'FREEDOM OF CHOICE' OR 'FREEDOM FROM CHOICE'?: BARGAINING AND INDIVIDUAL CONTRACTS IN THE VICTORIAN PUBLIC SECTOR

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ABSTRACT

John Howard went to the last federal election saying "Employees will have the choice to remain in the current award system....employees will have the choice of entering into workplace agreements." 'Freedom of choice' underlies the federal Government's reforms contained within the *Workplace Relations Act* 1996, just as it does the industrial relations reforms which have been made in Victoria since March 1993.

In this paper the experiences that the Community and Public Sector Union/State Public Service Federation (Victoria) has had bargaining in the Victorian Public Sector are examined. It is argued that unless the freedom to choose is supported by certain conditions, for example recourse to arbitration, then the outcome for employees can be 'freedom *from* choice'.

INTRODUCTION

For the first time in the federal jurisdiction the *Workplace Relations Act* 1996 enables individual employment agreements to regulate workplace industrial relations. This new initiative sits alongside collective agreements all of which are underpinned by awards stripped back to contain only 20 minimum conditions. The underlying

rationale for these changes is 'freedom of choice', this being the platform on which the Liberal/National Coalition went to the federal election on March 2, 1996.

In late 1995 the Weipa dispute highlighted the use of individual employment contacts in Australian workplaces. Their use at Weipa was part of a broad trend of converting award employees to 'staff status'. CRA argued that the reasons for their use was that they enabled workers to show their commitment to the company, which meant they were more valuable to the company (Comalco Aluminium Ltd, November 13, 1995). As a result CRA employees who signed individual contracts were rewarded more highly than those who remained on award conditions.

Despite the rhetoric about individual contracts the benefits that accrue from their use are largely unexplored. The lack of research stems partly from the secrecy surrounding their use, particularly in Victoria. Further, requirements of the *Workplace Relations Act* 1996 (sections 170WHC and 170WHD) mean that information which exposes the parties to the Australian Workplace Agreements will be confidential and as a result an element of secrecy will continue to surround the use of individual contracts.

In Victoria the *Employee Relations Act* 1992 is premised on the parties ability to choose the most appropriate form of regulating the employment relationship. Chamberlain and Kuhn (1965 in Flanders, 1969: p. 317) write that "freedom to contract is dependent upon freedom not to contract, and the latter in turn depends upon the opportunity to make another choice". When responsibility for regulating the employment relationship is devolved in such a way then 'choice' becomes an important element. It is possible to argue that unless appropriate safeguards are implemented to reinforce and protect both party's right to choose then the right is a fairly hollow one. Historically in Australia arbitration has been recognised as a significant force in ensuring national and social cohesion (McCallum, 1996). Although arbitration may remove the freedom to choose through the imposition of a legally binding decision, it also can protect choice by ensuring that one party's power or strength is not used to remove the other party's choices. Industrial tribunals, with

their powers of compulsory conciliation and arbitration, have acted a 'umpires' to ensure that there is some balance of power in the relationship between employer and employee, without which the relationship would most likely be skewed in the employer's favour. In the majority of jurisdictions legislative changes since the beginning of this decade have reduced the ability for industrial tribunals to intervene, particularly with regards to certification or approval of agreements (McCallum, 1996). By introducing individual employment agreements and severely circumscribing the industrial tribunals arbitral power, Victoria has been "the leader in reforming this nation's otherwise moribund industrial relations climate" (Gude, Second Reading Speech *Employee Relations Amendment Bill* 1994, Victorian Legislative Assembly, October 13, 1994).

In this paper the problems encountered with individual employment agreements in the Victorian Public Sector (VPS) are examined from the perspective of the State Public Service Federation Victoria (SPSFV). Their experience has been of unwilling employees forced to sign agreements. This has occurred in an environment of wage restraint coupled with forms of direct and indirect pressure from their employer to sign. Employees in the VPS have had their right to choose seriously compromised by their employer refusing to negotiate legitimate industrial claims and the industrial tribunal not having the capacity to force the parties to negotiate. Industrial disputation has resulted and the only choice for employees was to accept the non-negotiable position of their employer.

In the first section of this paper the characteristics of the *Employee Relations Act* 1992 (Vic) related to awards, agreements and arbitration, are briefly outlined[1] and compared against relevant aspects of the *Workplace Relations Act* 1996 (Cwlth). In the second section the process of bargaining and use of individual employment agreements in the VPS over the last four year period are discussed. Two case studies of disputes in the VPS are examined in the third section of the paper. These cases show the reality of having 'freedom of choice' in the Victorian industrial

[1]For more detailed information on the *Employee Relations Act* 1992 see Creighton, 1993; Forsyth, 1995; Fox and Teicher, 1994; Mitchell, 1993; Mitchell and Naughton, 1994; Naughton, 1993; Pittard, 1993; or Watson 1993.

relations system. The conclusion is drawn that 'freedom from choice' more adequately describes the situation in Victoria and the implications of this for workers in the federal jurisdiction are considered.

THE VICTORIAN AND FEDERAL SYSTEMS COMPARED

The *Employee Relations Act* 1992 (Victoria)

One of the most controversial pieces of legislation passed by the Kennett Victorian Government was the *Employee Relations Act* 1992 (the 'ERA'). Its enactment "swept away all vestiges of compulsory conciliation and arbitration" (Creighton and Stewart, 1994: p. 35) and voluntary arbitration was effectively introduced as the means to resolve industrial disputes in Victoria (Naughton, 1993; Pittard, 1993). Furthermore, although the ERA provided for individual and collective employment agreements, as well as awards, as ways to regulate the employment relationship, individual employment agreements were accorded supremacy over those other forms of regulation (Mitchell, 1993).

Among the objectives of the ERA was "to establish an employee relations system for Victoria which facilitates the freedom of employers and employees to choose how they regulate their own affairs" (section 3(b), ERA). The ERA abolished Victorian awards from March 1, 1993 and in their place individual or collective employment agreements could be negotiated between the employer and his/her employees (or their nominated bargaining agent) to regulate the employment relationship.[2] Those workers who were covered by an award on March 1, 1993 and who did not negotiate an employment agreement, were said to have their employment regulated by a

[2] Section 8 of the ERA provides for collective agreements to be made between an employer and two or more of his/her employees. Section 9 of the ERA provides for the making of individual employment agreements between the employer and a single employee. Sections 8(3) and 9(3) of the ERA enable employees to nominate an authorised representative to bargain on their behalf or, in the case of collective agreements only, nominate a committee of employees to bargain. These sections are the only references in the ERA to any possible involvement of trade unions in the bargaining process. However the statement "An employer may" in sections 8(3) and 9(3) indicate that there is no obligation on the employer to negotiate (Mitchell, 1993; Mitchell and Naughton, 1994).

'deemed individual employment agreement' (section 24(3), ERA) continuing the terms and conditions of the expired award (Pittard, 1993). All agreements had to meet the four minimum conditions specified in schedule 1 of the ERA. Further, all collective employment agreements had to be lodged with the Chief Commission Administrative Officer (CCAO), while under section 13(2) of the ERA employers had only to notify the CCAO of the number of individual agreements by which they are bound at the end of each financial year.[3]

Another objective of the ERA was "to facilitate the prompt settlement of industrial matters in a fair manner by agreement, conciliation, mediation and arbitration with the minimum of legal form and technicality" (section 3(h), ERA). Part 6 of the ERA established the Employee Relations Commission Victoria (ERCV) whose award making powers were severely limited (Naughton, 1993). The ERCV could only be involved in an industrial dispute with the consent of both parties (sections 92(2) and 98(2), ERA). This was widely criticised by many commentators including the President of the ERCV, who in her annual report of 1994 noted: "The withholding of consent as required by the Act has been used as a device to avoid resolution of industrial matters and disputes [and] undermines the Objects of the Act" (ERCV, 1995: p. 4).

Amendments to the ERA in December 1993 by the *Employee Relations (Amendment) Act* 1993 reinstated limited powers of compulsory arbitration to the ERCV. This meant that the ERCV's arbitral power (under section 113A) could only be used, subject to a request from the Minister, to vary the minimum rates of pay in expired awards and public sector determinations. Therefore, in specified circumstances, section 113A enabled increases in the minimum rates payable under schedule 1 of the ERA (Fox and Teicher, 1994). In particular section 113A was to be used by the ERCV to apply the $8 Safety Net Adjustment and the principles established by the Australian Industrial Relations Commission's (AIRC) October 1993 Review of Wage Fixing Principles (AIRC, Print K9700) to expired awards and

[3] See Creighton, 1993; Mitchell, 1993 or Mitchell and Naughton, 1994 for some of the "odd features" of these lodgement requirements in the ERA.

public sector determinations (ERCV, 1995: p. 2). These amendments were made in response to amendments to the *Industrial Relations Act* 1988 (Cwlth) (the 'IRAct') that introduced minimum wages for all Australian workers, specifically for those workers "where minimum wages are unable to be fixed or adjusted by a state arbitrator (section 170AE(3)(a), IRAct)" (Mitchell and Naughton, 1994: p. 281).

In December 1994 further amendments were made to the ERA by the *Employee Relations (Amendment) Act* 1994. Amongst other changes[4] these amendments removed the ERCV's award making jurisdiction[5]; provided the ERCV with narrowly circumscribed powers of arbitration; and enabled the ERCV to set minimum wages for workers in designated industry sectors (Forsyth, 1995; Mitchell and Naughton, 1994). The ERCV was essentially left with only a minimal arbitral role (Forsyth, 1995) relating mainly to the minimum wages regime. It has been argued that these amendments were an attempt to close the 'escape hatch' (provided under section 111, IRAct) that enabled workers in state jurisdictions where compulsory arbitration was not available the ability to obtain federal award coverage (Mitchell and Naughton, 1994).

On Monday November 11, 1996 the Kennett Government announced the end of the Victorian industrial relations system. In an unprecedented move Victoria handed over all industrial relations power to the Commonwealth Government. This move was heralded by both Governments as 'a triumph of pragmatic federalism' and a step towards 'sensible economic management'. The response of the trade union movement and the ALP to the end of the Victorian system of industrial relations was mixed, however there was general agreement that 'the bizarre experiment of the ERA had failed'. The popular understanding of what has happened to Victorian industrial relations is that control has been handed over to the federal Government. In fact all that has happened is the handover of the system. The ERA survives in the

[4] See Forsyth, 1995 for a discussion of the other changes made by the *Employee Relations (Amendment) Act* 1994.
[5] The ERCV had not made a single award while it the power to make awards.

form of an amendment to the *Workplace Relations Act* 1996.[6] Collective, individual and deemed employment agreements continue, preserved for three years after which time they will become common law agreements. For those Victorian workers who are not covered by federal awards, the Victorian minimum pay rates regime continues with the conditions being those four minima set out in schedule 1 of the ERA as opposed to the 20 minima in the federal jurisdiction.

The abandonment of an industrial relations system in Victoria signalled that the new workplace relations regime of the Commonwealth Government was considered to be compatible with the ambitions of the Kennett Victorian Government. Clearly there was confidence in the Victorian Government that the *Workplace Relations Act* 1996 would continue to deliver their desired outcomes of 'efficient and productive industry in Victoria and an efficient labour market' (section 3(a), ERA).

The *Workplace Relations Act* 1996 (Commonwealth)

On May 23, 1996 the federal (Liberal/National Coalition) Government introduced the *Workplace Relations and Other Legislation Amendment Bill* 1996. Following an agreement with the Democrats[7] the Government was able to see their Bill through both the Senate and House of Representatives to be given Royal Assent on November 25, 1996. The *Workplace Relations Act* 1996 (the WRA) represents a radical revision of federal labour laws despite Mr Reith's assurances that it is no more than the industrial relations policy Paul Keating wanted to deliver (the one which he outlined in his April 1993 speech to the Institute of Company Directors), but the ACTU would not let him (Reith, Second Reading Speech *Workplace Relations and Other Legislation Amendment Bill*, House of Representatives, May 23, 1996).

[6] The federal government has passed the *Workplace Relations and Other Legislation Amendment Act (No. 2)* 1996 in response to the Victorian government passing the *Commonwealth Powers (Industrial Relations) Act* 1996.

[7] 'Agreement between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill', October 1996.

There are a number of similarities between the ERA and the WRA, most notably the emphasis on developing more direct relationships between employers and employees and providing the parties with choice about how to regulate their working relationship (sections 3(b) and 3(c), WRA). As in Victoria individual agreements can (generally) prevail over collective agreements and override awards.[8] Part VID of the WRA, which provides for Australian workplace agreements (AWAs), draws upon section 51(xx) the corporations power of the Australian Constitution. Although AWAs can be negotiated individually or collectively they must be signed on an individual basis (section 170VE) and do not bind those employees at an enterprise who do not sign. AWAs must be lodged with the Employment Advocate (EA) who ensures that the agreement meets statutory requirements, in particular that the agreement satisfies the 'no disadvantage test' (under Part VIE, WRA). Referral to the AIRC occurs for those AWAs that do not satisfy the 'no disadvantage test'. Having a third party that is able to 'vet' agreements diverges from the position taken in Victoria.

The AIRC retains its arbitral power however its ability to use it is significantly reduced. This can be seen in the objects of the WRA, particularly sections 3(d)(i) "for wages and conditions of employment to be determined as far as possible by agreement...", and section 3(h) "enabling the Commission to prevent and settle industrial disputes by conciliation and, where appropriate and within specified limits, by arbitration".[9] The scope of the AIRC to resolve disputes by arbitration has been substantially cut back to a specified list of 20 allowable matters (under section 89A, WRA). An 18 month interim period has been provided for award simplification after which time all other existing award provisions will become unenforceable. However in the case where disputants are parties to a paid rates award a Full Bench of the

[8] A close reading of section 170VQ of the WRA is needed to discern exactly what prevails over what and when. However, *The Australian Financial Review* ran a special feature on the WRA (December 31, 1996) which was edited by Graham Smith, where the general order of priority (in the event of any inconsistency between awards and agreements) was outlined to be: (1) AWAs, unless made after a section 170MX(3) award and before the expiry date of the award; (2) section 170MX awards; (3) exceptional matters order; (4) State award or agreement; (5) pre-existing certified agreement; (6) pre-existing enterprise flexibility agreement; (7) new certified agreement; (8) new federal award; (9) existing federal award; (10) common law contract.

[9] Section 3(h) originally specified the use of arbitration as "a last resort", however following negotiations with the Democrats this reference can now only be found in section 89(a)(ii).

AIRC can arbitrate when it considers that there is no prospect of an agreed outcome (section 170MX, WRA).

In reforming industrial relations the WRA is more modest than the ERA. A wider array of choices about how the employment relationship can be regulated is provided under the WRA, but it is questionable as to whether this increased choice makes individuals freer or better off.[10] It will certainly be interesting to see how the WRA is put into practice. In particular it will be interesting to see whether employees should believe the assurance that "employers can be trusted" (Adviser to Mr Reith quoted in Way, 1996: p. 33) because, as the following sections of the paper reveal, this was not the case for public servants in Victoria.

BARGAINING AND INDIVIDUAL CONTRACTS IN THE VICTORIAN PUBLIC SECTOR 1993 - 1996

The principal union representing employees in Victorian Government departments, statutory authorities, and education institutions is the Community and Public Sector Union SPSF Group and its associated body the SPSF (Victoria). Currently the union covers around 60% of employees in the VPS. Since March 1993, the union has acted as bargaining agent in the negotiations of over 30 collective agreements and countless individual agreements in the VPS.

The primary legislative instruments governing industrial relations for public servants in Victoria is the *Employee Relations Act* 1992 and the *Public Sector Management Act* 1992 (Alford and Considine, 1994). In March 1993 Victorian public servants (below the Executive Officer (EO) class) had their terms and conditions, as governed by determinations and regulations of the Public Service Board, unilaterally transferred to 'deemed individual employment agreements' (clause 22, schedule 6, *Public Sector Management Act* 1992). Despite the Premier's repeated assurances

[10] See Hunt (1995) for an interesting discussion on this point.

that 'no Victorian worker would be worse off' a number of existing working conditions were abolished including annual leave loading and two public holidays. Furthermore, increases in employee contributions to superannuation also served to erode take home pay.

The Government's preferred position was to have public servants employed under individual employment agreements (Alford and Considine, 1994). Following the implementation of the ERA the Government rejected a proposal from the SPSFV to negotiate a collective agreement that would cover all public servants. Despite the majority of the EOs signing individual employment agreements in 1993, non-EO employees were averse to signing (Alford and Considine, 1994).

Early 1994 the ERCV considered a ministerial reference regarding increases to the minimum wage rates in the expired public sector awards by the $8 safety net adjustment. The ERCV decided that a 'proper process of enterprise bargaining' should be established before the wage increase could be considered. On July 11, 1994 an order was made by the ERCV to "complement the Enterprise Bargaining Principles of the Australian Industrial Relations Commission" (Decision E94/0157, at 3). The resulting *Victorian Public Service (Enterprise Bargaining) Regulations* 1994 established a system of enterprise bargaining in Victoria that included arbitration as a last resort. The reaction of the Kennett Government was to quash this decision through section 12 of the *Employee Relations (Amendment) Act* 1994 (Forsyth, 1995).[11]

Although over 50% of VPS employees had nominated the SPSFV as their bargaining agent, the Government refused to discuss or negotiate enterprise bargaining agreements with the union in any meaningful way.[12] Negotiations were

[11] Section 12 of the *Employee Relations (Amendment) Act* 1994 refers to, "Quashing of particular Commission decisions: (1) The decision of the Employee Relations Commission of Victoria in Full Session made on June 3, 1994 (Decision E94/0126) and the decision made by it on July 11, 1994 (Decision E94/0157) are quashed with effect from June 3, 1994."

[12] In a recent unreported decision in the Industrial Division of the Victorian Magistrates Court (*SPSFV and the State of Victoria and others*, June 4, 1996) it was found that there is no ability in the Victorian industrial relations system to force parties to negotiate. The Magistrate (Mr B. Braun), commenting on an employment agreement that the union was seeking to enforce, noted: "[N]either the agreement nor the Act... obliges the

supposed to occur at the Departmental level, but as was shown in the $8 case before the ERCV (Decision E94/0317), substantive issues of wages, performance monitoring systems, privatisation and compulsory arbitration were non-negotiable (Exhibit 1, Attachment to E94/0317). In an effort to avoid having the ERCV make a decision in the SPSFV's favour, the Government offered public sector employees a 3% pay increase conditional on signing an employment agreement. The proposed 3% pay increase absorbed the $8 safety net claim and continued wage restraint in the public sector.

Pressure to Sign Agreements

The Government allowed for the backdating of the proposed 3% pay increase. The amount varied from a few dollars to a few hundred dollars, but was strictly tied to employees signing an individual employment agreement by a deadline which was non-negotiable. While the amounts of money were not great, the use of the deadline heightened the perceived 'need' to sign an individual employment agreement. Considerable confusion occurred with many employees believing that if they did not sign by the prescribed date, they would not get any pay increase at any time in the future.

Departments were under extreme pressure to 'deliver the numbers' and to have as many employees on individual employment agreements as possible. Employees, both members and non-members of the union, were accused of disloyalty to their Departments when they refused to sign an individual employment agreement. Further, if employees were promoted, wished to gain a higher duty allowance, or were seconded or transferred, they were required to sign an agreement. To gain a new spread of work hours so that an employee could, for example, collect their children from creche, they were required to sign an agreement. In some

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parties to negotiate. This therefore leaves them to do as they please or to be more specific, embark upon negotiations and then at any stage to quit them at will.... Simply stated, if there is no obligation to negotiate, there cannot be an obligation to continue to negotiate or to accept direction as to how to negotiate" (p. 8).

Departments positions were declared vacant and employees were told that if they must sign an agreement if they accepted a job.[13]

The position taken by the SPSFV was that the proposed 3% wage rise was too low and that their members were being asked to 'sell off' too many conditions for such a small amount. At union meetings members voted to reject the individual employment agreements and in an effort to force the Government into genuine negotiations, the union tactic was to ask members not to sign the agreements. This boycott campaign was a tactic acceptable to the membership who were unfamiliar with protracted industrial action. Management's response was to focus on non-members and to tell them to sign as 'they will get what ever the union gets anyway'. In some Departments, management actually drew up clauses for workers to attach to their agreements which stated, 'that should the SPSFV achieve any conditions better than those contained in this agreement, then this agreement may be set aside and a new agreement negotiated.'

Management's actions undermined the effectiveness of the boycott campaign. As non-members and some members signed, those resisting the agreements became more unsettled and disillusioned. Eventually the pressure and financial loss became too much for many members and the union was directed by members to enter into collective agreement negotiations. In areas where there had been strong resistance, the negotiations were productive and conditions were preserved. In areas where significant numbers of employees had signed the agreements the union's ability to negotiate was weak and the process became a formality of changing the individual agreements into a collective agreement with substantially the same conditions. In some Departments the collective agreement process was used to ensure that a large number of employees signed agreements. Once the union-negotiated agreements were concluded, management simply removed the words 'union' and 'SPSFV' and the agreements were distributed to non-members to sign as individual employment agreements.

[13] This is consistent with the usual requirement for newly appointed staff to sign individual employment contracts (Alford and Considine, 1994: p. 51).

Terms and Conditions in Agreements

On signing the employment agreements a number of existing employment conditions were lost including: overtime payments, meal allowances, part days, training and Community Service and Trade Union Training leave. Furthermore, as collective agreements could be individually varied many 'supplementary agreements' undermined the collective, union-negotiated conditions. The SPSFV had no capacity to prevent this from occurring.

The employment agreements abolished over 1200 public sector job classifications and an incremental pay system. These were replaced by the 5 band VPS pay structure with pay increases being linked to an annual, individual performance assessment. Wage adjustments outside those resulting from the annual performance assessment were to be linked to a 'market rate review' of the pay bands which was to be undertaken by a private consultant. However, the Government refused to make the documentation available which would explain the review process. Ultimately, the explanatory document was declared a Cabinet document and access was refused.

The market rates review was conducted in October 1995. It concluded that the average minimum salary for Victorian public servants was up to 24% less than that being paid to private sector employees engaged in similar work (Das, 1996). In November 1995, the Premier announced a 4% pay rise for public servants, conditional upon signing a new employment agreement. The new employment agreement did not contain any reference to the market rate review, which meant that there was no longer any mechanism for wage improvement in the VPS outside the individual performance assessment process. The only way employees were able to protect their take home pay against inflation was by signing a new agreement. The union was authorised by members who had not signed the new agreements to enforce the market rate review in their agreements in the Industrial Division of the Magistrates Court.

On December 11, 1996, just days before the handover of Victorian industrial relations powers was finalised the AIRC finally granted Victoria's 23 000 public sector workers an interim paid rates award. The interim award reinstated annual leave loading (backdated to March 4, 1994) as well as providing pay increases that took into account the three groups of employees within the VPS. As a result the first group, who had never signed an agreement received a 7% pay increase backdated to November 1995 and a further 3% from December 1996. The second group, who had signed agreements in the first round, received a 4% pay increase backdated to November 1995 and the 3% from December 1996. The third group, who had signed all agreements did not receive any pay increase. The interim awards contains a 'no extra claims' clause. Further the Government gave an undertaking to stop offering employees individual employment agreements (Workforce Issue 1098, December 12, 1996).

Despite 'choice' being an underlying principle of the ERA quite clearly employees within the VPS have not had the ability to determine when, how or whether they would exercise their right to choose. In December 1996, the union estimated that about 60% of employees across the public service had signed individual employment agreements, 20% were covered by collective agreements and a further 20% had refused to sign any contracts (Workforce, Issue 1098, December 12, 1996). The following cases demonstrate how two different groups of employees in the VPS have not had the freedom to choose whether to sign an agreement or not.

CASE STUDY 1: THE HOUSING DISPUTE 1994

The first collective employment agreement to be signed in the VPS was negotiated for employees in the Housing section of the Department of Planning and Development. In this section one group of employees had their jobs declared vacant and then were required to sign an employment agreement upon regaining their positions.

The SPSFV made a number of claims, including the following, to that Department, as the employer of the affected workers:

1. No employee who is a member of the SPSFV be redeployed, transferred or made redundant unless in accordance with agreements in force as at 27 October 1992.

2. The Department retrospectively reinstate Public Holidays as removed by the *Public Holidays Act* 1993.

3. Payment of 17.5% Holiday Pay loading to be reinstated retrospectively.

4. An agreed common salary and remuneration structure to apply across the Department which provides for equal pay for work of equal value.

5. The level of remuneration for all categories of employment should be increased in recognition of the substantial alterations that have occurred in the employment terms and conditions since the election of the present Government. The SPSFV estimates that such compensation equates a minimum of 4% for all employment categories.

6. The level of remuneration for all categories of employment should be adjusted to reflect changes in the CPI since the last general movement occurred in September 1991. Such compensation equates with a 1.4% increase for 1993 and a further increase of 1.5% in 1994.

7. Further increases of at least 4.5% to be available and negotiated with the SPSFV on the basis of agreed productivity and efficiency changes.

Such industrial demands are common in all industrial relations jurisdictions in Australia, but not in the State of Victoria. The case appeared before the ERCV for

mediation and conciliation (Decision E94/0317). It rapidly became clear that the Department was completely hampered in its capacity to negotiate in any meaningful manner with the union on the matters listed above. While the Department was the legal employer of the workers, it was strictly controlled by the Department of Business and Employment and the Victorian Government in how it could regulate the terms and conditions of its workforce.[14]

The ERCV requested that the items for negotiation be divided into four categories: (1) those that were agreed upon; (2) those that could be negotiated; (3) those that the Department required further clarification as to whether it could negotiate; and (4) those which the Department had no authority to negotiate (Exhibit 1, Attachment to Decision E94/0317). All of the above items were labelled as category 4, non-negotiable items.

Due to its lack of arbitration powers the ERCV was left in the position of being unable to advance the matter any further. The Commissioner could make recommendations but the Department was not willing to accept them. While the case was being heard, the Department used pressure, as noted above, to force employees to sign individual employment agreements. This action was in complete disregard to the ERCV's recommendation that the implementation of the system be postponed to allow for negotiations to continue.

The members were essentially left with two options: either they could accept the non-negotiable approach of the Department and sign or they could undertake industrial action. The choice most union members made was to sign a collective employment agreement.

[14] In her Third Annual Report, the President of the ERCV alludes to the difficulties in resolving industrial disputes that come from "attempting to determine "parties" from whom consent is required" (ERCV, 1996: p. 2). In the public sector this difficulty has arisen when determining whether the Department in which the employees concerned are employed is a party to the dispute or whether the Department of Business and Employment is the relevant party to the dispute.

CASE STUDY 2: THE HEALTH AND COMMUNITY SERVICES DISPUTE 1996

The longest strike against the Kennett Government occurred in the Department of Health and Community Services from March 7 to March 29, 1996. The dispute began as a result of a lack of enterprise bargaining. Health workers in federal award covered sections of the Department were gaining wage increases of 10%, without the absorption of safety wage net adjustments. SPSFV members whose federal award had recently been overturned, were covered by an interim collective employment agreement. After four months of mediation before the ERCV, the Department refused to move, citing that they were bound by Government policy as to the wage increase they could offer. Workers were offered a wage increase in 3 parts: an initial 3%, which would absorb two $8 payments; another 4% linked to signing a new individual contract; and a further 3% in December 1996 tied to unspecified productivity achievements to be negotiated at a later date.

Members voted to reject the offer and began an industrial campaign with various work bans applied across the Department. These were later escalated and the Departmental response was to institute the Government's policy[15] of 'No Work as Directed, No Pay', which relies on the 'stand down' provisions in section 14(4)(b) of the ERA. Although all sections of the Department were involved in the work bans, the Department chose the child protection area to stand down 500 workers. The commitment of the employees to their clients and the emotive nature of the work performed ensured that media attention was gained. It is estimated that the Government spent around $170,000 on newspaper advertisements explaining their position to the public.[16]

Workers elsewhere within the Department went on strike in support of child protection workers. Pickets were established across the State and 3 weeks of industrial action was undertaken. The dispute remained deadlocked with the

[15] This is one of the government's Employee Relations Policies developed by the Department of Business and Employment which the SPSFV obtained through Freedom of Information in March 1996.
[16] Information obtained by the SPSFV through Freedom of Information.

Government refusing to concede and the employees demanding the right to have the matter arbitrated.

The ERCV, having no power to arbitrate the dispute, was only able to make recommendations in an effort to resolve the dispute. An immediate, unconditional 4% pay rise and a return to work were recommended by the ERCV. When the Government refused to accept these recommendations the matter languished. Arbitration was also recommended by the ERCV however, this too was rejected by the Government. Ultimately, the membership voted to suspend industrial action so that the ERCV could attempt to settle the matter using its minimum wage setting powers. It was later determined by the ERCV that it did not have the ability to use section 113A of the ERA in such a manner.

CONCLUSION

One of Peter Reith's advisers said that the basic tenet of the Coalition's industrial relations policy is that "employers can be trusted and in a more deregulated labour market they will not exploit the workforce" (in Way, 1996: p. 33). As a result the role that third parties can play within the federal system has been altered to be consistent with this philosophy. Under the WRA, especially with respect to certified agreements, trade unions are provided with a greater role than that in the ERA. In Victoria individual employment agreements have been used in a manner to undermine terms and conditions gained through collective negotiations. The SPSFV has been largely powerless to stop this situation from occurring. The ability of AWAs to (generally) override other forms of regulation means that a similar situation may emerge in the federal jurisdiction.

In 1992 Mr Gude said in his Second Reading Speech for the *Employee Relations Bill* 1992 that strengthening the right of freedom of choice is a key objective of the ERA. Similarly it is an underpinning principle of the federal Government's WRA. However Victorian public servants have found that rather than their freedom of choice being

strengthened, as individuals and as union members their choice was severely constrained by the dominant, non-negotiable position taken by their employer, the Victorian Government. Choice was constrained by making pay increases, promotions, transfers and other changes in working conditions dependent upon signing employment agreements. In this paper it has been demonstrated that in an environment where the employer can refuse to negotiate legitimate industrial claims, and where an industrial tribunal does not have the capacity to force the parties to negotiate, industrial disputation occurred.

The need for consent from both parties before the ERCV could use its arbitral power, which the cases show was not forthcoming from the Government, meant that employees were forced to choose between lengthy industrial action or accepting the Government's non-negotiable offer by signing an individual employment agreement. By denying employees access to an independent 'umpire', inferior terms and conditions were implemented through economic duress and the application of direct or indirect pressure. For many employees the 'best available option' (Hunt, 1995) was to sign an individual employment agreement.

For Victorian public servants 'freedom from choice' rather than 'freedom of choice' was the outcome. Having recourse to arbitration, albeit limited, under the WRA should ensure that the worst excesses of the ERA are not replicated in the federal jurisdiction.

REFERENCES

Alford, J., and Considine, M. (1994). 'Public sector employment contracts'. In Alford, J., and O'Neill, D. (Eds). *The Contract State: Public Management and the Kennett Government.* Deakin University Press, 1994, pp. 46 - 73.

Chamberlain, N. W., and Kuhn, J. W. (1965). 'Conjunctive and cooperative bargaining'. In Flanders, A. (Ed). *Collective Bargaining: Selected Readings.* Penguin: UK, 1969, pp. 317 - 332.

Comalco Aluminium Ltd (1995). *Bulletin: Weipa Industrial Dispute.* November 13, 1995.

Creighton, B. (1993). 'Employment agreements and conditions of employment under the Employee Relations Act 1992 (Vic)'. *Australian Journal of Labour Law,* Vol. 6, pp. 141 - 158.

Creighton, B., and Stewart, A. (1994). *Labour Law: An Introduction (2e).* The Federation Press: Sydney.

Das, S. (1996). 'PS salaries lag behind the private sector, court told'. *The Age,* July 23, 1996.

ERCV (1995). *Second Annual Report by the President of the Employee Relations Commission of Victoria, Year Ended 31 October 1994.*

ERCV (1996). *Third Annual Report by the President of the Employee Relations Commission of Victoria, Year Ended 31 December 1995.*

Forsyth, A. (1995). 'Employee Relations (Amendment) Act 1994 (Vic)'. *Australian Journal of Labour Law,* Vol. 8, pp. 154 - 165.

Fox, C., and Teicher, J. (1994). 'Victoria's Employee Relations Act: The way of the future?'. In Callus, R., and Schumacher, M. (Eds). *Current Research in Industrial Relations*. Proceeding of the 8th AIRAANZ Conference, February 1994, pp. 508 - 536.

Hunt, I. (1995). 'Are choices always liberating? - Dilemmas of 'freeing up' the Australian labour market'. In Hunt, I., and Provis, C. (Eds). *The New Industrial Relations in Australia*. The Federation Press: Sydney, 1995, pp. 127 - 149.

McCallum, R. (1996). 'The new millennium and the Higgins heritage: Industrial relations in the 21st century'. *Journal of Industrial Relations*, Vol. 38, No. 2, pp. 294 - 312.

Mitchell, R. (1993). 'Notes on the Employee Relations Act 1992 (Victoria)'. *Working Paper No. 70*, Department of Management and Industrial Relations, The University of Melbourne, Parkville, 3052, Australia.

Mitchell, R., and Naughton, R. (1994). 'Radical labour law reform and the demise of the Victorian industrial relations system'. *New Zealand Journal of Industrial Relations*, Vol. 19, No. 3, pp. 275 - 288.

Naughton, R. (1993). 'The institutions established by the Employee Relations Act 1992'. *Australian Journal of Labour Law*, Vol. 6, pp. 121 - 139.

Pittard, M. (1993). 'The fundamental transformation of employee relations in Victoria'. *Australian Business Law Review*, Vol. 21, pp. 220 - 227.

Smith, G. (Ed). 'The Workplace Revolution'. *The Australian Financial Review*, December 31, 1996, p. 3 - 7.

Watson, G. (1993). *Guide to Victoria's Employee Relations Law*. CCH Australia.

Way, N. (1996). 'Reith's bold plans'. *Business Review Weekly*, April 15, 1996, pp. 32 - 36.

Workforce. Issue 1098, December 12, 1996.

Cases

October 1993 Review of Wage Fixing Principles. (AIRC, Print K9700).

The SPSF Enterprise Bargaining Case: 'In Matter of a Ministerial Request Pursuant to Section 113A of the Employee Relations Act 1992 Concerning Provisions Referred to in Clause 22(1) of Schedule 6 of the Public Sector Management Act 1992 that Expired Due to the Operation of Clause 22(3) of that Schedule'. (ERCV, E94/0157).

The $8 Case: 'In Matter of a Ministerial Request Pursuant to Section 113A of the Employee Relations Act 1992 Concerning Provisions Referred to in Clause 22(1) of Schedule 6 of the Public Sector Management Act 1992 that Expired Due to the Operation of Clause 22(3) of that Schedule'. (ERCV, E94/0317).

Legislation

Employee Relations (Amendment) Act 1993 (Victoria)
Employee Relations (Amendment) Act 1994 (Victoria)
Employee Relations Act 1992 (Victoria)
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Public Sector Management Act 1992 (Victoria)
Workplace Relations Act 1996 (Commonwealth)

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