as to not signify any threat effect. In coal mining, estimated union density in August 2006 was 66 per cent, compared to 11 per cent in metal ore mining where AWAs dominate (Australian Bureau of Statistics 6310.0). The main way AWAs reduce union influence in coal is by ensuring an alternative labour supply in case of industrial action. Workers in metal ore mining work 5 per cent more hours but earn 21 per cent less per week than workers in coal mining.

Retail trade also had a high AWA/CA ratio (1.18). This partly reflected the structure of retail awards and collective agreements, under which employees earning above a certain level are 'exempt' from the instrument (Price 2004). More importantly, retail trade, along with hospitality, is an industry where many non-union 'collective' agreements cut pay and conditions (Evesson et al. 2007), suppressing mean CA earnings.

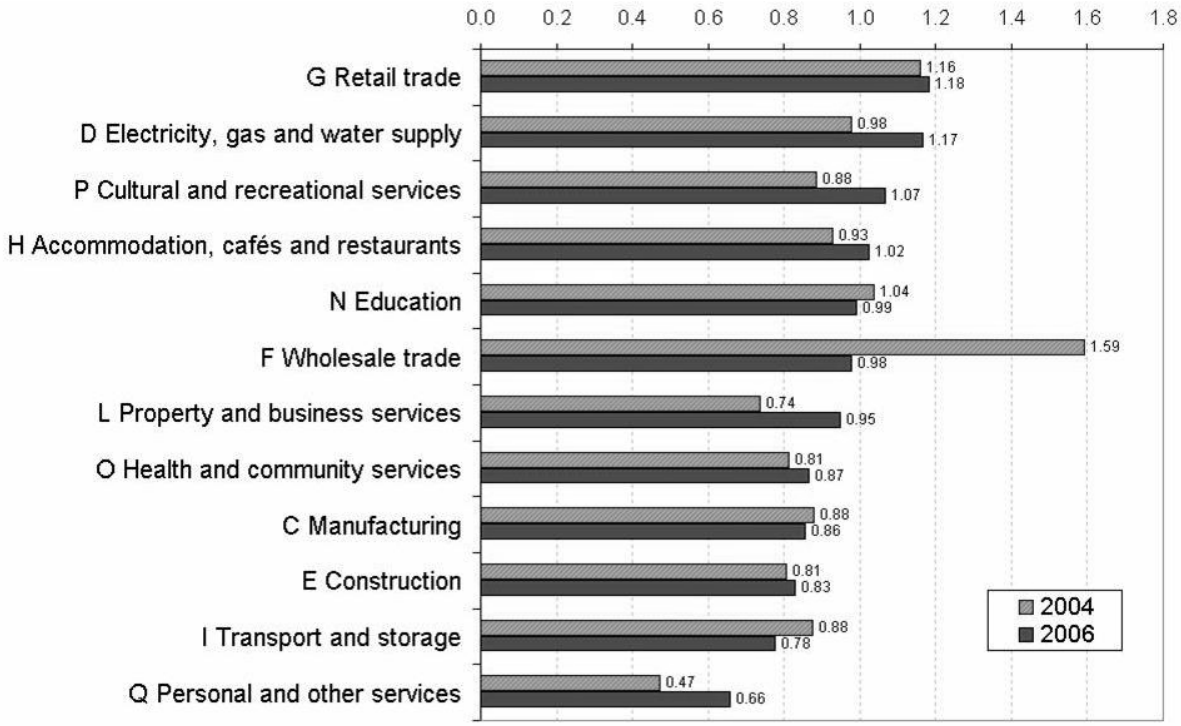

Figure 4: Ratio of AWA/CA Average Total Hourly Cash Earnings by Industry, other industries, May 2004 and 2006
Source: unpublished data from ABS Cat No 6306.0

AWAs paid on average well below CAs in: manufacturing (where the AWA shortfall was 14 per cent in 2006); construction (17 per cent); transport and storage (22 per cent); health and community services (14 per cent); property and business services (5 per cent); and personal and other services (though the high 34 per cent shortfall was influenced by the inclusion of high paying emergency service CAs). (Figure 4)

Occupation and agreements

The Australian Standard Classification of Occupations system ranks occupations by broad skill level. Nine occupational groups are spread across five skill levels in descending order of skill. Skill level is 'a proxy for bargaining position' (van Wanrooy et al. 2007:93). Consistent with this, survey evidence shows that employees who viewed their skills as in high demand, and those on high incomes, were less likely than others to accept pay and conditions on offer without negotiation (Australian Research Group 2006).

For the top three occupational groups (covering the top two skill levels), AWA employees earned more on average than CA employees in both 2004 and 2006. Professionals were clearly a group with high labour market power.

At the other end of the labour market, labourers and related workers experienced a consistent AWA pay shortfall – their wages were 17 per cent lower than wages of workers on CAs in 2006 (and 14 per cent lower in 2004). In all, five of the six lowest occupational groups, occupying the three lowest skill level bands, revealed an AWA pay shortfall compared to CAs in 2006 (Figure 5)

Figure 5: Ratio of AWA/CA Average Total Hourly Cash Earnings by Occupation, May 2004 and 2006
Source: unpublished data from ABS Cat No 6306.0

DISCUSSION

Several points can be readily made. First, the distribution of earnings under individual contracts in the form of AWAs was more unequal than that of earnings under collective agreements. This is consistent with theory and international experience. Second, average and especially median earnings under AWAs were lower than under collective agreements. It was the case both in aggregate and for many industries, occupations and size groups. This is consistent with individual contracting reducing the bargaining power of employees, by comparison with collective bargaining. Third, there is little to support the idea that individual contracting, of itself, raises productivity by removing union-related impediments to productivity. This scepticism arises from: the poorer overall wage outcomes for workers under AWAs; the poor productivity performance of the Australian economy during a period in which individual contracting, particularly through AWAs, grew and was actively promoted; the lack of a consistent inter-industry correlation between individual contracting and productivity growth shown in Table 1; and the low take-up of AWAs, outside two or three industries, by comparison with earlier expectations (cf Hamberger 1995) despite a decade of availability, which suggests little benefit for most employers from deploying them. This lack of a positive link between individual contracting and productivity is consistent with other research in Australia and New Zealand (Gilson & Wagar 1996; Dalziel 2002; Hull & Read 2003; Dalziel & Peetz 2008) and with British experience (Charlwood 2007). It is also consistent with the international literature which tends to suggest that unions probably

have little or no net effect on productivity, and any impact is contingent on circumstances (Addison & Belfield 2004; Freeman 2004; Hirsch 2004; Kaufman 2004).

Fourth, the link between contracting and pay appears contingent, varying between occupations, industries and firm size, raising the question as to what causes these variations. This contingency should not surprise us: other research also indicated there were different types of AWAs that focused on different issues, (Cole, Callus & Van Barneveld 2001). It is consistent with an earlier survey comparing employees on AWAs with a control group, which showed perceived effects of AWAs varied greatly according to employees' position in the labour market. AWA employees in managerial and professional occupations (the highest skill group) were quite satisfied, while those in other occupations were dissatisfied on several key issues, by comparison with workers not on AWAs (Peetz 2004). Labour market position appears to be a factor explaining some of the patterns we observe here too.

The other key factor helping explain outcomes is union avoidance behaviour – employers offering a non-union premium to employees through individual contracts, a form of assumed 'efficiency wage' to avoid the loss of control collective bargaining might bring. AWAs generally paid above CAs in industries where union avoidance strategies are important and below CAs in industries where labour cost minimisation was important. The findings on size are also consistent with the idea AWAs are frequently used for cost cutting or union avoidance. Very large firms and federal government departments had the resources and sophistication to mount concerted union avoidance strategies, offering wage premiums to induce workers to sign AWAs and/or financially penalising those who seek to remain on collective agreements. As economies of scale encourage unions to concentrate organising efforts in large firms, union density is on average higher there (eg Millward & Stevens 1986; Hundley 1989; Visser 1991), so large firms have a stronger incentive to devote resources to non-union premiums. Indeed there is British and US evidence that union density, after mostly rising with size, decreases again in very large firms which have large human resource management capacities to discourage unionisation (Bain & Elias 1985; Hirsch & Berger 1984). Some large firms are prominent in industries featuring high AWA premiums (communications, finance and government administration). The AWA/CA ratio is considerably higher in the top industries identified as union avoiders, and in the largest firms with the greatest incentive to engage in union avoidance, than it is in the top occupations identified as having high skills.

Small firms are not likely to follow this approach, as threat of unionisation is low. They appear more likely to use AWAs for cost minimisation, presumably through cutting penalty rates, overtime pay and other 'protected' award conditions. The prevalence of such cost-cutting should not be underestimated. In the period May–September 2006, some 76 per cent of AWAs abolished shiftwork loading, 68 per cent of AWAs abolished penalty rates and 52 per cent abolished overtime

pay (Davis 2007). This changing of ways in which workers are paid for the time they work is observed in other research on individual contracting in Australia and New Zealand (Mitchell & Fetter 2003; Dannin 1997; Oxenbridge 1999). Qualitative studies, too, showed effects of WorkChoices to be 'uneven, impacting on workers differently depending on their location in particular occupations and sectors' (Charlesworth & McDonald 2007). For more vulnerable workers, including women and workers in retail and hospitality, effects included reduced conditions and power (Elton et al. 2007; Evesson et al. 2007). It is consistent with such literature that our data show the lowest skill occupation group had the worst outcomes for workers on AWAs, while occupations with the most market power had relatively good outcomes. AWA wage shortfalls are also apparent in small firms and in sectors with low worker bargaining power such as health and community services (which includes aged care and child-care). We attribute these outcomes to the use of AWAs as a cost-cutting measure. The impact of individual contracting also appeared worse on average for women than for men, probably because of the industries and occupations in which they worked.

Structural factors also played a role in explaining patterns in specific industries. Examples include the use of exemption clauses in retail trade, the hiring of staff in high-salary areas in finance on AWAs, and the strong bargaining power of unionised workers in coal mining and emergency services.

CONCLUSIONS

Our findings are qualified by the facts that we were unable to apply multivariate techniques to control for individual characteristics, and that the collective agreement stream data include many employees who are on non-union agreements. This latter qualification, however, tends to strengthen our conclusions, as it leads to understatement of wages under collective agreements.

If there were 'flexibility' benefits for employees and employers through individual contracting, they were not apparent in these data at either aggregate or disaggregated levels. We found nothing to suggest that individual contracting, by increasing productivity, led to generally higher wages than would occur under collective bargaining. For the typical worker (that is, the median employee), the reverse was the case. The median AWA shortfall of 15 to 16 per cent over the two years suggested cost-minimisation was an important element in individual contract strategies, and any 'flexibility' benefits that existed were not enough to offset the cost-minimisation effects on wages. Overall, AWAs were commonly associated with poorer outcomes for 'typical' employees than collective agreements. Policy institutions clearly matter in shaping wage outcomes.

The findings are consistent with the view that individual contracting is heterogeneous (eg Cole et al. 2001) and 'optimal for those with bargaining power, but an inadequate solution for employees without bargaining power as it

can be used to undermine labour standards' (van Wanrooy et al. 2007). Its effects, by comparison with collective agreements, vary according to reasons for introduction and labour market characteristics. Employers may have paid non-union premiums (and/or apply penalties for not signing AWAs) where they use individual contracts to avoid unions. However, where organisations did not perceive a union threat effect, such as in most small firms, and were focused on cost minimisation, registered individual contracts were commonly used to reduce average pay and conditions as the legal environment permitted. Most affected were workers whose skills were not unique and who had limited bargaining power. For these workers, individual contracting represents a transfer of power from labour to capital.

Our findings imply that part of the reason for the widening dispersion of earnings under individual contracting is that workers with less skill and bargaining power in the labour market lose power, relative to those with highly sought after skills who are in position to obtain higher benefits through individual contracting. Another reason for the widening dispersion appears to be the offering of a non-union premium in response to a union threat effect, specifically in situations where the threat of unionism is real and workers have some individual bargaining power. The importance of employer strategies is highlighted by the greater variability of AWA/CA ratios by firm size and industry than by employee skill level. Again, the limitations of the dataset mean we must be cautious in interpreting this difference, but they point to the need to take account of union threat and avoidance effects in explaining how individual contacting affects the earnings distribution. This in turn suggests that models of union wage effects which do not take account of union threat effects on non-union wages will understate the true impact of unions on wages. Conversely, models of the impact of individual contracting on wages will understate the negative effect of individual contracting, compared to collective bargaining, unless they take account of the heterogeneity of individual contracting, including its role in responding to union threat effects.

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Attachment F: 'Regulation distance, labour segmentation & gender gaps'

Peetz, D, 'Regulation distance, labour segmentation & gender gaps', *Cambridge Journal of Economics*. November 2014, doi: 10.1093/cje/beu054.

Regulation Distance, Labour Segmentation and Gender Gaps

Abstract

Existing theories on human capital, labour market segmentation and discrimination

fail to fully explain gender gaps—for example, the large gender gap in elite occupations

where women apparently possess high labour market power. This article seeks

to extend our understanding, through the interaction between labour segmentation,

regulation content and regulation distance, the last referring to the extent to which

employment of particular workers is (un)regulated, including by collective agreements,

legislation or other instruments. Regulation distance encompasses a continuum

from 'regulation proximity' to 'market proximity'. A greater reliance on the

'market' does not necessarily remove pay distortions; rather, it might increase their

impact through the mechanism of gendered norms. Empirical evidence is drawn

from studies in several countries, most commonly Australia. This approach more

clearly specifies the roles of under-valuation, labour segmentation, group norms

and human and social capital; illuminates public sector and union effects; explains

why the gender gap is greatest for a group of women with the most labour market

power; and illustrates some non-pay aspects of gendered experience at work.

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Regulation Distance, Labour Segmentation and Gender Gaps

The purpose of this paper is to reconsider some aspects of our thinking on the 'gender gap'. The term is typically used to refer to proportionate difference in the wages received by men and women (the 'gender pay gap') but here it is conceived more broadly as relating to differences both in pay and in other workplace outcomes including the conditions under which work is performed.

Conventional economic theory defines distortions in the setting of pay as minimised when markets are able to most freely operate (Ehrenberg and Smith 1997). Under that logic, the earnings of male and female employees should reflect the skills they possess and the demand for those skills, regardless of gender. Yet casual observation tells us that women are paid less per hour than men. After 'human capital' variables such as education and experience, associated with conventional theory, are accounted for, 'unexplained' differences persist (Tharenou 2013). Several models of discrimination have arisen in order to try to explain this. Outside of conventional economics, an important development has been the emergence of labour market segmentation theory, which questions the notion of freely operating markets in which employers are, in effect, price takers rather than price makers (Brosnan 1996, Rubery 2005, Beynon et al. 2002, Reid and Rubin 2003). Yet even with this, important issues remain unanswered.

Highlighting this explanatory gap is the situation of women in higher status occupations. Such occupations wield substantial class power. It is widely acknowledged they employees in high-paid jobs have greater labour market power than those in segmented, lower skilled jobs. They have higher work-related skills, are the most highly educated and therefore most aware of their rights when it comes to fighting issues of discrimination and harassment. So if there were one group of women whom we would expect to achieve equality in pay and conditions, it would be those in the highly paid, high status jobs. Yet, as we shall see below, gender inequality in pay appears, if anything, to increase as women approach the top.

In order to explain this, we have to move beyond conventional human capital theory and integrate labour market segmentation theory with another concept introduced here, that of 'regulation distance'. This term means *the extent to which the terms of employment of particular workers are (un)regulated*, including by collective agreements, legislation or other instruments. It refers to a continuum from 'regulation proximity' to 'market proximity'. When regulation distance is low, we say that workers have high 'regulation proximity': a set of objective criteria – rules – determine most aspects of their employment (it is not possible for rules to determine *all* aspects of the open-ended employment relationship), and there is limited room for subjective factors, such as whether workers are from the same social milieu as their bosses or look or behave similarly to them, to influence pay and conditions. In the UK, for example, it is

shaped by the extent to which employment is regulated by collective agreements or legislation; in Australia, tribunal awards are added to this list. This concept is relevant not only for understanding the situation of high status women but of working women in many situations.

When regulation distance is high, we could say workers have 'market proximity' or, in many cases, 'subjective proximity'. Hence 'market proximity' does not mean that pay and conditions are governed by simple laws of supply and demand, and the human capital model. High regulation distance reduces the inherent role of objective criteria and increases the potential role of subjective criteria. It increases the likelihood that norms and cultures that favour those in power (men) will dominate outcomes. Whereas Becker (1957), in describing how employers may in effect pay a premium (higher wages or lost productivity) to satisfy their preference or 'taste' for certain types of labour (eg male or white labour), put forward a model that in effect indicated that discrimination would be self-defeating in a market context (discriminating employers would eventually go broke), a 'regulation distance' model suggests that greater reliance on the 'market' need not remove distortions and may increase their impact.

The extent to which subjective criteria rule is influenced by how 'visible' women workers are in that particular market – that is, whether those on the 'demand' side of the labour market can tell the gender of those on the 'supply' side. Gender can only influence outcomes where it is known. Where gender is known and influential, we call this a 'subjectified' market; where it is unknown, we call this an 'objectified' market. The degree of subjectification will be one factor influencing market 'norms'. In principle, a market in which labour was supplied anonymously through an opaque intermediary (such as the internet) would be objectified and unable to generate discriminatory outcomes. Some 'contract for' service arrangements may be like this (eg contract writing of software or articles. interpretation of radiographic images, etc (Yu and Levy 2010), but few if any employment relationships are like this at present. Still, in some regulation-distant labour markets, delivery of a simply defined output with simply defined value may be the principal concern of management, and the labour market might be more objectified than in some other regulation-distant markets for labour for which personal interactions are the dominant mode of generating value (for example, for management positions).

So regulation distance is not the only factor influencing gender gaps. In addition to the nature of market norms, the *content* of regulation matters critically, and regulation distance operates differently for different labour market segments. So we have to consider how regulation distance and labour segments interact: in particular, whether work women are undertaking is female-dominated, male-dominated or mixed.

These ideas are elaborated upon below. First, we consider the factors that are commonly used to explain the gender pay gap. We then discuss empirical

evidence and theoretical propositions on the roles in shaping gender gaps played by: the content of regulation and norms; regulation distance; labour market segmentation; and the intersections between these latter two. Evidence is drawn from a number of countries, most commonly Australia. We conclude with some implications for theory and policy. While the gender gap should be conceived as encompassing matters beyond wages, the data mostly relate to wages.

Explaining gender gaps

Human capital theory seeks to explain gender gaps in terms of human capital 'endowments' – different income-earning characteristics, particularly education, and experience. Workers experience costs by undergoing education or training, and then receive a return on their investment as higher earnings (Norris, Kelly and Giles 2005). Women may have lower earnings than men because they possess fewer endowments; or they may receive a lower return on those endowments. However, studies indicate that differences in the human capital characteristics of men and women explain little of the gender pay gap (Healy, Kidd and Richardson 2007, Cassells et al. 2009b). There is more substantial evidence that women receive lower returns from education and experience than do men, especially in the upper ends of the private sector earnings distribution (Cassells et al. 2009b). But this implies the question: why are returns lower for women?

Other studies have suggested various *labour market factors* play a role in gender gaps. Women tend to be segregated into particular industries and occupations, and those with high rates of female employment tend to have lower average rates of pay (Cassells et al. 2009b). The gender pay gap tends to be lower amongst union members than non-members, particularly for lower wage earners (Card, Lemieux and Riddell 2003, Blanchflower and Bryson 2004). It tends to be lower amongst people in the lower half of the earnings distribution and higher in the top part, especially within the private sector (Cassells et al. 2009b, Kee 2006). When education is correlated with income, a higher gender gap for high income earners mathematically reduces the apparent returns for education for women.

Labour market segmentation theory explains some aspects of gender pay gap. The demand side of labour markets (in particular, the practices of employers) and the supply sides (divided by class, gender, race, skill or qualification) interact to create social differentiations that create unequal access to employment and income, thereby segmenting labour markets (Rubery 2005). By separating workers into groups with different bargaining power and status, workers with similar productivity are paid differently (Brosnan 1996). On the demand side, gender segmentation can arise from a number of sources including employer flexibility strategies aimed at recruiting large, 'casual' workforces, other employer strategies to build and reproduce internal labour markets with

committed, secure and reliable (male) employees, employer discrimination and career blocks in part-time work. On the supply side, factors include the social definition of 'women's jobs' related to the domestic sphere, their portrayal as possessing less skill than men's jobs, and male resistance to women in 'men's jobs' (Power 1975, Rubery 2005). Segmentation divides 'male' and 'female' jobs; it also segments employees from migrant backgrounds, intermittently unemployed people, indigenous people and people with disabilities. Within firms, pay hierarchies may reflect gender rather than 'the internal value of jobs' in an organisation (Rubery 2005). In segmented labour markets, skills (eg 'caring' or 'dexterity) associated with women are given less value than those (eg 'strength') associated with a more powerful grouping, men (Brosnan 1996).

Despite its usefulness in explaining low pay in female-dominated occupations, labour market segmentation theory does *not adequately explain other aspects* of the gender pay gap. For one thing, many women are not 'segmented' into female-dominated occupations or industries. In 2009, when women constituted 46 per cent of the employed Australian workforce, amongst the 99 ABS industry subdivisions, a third of women worked in industries where they constituted a minority of industry employment, and half worked in industries where they constituted less than 56 per cent of employment (ABS Cat No 6291.0.55.003). Nor does labour market segmentation theory explain the phenomenon of a widening pay gap at high pay levels.

At the cross-national level, differences in the egalitarian characteristics of wage structures play an important part in explaining gender gaps, as women in all countries are overrepresented in lower-status occupation and under-represented in higher status jobs (Blau & Kahn 2001). Class is thus an important factor in national gender gaps, as is (in complex ways) the nature of welfare state programs (Mandel and Shalev 2009). Our interest, though, is also in explaining gender gaps within countries, as they apply to different women in different labour market positions.

The content of regulation and norms

Regulation reflects (and reinforces) dominant social norms which in turn reflect, not without challenge, the interests of the dominant group(s) – in this case, men. Regulation distance only matters when there is some difference between the values embodied in regulation (manifested as rules) and the values embodied in the market (manifested as the culture and norms that operate under market/subjective proximity). In the early nineteenth century, there was little if any difference between the two for most workers, and the concept of regulation distance would have had little salience. The Australian arbitration tribunal's 1907 'Harvester' judgement and related rulings on female pay reflected and reinforced the dominant social norms and interests of men (Macarthy 1975, Beyrer 1975). Through a century of women's struggle, social attitudes and legislation changed to greater value women's work. Countless examples of class

and feminist struggle led, directly or indirectly, to the introduction of regulation that in one way or another advanced the interests of women. They forced employers, management and some workers to do things that they otherwise would not have done. Equal pay legislation in the UK and other countries (Whitehouse, Zetlin and Earnshaw 2001), and the introduction in Australia through the tribunal system of equal pay for equal work (and later equal pay for work of equal value), imposed new behaviours on employers. The *content* of legislation as it affects women at work (including direct regulation of wages, leave, parental leave and discrimination, as well as welfare state policies such as those affecting child care, child allowances and state payments), varies substantially between nations (Whitehouse 1992; Mandel and Shalev 2009), and this helps us understand cross-national differences in gender outcomes. Between them, regulation and norms shape what Connell (2006) calls the 'gender relations of power' – how control, authority and force, including hierarchy and legal power, are organised along gender lines – one of her four dimensions of gender regimes. Some of these regulations – for example, uniform minimum wage laws – may have the appearance of being gender neutral even though they have important implications for gender.

An important aspect of regulation content arises through union values, embodied in the regulation unions enact. For example, in Australia for many decades trade unions gave little attention to women (eg Storer and Hargreaves 1976), and actively supported unequal wages for men and women. This reflected the dominance of the 'family needs' or 'male breadwinner' notion in wage fixing and union ideology. Discrimination against women was as much a result of union pressure as it was of employer decisions. However, from the 1960s—under the rising influence of the women's movement—union policy changed and unions supported a range of equal pay campaigns and the promotion of women and women's policies within unions. While women remain under-represented in unions at all levels, most severely at senior levels of unions, under-representation is declining (Pocock 1995, 1992, Bramble 1995, Nightingale 1991, Parker and Douglas 2010, Cooper 2012).

Similarly important is the content of *norms*. The norms that are relevant in this respect are driven by the values of people in positions of power in a given situation, not the values of the population at large. In two workplaces or occupations with market proximity, the norms for a female-dominated one will be very different to those for a male dominated one. The idea of 'norms' relates to two of Connell's four dimensions of gender regimes: emotion and human relations (how antagonisms or attachments are organised along gender lines) and culture and symbolism (the language, symbols, definitions, beliefs and attitudes about gender) (Connell 2002, 2006). Norms will likely vary with education, as education tends to diminish intolerance and be linked to more positive attitudes towards women's employment (Bates and Heaven 2001 , Shu 2004, Crompton and Lyonette 2005, Dunn et al. 2004). Education effects may mask the impact of regulation distance, as protective labour market laws tend to

be extended to those with greatest vulnerability, who typically have the lowest skills and education. Norms may also vary with employer values and (conscious or unconscious) strategy, nationality, location, cultural setting and other factors. As a result, subjective proximity in a occupation where norms favour equality will have a very different impact to that in an occupation where norms favour men or downplay objective criteria for pay determination.

Features of and evidence on regulation distance

Several dimensions of employment for an occupation or group of female workers will vary according to where they are on the regulation distance continuum. The following discussion describes differences between groups at the polar ends of *regulation proximity* and *market/subjective proximity*. While many groups of workers will sit at one pole or the other, many others will occupy intermediate steps in the continuum, and their characteristics will likewise have appropriately intermediate characteristics.

1. For workers with regulation proximity, the *governance system* of employment, including wages, is based on rules. For workers in subjective proximity, by contrast, employment is governed not by rules but by the norms of the groups who possess power. The public sector has high regulation proximity, using a web of rules to govern employment more consistently than the private sector. So it is that the gender wage gap is smaller in the public than the private sector (Preston 2000, Kee 2006, Barón and Cobb-Clarke 2008, Cassells et al. 2009a, Pfeffer and Ross 1990). Likewise the gender wage gap widened in the private sector, but remained stable in the public sector, during years when laws undermined collective bargaining power in Australia (Peetz 2007).

2. Related to this, the *rule of law* is significant for workers with regulation proximity. Where rules exempt from regulation workers with incomes above a certain level or in certain type of occupations or with certain modes of employment (such as 'independent' contractors or outworkers) then market proximity is high. Outworkers are documented as having minimal protections (eg Thorpe in Centre for Research on Employment and Work and Socio Legal Research Centre 2000). If state authorities do not substantially enforce minimum employment standards, or if the processes, rules or costs of the legal system discourage enforcement, then market proximity is increased for all workers so affected, and they become more reliant on unions. 'Hard law' brings about regulation proximity, 'soft law' – the feature of recent European Union legislation in the area of gender gaps (Smith 2012) – increases regulation distance.

Enforceability is not just about state agency actions. It is also about the access of workers to resources to enforce their rights, and indeed their awareness of those rights. State inspectors may enforce minimum wages and conditions, but they often act on complaints that depend on employee willingness to complain and awareness that their rights are being breached. If low-wage workers are most likely to be affected by minimum wage laws, it is high wage earners who are

most likely to be aware of anti-discrimination law, and most likely to have the resources to access such law if it is reliant on individuals lodging claims in a court or tribunal against an employer.

3. The *employment instrument* of workers with regulation proximity will often be a collective agreement that sets out the pay and several conditions of employment of covered employees. By contrast, workers with market proximity will typically be covered by a form of individual contract. These contracts will largely be determined by the employer, who has the opportunity to shape norms in the workplace.

In most countries, collective agreements are negotiated by unions. There is scope for pay and conditions to be influenced by local norms, though unions may exercise centralised control over some aspects of locally determined agreements. In much of Europe, the extension of collective agreement coverage across an industry, or at least beyond the workplaces where unions actively negotiated or threatened or took action in support of negotiations for that collective agreement, is a mechanism for enhancing regulation proximity. In Australia, the gender pay gap for workers on collective agreements is typically less than it is for those on individual contracts (Peetz and Preston 2009). In Germany, the gender pay gap is least in firms with collective contracts and wage councils (Gartner and Stephan 2004). Cross-nationally, higher collective bargaining coverage is associated with lower gender pay gaps (Blau and Kahn 2001).

In Australia, a comparable but distinct role to collective agreements is played by awards (regulatory instruments, created by an independent tribunal, which set minimum wages and certain conditions for each occupation covered by that award). Those employees whose wages are determined solely by the award rate are subject to a high level of regulation proximity – to the extent, at least, that the award is enforceable. In recent years the resources put into award enforcement by inspectorates has increased (Goodwin and Maconachie 2010), and the lowest gender pay gap in Australia is for award-reliant workers (Australian Bureau of Statistics 6306.0).

4. Where collective agreements or public sector pay scales codify and regularise pay, management may increase market proximity by introducing flexibility into pay through incentive or 'performance' related pay. This frequently has the effect of increasing the use of subjective criteria at the expense of objective criteria, which in turn has potentially negative implications for women (Hall 1995, Rubery 1995). For example, a study by the UK Institute of Manpower Studies on merit pay, found that the perceived fairness of PBP criteria varied by gender, such that PBP increased the gender earnings gap (discussed by Hall 1995). The low transparency of performance-related pay has been linked to gender pay inequities (Rubery 1995). *Transparency*, then, is typically high where workers have regulation proximity (eg the public sector) and low where they have market proximity (eg individual contracts).

5. The *role of unions* is often significant for workers with high regulation proximity. Unions are a key form of non-state regulation, seeking to create rules,

codify behaviour, and ensure rules are enforced. Most workers with market proximity are non-unionised. In several countries, the union wage premium is greater for women than for men, which suggests that the gender pay gap is smaller amongst union than non-union workers (Card et al. 2003, Blanchflower and Bryson 2004), as unions tend to most benefit those groups who, in the absence of unions, would be in the weakest position in the labour market (Blanchflower 1999, Butcher and Rose 2001, Freeman and Medoff 1984, Jackson and Schellenberg 1999) – though the union wage effect has been declining as union density falls (Blanchflower and Bryson 2004). One factor is that, according to some studies, men and women negotiate differently in individual contracting, with men socialised to be more competitive, acquisitive and confident (Babcock and Laschever 2003, Barron 2003; Niederle and Vesterlund 2005). Collective union negotiations tend to avoid these problems with individual negotiations.

6. The *type of personal capital* that is important for shaping pay varies according to regulation distance. For workers with regulation proximity, human capital is important. Greater education and training leads to higher human capital and this in turn leads to increased opportunities for advancement and hence for higher pay, though in internal labour markets this effect may be moderated by tenure.

Human capital also matters for workers with market proximity. However, for this group, social capital also plays a significant role (eg, Ang, Nagel and Yang 2008). Social capital refers to the access to information and connections that people have, and the concept highlights the importance of social networks. These networks act to reproduce and reinforce values. If those values favour the importance of certain types of skills or characteristic over others – for example, privileging physical skills or work over caring skills or work – then those with other skills (women) will be disadvantaged. Through what might be referred to as the 'old boys club', high network connectedness of men to those in power (other men) will give greater access to career opportunities, and pay, to men than women (Tharenou, 1999).

Correlates

Some other work characteristics will have correlates in regulation distance, though these need not be linear or uniform. Most obvious is income. High income earners are most exposed to market proximity. They are least likely to be subject to minimum wage laws, often exempted from certain labour laws (for example, on unfair dismissal), less likely to be unionised (especially when in managerial positions), and more likely to be governed by individual contracts. On the other hand, they have access to the most resources to enforce their rights, and this ability to access the rule of law can be helpful to some women in high positions. They also work in a milieu with, on average, higher education. Empirically, these last two factors are not typically enough to offset the other effects of market proximity. Thus in Australia, for example, there is a higher gender wage gap in the higher earnings brackets of most industry groups and on average, "the gender wage difference at the 10th percentile of men's and

women's earnings is only 7.9 per cent. At the 90th percentile point on the earnings distribution there is a 21 per cent difference between men's and women's earnings" (Austen et al. 2007). Other researchers have also observed that the gender wage gap is higher when managerial employees are included than when they are excluded (Wooden 1999) and that it increases at the top end of the income distribution (Barón and Cobb-Clarke 2008; Kee 2006; Miller 2005). Notably, though, this occurs only in the private sector, not the public sector (Barón and Cobb-Clarke 2008; Kee 2006), where regulation proximity continues much higher up the classification scale. Amongst information and communications technology professionals and scientists, unadjusted annual pay gaps widen and perceptions of pay inequity peak when seniority is high (APESMA 2007). Interestingly, a study of wage inequality in the US showed that union wage effects amongst high income earners were considerably higher amongst women than men (Card 2001), implying union regulation reduces the gender earnings gap at high income levels. The proximity of middle and low income earners to regulation will vary between countries, industries and firms, according to the laws in place, their enforcement, exposure and accessibility, and the extent to which they are being paid above the minimum by their employer.

Centralisation of wage fixation implies more extensive regulation proximity. Hence, at the cross-national level, gender equity is higher on average in countries with more centralised forms of wage fixation (Whitehouse 1990, 1992) and in countries with higher union density (calculated from data in United Nations 2005, International Labour Organisation 2006).

The frequency of harassment may vary with regulation distance, not only with respect to discrimination law. For example, calls to the Victorian Workplace Rights Information Line regarding discrimination and harassment issues, made by or on behalf of women experiencing problems increased after the introduction of the 'Work Choices' legislation (Gahan 2006), which promoted individual contracting and severely weakened unions. This is because individual work rights, for example, against discrimination and harassment, have little impact if they are not supported by collective rights that, for low income earners, make up for difficulties of awareness, resources and accessibility. Workers appeared likely to lack the confidence, knowledge or resources to assert their rights at work if they did not feel they have the power to protect themselves and ensure that the matter is properly dealt with (Elton et al 2007; Workplace Rights Advocate 2007).

Features of labour market segmentation

Several additional dimensions of work are a function of the nature of labour market segmentation in an occupation, that is whether it is male-dominated, female-dominated or mixed. These forms of segmentation reflect the fourth dimension of Connell's (2002) gender regimes – that is, the gender division of labour. In male-dominated and female-dominated occupations a gender division of labour in the workplace is very clear. In mixed occupations the gender division of labour within the workplace (or at least, within that occupation within the workplace) may be less clear (though there might be hierarchical

gender divisions, that is, women may occupy lower rungs and men higher rungs within the occupation); in all cases, though, the divisions between paid and domestic work – part of Connell's gender division of labour – still matters. The distinctions between the three occupational categories are, empirically, matters of degree: as we saw, there is a diverse distribution of gender shares by occupation (ABS Cat No 6306.0).

1. The *impact of the domestic sphere* on the *value of work* varies according to segmentation. In a female-dominated occupation, the skills deployed are typically undervalued, often treated as 'attributes' rather than skills because they often share activities that had been historically undertaken by women in households (Horrell, Rubery and Burchell 1989). This is evident in occupations such as child care, elderly care and nursing, identified as experiencing undervaluation (CREW/SLRC 2000). The higher the female share of employment in an industry (or occupation: Brynin and Güveli 2012:582), the lower are earnings after controlling for education, experience and gender – partly because regulation distance in the form of non-unionism tends to be greater in female-dominated industries (Allen and Saunders 2002).

By contrast, in a male-dominated occupation the skills or capabilities of individual women may be undervalued, through men's questioning women's ability to 'do a man's job'. She would, they may argue, be better to 'stay at home' and do domestic work. Men are more likely to reward other men, for example through promotion, especially in male-dominated areas (Kanter 1977).

Hence, the problems of undervaluation are collective in a female-dominated occupation while being individualised in a male-dominated occupation. Hence in a female-dominated occupation, remedies to undervaluation are inherently collective (for example, through prosecuting work value or comparable worth cases in tribunals).

2. There are notable differences between *career barriers* according to gender segmentation. In female-dominated occupations, career barriers are mainly structural: many female-dominated occupations have much more poorly defined career paths than male-dominated occupations, or paths may be truncated by few opportunities at higher levels. This was clearly evident in a comparison of career paths in male- and female-dominated public sector professional career paths in Queensland, including librarians (Robin Price in CREW/SLRC 2000). In male-dominated occupations, career paths may be clearly defined but career barriers for women arise mainly from restrictions being placed on women accessing promotions or training necessary for career advancement, as a result of direct or indirect discrimination. Just as some women may be told that a particular occupation is not for them, others in that same occupation may be discouraged from, or encounter barriers to, accessing training and career development because gatekeepers to training (supervisors or training providers) believe it to be a poor investment, expecting women to perform worse or leave to have children (Murray & Peetz 2010).

In mixed occupations, the barriers to career advancement may chiefly operate at the procedural interface between the work and domestic spheres. Thus women`s advancement may be hampered by inadequate access to paid maternity leave, permanent part-time work, job sharing or other employee-focused flexibilities that enable women both to have children and exit and re-enter the work force without suffering loss of status or seniority. These procedural interface problems, of course, affect women in all occupations, but in male- and female-dominated occupations they are exceeded by other barriers mentioned in the previous paragraph.

3. Labour segmentation has implications for *performance visibility*. In mixed occupations, male and female workers are equally visible. But in male-dominated occupations, women are highly visible and their performance is therefore under easy scrutiny. Thus apparent mistakes made by women in the performance of their duties are easily remembered and attributed both to the individual ('she's not up to it') and the gender (`I said women can't do this job') and achieve exaggerated status, whereas those by men are easily forgotten or passed off as within normal bounds (Kanter 1977). Women therefore report having to work harder than men in order to achieve recognition or promotion (Murray and Peetz 2010).

Conversely men in female-dominated occupations are also highly visible, but whether judgement of their performance is similarly skewed depends on whether they 'cross over to do women's work [so that] their status as men is questioned and they become suspect (Susan Murray 2001); hence `moral panic' over their role (Piper & Smith 2003) has led to men's departure from primary education (Stewart 2001) and they are similarly rare in child care. Yet male nurses or librarians may be unusual rather than 'unsuitable', perhaps even with useful skills (eg strength amongst male nurses).

4. Both men and women may experience harassment at work, but women are far more likely than men to experience sexual harassment (Australian Human Rights Commission 2012), so *forms of harassment* experiences will also vary by labour segmentation. In female-dominated and mixed work spaces, sexual harassment events are likely to be individualised: an individual co-worker, supervisor or manager harasses a female employee or contractor. In male-dominated work spaces, harassment can be of this form but it may also take on a collective form. A frequent example is female pornography posted on walls or in magazines in common rest areas (Eveline and Booth 2002). Such environments increase the potential for, and perceived legitimacy of, individual acts of harassment. Just as individual sexual harassment, particularly from supervisors, is an expression of male power over individual females, so too collective harassment behaviour can be a way of reinforcing male power in the workplace. Often collective behaviours may not meet what the law would consider to be criteria for 'harassment', and may consist of frequent 'blue' jokes or swearing (Eveline and Booth 2002).

Interactions and gender gaps

We can visualise the interaction of regulation distance and labour segmentation in modern times (where regulation norms are more female-friendly than the norms of those in positions of power) along the lines of Figure 1. The chart shows the location of several groups of women workers in an Australian context. For ease of reference, labels have been attached to male-dominated (M), female-dominated (F) and mixed (X) occupations, and to workers with regulation proximity (1) and subjective/market proximity (2). Thus the chart shows six segments, for example, M1 is a male-dominated segment with regulation proximity.

Some of the groups shown in Figure 1 may be located differently in different countries. For example, mining is a male-dominated industry in most countries, but in Australia coal is relatively well unionised whereas metals mining is non-union and dominated by individual contracts. So coal (at M1) has greater regulation proximity than metals mining (M2).

		Regulation distance	
		regulation proximity	market proximity
Labour segmentation	Male-dominated	(M1) coal mining	(M2) senior executives engineers high finance metals mining(?)
	Mixed	(X1) academics public servants	(X2) retail managers solicitors accountants
	Female-dominated	(F1) child care aged care nurses librarians	(F2) clothing outworkers private household staff

Figure 1: Examples of locations of women workers by regulation distance and labour segmentation, Australia

The intersections between regulation distance and labour segmentation help shape the nature and size of gender gaps and the disadvantages facing women. It is worth at this point again distinguishing between 'internal' and 'external' gender pay gaps: an internal gender pay gap exists when people in the same occupation doing the same work are paid differently as a result of their gender ('unequal pay for equal work'). An external gender pay gap exists when people in different occupations are doing work of equal worth but paid differently as a result of their gender ('unequal pay for work of equal value').

For women in segment M1 (male-dominated, regulation proximate), the internal hourly gender pay gap tends to be low, especially in relation to base pay and conditions (Murray & Peetz 2010). There may be issues arising from specific interfaces with the domestic sphere (for example there may be lower benefits for part-timers), and impediments to women obtaining training or career advancement on the basis that such investments may not achieve 'returns'. Performance pay may also create gender gaps. The main problems for women are thus in terms of non-wage discrimination as well as harassment, which has the potential to have a collective as well as an individual form.

For women in segment F1 (female-dominated, regulation proximate), the internal gender pay gap also tends to be low but the main problem is a (potentially large) external gender pay gap due to undervaluation, at least until such times as undervaluation can be remedied through changes to regulation. Amongst the female-dominated occupations are several which have featured in reports of skills under-valuation, including child care workers, nurses, aged care workers and librarians (CREW/SLRC 2000). For at least the first three, the research suggests the norms built into the regulation system have codified that undervaluation, principally through the inadequate application of work value principles by industrial tribunals. For many women in segment F1, there may also be structural barriers to career advancement - as with, for example, librarians (see Robin Price in CREW/SLRC 2000).

For women in segment X1 (mixed, regulation proximate), the internal pay gap for base pay again tends to be low and the external gender pay gap is not an issue. Harassment tends to be restricted to individualised forms. More significant problems for gender pay equity are likely to be individualised barriers to career progression arising in part from the interaction between the domestic and paid employment spheres; gender-biased barriers may also be implicitly imposed by managers or structures, though these are less likely to arise than in segment M1. Within such occupations there may still be major differences in the representation of women and their access to lower and higher levels. Thus 'compositional' factors (women being in lower paid, less qualified positions within an occupation) and work-family interactions may appear to be significant in explaining gender gaps within X1 occupations. Public (civil) servants and academics experience regulation proximity. Within this (and other) segments, there may still be substantial differences in regulation proximity. For example, while academics are subject to many rules of employment, universities apply their own variations or interpretations to state rules on matters such as equal employment opportunity, and this tempers some of the regulation proximity. By contrast, public servants have probably the highest regulation proximity of any group. In Australia, the reporting requirements for public service departments on equal employment are more onerous than those on universities and the Public Service and Merit Protection Commission exercises oversight over departments. Academics have, by definition, high education levels, and so we might expect norms to be more favourable to women in

academia than the bureaucracy. But in this instance regulation proximity triumphs: the distribution of employment in Australian universities amongst academic staff is less favourable to women than that in Australian Public Service employment, especially at the senior academic levels (Strachan et al 2011). Performance pay, bonuses or loadings may be a mechanism for creating windows of regulation distance and opportunities for widening of gender gaps.

Women in segment M2 (male-dominated, market proximate) may potentially face high internal gender gaps in both wage and non-wage conditions. These male-dominated occupations, such as CEOs, engineers and financial market traders, have strong market proximity. Many of the M2 occupations are high paid on average (as per the examples in figure 1), so women in M2 may be receiving higher earnings than those in other segments but the gap between them and men in M2 may be greater than the internal gender gap for women in any of the regulation proximate occupations. We mentioned earlier that for workers in market proximity, employment is governed not by rules but by norms. The norms are those of the groups who possess power, and in this segment it is heavily men. Women in this segment may also experience collective harassment but in many such occupations the likelihood of this occurring is reduced by the education level of their milieu and by their own access to individual resources (eg to sue a discriminatory employer), which discourages collective harassment behaviour.

Social capital plays a key role for this group. We saw earlier the way the gender gap widened near the top of the earnings distribution. The greatest internal gender pay gaps exist for the group that best exemplifies M2: CEOs, senior executives and managers (Kulich et al. 2011, Watson 2009, Australian Institute of Management NSW and ACT Limited 2009, Equal Opportunity for Women in the Workplace Agency 2008, Arulampalam, Booth and Bryan 2007, Kulich et al. 2011), where income and personal resources are at their highest but regulation distance is at its greatest. Women executives are less integrated into executive 'old boys' networks (Murray 2006) and have been shown to be less likely to advance through executive ranks than men due to their relative lack of social capital (Tharenou 1999). Given its role in executive pay (Ang, Nagle and Yang 2008) this lack of social capital is one of the critical elements in understanding the very large gender gap in senior executive ranks.

The metaphor of the 'glass ceiling' is frequently used to describe barriers to gender equity in senior executive ranks, but it is rarely theorised as to why this particular phenomenon exists. The concept of regulation distance in intersection with segmentation helps explain the glass ceiling. It arises because the combination of market proximity and male domination together ensure the perpetuation of male power and discrimination against women in rewards and opportunities.

Yet not all women that might appear to be in this group face high gender wage gaps. It depends on the extent of subjectification in markets. The production focus in metals mining, for example, probably makes it a less subjectified labour market than that for senior managers where gender is exposed in every interaction. In Australia, the 2010 internal gender gap in hourly earnings was just 14.6 per cent in metals mining, compared to 12.4 per cent in coal mining (ABS Cat No 6306.0, Table 1a). Small sample sizes make it difficult to be definitive here, and part of the *industry*-level gender gap here is due to women's over-representation in office jobs. Still, it is well below the 40 per cent internal gender gap in annual income evident in Australian taxation statistics for CEOs and managing directors, the 35 per cent for engineering professionals, and the 48 per cent gap for financial dealers (Australian Taxation Office 2012), occupations where part-time work is low and unlikely to seriously influence the comparisons. (For the occupations miners, drillers, shot firers, and mining and construction labourers, the internal annual gender gap in taxation statistics is 21 to 23 per cent; for sales assistant, waiters and bar attendants, typically covered by awards or enterprise agreements and so having regulation proximity, the internal gender gap in taxation statistics is 7 to 10 per cent.) Metals mining also experiences spillover effects from coal mining: employers use individual contracts to offer high wages as a means of replacing and circumventing unions, and so the level of regulation distance is really much lower than it is for CEOs.

Women in segment X2 (mixed, market-proximate), in areas such as such as accountants, retail managers and solicitors (respectively 49, 54 and 56 per cent female in Australia (ATO 2012)), may also face internal gender gaps but these will be a site of frequent contestation. When senior people in these fields are of mixed gender, it is more likely than for M2 that merit, skill and reward for performance may be the sole norms affecting pay for such workers, and that these will interact with the forces of demand and supply to determine final pay outcomes. An even distribution of power across the bargaining table may help ensure the primacy of merit. As the gender distribution of those in power shifts, so too will the norms that influence pay. That is, as women occupy more positions in an occupation in M2, and it slowly moves towards X2, they are likely to try to shift the norms towards objective criteria in determining pay and conditions. But this will be an uneven process with uneven outcomes, and will depend on occupational struggles and the roles of critical actors. (This latter point also applies, to a lesser degree, to the shift from M1 to X1.)

Women in segment F2 (female-dominated, market proximate) may suffer especially badly from external gender gaps arising from undervaluation. Unlike those in F1, they lack the access to regulation to remedy undervaluation while, unlike many of those in M2, they lack the personal resources to individually challenge instances of gender-biased injustice. They lack access to either individual or collective power. They are thus in the most difficult segment for women of all, the low paid ghettos. As mentioned, clothing outworkers have traditionally been very distant from regulation, not even defined as 'employees' because they undertake piece-work on contract. They have often been rightly

characterised as the most exploited of all female workers, with little protection against very low wages, poor conditions and long hours (eg Thorpe in CREW/SLRC 2000).

Concluding remarks

The interaction between regulation distance and content, labour segmentation and norms helps us understand various aspects of the gender gap. This includes identifying more clearly the roles of undervaluation, labour market segmentation, human capital, social capital, and public sector and union effects. It highlights the importance of group norms, social capital and power in shaping the pay of men and women and the situations where those things matter most. We can see that a greater reliance on the 'market' does not necessarily remove distortions, rather it can increase their potential impact. This interaction also illuminates some non-pay aspects of gendered experiences at work, such as harassment, and helps theorise the 'glass ceiling'.

We can draw some possible policy implications. Advancing gender equity requires several things: drawing occupations into regulation (including via collective action and the role of the state); breaking down barriers between segments of the labour market; ensuring regulation values women's work, precludes discrimination and harassment and enables equal career access; and minimising the scope for interference by the domestic sphere in career development. The great gains for women have been made, and are made, through collective action, but that action has lasting impact only where it produces regulation that favours women's employment opportunities and rewards, brings workers within the scope of such regulation and can only be said to be truly effective when segmentation in the labour market is broken down. That is no short term task.

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