TRADE UNIONISM IN 2004

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It was a disappointing year for Australian trade unions. The Howard government was returned in the 2004 federal election with an increased majority in the House of Representatives and an outright majority in the Senate. In July 2005, the government will use this mandate to push through a raft of legislative changes, which will make for a bleak union future. A controversial High Court decision in 2004 threatened to limit the range of issues which could be included in enterprise agreements and the circumstances in which unions could take legal industrial action. Nevertheless, unions could claim victory in the most high-profile campaign of the year, which forced the James Hardie corporation to meet its financial obligations to victims of its asbestos products.

INTRODUCTION

For trade unions in Australia, 2004 was a year of political anticipation, election disappointment and defensive campaigning. Much of the year was spent with the unions waiting for the announcement of a federal election, a short period in campaign mode and then the remainder of the year in shock at the resounding victory for the coalition government. For the unions it was not simply the return of the Howard government for another term but their resounding win in the Senate—guaranteeing massive changes in industrial regulation, making it more difficult to organise, bargain and represent members—which was most difficult to swallow. During the year the High Court also handed down a decision, which narrowed the definition of an industrial matter and significantly limited the range of issues that the unions could negotiate, include in enterprise bargaining agreements and take industrial action over. Responding to the decision and, later, the government's industrial relations agenda exercised much union attention during the last quarter of 2004. Although there is still uncertainty about the exact meaning of the decision, it will clearly have a great impact upon union activity, particularly, in relation to collective bargaining.

This review of trade unionism in 2004 is structured as follows. First, the paper examines Australian Bureau of Statistics (ABS) membership data released in 2004. Here, a comparison between the membership and density levels and membership composition of the Australian trade union movement in 2003 and a decade earlier is made. This reveals just how much has changed in the union landscape, notably the feminisation of union membership, a closing in the representation gap of Australian men and women and the de-unionisation of significant industry areas. Next, the paper turns to an analysis of the *Electrolux* decision and examines union

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Table 1 *Industries with unionisation rate above 50% in 1993 (and the 2003 unionisation rate)*

Industry	1993 (%)	2003 (%)	Change (% points)
Communication services	73.8	31.2	−42.6
Electricity, gas and water supply	71.5	53.7	−17.8
Transport and storage	58.60	38.2	−20.4
Government administration and defence	56.40	38.4	−18
Education	56.3	41.8	−14.5
Mining	55.2	29.1	−26.1

Source: ABS catalogue number 6310.0. Employee earnings, benefits and trade union membership, 1994–2004.

responses to it. The third section of the paper discusses unions and politics in 2004, focusing mostly on the federal election and the implications for unionism in 2005. Before concluding, the paper discusses the most high-profile union campaign of the year, that is, to secure compensation for victims of asbestos diseases from the James Hardie corporation.

UNION MEMBERSHIP

Australian Bureau of Statistics membership data released in March 2004 shows that in August 2003, membership stood at 1 866 700, representing an increase of 33 000 members over the 2002 (1 833 700) situation. Aggregate membership of Australian trade unions has grown, albeit marginally, in three of the past four years (2000, 2001, 2003) and fallen in one (2002). Membership density, however, continued to fall. In August 2003, the proportion of wage and salary earners who reported that they were members of a trade union stood at 23%. Union density has fallen across all industry areas, in all occupations, among all demographic groups and in each state (ABS 1994–2004).

Examination of the data on union density across industry over the past decade is but one way to reveal the extent of change in the union landscape. As shown in Table 1, in 1993 in six industry areas over 50% of the workforce was unionised. At that time, the most highly unionised industry was communication services, with a density of nearly three-quarters (73.8%); however, in 2003, less than one-third of the industry's workers were trade union members. In 2003, there was only one industry (electricity, gas and water supply) where the majority of workers were unionised (53.7%) and only three industries had a unionisation rate of over one-third (education, 41.8%; government administration and defence, 38.4% and transport and storage, 38.2%). The public sector remains a stronghold for union membership; 46.9% of public sector workers compared to 17.6% of private sector employees were members of trade unions; however, membership density has fallen considerably in both the public sector (from 64%) and the private sector (from 28%) in the past decade (ABS 1993–2003).

Table 2 *Unionisation rates males, females, persons 1993–2003*

Year	Male (%)	Female (%)	Difference	Persons (%)
1993	40.9	33.5	7.4	37.6
1995	35.7	29.1	6.6	32.7
1997	33	26.9	6.1	30.3
1999	27.7	23.4	4.3	25.7
2000	26.3	22.8	3.5	24.7
2001	26	22.7	3.3	24.5
2002	24.5	21.5	3	23.1
2003	26.3	22.8	3.5	23.0

Source: ABS catalogue number 6310.0. Employee earnings, benefits and trade union membership.

In 2003 (as shown in Table 2), 26.3% of men and 22.8% of women were union members. Although men remain more highly unionised than women, the difference between their unionisation rates has closed considerably. Ten years earlier, in 1993, 40.9% of men and 33.5% of women were unionised. This represents a narrowing in union representation for men and women from 7.4 to 3.5 percentage points during that decade. During the past decade, Australian unions have become more feminised, at least in terms of women's share of union membership. In 1993, 39.5% of union members were women and in 2003, 43.7% of Australian unionists were female (ABS 1993–2003). This membership profile is clearly at odds with the stereotype of Australian unions as organisations constituted exclusively by middle-aged, blue-collar males.

Compared to the previous 3 years, 2004 was a relatively quiet one in relation to union organising campaigns. Although the federal government was in election mode for most of 2004, in the union ranks much of the year was spent anticipating the announcement of an election date. The year had something of a feeling of unionists being on their very best behaviour as they crossed their fingers for a Latham Labor government. As we will see, this was not to be.

ELECTROLUX AND UNION ACTION

On September 2, the High Court handed down a controversial decision which had significant implications for unions in 2004.[1] This decision was interpreted by both employer groups and unionists alike as having the potential to radically alter the scope and effectiveness of union action, render many certified agreements invalid and narrow the range of issues that could be agreed at the enterprise and be legitimately included in registered agreements. The saga began when three unions, the Australian Manufacturing Workers Union (AMWU), the Australian Workers Union (AWU) and the Communications, Electrical and Plumbing Union (CEPU), included a claim for a $500 bargaining agent's fee in negotiations with Electrolux Home Products. This fee would be paid by non-union workers to compensate unions for the benefits that their collective organisation and efforts had for all workers at the site.[2] The company refused to reach an agreement on

this or any of the other unions' claims and as a result the unions notified their intention to take industrial action in September 2001. Electrolux management challenged the unions' entitlement to protected action on the grounds that it was in relation to matters outside of the employer–employee relationship, as set out in s170LI of the *Workplace Relations Act 1996*. Federal Court Justice Merkel agreed with the company, deeming the action illegal. This decision was subsequently reversed by a decision of the full Federal Court. When the decision of the Federal Court was challenged by the Australian Industry Group on behalf of their member, Electrolux, the High Court reaffirmed the decision of the original Federal Court Judge, ruling the industrial action illegal on the grounds that the issue of bargaining agent fees did *not* pertain to the employer–employee relationship. The Court also held that agreements should be certified only where all of the matters contained pertained to this relationship, and that industrial action undertaken in relation to the negotiation of an agreement where some of the claims did not pertain to this relationship was, as a result, unprotected.

The High Court decision was welcomed by the federal government and by business groups. The Workplace Relations Minister, Kevin Andrews, was quoted as saying that the decision was a good one because imposing 'bargaining agent fees on workers is backdoor compulsory unionism' (Campbell 2004). The Commonwealth had earlier effectively prohibited bargaining agent fees in federal agreements through the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003*.

The decision caused deep concern in the union movement. The short-term implications included the potential for thousands of current certified agreements to be voided and ongoing negotiations (and certification) of agreements were held back because of uncertainty about the legality of a whole range of clauses previously central to the union bargaining agenda. There was also considerable anxiety about the potential for retrospective findings about the legality of industrial action and tort action by employers. Unions were equally concerned about the longer-term ramifications of *Electrolux* (Phillips 2004). Echoing the thoughts of union officials across the country, Cameron (2004), National Secretary of the AMWU, called it an 'ultraconservative and narrow decision'.

Employer groups certainly made hay while the sun shone; casting doubt on all manner of matters that they claimed did not pertain to the requisite 'narrow' employer–employee relationship. This threw bargaining in the last quarter of 2004 into turmoil.

In the first detailed examination of the High Court's decision in *Electrolux*, Australian Industrial Relations Commission (AIRC) Vice President Iain Ross found that a much broader range of issues could be included in enterprise agreements than that employers had suggested in their arguments on the *Ballantyne* case. He took specific issue with the notion that clauses and claims which afford unions rights in the workplace were beyond the employment relationship:

> The submissions of the Ai Group and ACCI almost seem to proceed on the assumption that clauses which give unions, or their representatives, rights are, almost by definition, not clauses which pertain to the employment relationship and hence

> cannot be included in a certified agreement. This is a false premise. The task to be undertaken is one of characterisation (Ross 2004: 10).

Union right of access to workplaces, clauses disallowing Australian Workplace Agreements (AWAs) in agreements, trade union training leave and 'delegates rights' clauses were all matters that Vice President Ross approved. Union officials closely associated with the case expressed their delight at Ross' findings. The National Union of Workers' Victorian Secretary, Pakula (2004), said:

> This is a fantastic result for us, and means that we can all just get on with making agreements, with some very minor alterations. This ruling debunks some suggestions that all EBAs would not be certifiable and the system [would be] thrown back into chaos. Instead, we can all make some minor changes, and carry on as normal.

As unions absorbed the findings, as well as subsequent judgments, it appeared that Pakula's confidence was a little premature.

In the last sitting week of parliament for the year, the government pushed through legislation which validated existing enterprise agreements even where clauses contained in them were not valid under the *Electrolux* decision (Skulley 2005). This was as much an attempt to head-off the strategy of some unions to terminate agreements, take protected action and secure longer 'roll over' agreements as it was to provide certainty to the industrial parties (Priest & Skulley 2004).

Electrolux compounds a series of attacks on union organisation and activity since 1996. During this period, unions have been assaulted by anti-union legislative changes, privatisation and aggressive de-unionisation of public sector departments and utilities, contracting out of union jobs to overseas or non-union employers, vigorous government and quasi-judicial assaults on union organisation in many industries including construction and militant management strategies egged on by the government in the private sector. However, the 2004 election result suggests that union leaders and members need to steel themselves for an even worse environment in 2005 (see Cooper 2005).

UNIONS AND POLITICS

The federal election and its aftermath dominated the union world during 2004. There was a good deal of hope that a Labor government would be elected and that the changes that were promised in the federal Labor parliamentary platform, which unions saw as having the capacity to bolster the collective regulation of work, would frame their work in 2005. This included disbanding the Office of the Employment Advocate, abolishing AWAs and making it easier for unions to represent and collectively bargain for members (Workers Online 2004a). In this light, the union movement strongly supported Latham's bid for the Prime Ministership.[3]

The government left much of the political attack on Labor's industrial relations policies to big business. In July, the Business Council of Australia launched a scathing assessment of the ALP's industrial relations policy platform, prepared by Access Economics. The report argued that 're-regulation', the introduction

of collective bargaining rights and the enhancement of the role of 'third parties' (unions and the AIRC) in the workplace would undo the 'productivity growth achieved in the past decade', raise wages and increase unemployment (Business Council of Australia 2004).

The campaign itself was prosecuted with little reference to trade unions from either the Labor or Liberal camps. However, the final week of the campaign was distinguished by the remarkable sight of the Prime Minister being applauded by members of the Construction, Forestry, Mining and Energy Union's (CFMEU) Forestry Division Tasmanian Branch, who were there to support the government's stand on logging old growth forests in the state.[4] Afterwards, Sharan Burrow with uncharacteristic understatement was quoted as saying that 'needless to say we are all concerned at the treacherous image of workers supporting John Howard' (quoted in Priest 2004a).[5]

Howard's victory was comprehensive and there was evidence to show that many union members and their families voted conservative. A New South Wales Labor Council Survey post-election found that 49% of union members in the state voted Labor, 12% voted green and nearly one-third (31%) voted for the coalition (Workforce 2004c).[6]

There was no anticipating just how bad the election result would be for the union movement. The government gained an absolute majority—39 of the 76 seats—in the Senate, becoming the first government to have an absolute majority in that house since 1981 (Seccombe 2004). This means that all of the 14 bills which had been blocked by the Senate since 1996 would be passed, and unions fear much worse ahead (Porter 2004; Priest 2004b). Speaking after the first ACTU Executive after the election, President Sharan Burrow said that 'now we are faced with a Senate that from July next year could simply be a rubber stamp for a radical experiment in industrial relations' (quoted in Robinson 2004).

Howard did nothing to ease the anxiety of unionists. Two days after the election he said:

> we certainly will press ahead very strongly with things that we've believed in for a long time, particularly in the area of industrial relations, I think we do need more industrial relations reform and if the better outlook in the Senate means that we can have a little more reform in that area, especially the things that we've talked about, then that will be to the good of the country. (Howard 2004)

Exemptions from unfair dismissal for small business are set to be the first 'cab off the rank' (Seccombe 2004; Priest 2004a).[7] However, a range of other changes which will reshape the boundaries within which unions can act will also be introduced. Unions are to face tighter right-of-entry rules that will require officials to substantiate suspected award breaches before gaining access to a workplace, they will be given access to members in areas prescribed by employers and will be expected to limit visits for the purposes of recruitment to twice a year (AAP 2004). Changes in this area will provide stiff penalties including barring individuals from union office and deregistration for unions that breach the provisions. Secret ballots will be introduced before industrial action can be legally taken and there will be a tightening up of the circumstances in which industrial action

can be taken and much stiffer penalties for breaches in this area (Karvelas 2004; Norrington 2004). New regulations for the building and construction industry (including outlawing pattern bargaining, limiting union right of entry, limiting the length of strike action and establishing an Australian Building and Construction Commission) will be introduced (Ballough 2005). On top of these changes, awards will be further stripped back and the approval process for AWAs will be made easier (Fenton-Jones 2005). Although some unions have taken comfort in the fact that the state systems will offer them some shelter from this onslaught, the federal government has once again flagged pursuing a 'national industrial relations system', whereby all commonwealth law would override that of the states (Skulley 2004).

There was widespread dismay inside the union movement at Latham's initial post-election positioning on industrial relations. In a sop to big business, Latham appointed Stephen Smith as Shadow Minister for Industry and foreshadowed a new approach of consultation with business and 'flexibility and fairness' in industrial relations. Union leaders, smarting from the failure of Labor to overcome attacks on its economic credibility during the election campaign, were outraged at what they saw as Latham's betrayal (Grattan 2004).

At the time of writing, Latham's leadership had collapsed and Kim Beazley had resumed his position as leader of the Federal Parliamentary Labor Party. It is far too early to assess a renewed Beazley's impact on Labor and union relations, but in an era of conservative dominance of federal politics, the key focus for unions will be ensuring their own survival and growth.

UNION CAMPAIGNS

The most prominent union campaign of 2004 was the fight to force James Hardie to compensate victims of asbestosis, mesothelioma and other dust diseases who were exposed to asbestos fibres contained in its products. The Hardie group of companies produced asbestos building products in New South Wales, Western Australia and Victoria from the early 1900s. Since 1945, 7000 Australians have died of asbestos-related diseases and this has been estimated to rise to 18 000 by 2020 (Parliamentary Library 2004). Victims of the disease include workers and the families of workers who were exposed to asbestos fibres as a result of work in mines, factories, power stations, wharves, railways and the armed forces. Between the late 1930s and 1986, asbestos products were manufactured by two Hardie subsidiaries, now known as Amaba and Amaca. Between 1995 and 2001, the assets of both of these companies were transferred to James Hardie, or ABN 60 as it is now known, and later to James Hardie Industries NV. In February 2001, the ownership of the Amaca and Amaba subsidiaries was transferred to the newly formed Medical Research and Compensation Foundation, which was to fund future compensation claims, and the restructured company sought to relocate operations to the Netherlands. It was given permission to do so when it promised the New South Wales Supreme Court that it would leave $1.9 billion to meet the claims of future Australian creditors, including asbestos victims. Months later, the company cancelled the arrangement without informing the state government, the Court, victim's groups or unions. As a direct consequence, the Medical

Research and Compensation Foundation was left with a massive compensation shortfall (Parliamentary Library 2004).

After a substantial union campaign, the NSW Premier instituted the Jackson Inquiry to investigate the circumstances surrounding Hardie's exit from Australia and the funding shortfall. Union action, particularly by the NSW Branch of the AMWU and huge media interest galvanised public sympathy for the victims and outrage at Hardie's avoidance of its obligations (Priest 2004c). When the Jackson Inquiry handed down its findings Premier Carr, in an unprecedented move, appointed ACTU Secretary Greg Combet as the lead negotiator in a bid to force the company to fund the outstanding liability (Workers Online 2004b). In a spectacular victory for the union campaign, Combet and company representative Meredith Hellicar signed a deal in late 2004 to guarantee ongoing funding of James Hardie's share of asbestos-related liabilities (Alderton *et al.* 2004).

CONCLUSION: TOUGH TIMES AHEAD

Unions chalked up a win in the most high-profile union campaign of the year, that to make James Hardie meet its financial obligations to victims of its asbestos products; however, they are bracing themselves for a tough year in 2005. Although the exact impact of the *Electrolux* decision remains uncertain, it has the potential to severely limit the range of issues over which unions can negotiate, the clauses they can pursue in enterprise agreements and the circumstances in which they can take protected industrial action. For now, unions are awaiting further interpretation of the decision and in the meantime many are securing clauses which potentially offend the *Electrolux* principles in common law deeds. Union hopes were dashed in the 2004 federal election, which saw the return of the Howard government with an increased majority in the House of Representatives and an outright majority in the Senate. In July 2005, the government will use their parliamentary strength to push through a raft of legislative changes which will make it harder for unions to organise, bargain and represent workers. Having already suffered 8 years of an anti-union federal government, the unions are reeling at the prospect of a fourth term with the same but eminently more powerful administration. Since 1996, Australian unions have devoted considerable energy to making themselves more 'independent' organisations, drawing upon their own internal power resources, such as through the organising strategy, to build their strength. These efforts will need to be redoubled in the coming years.

ENDNOTES

1. The decision was 6-1, with Justice Michael Kirby dissenting.
2. This strategy has been one which unions, and indeed the courts, have grappled with for some time now, beginning in 2001 (Cooper 2002).
3. Despite union concerns about the performance of the opposition in relation to the free trade agreement with the USA, many unions reportedly contributed significantly more than in the 2001 elections.
4. This election campaign was one where the ALP attempted to clearly differentiate itself from the Coalition on Tasmanian old growth forest logging policy. The Prime Minister had hinted before the election campaign that the government would make major changes to its forestry policy; however, until the final moments of the campaign no policy change was announced. Labor unveiled a distinctly 'greener' policy to its traditional approach, in an attempt to force

Howard's hand on the issue. The timing of the announcement and the changes detailed in the ALP policy were hard to swallow for logging employers and forestry workers in Tasmania and this discontentment spilled into protests during the final days of the campaign. This allowed Howard to present himself as the ally of regional workers and industries. Latham and Labor were marginalised and the election resulted in the loss of two Tasmanian Labor seats.

5. There is no end in sight to the recriminations inside the CFMEU after the Forestry Division's public desertion of Labor during the last week of the campaign (see Workforce 2004a,b).
6. Immediately after the election, the NSW Labor Council announced that it would dump the name it had been known by for nearly a century and go by a new name, *Unions NSW*, from January 2005 (Wainwright 2004). The official history of the Council suggests that the organisation has been known by this name for 97 years, since 1908 (Markey 1994: 92).
7. These exemptions have been rejected by the senate 41 times.

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