

## **What's the future for registered organisations?**

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If one were to survey the recent history of Australian industrial regulation one might conclude that, especially since the workplace relations era (1996), and particularly since the Work Choices era (2006), the future for registered organisations was dim and dimming. Union membership figures (and the density of employer organisation coverage) would lend support to that view.

Institutionally, the movement from the conciliation and arbitration power to the corporations power – underpinning, first agreements, and then awards, meant that the systemic need for collective parties, organisations, disappeared. The increasing reliance on enterprise based agreements to provide conditions and the decline of the state jurisdictions also cut away at the second traditional basis for organisations – system convenience.

What do I mean by system convenience?

Arguably state common rule jurisdictions did not need parties in the same way that the federal conciliation and arbitration based system did. Nonetheless state organisations were integral because common rule award making was most efficiently done by having representative organisations, rather than individuals or random groups of individuals, arguing the case.

Conceptually, state common rule systems did not “need” organisations but, for convenience, and historical reasons, they were legislated into, and given rights in, each state system.

In this presentation I want to focus on the system and its need for organisations.

I fully realise that it's over simple to say that the structure and rules of the formal system determine the fate of organisations. Many other factors, internal and external to organisations, have also been at play over the last two decades and have impacted on organisations and their levels of success.

Organisations haven't stood still. Both unions and employer organisations have evolved over this time. But there is a truth in the fact that the system, its underlying nature and its rules, are a significant factor for organisations, their role and their future.

At a recent AMMA conference (3 April) Jeff Lawrence (ACTU Secretary) is reported as saying that the ACTU wants to engage employers and the community so that they better understand what collective bargaining and freedom of association really mean. Presuming that he was being correctly reported, and if I understand him correctly, he was saying that unless employees who want to bargain with their employer are able to, it undermined the apparent right to join a union.

Union membership is meaningless without the right to bargain collectively. Jeff Lawrence was also saying that employers and the community needed to understand that Labor policy was clear and made this link between bargaining rights and the right to associate.

The government's proposed national system has been outlined in its election policy and implementation plan, but the detail of its new system awaits the government's draft legislation. (That is expected later in the year).

So while there may be some wishful thinking in this and perhaps Jeff is attempting to set the climate for the forthcoming draft legislation, we do know the government's broad policy position.

In the new system, Fair Work Australia, the government's proposed "one stop shop" which will broadly take up the roles of the Australian Industrial Relations Commission, the Workplace Authority, the Workplace Ombudsman and the Australian Building and Construction Commission, will be able to intervene when a majority of employees in a workplace want to bargain and the employer does not.

Fair Work Australia will be able to ascertain the actual level of support for collective bargaining and, where there is sufficient support, direct the employer to bargain in good faith. Fair Work Australia will also have the power to make orders where bargaining participants are not bargaining in good faith.

An employer will be able to bargain with employees who are not union members. An employer will be able to bargain with a union with coverage in the workplace. More than one employer can bargain with employees and unions with coverage in their workplaces to make a multi-employer agreement. Where a union represented employees covered by the agreement the union, too, is a party to the agreement.

These seem enhanced bargaining rights from what currently prevails, and may – the policy is a little unclear on this – mean that unions have a right of representation during agreement making, and a right to be a party to an agreement, on the basis of a single member. The policy does not seem to be saying that a union can force bargaining where there is not majority employee support for it.

Another change is that under the policy agreements can be about whatever matters the parties agree to so long as they are lawful. A system which is not based on the conciliation and arbitration power does not require, as a system imperative, that matters in awards or agreements pertain to the employment relationship. The government has announced some exceptions to this "any lawful content" rule (right of entry, bargaining fees and retention of freedom of association rules) and there is speculation that there may be some further restrictions in the draft legislation when it appears.

Nonetheless, there is the real possibility that unions will be able to, and will seek to have additional union rights provisions in agreements.

No matter what its system rules are, enterprise based bargaining has different implications for employer organisations. This is because there is a single employer involved, and therefore no issue of collective representation. There is no system need for some kind of bargaining right for employer organisations, nor is there a benefit for system convenience. This fact has not changed.

As at present, employer organisations can advise, provide comparative and industry information, suggest solutions; but there is no need for them to have bargaining rights.

Even if multi-employer bargaining becomes common place it does not seem likely there would be a system need to legislate employer organisation bargaining rights. Indeed, under its current policy, the government would not want to see industry bargaining yielding instruments with something like industry wide (common rule) coverage. It would not wish to legislate bargaining rights for employer organisations.

Of course the proposed new system is not just the beckoning bargaining table.

The new system is to be underpinned by minimum standards. There are two types of proposed minimum standard. The first, ten National Employment Standards (NES) will provide common standards to all employees under the government's proposed national system. NES will not be able to be excluded by industrial instruments except as their terms explicitly provide.

The government is currently considering comments on its draft standards with the intention of finalising them, and releasing the final version, by 30 June 2008.

Supplementing the NES is a proposed system of modern awards. Modern awards are to provide minimum terms and conditions for particular industries and occupations, and should be relevant to a modern economy. They should provide a fair minimum safety net. The government's election implementation document says:

*“Awards will not be prescriptive; they will be flexible. Awards will not enshrine inefficient work practices; they will promote flexible and family friendly work arrangements.”*

Modern awards are also intended to be simple to understand so that employers and employees have certainty about their rights and obligations.

Current policy, reflected in the drafting of the exposure NES, is that only modern awards can exclude the operation of a part of the NES in a way provided, but this causes difficulties with agreements and appears to operate quixotically for non award-covered employees. There is speculation that the final form of the NES may allow modification by instruments other than modern awards.

Apart from their potential to deal with matters in the NES modern awards will be able to prescribe up to 10 award matters (or 11, if outworker provisions are relevant to the award's coverage). As well, modern awards are to contain an award flexibility clause which would enable an individual employee and his or her employer to enter into an individual flexibility arrangement modifying the award's operation provided that it doesn't disadvantage the employee.

If modern awards are starting to sound different from what is currently in the system, they are.

For a start, there will be fewer awards than there are now. The system of modern awards will at least cover those whose work is currently covered by an award. NAPSAs will expire from the system but those under them, or who would be but for an agreement, will be covered by a modern award.

As you will all know, the government's first step towards its new system, its transition legislation, is in operation (28 March). The headline news was that AWAs could no longer be made or varied, and for many workplaces that is a significant development. However, more importantly for the coming system was the fact that the transition legislation empowered the AIRC to undertake the process of award modernisation (making a system of modern awards).

Award modernisation requires the Minister to issue an "award modernisation request" which directs the AIRC as to the process and timing of modernisation. The Commission has received the Minister's request (1 April).

For the next twenty months or so the future of organisations, and that of transitionally registered associations, if it comes to that, is clear. They'll be busy. Very busy. The government's intention is that modern awards will start to be created in at least the first industries selected by the end of 2008, and that modern awards would be continue to be created throughout 2009 so that the structure of modern awards is in place for the new system's starting date of 1 January 2010.

Government policy in this regard appears to be directed towards keeping organisations out of trouble and ensuring that they are so tired when its new system starts that they won't go and ruin it right away.

The first point to make about award modernisation is that it is a massive undertaking. The modernisation process is based on pre-reform awards but, as has been widely publicised, the request requires that employees are not disadvantaged and that employers do not face increased costs. This means that NAPSAs and pay scales derived from pre-reform state wage instruments, although not formally instruments in the modernisation process, are part of the consideration of modern award content.

Justice Giudice, in a speech to the same AMMA conference that Jeff Lawrence spoke at, estimated that there were at least 740 relevant pre-reform awards (about 70 of which were single issue awards) and possibly 1670 NAPSAs involved. Modern awards are to be structured primarily along industry lines, or if appropriate, operational lines, and by the end of a transitional period, not have state-based differences. There is intended to be a single national modern award for any particular "industry".

In determining the coverage of modern awards the Commission is to have regard to the representation rights of organisations and transitionally registered associations. The phrasing is not confined to unions.

Regard also has to be had to the desirability of avoiding both award overlap and minimising the number of modern awards applying to any employer (or employee).

Putting aside which employer organisations might be "bound" by a particular modern award because they have coverage in its industry, the rationalisation component of modernisation raises the prospect of modern awards with more than one union "party". For example, is clerical work an industry (or a defensively distinct operation) giving rise to a clerical award, or are clerical classifications distributed throughout the various industry awards? Will there be, as there is at present, a mix of both approaches? Does not having a modern award for a

clerical industry mean that the ASU and other unions with clerical coverage become party to awards in a large number of industries?

There are major consequences here for organisations' rights, and therefore differences of interests and possible turbulence. We may subsequently see new amalgamations. We don't know the final form of the legislation but it seems likely that an organisation which is "bound" to a particular award will have some statutory rights concerning award variation, and in the case of unions, rights of entry. The fact of being "bound" by a modern award may also determine a union's bargaining rights in a workplace.

Second, the timing is tight and the process will need to be driven. The government's intention is clear. I think that if award modernisation does start to bog down and persuasion doesn't work the government might be minded to legislate to clear the problem.

In his speech to the AMMA conference Justice Giudice said:

*"As the Minister's Request acknowledges, the Commission will require the full support and cooperation of the major workplace relations stockholders and other interested parties. Once the timetable has been established it will be very important for it to be adhered to. That will put strains on the resources of all involved, particularly the larger unions and employer bodies which represent interests in multiple industries.*

...  
*Award modernisation is an unprecedented opportunity for all those involved to make a lasting contribution to the quality of industrial regulation in this country."*

The request empowers the Commission to drive the process, but to do so with consultation. I think that we can expect to see the Commission making limited use of conferences and producing material for comment by written submissions rather than having parties putting their views and responses in the usual way.

Speaking at the 3<sup>rd</sup> Annual Industrial Relations Forum, Vice President Lawler noted that award simplification took five years and was not as complicated as award modernisation. He is quoted as saying:

*"[Modernisation] is complicated, difficult and boring. The timetable means that we have to be ruthless."*

Modern awards are to be created by full benches, that is, redress would be complicated and expensive. Presumably this fact will sharpen the focus of organisations on the process in hand.

By 30 June there will have been identified a number of priority industries slated for the first modernisation process. The Commission has said that it will consult but the priority industries and occupations will in part be selected on the basis of high AWA and NAPSA coverage. There will also be the final form of the NES so that industry specific detail can be written for an award where appropriate.

There will be a model award flexibility clause and a timetable. Some of these matters may be decided following consultation with peak organisations only but Justice Giudice has said that

the Commission would consult more widely about priority industries, a modernisation timetable and the draft of the award modernisation clause.

All of this, and the award modernisation process, means not only that organisations will be busy but also that members and organisations need to be talking and working together much more intensely than has been the case over the last few years.

However it is clear that representation in the transitional system is organisation based.

Indeed, individual enterprise awards are not included in the modernisation process. Enterprise awards are not replaced by modern awards when the new system begins. Modern awards will be written to exclude enterprise awards and enterprise awards seem likely to retain their current form. At present there does not seem to be any scope to modernise them.

This fact should not be understood to mean that those employers do not have an interest in the modernisation process. They do. On present indications if an enterprise award is terminated the appropriate modern award(s) come into effect. It seems reasonable to understand the government's intention is that enterprise specific awards should die out over time. The shape of industry coverage and the terms and conditions in modern awards are just as important for employers with enterprise awards as for those who are not under an enterprise award.

(Employer specific NAPSAs, which are not deemed NSW enterprise agreements, are currently treated in the same way as common rule NAPSAs. They will cease to have effect on commencement of the new system.)

What is the future for organisations when the new system is in place?

I have put such focus on award modernisation in this talk because in the new system, awards will matter. Awards will be a more salient fact of life than has been the case over the last decade or so and it seems unlikely that this new fact is going to change any time soon.

Subject to the detail of the final legislation, awards will provide fair minimum safety net conditions, not minimum safety net conditions. Modern awards will prescribe a wider range of conditions that is currently the case with pre-reform awards which are subject to the present allowable award matters, and of course they will be varied from time to time – something, pay scales aside, we haven't seen in a while. (In fact award pay setting may remain not too different from what happens now.)

It may be that we no longer see the types of test cases which we saw during the second half of the pre-Work Choices Workplace Relations Act era (*Redundancy, Family Provisions*). The new legislation may discourage general cases in favour of more focussed industry specific variations but we can be certain that unions will from time to time seek to vary awards, and so might employer organisations. The new system means a greater emphasis on collectively sourced workplace regulation.

Not only will you work more with your organisation determining policies and responses but you may well be paying a bit more, too. It's a new system coming. The government is understood to be writing a new act, not amending the current one. Vice President Lawler is

quoted as saying that he understood that the government was proposing a new industrial relations act:

*“...from scratch, not amending a monstrosity.”*

Given the complexity of the current act I can only applaud that approach.

However there is a down side. Whereas an amended act brings its established precedent to its new provisions (subject to their terms) a new act does not. New legislation often provides teething problems, and this is more true the more of it there is. Obviously the extent of settling down litigation is dependent on what's in the act but it is difficult to imagine that there will not be a number of questions which require to be decided.

Organisations can look forward to a number of key cases. Employer organisations can, and will, spread the costs of these cases in Fair Work Australia and the courts, away from the particular affected employer.