

INDUSTRIAL ACTION UNDER THE WORKPLACE RELATIONS ACT: 'WINNING' IN THE PUBLIC SECTOR

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Abstract

Upon its introduction the *Workplace Relations and Other Legislation Amendment Act 1996 (Cth.)* (WRA) made significant changes to the legal regulation of trade unions in the federal system. One of the most significant areas that has witnessed dramatic change is industrial action. The WRA seriously curtails the degree to which unions can take industrial action. This paper undertakes a comparative case study of two service sector unions, one public and the other private sector, tracing their experiences under the WRA in relation to industrial action. A comparison of the unions' experiences reveals that the success of service sector union I has been in large part, derived from its position of strength in the public sector.

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INTRODUCTION

The introduction of the *Workplace Relations and Other Legislation Amendment Act 1996 (Cth.)* (WRA) heralded a new era for trade unions in the federal system in Australia. Despite continuities with the Keating Labor Government's industrial relations reforms, the WRA makes fundamental changes to the legal regulation, role and functioning of unions within the federal system. One of the most significant areas pertaining to unions that has witnessed dramatic change is industrial action. The WRA inhibits the industrial, organisational and economic power of unions by seriously curtailing the degree to which they can take industrial action. This paper undertakes a comparative case study of two service sector unions, tracing their experiences under the WRA in relation to industrial action. The findings reveal that the success of service sector union I has been in large part, derived from its position of strength in the public sector. Indeed, the unique characteristics of the union in its industry have been critical intervening factors mitigating the adverse influence of the industrial action provisions.

CHANGES TO INDUSTRIAL ACTION

The introduction of a right to strike first appeared in the Australian federal system following the Keating Labor government's amendments to the *Industrial Relations Act 1988 (Cth.)* (IRA). Consistent with the introduction of a right to strike, the legislation provided for protection against victimisation for participation in industrial action and immunity from common law liability during negotiations for an agreement. The WRA continues to provide an avenue for 'protected' industrial action during a legally sanctioned bargaining period, for the purpose of negotiating a certified agreement or Australian Workplace Agreement. Nevertheless, the WRA strengthens the armory available to employers to defeat and overcome industrial action taken by unions (Riley 1997).

One of the most basic changes made to the industrial action provisions under the WRA concerns the definition. The WRA defines industrial action as a broader range of conduct than the IRA did, meaning a greater number of actions can be defined as 'unprotected' industrial action, giving employers an opportunity to pursue legal remedy. This significantly limits the ability of unions to counter the economic power of employers and raise awareness and interest in, or during, a dispute. A second significant change concerns protection against dismissal for participation in industrial action. Section 170MU(1) and section 170WE provide protection for employees against dismissal or injury in their employment for participation in industrial action, only if they are engaged in 'protected' action. Therefore, these statutory provisions are narrower in application than the previous provisions, because they only apply in limited circumstances. That is, where the parties have notified a bargaining period for the purpose of negotiating either a certified agreement or an Australian Workplace Agreement.

The third major change pertaining to industrial action under the WRA is the introduction of new powers for the Australian Industrial Relations Commission (AIRC) to stop or prevent industrial action (s 127(1)). The intention of the government in introducing this statutory provision was to provide a rapid and effective means of recourse for parties who suffered from illegitimate industrial action (Forsyth 1998). Section 127(1) is not applicable to protected action. The provisions allow an order to be made on the AIRC's own motion, on the application of a party to an industrial dispute, or a person directly affected by industrial action. The AIRC is required under the WRA to hear and determine applications for such orders as soon as practicable. Following the making of an order, the parties are directed to comply. Failure to comply with an order can result in the imposition of a monetary penalty. Despite the apparent increase in the AIRC's powers, section 127(1) involves a marginal role for the AIRC, because the person or organisation has a right to proceed to the Federal Court for an injunction without any prior attempt to resolve the matters at

issue by negotiation. Despite the breadth of powers available to employers under section 127(1), unions can also use the provisions to stop industrial action by employers.

In sum, the changes to industrial action under the WRA severely limit the ability of unions to counter the inherent imbalance of power in the employment relationship, by severely curtailing the circumstances in which they can legally withdraw their labour. The restrictions may lead to union marginalisation and exclusion, diminishing their capacity to address enterprise and broader social issues. Nevertheless, the provisions may also be positive, in the sense that they engender a strategic and proactive approach that results in novel ways of working within the restrictions. This paper traces the experiences of two service sector unions in an endeavour to explore these issues.

CASE STUDY

This paper undertakes a comparative case study of two service sector unions. The experiences of the unions are explored on the basis of semi-structured interviews that were conducted in 2001-2002, as part of a larger study of the impact of the WRA on union effectiveness (Pyman 2003). The semi-structured interviews were conducted with officials and delegates, predominantly in the Victorian branches of the unions. However, some national level officials were also interviewed. The characteristics of the two unions are outlined below.

Service Sector Union I

Service Sector Union I (SSU I) is a large professional union with approximately 115,000 members largely in the public sector. Managerial staff are covered within the membership of the union. In contrast to many other federally registered Australian unions, this union has experienced membership growth over the past five years at both a state and national level.

Service Sector Union II

Unlike its counterpart, Service Sector Union II (SSU II) is a medium sized industry union in the private sector with approximately 65,000 members and has experienced a pronounced decline in union membership over the past five years. Covering predominantly semi-skilled staff, managerial staff are also covered within the membership of the union.

THE UNIONS EXPERIENCES

Four key themes emerged from the interviews concerning the unions' experiences of industrial action under the WRA. These are positive influences, negative influences, employer tactics and intervening conditions. Intervening conditions refer to factors that facilitated or constrained the influence of the industrial action provisions in the WRA.

Positive Influences

Officials and delegates in both unions reported positive influences of the provisions on union strategy. The provisions have facilitated adaptation, resulting in a more strategic approach in relation to preparation for industrial action and the method of industrial action. The most common example identified by both unions was the fine-tuning of industrial action. This has led to a greater incidence of site-specific action.

Officials in SSU I only, also identified a positive influence of the provisions on organisational capacity in well-organised workplaces. These officials reported that the restrictions on industrial action have frustrated members, leading to an increased use of disruptive direct action and increased militancy among the rank-and-file in the public sector.

Negative Influences

In addition to identifying positive influences on union strategy, officials and delegates in both unions also reported negative influences. One common theme emerged. The provisions have constrained the type of industrial action that can be taken, particularly wildcat action. Two particular provisions were identified as important in this context: the notice of intention to take industrial action and the definition of protected action. Officials in SSU II however, went further, arguing that these particular provisions have given employers unfettered power and therefore, a significant tactical advantage in disputes.

Despite both unions recognising restrictions on wildcat action, officials in SSU II only, identified a range of implications in the private sector. One reason for this appears to be a lack of activism and militancy in comparison to SSU I, meaning that the negative influences on union strategy have been greater. Officials in SSU II identified four major implications. First, it has placed the union at a tactical disadvantage by rendering the elements of surprise, creativity and spontaneity nugatory. Second, it has inhibited the union taking industrial action at the point of maximum impact, by giving employers greater capacity to respond to, and overcome, union action. Third, it has given employers greater opportunities to bully and intimidate members during the period before industrial action takes place. Fourth, it has limited the ability of the union to respond to 'hot' issues; that is, situations where members want to strike immediately. Consequently, this has led to a degree of frustration among members and necessitated greater investment of resources in education, to inform members of their rights and responsibilities and the union's rights and responsibilities during industrial action. These implications have resulted in SSU II making greater use of low-level action such as bans. However, this reliance on low-level action has been due in part, to a lack of activism and militancy among the rank-and-file, and therefore a broader reluctance to take industrial action. Consequently, the union has begun investing resources into educational programs designed to build power and confidence in the strength of workplace action.

Officials in both unions reported negative influences of the industrial action provisions on union resources. The common thread among their experiences was the increased legalism of industrial action. Several examples were identified by the interviewees: the procedural complexity and manpower involved in preparing notices of the intention to take industrial action and section 127 orders to stop or prevent industrial action; and the need to keep abreast of case law pertaining to industrial action. Officials in SSU II also identified an increased incidence of fights with employers in the courts over legal technicalities associated with industrial action. This keenness to take fights to the courts has also been substantiated in the literature (Catanzariti, Shariff & Brown 2003).

Employer Tactics

A majority of officials in both service sector unions agreed that employer tactics have been central in shaping the influence of the provisions. Officials identified the use of overt tactics in the form of challenges to industrial action. Officials in SSU II however also identified a more hostile and aggressive approach by employers in the private sector. Several examples of a 'hard headed' employer approach were identified: an increased incidence and threat of section 127 orders, stand-downs and lockouts, and in increased use of law firms in industrial disputes. The officials also argued that the hostile and aggressive tactics used by employers have shaped the industrial relations climate, leading to bitter, costly and protracted industrial disputes. The divergence between the unions' experiences in relation to employer tactics suggests that a spectrum of employer behaviour existed across the different industries.

Intervening Conditions

Industry characteristics were identified as an intervening condition for both unions in widely differing contexts. For SSU I, industry characteristics have been a positive in the public sector. The nexus between the industry and the provision of services to the community was critical in this respect. Indeed, a majority of officials and delegates identified this as a positive factor shaping

their industrial action under the WRA. They argued that the profession's role in providing critical services to the community enhanced the bargaining power of the union: the concept of essential services. As one official described:

We help the community and that's a very fortunate position to be in. We are in that wonderful win-win situation. The nature of the industry is definitely an advantage (Interviewee 1 SSU I, 2001).

In marked contrast, industry characteristics have been a negative for SSU II in the private sector. There were several reasons for this. First, the presence of four large, well-resourced and hostile multinational employers who dominate the industry have had a marked impact on the bargaining power of the union. Second, specific trends in the industry have been important in diminishing union power. These include: globalisation, labour shedding, the introduction of new technology, understaffing and excessive workloads. Third, the characteristics of the workforce have contributed to a lack of activism and militancy. The heartland membership of the union is middle aged-women who work part-time and earn less than average weekly earnings (Interviewee 1 SSU II, 2001). As one official explained:

It's a white-collar professional union and it hasn't been the most militant union. They're not very confrontational our members (Interviewee 1 SSU II, 2001).

In sum, a comparison of the unions' experiences reveals that they are consistent in terms of the positive and negative influences of the industrial action provisions on union strategy and union resources. In relation to employer tactics, the unions' experiences also reveal similarities in that the case study suggests a diverse range of tactics are being used by employers in the different industries and sectors to challenge industrial action by the unions. However, SSU I and SSU II do stand in marked contrast to each other in some respects. SSU II seems to have been more affected by the organisational tactics of employers in the private sector, and by a lack of activism and militancy on behalf of the rank-and-file. These issues are taken up for further discussion in the following section.

DISCUSSION

This paper has undertaken a comparative case study of two service sector unions, one private and the other public sector, in relation to industrial action under the WRA. The findings indicate that the WRA has impacted on union effectiveness, yet the impact has been both positive and negative. A comparison of the two unions' experiences in relation to the industrial action provisions highlights the differing impacts. SSU I stands out as being successful in the public sector, despite the restrictions in the legislation, whereas the experiences of SSU II point to a lack of success in the private sector because of the restrictions. Two factors seem to be plausible in explaining the different fortunes of the unions: industry characteristics and activism.

Industry Characteristics

Three main industry specific factors explain the differences in industrial relations outcomes pertaining to industrial action and the success of SSU I under the WRA. First, SSU I stands as a true craft union, representing only skilled professionals in its industry. It is the only union in the industry and therefore has benefited from little competition. The union has also benefited from drawing its heartland membership from the public sector, and the presence of a state Labor government willing to negotiate multi-employer agreements that provide comparable terms and conditions across both the public and private sectors. Thus, the political environment of the public sector has shaped the success of SSU I. In addition, a labour supply shortage in the industry has spurred cooperative employer-union relationships, leading to more favourable outcomes. This may reflect different management approaches in the public and private sectors toward unions. This seems to be reflected in the unions' experiences, with SSU II reporting a much more aggressive and hostile approach to union involvement in the private sector. Cooperative relationships have

also been encouraged in the public sector for SSU I due to the mobile nature of the workforce and consistency in the transferability of skills. This illustrates that both the cultural and economic environments of the public sector have shaped the experiences of SSU I, particularly in relation to levels of government funding and the nature of union employer relationships.

Secondly, a defining characteristic of the membership of SSU I is a strong sense of belonging to the profession. This culture and sense of ownership has resulted in industry based rather than enterprise based union infrastructure. As a result, the union has not suffered greatly from the explicit focus of the WRA on the enterprise level, since union activity is still centered on the industry level. This has given the union greater campaigning capacity and thus a stronger voice in industrial action.

Thirdly, the strategic location of the union in the industry has enhanced its bargaining power and the power of the rank-and-file. This is particularly important in relation to industrial action. The union plays a central role in the community via the provision of essential services, and, influences public policy within the industry. This has given the union a significant amount of leverage in industrial disputes. Indeed, a social unionism strategy involving the building of a 'sense of community' between the union, the members and the public, has been a strategy that has proved successful during industrial action.

Activism

The lack of rank-and-file activism and militancy of the rank-and-file members in SSU II appears to be an important factor explaining its lack of success in comparison to SSU I. Indeed, a lack of activism combined with hostile and aggressive employer approaches has constrained the ability of SSU II to take effective industrial action in the private sector. In contrast, cooperative union-employer relationships and membership strength and activism have enhanced the ability of SSU I to take action in the public sector. In this sense, the WRA has not been an impediment to SSU I. It has been able to use the legislation to its advantage to organise effectively. The level of activism and militancy evident in SSU I is a result of both history and strategy: an industry with a culture of strong, active trade unionism and a commitment to wage parity in the industry, and the use of techniques associated with the organising model of unionism (Griffin & Moors 2002) to build grass-roots collectivism and mobilisation.

CONCLUSION

This paper has undertaken a comparative case study of two service sector unions under the WRA, tracing their experiences in relation to industrial action. The WRA, upon its introduction in 1996, made significant changes to the legal regulation of unions in the federal system. One of the key areas pertaining to unions that has witnessed change is industrial action. The legislation imposes greater restrictions on the ability of unions to take industrial action, and simultaneously, increases the power of employers to oppose and resist industrial action. The case study reveals that the statutory provisions have had both positive and negative effects, impacting on the effectiveness of both service sector unions. However, a comparison of the unions' experiences reveals that SSU I has continued to achieve success, whereas SSU II has been largely unsuccessful. The reasons for these differences fall into two areas: industry characteristics and activism. Upon examining these two factors, it is apparent that the political, economic and cultural environments of the public sector have shaped these two factors, and, that the success of SSU I is derived largely from its strategic location in the public sector. Indeed, the union draws its heartland membership from this sector, and these members have a tradition of strong rank-and-file activism and collective mobilisation. In addition, the role of the union's members in providing essential services to the community has been a critical factor underpinning its success and has translated into 'winning' in the public sector. The gains made by the union in the public sector have been central in 'setting the trend', and thus leading to a flow-on effect in the private sector. This has enhanced the bargaining power and success of SSU I under the WRA in the public sector, despite the 'anti-union' provisions.

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