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**The potential impact of the
*Workplace Relations and other
Legislation Amendment Act
1996* on Indigenous employees**

B. Hunter

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DISCUSSION PAPER

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Professor Jon Altman
Director, CAEPR
The Australian National University
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ABSTRACT

The *Workplace Relations and other Legislation Amendment Act 1996* attempts to expedite reform of the industrial relations system and increase flexibility of workplaces seeking to compete in the international market place. This paper provides a detailed guide to the legislation with a particular focus on its likely impact on Indigenous workers. The potential equity concerns arising from the operationalisation of the provisions of the Act should be weighed against the potential employment gains from improved macroeconomic performance or the increased flexibility of workplaces. Unfortunately, the lack of data on the articulation of the interests of Indigenous workers within the industrial relations system severely limits the depth of the analysis. Notwithstanding such shortcomings, the entrenched disadvantage experienced by Indigenous workers means that they may not be in a position to avail themselves of any employment gains in the wider community.

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Boyd Hunter is Post-Doctoral Fellow at the Centre for Aboriginal Economic Policy Research, Faculty of Arts, The Australian National University, Canberra.

Introduction

Since Federation, wage bargaining in Australia's formal labour market has been highly centralised. Many of the wages and conditions enjoyed by Australian workers have been negotiated by representatives of governments, employer groups or trade unions under the auspices of the Australian Industrial Relations Commission (AIRC) or its antecedents and counterparts in the state jurisdictions. Even the enterprise bargaining reforms designed by the previous Labor Government to introduce some flexibility of wages and conditions have been largely monitored and regulated by the AIRC.

The Howard Government recently enacted legislation which attempts to expedite reform of the industrial relations system and increase flexibility of workplaces seeking to compete in the international market place. The *Workplace Relations and other Legislation Amendment Act 1996* (WROLA Act) received royal assent on 25 November 1996. Most schedules of the Act came into effect at the beginning of 1997, with provisions relating to Australian workplace agreements likely to come into effect in the first half of 1997.

The WROLA Act does not attempt to decentralise the industrial relations system directly. The AIRC retains a significant role in overseeing its operation. The Act, however, seeks to simplify the award system by removing overly prescriptive conditions which may hamper workplace flexibility, facilitating the capacity for local agreements and reducing the power of trade unions. The Commonwealth Government hopes that these reforms will improve microeconomic efficiency in Australia's labour markets and therefore lead to improved macroeconomic outcomes including significant reductions in unemployment and improved employment growth. While the overall performance of the economy has clear implications for any group of workers, this paper focuses on the likely impact of the reforms on the Indigenous workforce rather than examining possible macroeconomic outcomes in any detail.

The WROLA Act is likely to have a particular impact on Indigenous employees. For example, the Act includes a range of provisions intended to help prevent and eliminate discrimination, including on grounds particularly relevant to Indigenous workers such as race, colour and social origin. Such provisions are included in the principal object of the *Workplace Relations Act 1996*, as well as in provisions relating to awards, agreements, and termination of employment.

The impact of more general provisions of the WROLA Act are more problematic. Amendments of particular concern to Indigenous employees fall into the broad areas of award simplification, agreement-making, termination of employment and union rights. This paper summarises the

major features of the WROLA Act of concern to Indigenous employees and provides an a priori analysis of its implications for the Indigenous workforce. To ensure that the analysis can be placed in an appropriate historical context, it is also important to summarise the relevant characteristics of the Indigenous workforce.

Indigenous workers and the industrial relations system

The articulation of the interests of Indigenous workers within the industrial relations system is not well documented. The general lack of documentation does not reflect poor scholarship as much as it does the historical exclusion of Indigenous workers from the industrial relations system and the general marginalisation of Indigenous people within Australian society. For the first 60 years of Federation, Indigenous workers were largely excluded from the jurisdiction of the Commonwealth Arbitration Court by default (Stevens 1974: 190).¹

One prominent exception is the extensively studied industrial struggle over equal pay in the pastoral industry in the late 1960s (Stevens 1974; Kerr 1986; May 1994). The Northern Australian Workers Union and the Commonwealth Government successfully applied to amend the Northern Territory Cattle Industry Award so that Aboriginal station hands were paid the same as white workers. The subsequent decline in Aboriginal participation in the pastoral industry has been attributed to the employment effects of the subsequent increases in Aboriginal wages (Kerr 1986), but can just as easily be put down to technological changes in the sector or inaccurate and discriminatory employer assessments of Aboriginal workers' work ethics or skills.

Most contemporary studies suffer from difficulties in sampling an extremely small population of Indigenous workers. Buultjens (1995) found, using a sample of only 42 respondents, that most Indigenous workers had little knowledge of agreements or awards. Even the Department of Industrial Relations' (DIR) study of agreements made under their enterprise bargaining reforms was circumspect in making definitive judgments about Indigenous involvement in the industrial relations system because of the sampling problems in a small population (DIR 1995: 56). Notwithstanding this poverty of data, it is possible to construct a profile of the likely interactions between Indigenous workers and the industrial relations system using a mixture of existing data about the nature of the Indigenous workforce and a priori analysis.

The historical exclusion of Indigenous Australians from the mainstream institutions of Australian society, including the award system, may insulate Indigenous workers, to some extent, from some of the impacts of the WROLA Act. Indeed, if Indigenous people are not covered by awards, then

simplifying awards will not affect Indigenous employment outcomes. Given that many Indigenous organisations have historically not been covered by awards for their Indigenous (and non-Indigenous) staff, the award system cannot be considered a binding constraint on such Indigenous employment.²

An associated issue is the extent to which Indigenous Australians are outside mainstream labour markets and therefore outside the award system. Of particular relevance to this issue are those in informal employment, such as artefact manufacture or subsistence activities (Altman and Allen 1992; Smith and Roach 1996).

The Indigenous workforce is highly segregated into a few industries. One implication of the high level of segmentation is that they are more vulnerable to changes in these sectors. A case in point is the community services sector. In 1991, 27.7 per cent of Indigenous males and 46.8 per cent of female employees were employed in this sector (Taylor and Liu 1996). As for all service industries, measuring productivity is extremely hard due to the difficulty in quantifying output. Thus, the high participation of Indigenous people in this sector, which is often a conscious choice, makes it difficult to apply performance-linked awards or agreements. To the extent that wage increases are increasingly linked to workplace performance and productivity, a key goal of the Government's industrial relations reforms, the potential outcome of such a choice may be that the average wages and salaries of Indigenous Australians, compared to the total population, are eroded over time. A related issue is the relative concentration of Indigenous Australians in the public sector. Hammond and Harbridge (1995: 374) argue that the decentralisation of bargaining embodied in the WROLA Act risks worsening the 'structural inequalities of industry segmentation'.

Indigenous employment is also concentrated in the low-skilled end of the labour market where there are many persons who could take their jobs (Altman and Daly 1995). While there has been an improvement in the skill base of the Indigenous workforce in recent years, a general decline in the demand for unskilled and other workers with low education has maintained the relative disadvantage of Indigenous workers in the labour market.³ That is, the improvements in the skill base were necessary to ensure that employment prospects of Indigenous workers did not decline.

Very little is currently known about Indigenous participation in the union movement.⁴ Irrespective of the overall coverage of Indigenous workers in the union movement, the small numbers of Indigenous employees in the overall workforce and the concentration in disadvantaged segments of the labour market means that Indigenous workers tend to have limited bargaining power within the industrial relations system.

To the extent that Indigenous employees have less bargaining power than other employees, they may be placed at a further disadvantage in negotiating workplace agreements under the WROLA Act. The possible exception to the poor bargaining position are Indigenous organisations which could be expected to be sympathetic to the cultural needs of their workforce.

The Community Development Employment Projects (CDEP) scheme and the new industrial relations environment

The CDEP scheme is a major employer of Indigenous workers with about 28 per cent of Indigenous workers or over 19,000 people currently employed in the scheme (Hunter and Taylor 1996). The position of the CDEP scheme within the industrial relations system has important implications for this analysis. Deloitte Ross Tohmatsu (1992) demonstrated that there were important differences in the treatment of CDEP and non-CDEP employees. For example, in some Indigenous organisations CDEP and non-CDEP employees worked together, non-CDEP workers often being covered by awards. While provisions for annual leave and sick leave were similar, no specific provisions for casual pay loadings, maternity, long-service and bereavement leave were identified for CDEP workers. Overtime was not paid to CDEP workers; however, they were granted time off work in lieu of overtime. General payments, such as time-and-a-half and double-time provisions available under the award, were not extended to CDEP scheme workers. There are also striking differences between employment conditions for CDEP scheme workers and general award employees relating to termination, redundancy and superannuation payments (Altman and Sanders 1991). Superannuation is also not provided for employees participating in the CDEP scheme.

The differences in the rates of pay among CDEP scheme and award workers arise mainly from the origins of the scheme as a work-for-the-dole scheme. CDEP wages are determined by the block grants to communities participating in the scheme and are notionally linked to the welfare benefit entitlements of individuals broadly adjusted for demographic characteristics, such as marital status and number of dependants. The Deloitte Ross Tohmatsu (1992) report that the average hourly rate of pay for CDEP scheme workers in construction and maintenance was \$8.73 compared to \$8.78 for relevant award comparisons. Notwithstanding this apparently small wage differential, one of the key issues is the limited number of hours available for work under the CDEP scheme with many workers constrained to working less than 20 hours per week (Altman and Hawke 1993). Another major issue from an industrial relations perspective is the poor access to the employment conditions enjoyed by other workers. There are no easy answers to these issues and one's position depends on the extent to which one considers CDEP workers as employees rather than welfare recipients.

These differentials may act as an incentive for employers to transfer individuals from one employment scheme to another based upon these considerations. Altman and Sanders (1991) have expressed concern that the CDEP scheme has the potential to create secondary labour markets. If the situation of differential treatment between award covered employees and CDEP workers continues to exist, it is possible that the scheme (which has many social externalities) may become a target for criticism from groups identifying CDEP as supporting the relatively poor pay structure of Indigenous Australians (Altman and Hawke 1993). The new WROLA Act may lessen the differential between CDEP scheme and other workers by enabling analogous award workers to use some of their wages and conditions as a bargaining tool. However, given repeated assurances from the coalition Government that no worker will be worse off, the differential treatment of CDEP and award workers may persist unless, as seems unlikely, CDEP workers wages are increased in line with other workers in the workplace.

Enterprise bargaining and Indigenous employees

The most detailed study of the articulation of Indigenous interests within the industrial relations system was commissioned by the DIR (DIR 1996). The focus group research examined the extent of Indigenous participation in enterprise bargaining within three Darwin organisations. These focus groups were supplemented by interviews with Indigenous workers, Aboriginal liaison officers, the Northern Land Council, the Aboriginal and Torres Strait Islander Commission (ATSIC), managers and union delegates. Notwithstanding the relatively small size of the research project, the research found that Indigenous workers played little or no part in enterprise bargaining (DIR 1996: 176-78). For the non-Indigenous organisations in the DIR study, Indigenous workers were isolated and few in number. Employers in such organisations argue that 'we treat everyone the same here' and do not see a requirement for a special effort to involve Indigenous workers in the bargaining process. Even in Indigenous organisations, Indigenous workers had limited involvement in the process (DIR 1996: 177).

A number of factors worked against Indigenous involvement in enterprise bargaining. The fear of losing special Aboriginal award conditions which exceed community standards and the high turnover of Indigenous workers inhibited participation in the bargaining process. The geographical isolation of Indigenous organisations from industrial relations support services provided by government, employers and unions mitigated against Indigenous participation.⁵ Also, the tardiness of employers in informing workers of bargaining developments combined with the tendency of many Indigenous workers to dislike expressing disagreements in front of managements tended to ensure minimal Indigenous involvement in the process (DIR 1996: 177-78).

It should not be surprising that none of the agreements in non-Indigenous organisations contained clauses which specifically address issues pertinent to Indigenous workers. Management discretion and informal arrangements remain the only avenues for addressing issues such as ceremonial leave and attended family compassionate leave. The consensus among the respondents in the study was that Aboriginal and Torres Strait Islander workers would be no better and no worse off under enterprise bargaining relative to other employees (DIR 1996: 178).

The movement-to-award program

One recent attempt to specifically deal with Indigenous interests in the industrial relations system was the movement-to-award program.⁶ The program was set up in 1992 to support the extension of appropriate awards to Commonwealth-funded Aboriginal and Torres Strait Islander organisations and sectors of the community service industry. The movement-to-award program guidelines specified several matters of special interest to Indigenous workers that could be included, including: compassionate/bereavement leave which recognised the extended family networks of Indigenous employees; unpaid ceremonial leave of up to ten days over two years; and allowing employees to partake in National Aboriginal and Torres Strait Islander observance day activities. It is probably not surprising that the program only succeeded in securing awards in a handful of cases given the suspicion about the effects of the full extension of award coverage among some Indigenous organisations (Smith 1994: 23).⁷ Given the limited success of the movement-to-award wages program, workplace agreements reached under the WROLA Act could have the potential to be more successful in ensuring that the workplace environment is agreeable for Indigenous workers. However, this potential needs to be balanced by a number of features of the Act that could act against Indigenous interests. These features are discussed below.

Award simplification process

Awards are to be simplified so that they contain only a limited number of allowable award matters (s.89A).⁸ Following the commencement of the Act, no new awards will be able to include non-allowable award matters and, after an 18 month transitional process, non-allowable award matters in existing awards will not be enforceable, but will need to be determined by agreement at the workplace (Items 46 and 50, Schedule 5, WROLA Act). While the Act does not prescribe minimum award conditions, it does specify important restrictions on the issues that can be dealt with under awards after this transitional phase.

As a result of the Government's agreement with the political party, the Australian Democrats, which led to the passage of a large number of amendments to the Bill in the Senate,⁹ some issues of particular concern, to

Indigenous employees, notably cultural leave, have been included in the list of allowable matters (s.89A(2)(g)). This concession is potentially important for many Indigenous employees who have difficulty reconciling work and cultural commitments. At the time of the National Aboriginal and Torres Strait Islander Survey (NATSIS) more than one-fifth of Indigenous employees found that work and cultural obligations were incompatible (Australian Bureau of Statistics (ABS) 1995).¹⁰ However, given that the current provisions for cultural leave in awards are limited to a few awards such as the Australian Public Sector General Employment Conditions award, this concession may have a limited impact on employment conditions for Indigenous workers.

Matters that could no longer be in awards after the transitional period, but are of likely to be of relevance to Indigenous employees, include:

- Equal Employment Opportunity and affirmative action provisions;
- provisions relating to workplace harassment;
- provisions relating to employee consultation (including aspects of the 'Termination, Change and Redundancy' test case provisions);
- training provisions generally, including literacy provisions;
- study leave;
- authorised stopwork meetings;
- union picnic days;
- trade union training provisions;
- union right of entry provisions;
- occupational health and safety and clothing provisions;
- rest periods; and
- workplace amenities.

EEO and workplace harassment

The first two dot points have important implications for dealing with direct or indirect discrimination against Indigenous Australians. The NATSIS provides evidence that racial discrimination is a constraint in finding employment for just over 4 per cent of Indigenous unemployed (Table 1). However, the lack of jobs in the local area and insufficient education are more important factors preventing the Indigenous unemployed finding work.¹¹ Notwithstanding the relatively small numbers of people reporting racial discrimination as the primary reason for unemployment, the very nature of discrimination means that job applicants are unlikely to be aware of the reasoning processes of potential employers.

Table 1. Main difficulty finding a job by part-of-State and sex, 1994.

	Capital city	Other urban	Rural	Males	Females	Persons
Transport problems	22.9	14.6	12.9	16.4	16.7	16.5
No jobs at all	6.9	22.6	33.5	22.9	17.7	20.8
No jobs in local area	11.3	17.8	25.2	19.7	14.6	17.7
Insufficient education	20.9	20.3	6.4	17.9	16.5	17.4
Own ill health	*2.8	*1.2	*1.7	*1.8	*1.6	1.7
Racial discrimination	*3.0	5.2	*3.5	4.3	4.2	4.2
Childcare	*1.0	2.6	*0.3	*0.4	3.4	1.6
Other difficulty	5.7	5.6	3.2	5.7	4.2	5.1
No difficulty	24.6	9.7	11.9	10.5	19.8	14.2
Not stated	*0.8	*0.4	*1.5	*0.3	*1.4	*0.8
Total	100.0	100.0	100.0	100.0	100.0	100.0
Total ('000s)	10,900	20,300	9,000	24,100	16,100	40,200

* These estimates are subject to a high sampling variability.

Source: ABS (1995).

Employee consultation

The exclusion of employee consultation from awards also reduces possible feedback on the reasons for access to various employment conditions within the workplace. While some organisations will continue to recognise the importance of consultative work practices, the removal of provisions on consultation procedures from awards may mean that, in less progressive organisations, consultation with employees may not occur. In the context of Indigenous employees, employers may provide less information on management decisions relating to issues such as promotions, recruitment, job redesign and rotation and the provision of employment benefits. This may mean that employers are able to make discriminatory decisions without challenge. However, in the case of termination of employment, a relevant factor in determining whether a termination was harsh, unjust or unreasonable will include whether there was a valid reason for the termination, and whether the employee was notified of that reason (s.170CG(3)(a) and (b)). This should help to ensure that employees are consulted about the reasons for decisions to terminate their employment.

Training

The injunction against inclusion of training and literacy provisions or study leave in awards is likely to have a particularly adverse affect on Indigenous employees. Given that the poor educational attainment is by far and away the most significant factor in constraining employment prospects (Hunter 1996), any limitation on educational opportunities within the working environment can have an especially damaging affect on Indigenous employees. ABS (1996) identified the completion of training courses as a

significant influence in the ongoing employment opportunities. However, given the relatively low labour force participation rate among Indigenous people, limitations on the prescribed level of employer-provided training may increase the overall competitiveness of Indigenous Australians vis-à-vis other Australians.

Ability to organise

The next three non-allowable matters relate to the ability of Indigenous workers to organise and hence the ability to bargain for appropriate outcomes within the industrial relations system. If, as seems likely, Indigenous workers are extremely circumscribed in their ability to organise, either within or outside unions, then the exclusion of these matters may disproportionately affect Indigenous workers. A detailed discussion of such matters is left to the second last section of this paper. Suffice to say that the ability to organise workers to improve their bargaining provision is a crucial ingredient which determines what eventually will be included in any bargaining of matters allowed under the Act.

Occupational health and safety

The listing of the occupational health and safety and clothing provisions, workplace amenities and rest periods as non-allowable may not affect workplace conditions to the extent that such issues are covered in other statutes.¹² However, workplace conditions may vary substantially and it is quite conceivable that there are significant lags between the identification of localised hazards and legislative response. By rendering such provisions non-allowable, the Act begs the question of whether legislative responses are adequate to the threat posed by the hazard.

The likely reduction in prescriptive occupational health and safety provisions in awards may have a positive employment effect for the Indigenous workforce if employers can save on unnecessary expenditure. Such effects need to be weighed against the increased risk associated with real hazards not accounted for in the relevant statute.

McHugh's (1996) study of the cotton industry in northern New South Wales provides an alarming analysis of the poor treatment of low skilled Indigenous workers known as 'chippers'.¹³ In 1984, almost a third of Indigenous chippers surveyed reported they had been sprayed with dangerous chemicals at work. It is not surprising that these chippers had a high incidence of rashes, blisters, vision problems, giddiness, asthma and other conditions associated with pesticide poisoning (McHugh 1996: 151). The failure to look after the interests of these Indigenous workers illustrates the inadequacies of the statutory regulation of the working environment and the industrial relations system.¹⁴ Nonetheless, the changes embodied in the WROLA Act remove one avenue for ensuring that employers comply with their duty of care.

The AIRC and non-allowable matters

As a result of the agreement with the Democrats, the Act allows the AIRC to deal with non-allowable matters in a very restricted range of circumstances. The AIRC can only deal with such matters if:

- there has been a genuine attempt to reach agreement, and there is no reasonable prospect of agreement being reached on the exceptional matter by conciliation;
- it is appropriate to settle the matter by arbitration;
- the issues involved are exceptional; and
- a harsh or unjust outcome would apply if the matter was not addressed (s.89A(7)).

These criteria are so restrictive that they are unlikely to make much of an impact on the matters that can be addressed in awards. In any case, in the unlikely circumstance that all four conditions are met, the Indigenous portion of the workforce is probably so small that the AIRC is unlikely to bring its limited resources to bear on the more subtle issues underlying the poor on-going access to employment of Indigenous population.

Complementing the restriction of awards to allowable matters, all restrictions on the use of particular types of employment will be removed from awards (s.89(4)(a)). This means that there will be no quotas on the numbers of employees that can be employed on a casual rather than permanent basis. Casual employees have little job security, and generally receive a loading (usually around 20 per cent) on their hourly rate to compensate them for all employment conditions, such as annual, sick and other forms of leave. The removal of restrictions on casual employment will mean that employers are more likely to hire vulnerable employees, such as Indigenous employees, on a casual basis. Under these circumstances, Indigenous employment is likely to be increasingly concentrated in the 'peripheral', rather than the 'core' workforce. As such, Indigenous employees will have access to few employment benefits, little job security, and no access to career or training opportunities. However, to the extent that employers hire additional Indigenous workers as a result of the removal of these restrictions, Indigenous employment may even improve. Casual work is probably preferable to unemployment.

In addition to specified restrictions, the AIRC will be required to review all awards, to determine whether they:

- include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level;

- do not prescribe work practices or procedures that restrict or hinder the efficient performance of work; and
- do not contain provisions that have the effect of restricting or hindering productivity, having regard to fairness to employees. (items 49(7) and 51(6) Schedule 5, WROLA Act).

Similarly, new awards and variations to awards will not be able to be approved where they do include such matters (s.143(1B)). While the precise application of these provisions will be up to the Australian Industrial Relations Commission, it is likely that they could lead to the removal of substantive provisions that provide real benefits to Indigenous employees from awards. For example, the clear emphasis on efficiency implies that equity considerations will be a secondary consideration when there is any trade-off between equity and efficiency. While award reviews must also address discriminatory provisions and new awards must not discriminate on grounds including race, colour, and social origin, this is likely to have little effect on Indigenous workers as few awards would directly discriminate on such grounds.

Paid rates awards

The new Act also makes significant changes to paid rates awards, that is awards that specify the actual rate of pay and conditions provided to employees, as opposed to minimum rates awards, which only specify minimum pay and conditions, with employers free to pay above this minimum. Paid rates are common in the public sector where much Indigenous employment is concentrated, and generally provide a higher rate of pay than equivalent minimum rates awards, as they incorporate an element of the 'market rate' that is paid on an over-award basis in the private sector.

Under the new provisions, the Commission's power to make an award is limited to making a minimum rates award (s.89A(3)). By application during an 18 month interim period, and as a requirement after that period, the AIRC must review all awards. As part of this review, the AIRC may vary paid rates awards so that they provide for minimum rates of pay (items 49(5) and 51(4), Schedule 5, WROLA Act).

Under the legislation, the Commission is required to handle such conversion in a way that ensures that overall entitlements to pay provided by the award are not reduced by that variation (items 49(6) and 51(5), Schedule 5, WROLA Act). While the operation of this provision would be left up to the AIRC, past practice suggests that it would involve identifying the element of paid rates that reflects an over-award component, and expressing this as a separate amount that is not subject to any further increases.¹⁵ Thus, while the conversion to minimum rates may not immediately reduce current rates, it would lead to disadvantage over time

as the real value of the 'over-award' element is eaten away by inflation. This is likely to lead to substantial disadvantage for those Indigenous employees currently covered by paid rates awards in the public sector.

The WROLA Act, as a result of the Government's agreement with the Democrats, does contain a mechanism by which some employees may be able to retain their paid rates awards. The AIRC is able to arbitrate an award for employees previously covered by a paid rates award, where there is no reasonable prospect of the negotiating parties reaching an agreement, even if the AIRC conciliates (s.170MW(7) and 170MX(3)). Such an award does not have to meet requirements for other awards (s.170MY(2)), but must have regard to how productivity might be improved in the business concerned (not usually a specific concern in award-making) (s.170MX(5)(d)). Unlike other awards, it must also specify a nominal expiry date after which the award can be revoked on application by an employer or organisation bound by the award, or a majority of employees (s.170MZ(1) and (5)). The impact that this provision will have on the retention of paid rates awards remains to be seen, but it is clearly framed with a view to any arbitrated paid awards operating on a short-term basis, and only in return for productivity offsets.

Holes in the safety net?

While the treatment of awards under the WROLA Act raises concerns for Indigenous employees, it should also be noted that new provisions will require the Australian Industrial Relations Commission to have particular regard to the needs of the low paid when adjusting the safety net (s.88B(2)(c)). In its submission to the current Living Wage Case, the Commonwealth used this provision to argue that safety net increases should only be granted to employees whose award rates are at or below Average Weekly Ordinary Time Earnings (AWOTE). The Commonwealth suggested that this would proportionally benefit Aboriginal and Torres Strait Islander people as approximately 84 per cent of such employees in non-CDEP employment were estimated to be earning at or below AWOTE in 1994 (Commonwealth of Australia (forthcoming)). Nevertheless, in the longer term, the Commonwealth's approach means that the award system is likely to play an increasingly residual role in Australian industrial relations, which is unlikely to benefit those disadvantaged employees who most rely on minimum award wages.

The WROLA Act is part of a new phase in Government policy which emphasises the importance of agreements between enterprises and their employees. For Indigenous employees, the first element of this policy phase was seen when the movement-to-award program was scrapped in the last budget. For this new policy focus to achieve the desired results, Indigenous workers must be able to obtain suitable and equitable agreements with local enterprises. While all matters not included in the awards can be negotiated at a workplace level, achieving a suitable

outcome depends on the preferences of the Indigenous workforce and the relative bargaining strength of the respective parties. The next section examines the role of the agreement-making provisions in the Act.

Agreement-making

Under the new legislation there are provisions for three types of formal enterprise agreements:

- certified agreements negotiated collectively between unions and employers;
- certified agreements negotiated on a collective basis directly between employers and employees; and
- Australian workplace agreements (AWAs) negotiated either collectively or individually directly with employees, but signed by individual employees.

The first category of agreement is essentially the same as existing certified agreements. The last two categories represent a fundamental addition to the scope for enterprise agreements.

As a result of the Government's agreement with the Democrats, a 'no disadvantage' test, similar to the test currently applying to federal agreements will apply to agreements, and all types of agreements will be subject to upfront vetting (by the AIRC in the case of certified agreements, and by a new Employment Advocate in the case of AWAs with agreements).¹⁶ Nevertheless, there are a number of features of the new agreement-making provisions that could put vulnerable employees, including Indigenous employees, at a disadvantage.

Certified agreements

In the case of certified agreements, the AIRC's responsibility in relation to vulnerable employees has been reduced. Previously, the AIRC was required to identify any employees covered by the agreement whose interest may not have been taken sufficiently into account in the negotiations for, or the terms of, the agreement. To decide this, the AIRC was required to find out whether relevant employees were consulted and informed about the agreement in ways that were appropriate having regard to their particular circumstances and needs, and whether the effects on the relevant employees of the terms of the agreement were properly explained to those employees. Where there was a failure to consult or explain, the Commission could make whatever orders it thought necessary to remedy the failure and its effects (formerly s.170MG of the *Industrial Relations Act 1988*). This requirement clearly had three parts: identify vulnerable employees, check that they had been consulted properly, and remedy any defects.

Under the new legislation, this requirement has been replaced with a shorter requirement that the agreement be appropriately explained to employees, having regard to their particular circumstances and needs (s.170LT(7)). The legislation rather nonsensically states that 'An example of such a case [surely the requirement applies to all cases?] would be where the persons included: (a) women; or (b) persons from a non-English speaking background; or (c) young persons'.

The legislation no longer specifically requires the identification of vulnerable employees. It also refers to 'explanation' rather than 'consultation', implying a one-way process of communication from employers to employees, rather than a two-way process, where employees are able to influence an agreement's outcome. Finally, the AIRC's only alternatives if the agreement does not meet the requirements of s.170LT(7) is for it to reject the agreement or accept undertakings or other action at the initiative of the parties to the agreement. It cannot make orders to remedy the deficiency itself. In combination, these differences in the new legislation are likely to undermine the effectiveness of the provisions in protecting vulnerable employees.

Another weakness in the certified agreements provisions relates to agreements negotiated directly between employers and employees. An employer is able to negotiate directly with employees at his or her own initiative. An employee who is a union member can make a request that their union represent them, but this can only be in 'meeting and conferring' with the employer, not with negotiating the agreement itself (s.170LK(5)). A union in an area where employees have little bargaining power, likely to be the case in many areas of Indigenous employment, has no rights to force an employer to negotiate with it directly.

Australian Workplace Agreements (AWAs)

Despite the provisions governing AWAs being substantially amended as a result of the agreement between the Democrats and the Government, there are still a number of deficiencies in the provisions that are likely to disadvantage many vulnerable employees, including Indigenous employees.

Unlike certified agreements, AWAs do not include provisions requiring employers to explain agreements to employees in ways that have regard to their particular circumstances and needs. The legislation simply requires the agreement to be explained (s.170VPA(1)(c)). The Government has provided no explanation of this difference in approach between certified agreements and AWAs.

Also unlike certified agreements, there is no requirement for AWAs to be tested upfront to see whether they contain discriminatory provisions (for example on the basis of race, colour, social origin or national extraction).

There is a requirement that AWAs include provisions relating to discrimination that are prescribed by the regulations (s.170VG(1)). However, the requirement for a vague commitment on the part of the parties to avoid discriminatory practices is unlikely to have the same effect as an upfront test by a third party. There is no basis for a distinction between certified agreements and AWAs on this matter.

Despite the use of a 'no disadvantage' test, vulnerable employees are also likely to be disadvantaged by the introduction of formal individual contracts, that can change award provisions, into the industrial relations system. In the past, individual agreements have had to operate over and above award provisions for employees covered by awards. Now, an employer can use their bargaining power to force an employee to agree, on an individual basis, to changes to their award that they may be unhappy with. This is clear as, despite a requirement that employees genuinely consent to an agreement (s.170VPA(1)(d)), there is no prohibition on employers making agreement to an individual AWA a condition of employment for new employees.

Also employers have the right to 'lock out' individual employees (that is, refuse to allow them to work or be paid, without terminating their employment contract) until they agree to an individual AWA (s.170WC). This provision appears to be designed to achieve some perverse symmetry between collective certified agreements - where employers and unions/employees are provided with the right to collectively strike or lock out a group of employees in a bargaining period - and AWAs. There appears to be no regard to the inherent differences in bargaining power in individual and collective negotiations which are all too apparent for Indigenous workers in the secondary labour market.

Other provisions stipulate that unions can only operate as 'bargaining agents' for employees (s.170VK), and cannot be party to an AWA (s.170VA). This provision is ironic in the context of comments by the Government on its intention to provide choice to employees.

Finally, it is relevant to note that, as a result of the Government's agreements with the Democrats, the Employment Advocate must have regard to the needs of workers in a disadvantaged bargaining position (s.83BB) in the performance of its general functions, for example in providing advice and assistance to employees. The legislation specifically states that examples of such employees are women, people from non-English speaking backgrounds, young people, apprentices, trainees and outworkers. Indigenous employees are not specifically mentioned, despite the fact that the Government's access and equity policies purportedly are aimed at increasing access to Government services to both Indigenous employees and employees from non-English speaking backgrounds.

Termination of employment

The Government has made substantial revisions to existing unfair dismissal provisions, designed to make them less onerous to employers. A number of the amendments made could act as a disincentive for employees with a genuine case, but with limited financial resources, from pursuing their claims, for example, Indigenous employees. In particular, the Commission can award costs against an employee, not only when a complaint was made vexatiously or without reasonable cause, but also where it is satisfied that an employee has acted unreasonably in failing to discontinue the matter before the Commission or to agree to terms of settlement and, where an employee elects to proceed to arbitration but then discontinues the matter (s.170CJ). Regulations also provide that a fee of \$50 is payable for lodgement of an application to the Commission for relief in respect of termination of employment. However, a registrar may waive the fee if satisfied that a person lodging an application will suffer serious hardship if the lodgement fee is paid.

This fee, in conjunction with the widespread ignorance of the industrial relations system, may mean that Indigenous persons who might have a successful claim may not lodge it. In this way a cycle of Indigenous distrust of official institutions is perpetuated.¹⁷ While alienation from the industrial relations system is difficult to quantify, it is potentially an important constraint on the ability of the system to fulfil its promise. If Indigenous people do not feel it is in their interest to participate, then they cannot participate in the bargaining process which determines the final outcome.

Union rights

A number of restrictions on union rights in the legislation may disadvantage Indigenous employees, to the extent that they are more reliant on the activities of unions to prevent exploitation from unscrupulous employers. These include:

- the fact that unions can only enter an employer's premises to investigate where the employer is complying with an award, where a union member is employed at the premises (s.285(B)(2)) (unions have no rights to inspect premises to ensure compliance with an AWA)). To the extent that Indigenous employees are less likely to be members of unions, this means that they have to rely on the Department of Industrial Relations to ensure compliance in their areas of employment;
- that fact that awards providing unions with rights of entry are made unenforceable (s.127AA);
- employers are forbidden to pay employees when they are taking industrial action, which is defined to include partial work bans, where

employees perform all but a small part of their usual duties (s.187AA and s.4); and

- provisions are made for enterprise unions of 50 or more employees (s.189(4)). This may result in fragmented and under-resourced unions which cannot adequately represent employees.

While the evidence about the extent to which Indigenous employees are adequately represented by the unions is limited, it is clear that the WROLA Act will hinder the legitimate activities of unions including the representation of Indigenous workers who have experienced discrimination in the workplace on the basis of race. However, the limited ability of unions to cover workers in remote and rural location means that such constraints will be largely confined to urban areas.

Notwithstanding the shortcomings of the Act, the somewhat inglorious history of certain elements of the union movement with respect to Indigenous workers means that we should not be too romantic about the prospect for union activity eliminating racial discrimination in the workplace (see footnote 1).

Concluding remarks

The WROLA Act will change the environment in which industrial relations is conducted in Australia and therefore will have profound implications for the employment conditions of all Indigenous workers. However, as indicated above, it should be recognised that many Indigenous workers are not covered by awards. This is particularly true among remote communities and in Indigenous organisations. The restrictions imposed on what can be included in awards in the WROLA Act are not likely to constrain the conditions of employment for such workers. Notwithstanding, we cannot discount the possibility that other workers will be adversely affected by the award simplification process, particularly non-CDEP employees in urban areas where the relative ease of organising union members may mean that more Indigenous workers are covered by awards.

The role of unions in Indigenous industrial relations?

The WROLA Act severely circumscribes the role of unions in the industrial relations system. Eichbaum (1997) suggests that this aspect of the Act may be inconsistent with the International Labour Organisation conventions on freedom of association and collective bargaining.¹⁸ Notwithstanding any such inconsistency, the Act will obstruct unions fulfilling their legitimate role in looking after the interests of Indigenous workers.

The deep-seated factors underlying the poor labour market performance of Indigenous Australians means that the trade union movement can only play a limited role in facilitating improvement, especially in the immediate future (Altman and Hawke 1993). While the attempt to curtail union power may have a limited impact on overall employment outcomes and wages for Indigenous workers, it may affect the terms and conditions of individual workers. Indeed, if unprosecuted discrimination against Indigenous workers is widespread and systematic, then the adverse employment effect of reducing unions' role in pursuing employers who discriminate on the basis of race, may outweigh the positive employment impacts of increased flexibility in wages and conditions.

Unions could play a vital role in assisting the entrance of Indigenous people into the formal labour market and attempting to ensure that an over-segregated labour market does not develop (Altman and Hawke 1993). However, if unions genuinely wish to represent the interests of Indigenous workers they must encourage effective Indigenous participation in the formulation of union goals and objectives. To remain relevant in the new industrial relations environment unions must actively service the needs of all their potential members, including Indigenous workers.

In order to service Indigenous members, unions must systematically collect information about such members. The absence of any such database in the public sector unions, where many Indigenous workers are employed, highlights the historical failure of unions to adequately service Indigenous members.

The employment effects of the WROLA Act

Given that employment demand is one of the major factors constraining the Indigenous unemployed from securing employment, the employment effects of the Act are potentially very important (see Table 1). The relatively flexible industrial relations environment has some potential to reduce the cost to employers of workforce expansion. However, the protections in the Act which constrain the reduction of wages will limit the actual cost saving that can be achieved by employers and therefore the potential size of any employment effect. In any case, as Gregory (1993: 65) points out, unacceptably large reductions in wages may be required to achieve the increases in employment necessary to restore the economy to full employment.¹⁹

There are two Indigenous-specific constraints on the size of these employment effects: the geographic distribution of the Indigenous population and the skill base of its workforce. Even if the employment effects are substantial in major urban areas, this will not affect the majority of the Indigenous workforce in rural and other urban areas. The relatively low educational attainment of the Indigenous workforce means that they may not be competitive against other potential employees (Hunter 1996).

That is, whatever the employment effects of the Act there is likely to be a persistent problem with a mismatch of supply and demand for Indigenous labour. Indigenous unemployment that can only effectively be addressed by a menu of policies which simultaneously address both supply and demand factors.

The possibility of improved employment for Indigenous workers must be weighed against potential equity implications of increased enterprise flexibility. If society values equity in the wages and conditions under which workers are employed, then we need to explicitly recognise the trade-off between these equity considerations and possible employment opportunities. However, even if equity considerations are ignored entirely, it is possible that the employment losses for Indigenous workers from unprosecuted racial discrimination resulting from the changes to the conditions under which employers hire and fire may outweigh potential gains from improvements in macroeconomic growth.

Notes

1. In 1932, the Court ruled that, as the Federal award did not mention Aborigines, they could not join the Australian Workers Union. The Court explicitly excluded 'natives' from its jurisdiction in 1944 (Stevens 1974: 190-1). The Australian Workers Union had attempted to exclude blacks from their ranks as early as the 1910s (May 1994: 160).
2. Aboriginal and Torres Strait Islander Commission (ATSIC) (1991) notes:

The situation now exists where some organisations have acted to implement effective award coverage for their own operations, in the process setting potential precedents for other areas. Others operate in terms of fixing wages and conditions by reference to a wide range of Common Rule awards that may be remote from and inappropriate to their operations, and further, a significant proportion of organisations appear to be effectively award free, with wages and conditions for employees set quite arbitrarily.
3. Katz and Murphy (1992) documented the international nature of the decline for unskilled labour.
4. Several unions have moved to rectify the lack of information about Indigenous union membership and encourage greater participation in the union movement. For example, the Australian Education Union has made moves to estimate the number of Indigenous members and actively include these members in the union.
5. The Kimberley region was mentioned as a specific case where geographic isolation had inhibited the pursuit of enterprise bargaining.
6. The funding for the movement-to-award program was stopped in 1996.
7. ATSIC (1995) estimate that only two new awards were developed and implemented in 1994-95 under the movement-to-award program. The program expenditure for that year was \$300,687.
8. Unless otherwise indicated, section numbers refer to sections of the *Workplace Relations Act 1996*, as amended by the *WROLA Act*.

9. See Agreement Between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill - Agreed Statement of Position, October 1996.
10. The difficulty in reconciling work with cultural obligations is particularly pronounced among non-CDEP scheme employees. Of these employees, 25.1 per cent recognised that there was an incompatibility between their work and cultural obligations. Another 29.6 per cent indicated that they did not have any cultural obligations.
11. Demand-related factors account for more than 50 per cent of problems in finding employment in rural and remote areas.
12. That is, the respective State and Federal laws pertaining to occupational health and safety.
13. Chippers move through rows of cotton removing weeds so that the picked cotton will be free of weed and therefore fetch a higher price in the market. As many as 90 per cent of chippers in northern New South Wales (NSW) are Indigenous.
14. The NSW Department of Agriculture's Drugs and Poisons Schedule Committee set the allowable exposure limit at 0.1 mg/kg of the pesticide, chlordimeform, metabolites in a 48-hour pooled urine sample. When the authorities discovered that this was being exceeded in the first season, they simply doubled the allowable limit (McHugh 1996: 138).
15. This is consistent with the Commonwealth's submission in the current hearings on the Australian Council of Trade Unions (ACTU's) living wage claim.
16. Where there is some doubt that the 'no disadvantage' test is met, AWAs may still be referred to the AIRC.
17. Henderson (1975: 267) provides extensive documentation of extensive distrust in white bureaucracies.
18. Haworth and Hughes (1995: 154) express similar concerns about New Zealand's Employment Contract Act.
19. Foregoing wage increases experienced in the growing sectors of the economy is a viable option for employment improvements in the more sluggish sectors in the long term (see Gregory 1993).

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