The Future of Trade Unions in Australia

Ken McAlpine, National Tertiary Education Union, kmcalpine@nteu.org.au

Sarah Roberts[1], National Tertiary Education Union, sroberts@nteu.org.au

Abstract

The Australian union movement has been in decline for several decades. The social and economic factors which have led to the decline are briefly examined. Unions have spent many years developing strategies based on improved organising and recruitment methods, and academics have devoted research to analysing and assessing these. However, this paper argues that this concentration is misplaced, and that the legal framework in which unions operate is the central determinant of their limited success in recent years. Finally, a minimum legal framework, based on collective bargaining, is proposed as an example of what type of changes unions should prioritise if they are to recover.

Introduction

Anyone who looks at the trade union density figures in Australia over the past forty years could be forgiven for thinking that the union movement is in crisis, if not terminal decline. Since at least the early 1990s, the ACTU and many unions have been aware of the problem and have embarked on a range of strategies and tactics to address it.

Discussion about trade union strategies in Australia, especially within the union movement itself, has understandably concentrated upon how trade unions organise and structure themselves, how they organise and recruit, and how they sell their message. For example, in the wake of an *ACTU Leaders Forum* in February 2016, ACTU President Ged Kearney was asked on ABC Radio why union density had fallen so drastically in the past three decades. Her answer was to the effect that perhaps unions haven't been good enough at explaining their achievements and getting their message across. While this self-criticism may be true, it overlooks the systemic hurdles which prevent union revival, and which we examine in this paper.

The purpose of this paper is not to criticise the tactics and methods adopted to combat union decline. Instead it is to identify the role of the legal framework in which unions operate as the central and critical factor which prevents any of these tactics and methods from succeeding. Our argument is that restoring the right of unions to do what unions are supposed to do is a necessary pre-requisite for any sustained union growth, and that much discussion within unions and academia ignores or avoids this central but obvious conclusion.

What follows is a brief survey of the generally accepted causes of union decline since the 1970s. We then identify the specific anti-union changes in the law and what these have meant for union capacity, along with those areas in which the law has failed to adapt to changes in labour markets and employer strategies. We then suggest that finding a new legal framework for industrial relations is not only essential to union recovery, but achieving that new framework is the central long-term strategic question facing the union movement.

[1] The opinions expressed in this paper are those of the authors and do not represent the views of the National Tertiary Education Union

Economic and social factors

It is well known that membership of trade unions in Australia over the past four decades has declined steadily, from above 50% of the workforce in the 1970s to a little above 15% now. Unless something changes in the next couple of decades, the union movement may no longer be viable.

It is also clear that across nearly all the advanced capitalist world, to varying degrees, unions have had declining membership and influence, which suggests that the problems go deeper than the choices made by particular unions, or by the labour movements in particular countries.

Sympathetic analysts have identified and debated the relative importance of the 'external' factors in the decline of union membership. These include:

> Fundamental changes in product and labour markets, with firms subject to greater competition, including global competition, limiting unions' capacity to increase labour's share at the level of the firm.
>
> The loss of union 'bastions' - large employers with stable unionised workforces, such as the post office, the vehicle, steel, rail and power industries, and many large manufacturing plants.
>
> Chronic high unemployment and underemployment since 1975, with its consequent effect on the bargaining power of employees as individuals and collectively.
>
> Alleged changes in culture, away from collectivism and towards individualism, along with a more explicitly anti-union attitude on the part of employers.

We don't propose to analyse the relative contribution of each of the factors listed above, nor to disentangle them from each other. However, none of these is likely to change in the short term.

The legal framework

These changes have occurred alongside, and have been compounded by, radical changes in the legal rights of trade unions since 1977.

Perhaps the most obvious of these changes has been in relation to industrial action. During most of the twentieth century, despite the theoretical existence of the industrial torts, and the reality of 'bans clauses' and other Commission orders, unions were in practice able to take industrial action. In most industries, industrial action was used sparingly, but it was always in the background as a possibility when a delegate or organiser was raising a grievance or making a claim. Industrial action underwrote 'organising' by demonstrating actual or potential union power on-the-job.

In several steps, the union movement has lost nearly all of its previous de facto rights:

> Statutory prohibitions against secondary boycotts - from 1977 *(Sections 45D and 45E of the Trade Practices Act 1974)*.
>
> 'No Extra Claims' Clauses associated with the Accord - 1983-1994 *(Conciliation and Arbitration Commission, Print F2900 23 September 1983).*
>
> The confirmation of the availability of the industrial torts - 1985 *(Dollar Sweets Pty Ltd v Federated Confectioners Association and Others [1986] VicRp 38; [1986] VR 383).*

Protected industrial action, and its implied converse - from 1993 *(Section 170PG Industrial Relations Reform Act 1993).*

Orders against unprotected industrial action - from 1997 *(Section 127 Workplace Relations Act 1996.*

Mandatory orders against unprotected industrial action - from 2005 *(Section 496 Workplace Relations Act 1996, re-enacted in Fair Work Act 2009).*

All unprotected action specifically unlawful and injunctible - from 2005 *(Section 494 Workplace Relations Act 1996, re-enacted in the Fair Work Act 2009).*

Mandatory restrictions on industrial action which harms or threatens to harm the 'welfare' of 'part of the population', making effective industrial action difficult in many industries - from 2005 (*Section 430 of the Workplace Relations Act,* re-enacted in *Section 424 of The Fair Work Act)*

The right to take action in pursuit of an enterprise agreement is still significant, but it is a pale shadow of previous rights, and can rarely confer the right to use industrial action to resolve an acute workplace dispute. Until the 1980s, much union strength was built around the union's capacity to resolve a specific workplace issue through the use, or the threat of the use, of industrial action.

The loss of trade union rights to take industrial action is reflected in the official figures, which show that industrial action has almost disappeared, even by comparison with the 1970s and even the 1980s (Australian Bureau of Statistics, 2016).

The second significant change has been the loss of access to merit-based arbitration. Until 1997, unions had a general power to take industrial disputes to an independent state or federal arbitrator, for example, *Section 99 of the Industrial Relations Act 1988*, and its predecessors and equivalent State Acts. Although Awards were the most important outcome of arbitration, arbitration was also used to solve acute or immediate disputes. Unions considered these arbitrators were often fairly conservative, but they could and did intervene in acute workplace disputes. Managements, as well as unions, could never be sure what the arbitrator might decide, and this meant they were often willing to reach a settlement rather than run the risk of arbitration. Since 1997, with the limitation *of* disputes under *Section 89A of the Workpl*ace *Relations Act 1996* to 'allowable matters' and more particularly since the 2005 WorkChoices legislation, unions have almost completely lost the capacity to take merit-based disputes to the Commission. This loss has seriously weakened union power in workplaces, especially for unions which represent less militant groups or were for political reasons less militant.

A third factor has been the collapse of union security arrangements, which it has been suggested has suggested accounted for a large part of the collapse of union density (Peetz, 1997). These ranged from tribunal-ordered or tribunal-sanctioned arrangements which provided for compulsory union membership or varying degrees of preference in hiring or retention to union members, to de facto arrangements won by unions at workplaces. Peetz rightly suggests that these arrangements may have led to neglectful unions not engaged with workers. However, the collapse of union preference arrangements had a disastrous effect on union revenue and density and power, and have undermined the revenue stream which could have been used to adapt to a more hostile environment.

While not as important as the factors listed above, the extension of a range of rights to all employees since the 1970s, irrespective of their union membership, has tended to undermine unions. These rights have included those created under various state and federal unfair dismissal jurisdictions, anti-discrimination laws, paid 'parental leave', the Modern Awards and the National Employment

Standards, and the right to vote on enterprise agreements. Whatever the merits of such arrangements, some of which have been lobbied for by the union movement, much less of the package of rights held by employees has any tangible connection to union action, and the state has established a bureaucratic enforcement infrastructure, for example,the Fair Work Ombudsman, anti-discrimination bodies which acts as a substitute for unions.

What these changes have meant in practice

The loss of the right to take industrial action or have disputes arbitrated, drastically alters the balance of power between each employer and the unions with which it has to deal, in the employer's favour. Unions are at their core organisations whose job is to persuade, and sometimes coerce, employers to do things they don't want to. The loss of these de facto and legal rights cripples the project of 'organising', 'union action' and to some extent 'community engagement'. It is the loss of rights to contest management power which has, ironically, contributed to greater employer hostility. Moreover, both symbolically and in substance, many employment rights are no longer directly linked to union action.

While it is important to understand how the union movement has been hobbled over the past four decades, union recovery cannot consist of wishing for a return to the past. We now therefore wish to turn from an analysis of what has happened, to what we consider to be the central issues which the union movement need to address in future strategies.

The free-rider problem

Unions in Australia by law cannot secure benefits only for their members to the exclusion of non-members. For an employer to agree to this would be adverse action under the *Section 346, Fair Work Act 2009*. It is difficult for any membership-based organisation which charges a substantial fee to recruit if it cannot secure the benefits of membership only to members. Moreover unions cannot ensure that non-members contribute to the union on the basis that if all benefit, all should contribute.

The 'business model' under which unions operate is the equivalent of local councils collecting household garbage where paying council rates is voluntary, but the council cannot discriminate against those who don't pay rates. Such a model would quickly send most local councils broke, yet it is exactly the model which the union movement has come to accept as normal. The manifest injustice and irrationality of the position is discussed in an recent article by an ALP-Left activist (McElrea, 2016)

The problem of bargaining at the enterprise level

Contrary to ILO Convention 87, real bargaining, supported by industrial action, is only possible at the level of the enterprise. The union movement will never be able to negotiate separate enterprise agreements in cafes, small shops and the hundreds of thousands of other small enterprises. The diseconomies of scale are prohibitive, which effectively excludes nearly five million employees – those in businesses employing less than 20 staff – from collective bargaining, which is the main thing which the union movement still has to offer. (Australian Government Treasury, 2016).

It also means that in competitive industries where unions have power in only some firms, the union has the choice between achieving big gains and driving those firms to the wall and losing the members, or doing very little to increase returns to labour, and therefore failing to attract members. Moreover, with the increase in employer tactics of contracting-out of work, agreements at the enterprise level do not even protect employees' wages and conditions within the one enterprise.

Australia's position is uniquely bad

There are countries where unions are illegal or not independent, and others where unions are extra-judicially suppressed. However, we have suggested over a number of years, and not been challenged, that there is no other comparable country in the world where unions face all of these challenges:

- no general right to take industrial action, and
- no right to merit based arbitration, and
- no right to capture the benefits of their collective bargaining for members or make non-members contribute, and
- no right to bargain at the industry level, and
- no exclusive right to enter into binding collective agreements (i.e. there are non-union 'collective' agreements).

In some comparable countries, unions have only 2, 3 or 4 of these rights, but only in Australia do we have none. The hostility to unions of the system in Australia is masked somewhat by the standard of minimum entitlements of workers, which by international standards, is fairly good. However, while independent and democratic trade unions are allowed, successful *trade unionism* is barely possible in Australia. The best that unions can hope for in these circumstances is survival.

Can unions organise or recruit their way to recovery?

Australian unions are constantly changing by refining and improving their activities. In particular, there has been much energy spent on honing the craft of organising. Over the last 20 years consistent efforts have been made, across the union movement, to build an organising culture in each union rather than a culture that accepts servicing, or fee-for-service unionism, as the norm. Organising Works, the organisers' program run by the ACTU, and successive ACTU organising conferences heralding SEIU-type member-to-member recruitment programs are emblematic of these efforts. It is now fair to say that across much of the union movement, recruitment is no longer an accidental by-product of good servicing; it is deliberate and choreographed in fine detail.

At the same time unions have honed their administrative activities. Databases and websites have been built, and internal processes refined, leading to huge efficiencies and economies of scale. Members no longer resign from a union or fall off the books without follow-up. They are emailed, called and re-called. This simple measure, amongst many others, has resulted in improved retention rates for some unions.

Yet all the while, unions have continued its decline, measured by density and by the exercise of power. The best that can be said, in fact, is that the union movement's efforts in organising, recruitment and administrative streamlining have slowed the rate of decline. A demonstrable sign of effective organising might well be an increase in industrial action, but this is very rare.

It is therefore hard to escape the conclusion that unions cannot simply recruit or organise their way out of the present situation. Trying the latest theory from overseas, or trying harder, or improving union messaging have not succeeded, and will not succeed, except at the margins, until the basic rules of the game are changed.

Yet much discussion within the trade union movement, and, in its wake, much academic discussion about trade unionism, concentrates on internal union strategies and tactics, at the expense of discussing what might actually be necessary to revive the trade union movement.

Conclusions

At the micro-level organisers, officers and delegates simply have to fight their battles under the current regime of anti-union laws, and there is little time to consider the broader questions of what a better system might look like. At the level of union leadership, however, there appears to be a failure to articulate what would seem to be the obvious proposition that unions cannot rebuild under the current legal regime, let alone an articulation or discussion of what changes need to be made. It is beyond the scope of this paper to explain why this might be. This may have something to do with the relationship between unions and the Australian Labor Party, or a belief that favourable legal changes are impossible, or a misplaced belief that unions can organise their way out of their current crisis, or that until unions can rebuild their industrial or political influence significant change in union rights cannot be pursued. Probably, all of these are factors.

In academia, many have clearly and correctly described how the State in Australia has systematically set out to weaken unions (Cooper and Ellem, 2013). Others have well described and critiqued union organising strategies (Barnes and Markey, 2015). However, to our knowledge there has not been a systematic and extensive discussion of three central questions: First, whether it is actually possible for unions to organise their way out of their crisis without radical changes to the legal framework, and if the answer to that is in the negative; second, what changes to that framework should be prioritised to rebuild union membership and influence; and third, how might those changes be achieved. We suggest that the answer to the first question is clearly no. If we are right about that, we also suggest that much of the strategic thinking of the union movement should be addressed to the second and third questions.

In the ***Appendix*** to this paper, we propose what we consider to be the minimum necessary changes to give unions a level playing field. This has been developed after discussions with colleagues from a number of unions.

We claim no special knowledge or insight into how or over what timeframe it might be feasible to achieve the necessary changes to union rights. However, we suggest that a discussion should commence to develop a consensus about what is needed, and indeed that achieving those changes is the central strategic question facing the movement. Time is running out.

APPENDIX: How legal changes might lift union density to fifty percent in five years.

This Appendix proposes changes to the law which would allow the recovery of union density and influence, even in current political and economic conditions. While many other legal changes might be considered fair or desirable, the purpose of what is proposed here is only to achieve that recovery, not to fulfil a workers' or union or public policy wish list.

What we put forward is nothing more than the basis of discussion, and for the sake of brevity there are important and necessary aspects of such a scheme which are not addressed here. However, they do proceed from the assumption that, given a genuine choice, most workers in most industries would vote for collective representation, especially if that representation was allowed to be effective.

Establishment and coverage of bargaining electorates

All employees in the whole country, including employee-like independent contractors, would by law be covered by a defined *bargaining electorate*. The Fair Work Commission would establish these bargaining electorates in consultation with the ACTU, relevant unions, and employer bodies on the basis of community of industrial interests, labour and product markets, and supply chains.

It should be noted here that the creation of a bargaining electorate itself would create no rights for unions or workers unless the employees in the bargaining electorate voted to establish a *collective bargaining unit*; this is explained further below.

A bargaining electorate could be a large enterprise or a part of a very large enterprise. However, it could also be an industry, or an occupation, a supply chain or some combination of these, usually within a defined geographic area. Examples of bargaining electorates might be:

- Sydney University,
- Remote aboriginal health services,
- Nurses in NSW private nursing homes,
- Persons employed in retail stores in Darwin,
- Residential construction in Tasmania,
- The Gorgon gas project,
- Contract cleaners in North Queensland, and
- Woolworths.

Each Bargaining Electorate would have to be of sufficient size that it could support the resources necessary to have effective employee and employer representation. This would require that usually they cover at least 2000 employees. A bargaining electorate would be defined so that the introduction of labour hire or contracting-out would not take an employee or employer outside of the bargaining electorate.

Bargaining electorates would be defined so that they do not overlap. In the list of examples above, the boundary between the Woolworths bargaining electorate and the Darwin retail stores bargaining unit would be clear, and Woolworths employees in Darwin would be allocated either to one or the other, but not to both.

Voting to have a collective bargaining unit

Employees in a bargaining electorate could vote in a ballot to bargain collectively, that is to establish a Collective Bargaining Unit (CBU). An application for a ballot could be made by a union, supported by sufficient employees, and a vote would have to be held within 60 days. In the ballot process, an

employer could send employees written material opposing the union's ballot, but could not hold meetings with employees individually or in groups to discuss it. If a majority voted to establish a CBU, all employees would pay union dues and be members of the union(s), provided that an individual could instead choose to pay the same amount as Union dues to a charity concerned with worker welfare and in these circumstances would not be entitled to individual union assistance. Appropriate procedures would also be required to allow employees to collectively vote to de-unionise.

The great advantage of this system is that the decision to unionise or not is based on a democratic vote of workers with a community of interest. It fundamentally changes the question facing each individual worker from *'Should I join the union, and what difference will that make?'* to '*Would we be better off if we had a union to represent us?'*

How bargaining would work within collective bargaining units

Employers and unions would be entitled to bargain across the collective bargaining unit, even when this involved many employers. So, for example, if the CBU was *Hairdressing Salons in the ACT*, the union or the employers could insist that they wanted a single agreement covering all employers and employees, and could add workplaces to a common or 'core' agreement. A core agreement in an industry could permit the negotiation of subsidiary agreements at an enterprise level.

Only unions could negotiate agreements, and there would be no employee approval ballots or 'non-union' agreements. The union and employer(s) could by consent submit the terms of an agreement to arbitration.

Enterprise level bargaining would still be permitted, and an employer could not be forced to join a common or multi-employer agreement. In some CBUs, enterprise-level bargaining might remain the main form of bargaining if that is what was preferred.

If there was a core agreement which already applied to most of the employees in the CBU, any greenfield sites would by default be covered by that agreement for a specified period until and unless a new agreement could be negotiated.

There are two obvious advantages to sector-based bargaining. First, by grouping employees of small businesses into larger units for the purposes of bargaining, these employees would have genuine access to collective bargaining. Most collective bargaining systems are implicitly structured to leave small business employees stranded on inferior conditions outside effective bargaining. The second advantage of allowing industry or sector or locality bargaining is that it goes some way to taking wages out of competition between firms, forcing employers to compete on productivity and quality, rather than on labour costs.

Rights to take industrial action

It should be emphasised that what we propose about industrial action is not what we think is desirable in a general sense, nor what we consider necessary to establish an appropriate right-to-strike in Australia. Rather, we are describing only what we consider would be necessary to establish a system which would allow unions to be effective.

We propose that industrial action should be permitted generally except in the following circumstances:

Where the industrial action is taken in relation to a matter that has been specifically prescribed or settled by a collective agreement which has not expired. For example, if hours-of-work were prescribed in a current collective agreement, the union could not take industrial action for a shorter working week.

Where a current collective agreement included a 'no-strike' provision.

Where the industrial action was about whether a collective bargaining unit should be established or disestablished. Given a CBU can only be established by a vote of the employees themselves, industrial action against the employer could not be justified.

Where the industrial action seriously jeopardises public safety or health, in which case the union would be entitled to require an arbitrated agreement.

Where the Fair Work Commission, on the merits, ordered an end to a secondary boycott. As a broad principle, however, secondary boycotts would be permitted within the confines of a collective bargaining unit, in order to achieve collective agreements.

How things would work outside the collective bargaining units

We expect that the proposals described above would rapidly bring union density to well above fifty percent of the workforce. However, even then there would still be bargaining electorates covering millions of employees who did not vote to become collective bargaining units. We propose that in these areas, unions could still recruit and represent individual members in relation to their legal rights or individual grievances, but there would be no system of binding collective agreements. Employees could take industrial action over a specific dispute, or to attend a protest rally, but would have no access to arbitration.

References

Australian Bureau of Statistics. (2016) *4102.0 - Australian Social Trends – Industrial Disputes,* at http://www.abs.gov.au/AUSSTATS/abs@.nsf/latestmf/4102.0~99

Australian Government Treasury. (2016) Small Business Data Card, 23 September 2016, at http://www.treasury.gov.au/PublicationsAndMedia/Publications/2012/sml-bus-data

Barnes, A. and Markey, R. (2015), 'Evaluating the organising model of trade unionism: An Australian perspective', *Economic and Labour Relations Review*, 26 (4):):513- 525

Cooper R and Ellem B. (2013) 'The State against Unions: Australia's Neo-liberalism, 1996-2007' in *Global Anti-Unionism: Nature, Dynamics, Trajectories and Outcomes*, ed. Gregor Gall and Tony Dundon, Palgrave Macmillan, Basingstoke, United Kingdom, pp. 163-83

McElrea, D. (2016) 'The Little Red Hen gets her bread back' in Challenge: The magazine of the Left of the Australian Labor Party, 21 October 2016 at http://www.challengemagazine.com.au/the_little_red_hen_gets_her_bread_back

Peetz, D. (1997) The Paradigm Shift in Australian Union Membership: A Tale of Compulsory Unionism, in Proceedings of the Association of Industrial Relations Academics of Australia and New Zealand Conference, Brisbane, Australia.