Swimming against the Tide: New Challenges for Unions under Australian Labour Law

Anthony Forsyth, RMIT University and Andrew Stewart, University of Adelaide

Abstract:

In this paper, we will explore a number of recent developments that affect the regulatory supports for – and impediments to – union organising and representation under Australian law. The Fair Work Act provides unions with a framework of rights, including access to work sites and protections against the victimisation of union activists, that in some respects remains stronger than that found in comparable labour law systems (e.g. UK, Canada, USA). At the same time, however, the political tide has clearly turned against trade unions in Australia. Even under Labor governments, as explained by Cooper and Ellem, their institutional role had been progressively weakened. The current conservative Liberal/National Government, while wary of being seen to reduce individual protections for workers, has focused its reform efforts on union rights and activities. Besides seeking to highlight malfeasance and corruption within the administration of unions, it is attempting to truncate still further what by international standards is a severely limited right to take industrial action. Recent court rulings have also created important gaps in the protections given to union members and officials. Against that backdrop, the challenge to organise Australian workplaces has never been greater.

Outline:

International Labour Organization (ILO) standards (including Conventions 87 and 98 on freedom of association and collective bargaining) indicate that legal support for the organisation of workers should, at the very least: permit workers to form and join trade unions; facilitate or even encourage collective bargaining over wages and other employment conditions; allow the taking of industrial action in support of collective demands, at least within reasonable limits; and protect union members and officials against victimisation.

Assessed against those standards, Australian law compares reasonably favourably. Unions played an integral role in the conciliation and arbitration systems that were used in Australia during the 20th century not just to resolve collective disputes, but to establish a detailed framework of minimum standards on matters such as wages and working hours. In 1993, the focus of labour regulation at the federal level shifted away from the arbitration of disputes towards the promotion of enterprise-level bargaining – a development strongly urged by key union leaders and introduced by a Labor government. The new framework of rights for employees and unions to engage in collective bargaining included, for the first time, the capacity to take lawful industrial action in support of bargaining claims.

These rights, now found in Parts 2-4 and 3-3 of the *Fair Work Act 2009* (Cth) (FW Act), are supplemented by other provisions which support union organising and representation at the workplace level and which have their origins in the old arbitration system. They include rights of
entry for trade union officials to employers’ premises for purposes of meeting with members or potential members (Part 3-4) and protections against victimisation of union activists (Part 3-1).

Taking all of these provisions together (including a majoritarian-based procedure for overcoming employer resistance to bargaining, and good faith bargaining requirements), Australian law provides a much stronger basis for collective bargaining and representation than the laws of countries such as the UK, Canada and the USA (see eg Forsyth 2011; Forsyth and Slinn 2014). Even so, there remain questions as to whether Australian law fully complies with the ILO standards referred to earlier, especially given the limits that apply to agreement content (and therefore to the right to take protected industrial action); and the focus of bargaining on the enterprise rather than at industry level (Mccrystal 2010). Despite the FW Act having been crafted by a Labor government, little attempt was made to comply with those standards, with the government indeed making a virtue of retaining the ‘clear, tough rules’ on industrial action introduced by its conservative Liberal/National predecessor.

It is also notable that under the current bargaining framework, the recognition of unions has changed in subtle but important ways (Bray and Stewart 2013). For example, rather than being recognised as ‘parties’ to collective agreements, unions generally now participate in enterprise bargaining as the chosen ‘bargaining representatives’ of individual workers. The FW Act indeed embodies a form of collectivism that is both ‘attenuated’ and ‘notably “individualistic” in character’ (Creighton 2011: 142–3). Its strengths include the fact that unions are still treated by default as the bargaining representatives of their members, and that the right to bargain is not dependent on showing majority support through workplace ballots (petitions are the more common, and accepted, method). Its limitations, on the other hand, include restrictive interpretations of good faith bargaining (with limited capacity to address surface bargaining and employer obstruction tactics); and the minimal avenues for resolving deadlocks in negotiations (for example through arbitration).

Despite labour laws that on balance still offer more support than those of comparable countries, Australian trade unions have been experiencing membership decline for some time. From around 50% membership density in the 1980s, the latest statistics show that in August 2014 only 15% of employees were union members in their main job. The figure in the private sector was even lower, at 11% – and only 4.9% of 15-19 year olds had joined a union. Over 70% of the workforce had never belonged to a union (ABS 2015).

Union influence remains broader than those figures might suggest. Around 35% of Australian employees are covered by union-negotiated enterprise agreements, while at least the same number again have wages and conditions underpinned by ‘modern awards’, instruments whose content is still significantly shaped by the advocacy of unions (albeit not as directly as in the heyday of the arbitration system). Nevertheless, the fall off in membership has been precipitous
and plainly threatens the capacity of the union movement to preserve even the current level of collective bargaining, let alone extend it.

The reasons for the drop in union density are well-documented, and include changes in the structure of the economy, with jobs being lost in traditional union strongholds such as manufacturing, at the same time as employment has grown dramatically in the services sector, where organisation has generally been weak. There has also been an increase in precarious (and again typically non-unionised) forms of employment, such as casual and contract labour (see eg Crosby 2005; Bramble 2008). But part of the explanation lies as well in the more hostile approach of the state towards unions in the period 1996-2007, under the conservative Howard Government. While followed by a period in which the (relatively) supportive FW Act framework was introduced under the Labor Governments led by Kevin Rudd and Julia Gillard (2007-2013), this hostility has been revived since the return to office of a Liberal/National Coalition Government in late 2013.

The challenges to unions in the last few years have taken a number of different forms. The most significant of these has been the establishment by the Coalition Government of the Royal Commission into Trade Union Governance and Corruption. This controversial inquiry was set up in response to revelations of corruption and financial mismanagement within several major unions. But it was also clearly aimed at exposing the financial and political links between the union movement and the Australian Labor Party, as well as targeting both a former and the current leader of that party for alleged involvement in corrupt or inappropriate activities. After two years of hearings, the Royal Commission’s Final Report was released on 30 December 2015 (Heydon 2015), revealing what its author (who himself came under fire for alleged links to the Liberal Party) described as the tip of an iceberg of ‘widespread’ and ‘deep-seated’ misconduct by Australian unions and their officials (Heydon 2015 vol 1: 12). As well as referring almost 100 individuals and organisations to police and other investigative authorities, the Royal Commission made 79 recommendations aimed at lifting standards of financial probity and accountability within trade unions; and substantially increasing the penalties for breaches of these legal requirements. It endorsed a government proposal to establish a new agency, the Registered Organisations Commission, to take responsibility for the oversight and enforcement of the new regulatory regime. It also proposed measures not just to tighten the governance of the powerful Construction, Forestry, Mining and Energy Union (CFMEU), but to curb its industrial activities. This would include reinvigorating laws introduced in 2005 by the Howard Government to crack down on ‘lawlessness’ in the building industry.

The government will likely introduce legislation in early 2016 seeking to implement at least some of the Royal Commission’s recommendations, although others may be left until after the election that is due later in the year (and which the Coalition is currently favoured to win). The
government is also in the process of deciding what to do about a further series of recommendations from the Productivity Commission, an independent advisory body staffed primarily by economists. Tasked with reviewing the entire workplace relations framework, the Commission’s final report was also released in December 2015. It surprised observers – and profoundly disappointed many in the government and the business community – by recommending a ‘renovation’, rather than a ‘knockdown and rebuild’ (Productivity Commission 2015c: 8). It was largely positive about the way the current system seeks to balance the bargaining power of employers and workers, respect community norms about fair treatment and encourage employment. Indeed it articulated a case for state regulation that looks remarkably similar to the conventional ‘protective’ view of labour law. Nevertheless, its report contains a number of proposals that the government will likely seize on, including higher penalties for unlawful industrial action and restrictions on the capacity of unions to negotiate with employers over the issue of outsourcing of labour.

Even before receiving these two major reports, the Coalition Government had been pursuing an agenda of restricting some of the organising and bargaining rights enjoyed by unions under the FW Act. Its proposals have included the imposition of new restrictions on ‘protected’ (lawful) industrial action, for example to prevent it being taken in support of claims that are ‘manifestly excessive, having regard to the conditions at the workplace and the industry in which the employer operates’ or that ‘would have a significant adverse impact on productivity at the workplace’ (Fair Work Amendment (Bargaining Processes) Bill 2014). It has sought to make changes to union rights of entry, in particular to make it harder for a union official to enter a workplace where it has potential members, but has not yet successfully organised (Fair Work Amendment Bill 2014, reintroduced as part of the Fair Work Amendment (Remaining 2014 Measures) Bill 2015). It also has Bills before Parliament to implement two of the measures mentioned above as being supported by the Heydon Report, concerning the governance of registered unions (and employer associations) and the creation and enforcement of special rules for the building industry (Fair Work (Registered Organisations) Amendment Bill 2014; Building and Construction Industry (Improving Productivity) Bill 2013).

During its first term in office, the Coalition has struggled to win the support of the minor parties and independents who hold the balance of power in the Senate – and that is likely to continue to be an impediment to its plans if it wins a second term. But two amendments it did manage to get through the upper house, as part of the Fair Work Amendment Act 2015, have enhanced the ability of employers to secure ‘greenfields’ project agreements in the face of union opposition, and forced unions to use the majority support determination process – rather than taking protected industrial action – in response to an employer’s refusal to engage in collective bargaining.
A further challenge that unions are currently facing emanates not from the executive or the legislature, but from the courts. As already mentioned, Part 3-1 of the FW Act contains a series of ‘general protections’ against (among other things) the victimisation of union members and delegates (and indeed employees generally) for asserting their ‘workplace rights’ or engaging in ‘industrial activities’. A key part of these protections, which has been a feature of federal labour legislation since the first statute in 1904 (Chapman et al 2014), is that if an employer can be shown to have taken ‘adverse action’ against a worker (for example by dismissing or disciplining them, or reducing their pay or other entitlements, or refusing to hire them), the burden of proof falls on the employer to show that the action did not happen for any of the reasons prohibited by Part 3-1. Traditionally, this has required employers to present convincing evidence that their reasons for taking action had nothing to do with the worker’s union membership or activities, or assertion of their rights (etc), but concerned (for instance) their competence or capacity, or some unrelated act of misconduct. In two recent cases, however, employers have been able to escape liability for disciplining employees for conduct that was unquestionably ‘industrial’ in character: in one case a union delegate emailing co-workers to warn them about what he considered inappropriate requests by management (Board of Bendigo Regional Institute of TAFE v Barclay (2012) 248 CLR 500); and in the other, a union member waving a sign about ‘scabs’ (strike-breakers) during a lawful union protest (CFMEU v BHP Coal Pty Ltd (2014) 253 CLR 243). In both instances, the High Court of Australia ruled that so long as the relevant manager genuinely believed that their decision was motivated by the employee’s failure to abide by expected standards of conduct, rather than the fact that they were engaged in industrial activities, the burden was discharged. It did not matter how strong the connection may have been, from an objective perspective, between the industrial nature of what the worker was doing and management’s response. The decisions potentially create a loophole in the general protections which employers keen to crack down on or resist union activity may well seek to exploit.

These various developments, and their impact, will be explained and assessed in more detail in the final version of our paper. They will inform our conclusion that while unions retain important responsibilities, rights and protections under the Australian system of labour regulation, they are likely to face a difficult relationship with the Australian state for the foreseeable future.
References:


Bramble, Tom (2008), *Trade Unionism in Australia: A History from Flood to Ebb Tide*, Cambridge University Press, Melbourne


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


