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Policy Forum: Workplace Relations Reform

Why Labour Market Players Should Have Freedom to Contract

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1. Introduction

Economists naturally focus on the economic implications of change. But, when they support reforms designed to produce economic benefits, they are frequently accused of taking insufficient account of potential social costs. On the other hand, those preoccupied with social issues often focus only on the first-round adverse effects of economic reform and fail to take account of favourable second- and third-round effects. The opponents of free trade, for example, overlooked the now demonstrable favourable effects of (largely) removing protection.

My contention is that the opponents of a freer labour market have also largely ignored the potential for both economic and social benefits. Where the opponents have not simply been self-serving, their pleas that extensive regulation ensures a 'fair go' for the workers have overlooked the unfairness of much of that regulation, as well as neglecting the implications of the structural changes in society over the past 20 or so years.

Two major structural changes have largely been disregarded by those who espouse the cause of social justice. One of those has been the increasing acceptance that the most appropriate form of economic organisation is a market economy and that, in such an environment, individuals can generally make their own employment decisions without fear of being exploited by employers. Unsurprisingly, union membership has declined to 17 per cent of private sector employees and 90 per cent of businesses have no employees who are union members. Yet, supposedly to protect workers, employment decision-making remains highly regulated.

Second, governments have for many years now assumed direct responsibility through an extensive social security system for helping those judged unable to obtain employment or are otherwise disadvantaged. This system provides a protective bulwark for those at the bottom end of the social spectrum.

Let us suppose for a brief moment that social and economic circumstances 100 years ago and for the following 80-odd years could be said to have justified the extensive prescriptions of employment conditions that applied then. The changes in the last 20 or so years, producing a market economy and a social security system, should have long since led to recognition that workers in modern societies no longer need special legal protection against employers, let alone dictation by outsiders of what employment conditions are socially 'appropriate'.

2. The Failure of the Judiciary

While the main culprits include both governments and the judiciary, with each failing to recognise and adapt to structural economic and social changes, a major share of the blame rests with the judiciary (see Moore 2005). Despite the failure over 100 years of the Australian Industrial Relations Commission (AIRC) and its predecessors to fulfill the original establishment objective of preventing disputes, let alone to deliver the much-touted comparative wage justice objective, it continues along with its half-sister, the Federal Court, to be

widely regarded as an institutional fixture that is politically difficult to reform. In applying the regulatory legislation, these institutions have used their interpretive powers to proclaim roles for themselves as social justice gurus and have taken precious little account of the employment-deterring effects from the 20 commandments they have imposed.

Justice Kirby, now on the High Court bench, was once a member of the then Australian Conciliation and Arbitration Commission and seems to have become the leading advocate of the social justice theme, expounding at every opportunity the alleged virtues of Australia's compulsory conciliation and arbitration arrangements. Indeed, His Honour has portrayed the arbitral system as 'part of Australia's culture' and playing 'a key role in building the egalitarian features of our society that mark us off from many other countries' (Kirby 2001, p. 4).

But he is not alone. Many judges and commissioners leave the clear impression that, independently of parliament or the legislation it passes, the judiciary should play a major role in determining social policy and in ensuring what are perceived as 'fair' or socially desirable outcomes of employment negotiations.[1]

Of course, when faced with alternative legally open conclusions, the judiciary often needs to make choices and these will be influenced by personal beliefs on social issues. However, 'there are to be found in the Constitution very few express, or necessarily implied, civil rights' (Meagher 1998, p. 50) and as Chief Justice Gleeson (2000) pointed out in his Boyer Lecture:

> To establish a right in a constitution is to deny to a democratically elected Parliament the power to make a law inconsistent with that right. The whole point of having a constitutional right is to put it beyond the reach of Parliament. It gives judges the power to declare that the will of Parliament shall not prevail. If the Constitution is silent on a subject, then it is up to Parliament, from time to time, to deal with that subject – or not to deal with it – as it thinks fit.

By contrast, Justice Kirby has claimed that where there is no law on a subject, judges should prescribe it and his social justice pronouncements provide a worrying indication of the extent of judicial interventionism in workplace relations.[2]

At the opening session of the Centenary Convention on Conciliation and Arbitration on 22 October 2004 His Honour offered 'words of respect and praise on the centenary of industrial conciliation and arbitration in Australia' (Kirby 2004, p. 1) and made it clear that he considers Justice Higgins 'a true liberal' (p. 5) who understood that civil rights and basic human dignity are inextricably linked to the conciliation and arbitration of industrial disputes. According to Justice Kirby, the Higgins conception in the *Harvester* case of a wage that permitted the ordinary Australian to enjoy 'a condition of frugal comfort' was an idea that seemed right. Moreover, it 'remains in the ongoing function that Australians expect of their national tribunal for industrial conciliation and arbitration' (Kirby 2004, p. 23). Indeed, 'Higgins' considerable intellect and sense of history helped him and his supporters' create an institution that is not 'a mere agency of economics' but of 'industrial equity, a "fair go all round" or, as we would now usually describe it, human rights' (Kirby 2004, p. 6).

As to the critics of the Commission, Justice Kirby declared that those 'who see no future whatever in the Australian Industrial Relations Commission ... tend to live in a remote world of fantasy, inflaming themselves by their rhetoric into more and more unreal passions, usually engaged in serious dialogue only with people of like persuasion' (Kirby 2004, p. 24).

It is worth noting here that the constitutional basis of the Commission's powers rests with s. 51(xxxv) of the Constitution, which says nothing about safety nets or human rights. The subjecting of employment arrangements to specific legal conditions, both legislative and judicial, has developed over time largely from judicial decision-making based on the notion that it is a necessary part of the dispute-settling process inherent in the placitum. That is why, presumably, the AIRC has seen fit to require employers to include in employment agreements 'rights' such as jury duty, parental leave, compassionate leave, rostered days off and

other matters that would (seemingly) otherwise be non-negotiable. Justice Higgins's denigration of bargaining between employers and employees as the mere 'higgling of the market place' set the pattern for this judicial interventionism and for the belief that it is essential to have an independent umpire with the capacity to impose 'fair' conditions on the negotiating parties.

Nobody disputes the principle that the judiciary should be independent and free from political influence. But a serious problem exists when many of those who sit on cases involving workplace relations are wont to interpret regulatory laws according to their own views of what constitutes social justice and with little regard to the economic implications, let alone the intent of the legislation.

3. The Case for Major Reform: Aspects that Have Been Overlooked

But can a move to legislate to eliminate or greatly reduce regulation be justified when employers are perceived as being much more powerful and as able to force workers to accept onerous conditions?

The reality is that in our relatively modern competitive economy there are over 1.1 million Australian businesses and there is virtually no scope for them to exercise monopsony powers. Those businesses actively compete amongst each other for the services of a workforce of around 10 million and that workforce has as a backstop a generous social security system. In such circumstances no valid argument can be mounted that, without prescriptive regulations, employers as a group would force wages down or impose 'unfair' conditions on their employees. When working conditions are unacceptable to either party, each side has alternatives that, while not necessarily the first best option for either, prevent businesses as a group from being imposers and workers as a group from being slackers. Surveys show that Australia's labour force exhibits a high degree of job satisfaction and is able in most cases voluntarily to change jobs without penalty.

Accordingly, with no general imbalance of bargaining power between employers and employees, freedom of contract can be introduced into employment in the mutual interests of both workers and employers.[3] Nor is there a need to continue having judicial 'outsiders' passing judgements on whether employment contracts are 'working'. The satisfactory operation of such contracts depends primarily on relationships that can only be assessed *within* a business, particularly as to whether self-enforcing and inbuilt incentives work out in practice.[4]

This is not mere assertion. The existence of a generic problem with judicial 'outsiders' who exercise excessive interpretive power has increasingly been acknowledged, including by Chief Justice Gleeson when he was Chief Justice of New South Wales in 1995. In an article entitled 'Individualised Justice – The Holy Grail' (Gleeson 1995), His Honour then noted the potential for 'individualised' judicial decisions to have serious adverse implications, including for 'the willingness of people to engage in commercial transactions' (p. 432).[5]

This problem suggests that regulatory legislation should leave minimal scope for judicial interpretation and that action should be taken to strengthen the Acts Interpretation Acts. Far too few of the judiciary (and commentators on judicial decisions) pay regard to the requirements of these Acts that the purpose or object underlying an Act should be promoted.[6] These legislative requirements ought to have been highly relevant to judicial interpretations of the *Workplace Relations Act 1996*, the principal objects of which include 'ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level'.

In brief, my contention is that, particularly since the late 1980s, the judiciary's application of workplace relations regulatory legislation has been out of kilter with the structural changes in society and with the intent of legislative changes. Action needs to be taken on various fronts to reduce the risk averseness of employers and its adverse effects on employment, which have probably been underestimated.

4. The Case for Major Reform: Some Relevant Data

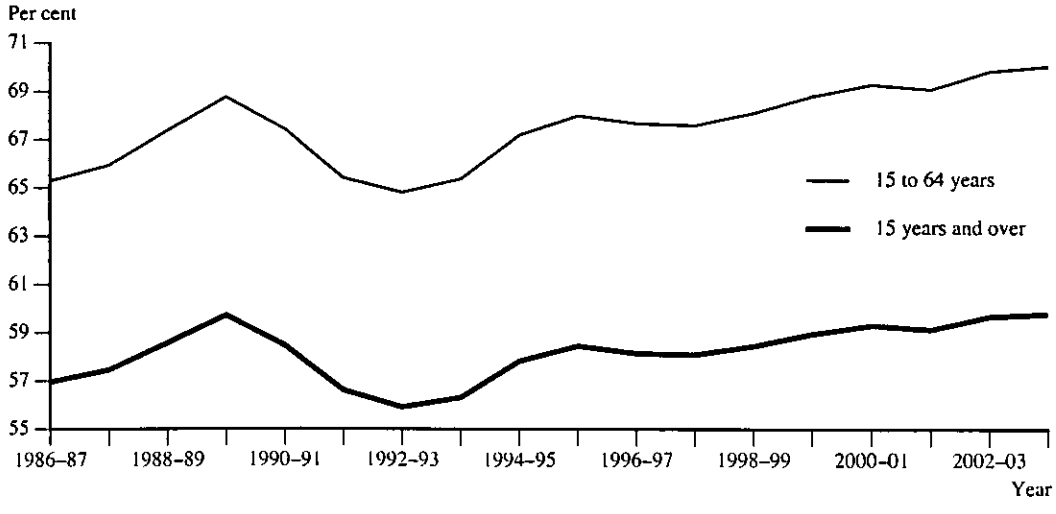
The performance of the labour market under the workplace relations regulatory legislation and its judicial interpretation have been affected by a range of other influences, including the deterrent effects on employment arising from the increased access to benefits available through the social security system (Moore 1997). Even so, with a greatly improved rate of economic growth since the early 1990s, it is surprising that the labour market has not performed much better.

First, although Figure 1 shows an encouraging increase in the proportion of the working-age population employed since the early 1990s, that proportion has only recently attained the peak reached in the late 1980s if one adopts the Australian Bureau of Statistics (ABS) definition of the working age as being all those over 15 years. Moreover, using the OECD definition of 15–64 years, Australia still has proportions employed that are significantly lower than in countries with economic, welfare and political systems that are broadly similar to ours. The OECD's *Employment Outlook 2004* shows that in 2003 Australia had 69.3 per cent of the working-age population in employment compared with 71.2 per cent in the United States, 72.9 per cent in the United Kingdom and 72.5 per cent in New Zealand. These higher proportions were not one-offs but have existed for many years. If in 2003 Australia had had similar proportions employed as in the United Kingdom, for example, our employment would have been around 400000 higher (that is, equivalent to about two-thirds of those officially unemployed). And such comparisons understate our employment potential: with our higher average rates of literacy and numeracy than these countries, Australia should have higher and not lower proportions of working age employed than they have.

Second, in interpreting Australia's employment to population ratios, account needs to be taken of our very high proportion of part-timers, over a quarter of which say they would like to work more hours. In 2003 we had 28 per cent employed part-time compared with 13 per cent in the United States, 23 per cent in the United Kingdom and 22 per cent in New Zealand. The increasing proportion of part-timers (up from 22 per cent in 1990) is reflected in the reduction in average annual hours worked by Australians (now down to 34.6 hours per week compared with 35.7 in 1997).

Third, although there has been a major fall in the so-called official unemployment rate compiled on an internationally comparable basis,

Figure 1 Employment to Population Ratios



Source: ABS (data supplied to author in 2004).

the effective unemployment rate is much higher. In September 2004 the then unemployment rate of 5.5 per cent compared with the labour underutilisation rate of 11.1 per cent published by the ABS in April 2005. While this was a significant improvement on the 15.2 per cent rate in September 1996, it still left 1.2 million 'underutilised' (including those who were working but would like to work more and those who were either actively looking for work, but not available in the survey week, or were discouraged job seekers). Moreover, the ABS survey of persons not in the labour force in September 2004 showed that, on top of the 562000 then formally unemployed, there was an additional 790000 who were not actively looking for work but who say they would be available to start work within four weeks if jobs became available (ABS 2005). As one leading economist has pointed out, this means that 'as many as 2 million people, or 20 percent of the numbers now employed, would like employment or an increase in their hours of work', indicating that 'the magnitude of the underutilised workforce suggests there are considerable opportunities to expand employment' (Freebairn 2004).

Fourth, the ABS Household Expenditure Survey for 1998–99 shows that households with incomes in the bottom quintile then received nearly 70 per cent of gross incomes from government pensions and allowances but only about 8 per cent from wages and salaries. The 2001 survey shows that wages constitute only 15 per cent of the bottom third of household incomes. Moreover, more than half of minimum wage recipients are in the top half of household incomes. Together, these two factors make it difficult to justify using the regulation of wages as a vehicle for assisting those on a low income.

Fifth, while it is generally agreed that a proportion of the workforce (perhaps 15 per cent) effectively operates outside the regulatory system, only an estimated 3 per cent (about 250000) are formally on individual agreements or Australian Workplace Agreements (AWAs). Moreover, when the Employment Advocate has doubts about whether an AWA proposal meets the 'no disadvantage' test, he is required to submit them to the AIRC to assess whether it meets that test.[7]

Sixth, although published industrial disputes statistics of working days lost have in recent years generally been at a relatively low level, this has been an international phenomenon. Moreover, it cannot necessarily be taken as indicating that employers are relatively free from disruptive union action to obtain 'concessions'. 'Disputes' and workplace 'disruptions' can (and do) occur without the loss of the 10 working days required to qualify as a statistical dispute.

5. The Case for Major Reform: Some Economic and Social Benefits

The foregoing brief outline of the judicial, legislative, economic and social situations suggests that if much greater freedom to contract is allowed, that will produce a positive labour demand response by businesses as a result of the reduction in regulatory risk and in the employment conditions currently required to be met. Job protection type responses either from unions or from decisions under judicial processes would also be less. That would, in turn, reduce the existing inhibition to implementing structural changes and productivity improvements, thereby providing Australian businesses with increased ability to maintain internationally competitive cost structures. Further, given a reasonable response in labour supply, the resultant increase in the employment to population ratio would help overcome the ageing population problems identified in the *Intergenerational Report* of 2002–03.

However, as unskilled labour makes up a relatively large proportion of the unemployed and the 800000 odd outside the labour force looking for a job, the extent to which the employment to population ratio increases will depend on two important specific policy reforms.

First, employers need to be able legally to offer wages below the current minimum. The existence of such a large group of potential employees with relatively low productivity provides a strong economic case for having no minimum or, at the very least, allowing it to fall to levels comparable with the lower levels of

minima existing in some OECD countries. Indeed, with Australia's minimum of 58 per cent of the median wage currently the second highest amongst OECD countries, a lowering of the minimum to around 33 per cent of the median ($7 per hour compared with the current $12 plus per hour) would offer enormous potential for increasing their employment. Such a rate would be about the same as in Spain (30 per cent), Japan (32 per cent) and the United States (34 per cent). Further, although some analyses by academic economists suggest only small employment responses to changes in the minimum wage, there are grounds for thinking that these analyses may involve a significant underestimation of responses in employment (Moore 2002). Such employment would, in turn, provide the on-the-job training that offers the potential for higher wages to be earned down the track.

There is also a strong social case for having no minimum wage or at least a much lower one. It is obviously grossly unfair to have a regulation that inhibits or prevents the legal employment of many at the bottom of the social spectrum. The fact that no wage is allowed to be paid between the minimum of around $24000 a year and the unemployment benefit of about $10000 (for a single adult) illustrates the extent of the unfairness. As noted, it is also difficult to see that social fairness is improved by helping the more than half of low-wage earners who are in the top half of household incomes and who now receive a minimum wage. And, with wages constituting only a very small proportion of the income of low-income households, the abolition or major reduction of the minimum wage could not be seen as taking away any important component of the social security safety net. It is patently obvious that assistance to those on low incomes should be the function of social welfare policy, not a responsibility of industrial tribunals that have no capacity to assess the widely different needs of individuals on such incomes.

The potential for significant additions to the employment of the lesser skilled would open up the possibility of a major improvement in the social situation. The argument sometimes used against a major freeing up of employer/employee relations—that it would be unfair to workers—can thus be turned around; that is, it is more the existing arrangements that are unfair because they protect the insiders but exclude from employment those at the bottom end who are unable to penetrate the regulatory constraints. The existence of over 1 million jobless couples, many with children, highlights the problem and the need to introduce reforms (in both workplace relations and social welfare policy) likely to reduce it.

Some will argue that if employers are allowed to offer a wage below the current minimum, those currently on the minimum will either lose their job or experience a reduction in wages and hence in living standards. However, unless those presently employed on the minimum have an inadequate productivity performance, their wages and/or jobs should not be adversely affected.[8] The main outcome of any lowering of the minimum would not be job replacement but additions to employment. Those on the minimum who could sustain an assertion that lower paid workers had 'forced' their wages down or caused them to lose their job could scarcely claim to be hard done by; and they would, of course, be eligible for the unemployment benefit if they could not find work at a wage lower than their previous one.

In short, the living standards of lower productivity workers should be 'protected' not through wage regulation but by maximising their opportunities for employment or, failing that, through the social security system.

Second, major changes also need to be effected in welfare and tax arrangements to help reverse the upward trend in the proportion of the working-age population on social benefits. Between 1969 and 2004, recipients of income support increased from 1.1 million to 4.4 million and the proportion of the working-age population receiving such support increased from 4 per cent to 27 per cent. The considerable deterrent to potential employees to make themselves available for employment was highlighted in a recent analysis by the Secretary General of the OECD, who pointed out that 'disincentives embedded in public policies' are a major reason for Australia having only an average (amongst OECD countries) employment

rate for those aged 55 or over (Cotis 2005). Much analysis has already been published on the consequences of high effective marginal tax rates, and what more might be done to reduce the disincentives, and it is not proposed to pursue that issue further here. However, a tightening in the eligibility for health and welfare benefits, particularly in regard to middle and higher income groups, and/or a flattening in tax rates would obviously be important in encouraging people to offer themselves for employment in circumstances where greater freedom to contract applies.

6. What the Reforms Should Comprise

There are alternative ways of implementing reform along the lines outlined. Some will argue that it should be effected through amendments to the existing workplace relations legislation. However, it would seem desirable to make a completely new start by repealing the existing legislation and passing new federal employment contracts legislation that would allow employers and employees the maximum freedom to negotiate and contract their own terms and conditions of employment and provide minimal opportunity for tribunals or courts to make decisions that apply non-legislated employment conditions.

The parties to employment contracts would not of course be able to avoid the normal criminal law applying to actual or attempted exercises of violence and duress and the legislation requiring no racial, sexual or disability discrimination would also continue to apply. It would also seem desirable to include in the legislation requirements that employers provide safe working places, but such requirements should be less onerous than those included in some state Acts.

As to other conditions, the basic approach should be that these would be determined in negotiations between employers and employees. It has been suggested above that, for both economic and social fairness reasons, there should be no minimum wage condition. However, if the government cannot move to abolish it, then at the very least it should be substantially reduced to (say) the equivalent (relative to the median wage) that exists in some other countries. In order to give early application to such a change, such action would presumably require a legislative provision to negate the extant decisions of the AIRC.

If it is decided to retain a minimum wage, there would be a question as to how it should be determined in future. An AIRC that appears to take little account of the potential adverse employment effects of the minimum, and believes it needs to deliver increases because 'not all employees are capable of bargaining and bargaining is not a practical possibility for those employees who lack bargaining power' (AIRC 2004, para. 325), is obviously not the appropriate body. Perhaps the best approach would be to legislate a charter of employment honesty requiring the Treasury and the Department of Employment to publish a report each year on the employment effects of the existing minimum wage and the likely effects of changing it either way. Such an official published report would reduce the risk that governments' determinations of minimum wages would be excessively influenced by political considerations.

A federal employment contracts Act along the lines indicated would rely for constitutional authority on the federal corporations power and, in the case of corporations, would thus override state laws to the extent they are inconsistent. While this would not cover unincorporated businesses, which the states would continue to be able to regulate, it appears that it would potentially cover around 85 per cent of total employees. If such a substantial proportion of such employees was to work under contract arrangements, that would represent a major reform. It is envisaged that large corporations would effectively be able to continue to undertake enterprise bargaining by concluding identical contracts with sections of, or even their entire, workforces. If states chose to continue to regulate unincorporated businesses the extent of incorporation could well increase to the point where it would cease to be worth their continuing the regulatory apparatus.

As to the AIRC itself, the passage of federal employment contracts legislation with minimal conditions, and the removal of any responsibility of that body for determining a minimum

wage (and other existing 'allowable matters'), would effectively mean a greatly reduced role for the espousers of social justice. If the government judged it necessary to retain an AIRC with some alternative responsibilities in workplace relations, one possible approach would be to convert it into a mediatory/conciliatory body with no legal powers of arbitration or intervention.

The Advisory Conciliation and Arbitration Service in the United Kingdom is such a (widely used) body that, in the voluntary mediations and conciliations it chairs, has established itself as being impartial between employers and employees. It provides extensive advisory services to both employers and employees at a low cost. The existence of such an advisory body here could be particularly helpful in adjusting to legislation providing for a federal contract of employment.

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Endnotes

1. A major example is the series of widely reported public interviews given in February 1996 during the federal election campaign by Justice Wilcox in which he criticised the Coalition's plans to amend unfair dismissal laws (see Forbes 1998). Again, in a paper to the XXIst Conference of the HR Nicholls Society in May 2000, leading industrial barrister Stuart Wood presented an analysis of judgements by several Federal Court judges, most notably that of Justice North in the important case of *Australian Paper Ltd v. CEPU* (1998, 81 IR 15), that clearly suggested tortuous interpretations of s. 127 of the *Workplace Relations Act* designed to render largely ineffective the legislative provisions directed at preventing unlawful industrial action. Wood also pointed out that, although the Industrial Relations Court had effectively been abolished, 10 judges of the Federal Court (including a number of ex-union barristers) had largely operated a de facto Industrial Relations Court through the administrative mechanism of the 'industrial' docket system.

2. A report in the *Herald Sun* of 26 November 2003 (p. 33), 'Kirby Calls for Judicial Activism', included the following quotation from a lecture by Justice Kirby in England on law making by judges: 'If there is no apparent law on a subject, the judge is duty-bound to create it, based on past precedents. Citizens need to know and face these realities. So do the bullies who cry judicial activism'.

3. For further consideration of this issue, see Hogbin (2005).

4. For further discussion of this point, see Moore (2001).

5. Even the current President of the AIRC, Justice Guidice, has complained that there is a potential for unfairness because 'the uncertainty generated by the mixture of laws which impact on employment relationships in this country constitutes an erosion of freedom and impacts on the quality of our society' (Guidice 2001, p. 5, para. 12).

6. The *Acts Interpretation Act* of 1901 and the 1981 addition of s. 15AA provided that 'in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object'. Also relevant is the 1984 addition of s. 15AB, which provided that extrinsic materials such as Hansards (and hence Second Reading Speeches) and explanatory memoranda should be used in interpreting legislation.

7. While this means that such proposals come before the AIRC in only a minority of cases, in practice it exercises a not insubstantial influence on the approval process and hence the capacity of employers to conclude AWAs. Thus, in deciding whether a proposal would pass the no disadvantage test, the Employment Advocate has to take account of the fact that, as it is a non-union agreement, the Commission will be more deliberative in any assessment that it is asked to make than it would if a union

agreement is involved. It is relevant in this context that, under the AIRC's interpretation of its general jurisdiction to conciliate and arbitrate industrial matters, a union can notify a dispute to the Commission when an employer is offering or planning to offer AWAs and the Commission can then make recommendations, and even arbitrate, to order that the employer desist from offering AWAs.

8. An estimate provided to the author by the Department of Employment and Workplace Relations is that, while the minimum award by the AIRC extends to about 1.5 million employees, only about 150000 are actually on the minimum. This suggests that, with no minimum, the potential for wages of existing employees to fall below the current minimum is very limited.

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