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**THE STRATEGIC USE OF INDIVIDUAL
EMPLOYMENT AGREEMENTS:
THREE CASE STUDIES**

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THE STRATEGIC USE OF INDIVIDUAL EMPLOYMENT AGREEMENTS: THREE CASE STUDIES

Joel Fetter*

INTRODUCTION

There has been considerable debate over the motivation behind the use of individual contracts by employers. Some have claimed that the overwhelming agenda is to facilitate cultural change at work through the introduction of high-trust or high-performance workplaces. However, studies carried out on the content of Australian Workplace Agreements (AWAs) show that there is no significant connection between individualisation and culture change,¹ while other empirical studies suggest that individualising employers are not interested in cultural change but are pursuing some other strategy.² One such strategy is the elimination of trade union opposition at work as a means of cutting costs.³ Another is the offer of individual contracts as a means of securing a weakened union or a more favourable enterprise agreement for the employer.⁴

Over the past decade there have been three major disputes featuring large employers engaged in long-term collectively organised industries. The CRA Weipa dispute in 1995, and an earlier dispute at the same company's Bell Bay site, involved the mass roll-out of non-statutory contracts of employment after enterprise bargaining had stalled. The BHP dispute in late 1999 and early 2000 involved the blanket offer of Western Australian statutory contracts and a refusal by the company to negotiate a collective agreement. The Commonwealth Bank dispute in 2000/2001 involved the offer of AWAs to over 20,000 employees encapsulating the company's preferred bargaining position in negotiations for a new certified agreement. Analysis of these three disputes may allow us to discern the motivation behind the individualisation process, at least for the large employers involved.

* Law Student, The University of Melbourne. I would like to thank Professor Richard Mitchell for supervising this project.

¹ Amanda Roan, Tom Bramble and Geoffrey Lafferty, 'Australian Workplace Agreements in Practice: The 'Hard' and 'Soft' Dimensions' (2001) 43 *Journal of Industrial Relations* 387; Richard Mitchell and Joel Fetter, *Human Resource Management and the Individualisation of Australian Industrial Relations* (2002) Centre for Employment and Labour Relations Law, The University of Melbourne, Working Paper No 25.

² See Stephen Deery and Janet Walsh, 'The Character of Individualised Employment Arrangements in Australia: A Model of 'Hard' HRM' in Stephen Deery and Richard Mitchell, *Employment Relations: Individualisation and Union Exclusion* (1999) Sydney: Federation Press, ch 6, and Simon Deakin, 'Organisational Change, Labour Flexibility and the Contract of Employment in Great Britain' in Deery and Mitchell, ch 7. Cf Mark Wooden, *The Transformation of Australian Industrial Relations* (2000) Sydney: Federation Press; Paul Gollan, *Trends In Processes in the Making of Australian Workplace Agreements* (2000) Office of the Employment Advocate <www.oea.gov.au/AWA/AWApollan_survey.htm>.

³ William Brown, 'Individualisation and Union Recognition in Britain in the 1990s' in Deery and Mitchell, above n 2, ch 8.

⁴ Bill Ford, 'Changing the Dynamics of Bargaining: Individualisation and Employment Agreements in Western Australia' in Deery and Mitchell, above n 2, ch 5.

In the published literature,⁵ this kind of investigation has been undertaken in respect of only one of the major disputes: the CRA Weipa case.⁶ However, the three studies published on this dispute vary in their interpretation of CRA's primary motivation in rejecting collective industrial relations in favour of individualised agreements. McDonald and Timo have argued that CRA had the narrow objective of removing 'unwanted third parties' from the employment relationship, in other words a desire to contract directly with its employees without the interference of trade unions or industrial tribunals.⁷ In contrast, Mackinnon has argued that a 'strategic choice' was taken to reintroduce managerial prerogative so as to maximise the exploitation of labour.⁸ A third approach was taken by Moir, who argued that CRA's management was trying to effect a cultural shift towards a neoliberal human resource management ideology of bilateralism, in which it had an almost obsessive 'teleological belief'.⁹ In light of these varying outlooks on the process of individualisation in hitherto collectively regulated industries, it was thought worthwhile revisiting the three disputes and thoroughly documenting them with a view to discovering what light they shed on the objectives of the individualisation process.

In the case of each dispute, this study examines the economic context of the employer company's operations and the pre-existing industrial relations background. It then details the process of management change and/or internal review which precipitated the decision to introduce individual contracts. The focus then shifts to the breakdown of collective bargaining negotiations and the roll-out of individual agreements. The

⁵ Two case studies, which remain unpublished, conclude that deunionisation was the motive behind the three disputes examined in this working paper: Peter Waring, 'Individualism and Collectivism in Contemporary Employment Relations: The Australian Black Coal Mining Industry Experience', PhD Thesis, University of Newcastle; See further Peter Waring and Mark Bray, 'Human Resource Management and the Individualisation of the Employment Relationship in Australia' in R Wiesner (ed), *Human Resource Management: Future Challenges* (forthcoming) John Wiley & Sons. For a summary of these case studies' findings, see Kristin van Barneveld and Peter Waring, 'AWAs: A Review of the Literature and Debates' (2002) 28 *Australian Bulletin of Labour* 104, 114.

⁶ There have been several case notes and minor pieces published on the three disputes, mostly examining their implications in the context of freedom of association laws. On the BHP dispute, see Sarah Richardson, 'Freedom of Association and the Meaning of Membership: An Analysis of the BHP Cases' (2000) 22 *Sydney Law Review* 435; David Noakes and Andrew Cardell-Ree, 'Individual Contracts and the Freedom to Associate' (2001) 14 *Australian Journal of Labour Law* 89; Maria Saraceni, 'Freedom of Association: Extending the Limits? *Australian Workers' Union & ors v BHP Iron Ore Pty Ltd*' [2000] *Australian Mining and Petroleum Law Association Yearbook*, 579; Steven Amendola, 'Freedom of Choice or Freedom from Choice? Collective Bargaining and Individual Workplace Agreements in the Pilbara' (2000) 19 *Australian Mining and Petroleum Law Journal* 25; Joellen Riley, 'Individual Contracting and Collective Bargaining in the Balance' (2000) 13 *Australian Journal of Labour Law* 92. On the CRA dispute, see Louise-Willans Floyd, 'Weipa and the Wharves: Australian Strike Law and Its Effect on Trade Union Power' (1999) 18 *University of Tasmania Review* 65. On the Commonwealth Bank dispute, see Leigh Johns, 'Offering Australian Workplace Agreements: A Breach of the Freedom of Association Protections' (2001) 6(10) *Employment Law Bulletin* 81.

⁷ Jim McDonald and Nils Timo, 'Killing the Union?: Individualised Contracts and CRA' in Gerard Griffin (ed), *Contemporary Research on Unions: Theory, Membership, Organisation and Non-Standard Employment* (1996) National Key Centre in Industrial Relations, Monash University, Monograph No 8, 422, 454.

⁸ Bruce Hearn Mackinnon, 'The Struggle for Managerial Prerogative: Ramifications of the CRA Weipa Dispute' in R Fells and T Todd (eds), *Current Research in Industrial Relations* (1996) Association of Industrial Relations Academics of Australia and New Zealand, Proceedings of the 10th AIRAANZ Conference held at the University of Western Australia, 287-8.

⁹ Matt Moir, 'Individual and Collective Bargaining in Australian Labour Law: The CRA Weipa Case' (1996) 18 *Sydney Law Review* 350, 358.

content of those agreements is presented, along with the reaction of the relevant unions. The study then examines the litigation generated, including the submissions of the parties. However, although the substance of the judicial decisions are noted, the actual legal outcomes of the disputes is beyond the purpose of this paper and thus no attempt is made to analyse the legal content of the judgments. Finally, the study attempts to assess the industrial outcomes of the disputes for employers, employees and unions.

The case studies were compiled from various sources of information on the public record, including the text of the relevant legal judgments and the published material, noted above. In the case of the BHP and Commonwealth Bank disputes, the court books were manually inspected at the offices of the plaintiffs' solicitors, giving access to the parties' submissions and original documentation.

CASE STUDY 1: THE CRA WEIPA DISPUTE

Economic and Industrial Relations Context

Comalco Aluminium Limited ('Comalco') is the operator of a large mine at Weipa, in Queensland, engaged in the extraction of bauxite and kaolin for use in aluminium production. Comalco also runs aluminium smelters in Bell Bay in Tasmania and at Boyne Island at Gladstone in Queensland.

During the period in question Comalco was a subsidiary of CRA, a corporation which was 48.7% owned by the UK-based multinational resources firm RTZ (now Rio Tinto). CRA owned and operated various mining businesses around Australia, including the Hammersley iron ore mine, the Argyle diamond mine, the Peak gold mine and the Vickery and Maules Creek coal mines. CRA was also a large global player with mining interests scattered around the world.

CRA enjoyed global sales of five and a half billion dollars in 1994 with assets in excess of five billion dollars.¹⁰ Earnings were strong during the period 1992-1995. During the same period CRA enjoyed a steady increase in efficiency (measured as a ratio of assets used) and employee productivity, most productivity increases attributable to the shedding of surplus labour. However, the rising Australian dollar was placing pressure on profits.

The CRA group employed tens of thousands of workers in Australia, including approximately 450 employees at Comalco Weipa. These employees worked in either the kaolin or bauxite extraction divisions. From 1982 the *Aluminium Industry (Comalco Aluminium Limited - Weipa) Award 1982* ('the Weipa Award')¹¹ governed the terms and conditions of employment of all eligible Weipa employees. The award was a 'paid rates award' thus specifying actual, not minimum, rates of pay.

Traditionally, most of the blue-collar workforce at Weipa was represented by the Australian Workers' Union (AWU). Other unions with coverage at the Weipa site include the Australian Manufacturing Workers' Union (AMWU) and the

¹⁰ McDonald and Timo, above n 7, 428.

¹¹ Print F0318; AW765614.

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) ('the unions').

Prior to 1991, the FEDFA (now the CFMEU) also had a strong presence at Comalco. However, the FEDFA had been engaged in a protracted demarcation dispute with the AWU. The tension between the two unions arose due to their differing industrial relations strategies; the relatively militant FEDFA had attempted to increase its leverage through the institution of industrial action and the use of enterprise bargaining, whereas the AWU preferred to act via alterations to the existing paid rates award. Comalco successfully applied to the Australian Industrial Relations Commission (AIRC) in 1991, pursuant to s 118 of the *Industrial Relations Act 1988* (Cth), to have the FEDFA excluded from the site.¹²

The CRA Restructure

In response to increasing global competition, during the early 1990s CRA head John Ralph presided over a major restructure of the corporation's business, with a focus on cost reductions and improvements to efficiency.¹³ Management focussed on achieving increased productivity and cost cutting, especially in its iron and coal mining operations.

This restructure was associated with an anti-union managerial strategy. Hostility to the role of unions at CRA dated back to 1978, when Chief Executive Sir Roderick Carnegie embraced the management theories of Dr Elliot Jacques, with their strong focus on individual employee choice and managerial prerogative.¹⁴ Anti-union sentiment was further reinforced by the engagement in 1985 of Dr Ian Macdonald as human resources consultant. Dr Macdonald was a consultant psychologist and partner in a United Kingdom based consulting firm, Macdonald Associates Consultancy. He advocated a 'single status workforce', united by the 'six core values: courage, dignity, honesty, trust, fairness and love'. This arrangement he viewed as 'inherently more cost-effective' than tripartite arrangements involving unions. Dr Macdonald gave advice to the CRA corporate human resource group on system changes at its operations in New Zealand, the Boyne and Bell Bay Smelters, Hammersley Iron, as well as Comalco.

Between 1991 and 1995 individual contracts were introduced at a number of CRA's Australian operations. The strategy was first implemented at Comalco's Tiwai Point smelter in New Zealand. All employees at that site were offered employment under individual 'staff' contracts. These contracts were made under the recently introduced *Employment Contracts Act 1991* (NZ). All of the approximately 2,000 employees (except for one) accepted the offer of an individual contract and most subsequently resigned from their union.¹⁵ By September 1995, Comalco reported a 30% increase in efficiency,¹⁶ including a 50% reduction in the time taken to reconstruct an

¹² *Re Queensland Alumina Ltd* (1991) 42 IR 304.

¹³ Mackinnon, above n 8. See also Mackinnon, 'The Weipa Dispute: Ramifications for the Spread of Australian Workplace Agreements' in Andrew Frazer, Ron McCallum and Paul Ronfeldt (eds), *Individual Contracts and Workplace Relations* (1997) Australian Centre for Industrial Relations Research and Training, The University of Sydney, Working Paper 50, 55.

¹⁴ Mackinnon, above n 8, 289.

¹⁵ Moir, above n 9, 367.

¹⁶ Mackinnon, above n 8.

electrochemical cell (a key work practice), and a consequent sharp decrease in the costs of production at the Tiwai Point Smelter. At the same time, the number of employees at the smelter was reduced from about 1550 to approximately 1300.

Following the success of this experiment, individual contracts were introduced during early 1993 at CRA's Australian subsidiaries Hammersley Iron, Robe River and Peak Gold Mines, as well as at Comalco's operations at Bell Bay. At the Bell Bay site, this occurred shortly after a spate of union-led industrial action and the breakdown of negotiations for a collective agreement.

Pursuant to the newly introduced *Workplace Relations Act 1993* (WA), Western Australian Workplace Agreements ('WAWAs') were the individualisation vehicle chosen for the Hammersley and Robe sites, while common law agreements were used at Bell Bay. These common law contracts provided that 'the terms and conditions of an appointment are provided in accordance with Company policy which may be varied from time to time'. The duties to be performed were those which managers had 'discussed' with employees, with management reserving to itself the power to transfer the employee to another position, work pattern or location. Employees were to work a minimum of 40 hours per week with the possibility of unpaid overtime being required. These contracts involved an effective 12% pay rise, with further increases dependent upon economic conditions and individual work performance. By May 1993, 390 of Bell Bay's 405 blue-collar workers had accepted staff contracts.¹⁷ At Hammersley, 95% of employees adopted individual contracts. Most of these employees subsequently resigned from their union.

The introduction of individual contracts at the Bell Bay site gave rise to litigation. The unions considered the offer of individual contracts to be a breach of the existing paid rates award. Accordingly, they sought the intervention of the AIRC, the Full Bench of which handed down a decision on 9 December 1994.¹⁸ The Full Bench affirmed that the Bell Bay Award was a paid rates award and commented that the attempt to remove unions from the site through the introduction of individual contracts was inconsistent with the system of collective regulation provided for by the Act. This decision was a powerful affirmation of the principles underlying the system.

In order to circumvent the Commission's decision, in February 1995 Comalco proposed a non-union Enterprise Flexibility Agreement to more than 600 employees. This agreement sought to replace award conditions with conditions provided through individual contracts, which in turn incorporated company policy. The Commission refused to certify the agreement.

Undaunted, Comalco appealed the Commission's December 1994 decision to the High Court, which remitted the case to the Industrial Relations Court. That Court decided, on 27 September 1995, to quash the Full Bench's decision on the grounds that the Bell Bay award was a minimum rates award and *not* a paid rates award.¹⁹ The Court commented that 'the mere fact that an award was created, and is perpetuated, as

¹⁷ Ibid.

¹⁸ *AMFEU v Alcoa of Australia Ltd* (1994) (Unreported, 8 December 1994, Print L7449).

¹⁹ *Comalco Aluminium (Bell Bay) Ltd v O'Connor [No 2]* (1995) 131 ALR 657.

a paid rates award does not prohibit an employer providing additional entitlements.’ The unions lodged an unsuccessful High Court appeal against this ruling.²⁰

For Comalco, the result of the various legal machinations was to legitimise its use of individual contracts, allowing it to chase the efficiency gains made in similar circumstances at Tiwai Point. The evidence suggests that similar gains were achieved at Bell Bay within a few months. For the unions, the company’s individualisation strategy decimated its presence and power at the Bell Bay site. Moreover, the weakening of the capacity of the union to oppose individualisation allowed Comalco to conclude an enterprise flexibility agreement with the union which effectively replaced award conditions with the terms of company’s policy manual and which allowed employees to opt-out of award based provisions and adopt staff contracts. Despite several misgivings, this agreement was ratified by the AIRC in April 1996. Finally, for employees, the evidence suggests that the benefits extended under the individual contracts were gradually reduced so that, within a few years of their introduction, new employees were generally being paid less than they would have received under award rates. Because union density was so low, unions were unable to collectively organise to remedy this position.

The Introduction of Individual Contracts at Weipa

In May 1992, Comalco’s Weipa site management, including Mr Thorne (General Manager – Operations), visited the company’s New Zealand smelter at Tiwai Point. Soon after, Comalco resolved to introduce performance-based remuneration at its Weipa site. It appears to be the case that initially Comalco was prepared to seek desired reforms through the existing collective bargaining processes.

In August 1992, Comalco presented a draft enterprise agreement, covering the company’s kaolin operations, to the unions. The agreement contained two main clauses. The first fixed working hours at forty per week. The second provided for an annualised salary which varied between maximum and minimum limits depending on individual performance. All grievances under the agreement were to be dealt with by the AIRC, with union representation. In April 1993, a meeting of Kaolin employees was held. The employees voted to accept the agreement, subject to the approval of the unions. Despite the endorsement of the Kaolin employees, the unions refused to assent to the agreement.²¹

Faced with this impasse, in October 1993 Comalco offered individual contracts to the Kaolin employees. At first, the contracts were structured to reflect what had previously been offered under the proposed enterprise agreement and did not provide for ‘full staff conditions’. Take-up was relatively slow (only half of the eligible employees). However, this was remedied by Comalco in early December 1993, when it made ‘full salaried staff roles available to all Kaolin employees who might wish to accept them’. The same offer was made to Bauxite employees in January/February 1994. By September 1995 all but one Kaolin employee, and all except 76 Bauxite employees, had accepted staff contracts.

²⁰ *Re Comalco Aluminium (Bell Bay) Ltd; Ex parte Australian Workers Union* (1995) 63 IR 445.

²¹ Moir, above n 9, 351.

The standard ‘staff’ contracts offered in these instances essentially traded greater temporal flexibility for financial incentives. Staff were required to work ‘such reasonable time as is necessary’ to perform their duties, with a ‘normal’ working week of 40 hours indicated. In exchange, the remuneration was much more generous than the Award: the base salary was set at a significantly higher rate, an additional 15% of salary was paid as superannuation (compared to 6%), and there were perks including free personal insurance, medical assistance, and travel. The remuneration was stated to be ‘for the performance of [the worker’s] role and not hours spent at work.’ Taken as a whole, it was estimated that there was a financial incentive of something in the order of \$15,000 (or 30% of salary) for an average worker to move from the Award to a staff contract.²²

However, once on staff contracts employees were subject to greater managerial discretion over their working conditions, with limited ability by unions to influence these conditions. There was an annual performance review, with salary increases at the discretion of the Company, ‘considering personal effectiveness as well as economic factors’. Employees were prohibited from engaging in conduct which was judged by Comalco as ‘damaging to the interests of the Company’. All disputes were to be dealt with under Comalco’s internal ‘fair treatment process’, without the involvement of third parties including unions or the AIRC.

The Company and the Unions Determine Their Strategies

Although the company and the unions continued to negotiate towards an enterprise agreement during January 1994, they remained in intractable dispute over the terms of such an agreement and the issue of staff contracts.

The Weipa unions were vehemently opposed to the introduction of the individual contracts and in November 1993, union members at Weipa conducted a six day protest strike over this issue. Moreover, the unions were determined to have the financial benefits enjoyed by staff on individual contracts granted to Award employees through a new ‘paid rates Award’. Accordingly, on 30 May 1994, the unions made applications to the AIRC for interim paid rates awards at Weipa to extend the benefits available under the individual contracts to Award employees.

Comalco was also active during 1994. In May, an internal document, ‘Staff Contracts of Employment – A Discussion Paper’, set out Comalco’s opposition to the role of collective agreements and awards in placing power in the hands of unions. This was felt to diminish employees’ loyalty to the company, posing a threat to Comalco’s workplace culture.²³ The unions were also criticised for opposing proposals to introduce workplace flexibility and to reduce job demarcations.²⁴

Accordingly, on 3 May 1994, Mr Thorne advised that new employees would, in future, only be offered salaried staff arrangements. This was a significant announcement in light of the high turnover of labour at Weipa²⁵, which threatened to

²² Mackinnon, above n 8, 289.

²³ Ibid 449–50.

²⁴ Weipa AIRC decision.

²⁵ McDonald and Timo, above n 7, 442.

replace Award employees with new employees on staff contracts within a short space of time.

In the wake of the Bell Bay litigation, Comalco was concerned that the Weipa paid rates awards would prevent its use of individual contracts at that site. Accordingly the company also applied to the AIRC to have the Weipa award replaced with two member-only minimum rates awards; in other words, they stipulated minimum terms and conditions and applied only in relation to employees who were members of one of the unions. In what proved to be a tactical error, the Weipa unions consented to the application and on 4 August 1994 Commissioner Hoffman decided²⁶ to make the *Kaolin Operations (Comalco Aluminium Limited - Weipa) Award 1994*²⁷ and the *Bauxite Operations (Comalco Aluminium Limited - Weipa) Award 1994*.²⁸ Once the unions realised that the deletion of the paid rates award would allow Comalco to introduce individual agreements providing for above-award conditions, they sought leave to appeal the decision. This application was refused by the Full Bench on 14 August 1995.²⁹

The unions were more hopeful that their application for a paid rates award, launched in May, would succeed. On 25 September 1995, the AIRC commenced hearing the matter. Comalco lodged a jurisdictional objection against the application and the proceedings were adjourned pending the parties' submissions on the jurisdictional matter.

The Industrial Action

Frustrated at the setbacks they were facing in the Commission, and wishing to place pressure on Comalco, the unions decided to resort to industrial action. On 13 October 1995 the remaining Bauxite and Kaolin Award employees at Weipa (approximately 75) formed a 'floating picket line' using small boats. This prevented the removal of bauxite from the port at Weipa. On 27 October 1995 the CFMEU filed a dispute notification with the AIRC. The Company filed its own notification on 30 October 1995. The ACTU, led by President-elect Jennie George and ACTU Secretary Bill Kelty, endorsed a national industrial campaign to put pressure on CRA and Comalco. On 7 November 1995, a 48 hour strike was held at CRA mines around the country.

On 10 November 1995, after several weeks of industrial action, Comalco served writs on 49 workers for breach of contract, seeking unspecified damages. The CFMEU was also sued for inducing a breach of contract. On 15 November 1995 the Full Bench handed down its decision on the jurisdictional issue, in which it held that the AIRC did not have jurisdiction to grant the unions' interim paid rates award.³⁰

On 16 November 1995 the Prime Minister, Paul Keating, personally intervened in the dispute and attempted to mediate an agreement between the parties. As a gesture of goodwill, Comalco agreed to suspend its Supreme Court litigation. However,

²⁶ *Comalco Aluminium Ltd v AWU-FIME Amalgamated Union* (1994) (Unreported, 4 August 1994, Print L4624).

²⁷ Print L4631 [K0057].

²⁸ Print L4630 [B0372].

²⁹ *CEPU v Comalco Aluminium Ltd* (1995) (Unreported, 14 August 1995, Print M4313).

³⁰ *AMWU v Alcoa of Australia Ltd* (1995) (Unreported, 15 November 1995, Print M7032).

negotiations soon stalled. A national campaign of industrial action against the company was organised. On 17 November a five-day sympathy strike by 20,000 MUA members commenced on the waterfront. Direct action against CRA and Comalco by power, oil, chemical, manufacturing and transport unions was planned to begin 20 November, and a seven day strike by 25,000 coalminers was supposed to commence on 21 November 1995.

The threat of imminent national strike action compelled the President of the AIRC to call a compulsory conference of the parties and to refer the matter to an emergency session of the Full Bench for Saturday 18 November, in order to consider the unions' interim application (now amended to seek a *minium rates* award) and the Company's jurisdictional objection.

On 21 November 1995, following submissions by the parties and interveners, the AIRC issued a statement containing a direction for the parties to confer, having regard to five principles which stressed the primacy of collective bargaining, conducted by trade unions, in the Australian industrial relations system, making reference to the Bell Bay decision.³¹ This statement was 'widely interpreted as a victory for the unions.'³²

On the same day the parties reported to the Commission that they had reached an agreement in accordance with the Statement of Principles. The AIRC immediately made a decision by consent, in accordance with the undertakings of the parties, providing for the cessation of industrial action and Comalco's court actions and an immediate 8% pay increase for Weipa's Award employees, with further increases to be considered by the Commission in hearings scheduled for the following day.

The Legal Decision

With the industrial situation under control, the Full Bench of the AIRC (O'Connor P, Macbean SDP, Polites SDP, Harrison DP & Merriman C) proceeded to consider the substantive matter, namely the application by the unions for a paid rates award. The central argument of the unions was that Comalco had discriminated against Award employees by offering superior conditions to those engaged under individual staff contracts. They called for the Awards to be amended so all Award employees (whether or not a union member) would have access to the same pay and conditions as employees on individual contracts who were performing work of an equivalent value.

Comalco submitted that individual contracts were more productive than collective arrangements, as evidenced by productivity increases at CRA's New Zealand and Bell Bay operations. It denied that the differential in pay between the two systems had been based on 'union membership or collective representation'. Comalco also sought to vary the existing minimum rates Awards, but so as to introduce administrative flexibilities, such as the ability to offer annualised salaries, and to remove the requirement of union consent to changes to shift work. The employer bodies supported Comalco's approach, submitting that an employer was in the best position to determine the level of overaward payment on the basis of 'market and value

³¹ *AMWU v Alcoa of Australia Ltd [No 2]* (1995) (Unreported, 25 November 1995, Print M7148).

³² Mackinnon, above n 8, 292.

considerations'. They urged the AIRC to affirm that the 'system of awards the Commission presides over will not be used to interfere with performance based schemes'.

The Commonwealth submitted that the federal system of industrial relations enshrined a collective approach to the determination of wages and conditions of employment' with a 'central' role for the AIRC as a means of ensuring employees' interests were protected. Whilst the Act did not prohibit the negotiation of individual contracts, there should be a distinction drawn between the (legitimate) use of overaward payments for such purposes as attracting and retaining employees and the (illegitimate) use of individual contracts as a means of inducing employees to give up the protection of the IR system established under the Act (ie to evade the award system and the role of the Commission or to undermine the legitimate role of unions). The Commonwealth submitted that Comalco seemed to have adopted the latter approach. Hence it endorsed the unions' application for interim orders and called for the AIRC to order the parties to negotiate a final agreement, in good faith and in accordance with AIRC principles.

On 23 January 1996 the Full Bench handed down its final decision.³³ It accepted that the staff contracts were fair to employees and were designed to increase flexibility and productivity. However, the use of the contracts discriminated financially against Award employees who were performing the same work; this was inconsistent with the Act 'generally' with its emphasis on the primacy of collective bargaining involving trade unions. Accordingly, the Full Bench ordered Comalco to extend the terms and conditions applicable to staff contract employees to those Award employees who stated their preparedness to work in accordance with all the requirements of the staff contracts (eg by agreeing to adopt flexible work practices, to submit to performance reviews, etc). The Awards were also amended to extend their operation to cover all employees.

The Outcomes

Despite its importance generally, the Full Bench decision had little effect on the new industrial reality at the CRA Weipa site. For the four remaining Award employees who had not moved onto individual 'staff contracts',³⁴ the decision delivered them equality with those working under individual contracts. For the approximately 450 workers who had already accepted individual agreements, the judgment had no impact at all.

The Full Bench decision was celebrated as a 'great victory for the trade union movement.'³⁵ However, it was to be a hollow victory. CRA's industrial relations strategy was radically successful in achieving the deunionisation of its workforce. By September 1995, 11,000 of CRA's 16,000 workers had ceased their membership of a union.³⁶ At Comalco's operations in Weipa and Bell Bay, union membership dwindled to about 10% of the workforce.³⁷

³³ *AMWU v Alcoa of Australia* (1996) (Unreported, 23 January 1996, Print M8600).

³⁴ McDonald and Timo, 444.

³⁵ Moir, above n 9, 371.

³⁶ Mackinnon, above n 8, 288.

³⁷ *Ibid* 367.

The real winner of the dispute was CRA. The Full Bench decision legitimised its use of individual contracts and allowed the company to pursue its ultimate objective of reducing costs. Furthermore, the individualisation strategy resulted in the crippling of union power and the cessation of collective bargaining, another clear objective of management.

CASE STUDY 2: THE BHP DISPUTE

Economic and Industrial Relations Context

BHP Iron Ore Pty Ltd ('BHPIO') is a wholly owned subsidiary of the Broken Hill Proprietary Company Ltd ('BHP'). BHPIO carries on the business of iron ore production and processing in the Pilbara region of Western Australia. It is the world's second largest exporter of iron ore, and is Australia's largest producer. In the financial year ended May 1999, BHPIO shipped 61.7 million tonnes of ore, valued at about \$1.5 billion, to steelmakers in Asia, Australia and Europe. Roughly 49% of BHPIO shipments are destined for Japan and a further 30% to other Asian countries.

Iron ore is extracted from the BHPIO open pit mine at Mount Newman in Western Australia. From there the ore is transported by private railway to one of the BHPIO facilities at Nelson Point or Finucane Island, located at Port Hedland, for processing and ship loading. Ultimately the ore is exported by sea or shipped elsewhere in Australia. BHPIO has two large competitors in the Pilbara region: Hamersley Iron Pty Ltd ('Hamersley') and Robe River Iron Associates Pty Ltd ('Robe River'), both controlled by CRA (now Rio Tinto).

The world steel industry is highly competitive and faced considerable pressure during the late 1990s. Iron ore prices fell by 11% as a result of price negotiations with Japanese customers in 1998. In February 1999 as a result of a further round of negotiations, BHPIO accepted a 10.6% reduction in the price and a 15% decrease in the tonnage of iron ore produced from its Mount Newman mine. In order to remain successful BHPIO became focussed on improving efficiencies and reducing costs. During 1998/99 BHPIO introduced various measures designed to decrease costs and increase flexibility, including a 20% reduction in employee levels³⁸ and operational productivity improvements (17% increase in the tonnes of ore moved per man hour; reduction in the truck fleet by 50%; reduced waste/ore ratios; introduction of continuous stockpile management).

The Industrial Relations Context

³⁸ This was achieved by offering voluntary redundancy packages to employees. The generous packages were largely based on the number of years of service with the company, as required by the award. Approximately 500 employees (including staff employees) accepted redundancy packages, including a significant number of union convenors, shop stewards and other active union members. This was a consequence of the fact that active union members and union officials tended to have seven to ten years longer service with BHPIO than the workforce average; thus to these employees the redundancy packages were most attractive. The voluntary departure of many union officials and supporters severely impaired the unions' capacity to organise its members.

Traditionally there existed a distinction within the BHPIO workforce between ‘staff’ employees and ‘award’ employees. Staff employees were foremen, supervisors and managers whose terms and conditions of employment were governed mainly by individual common law contracts of employment. Award employees were those whose terms and conditions of employment were prescribed principally by an award and a series of collective agreements (see below). At November 1999 BHPIO employed approximately 1,057 award employees: 450 at Mount Newman, 131 at Finucane Island and 476 at Nelson Point.

Prior to November 1999 approximately 95% of BHPIO’s award employees were members of one of the five State based trade unions present on site and party to the various agreements with BHPIO (‘the state unions’). These unions were the Western Australian branches of the Australian Workers’ Union (AWU), Construction, Forestry, Mining, Energy, Timberyards, Sawmills and Woodworkers Union (CFMEU), Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (AFMEU), the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia (CEPU) and the Transport Workers’ Union of Australia (TWU).

The award covering BHPIO award employees was an award of the Western Australian Industrial Relations Commission, the *Iron Ore Production and Processing (Mt. Newman Mining Co Pty Limited) Award No. A 29 of 1984*,³⁹ made pursuant to the *Industrial Relations Act 1979* (WA).

Importantly, clause 5(14)(a) of the Award provided:

No contract of employment shall be made between the employer and any employee which contains any term or condition which is inconsistent with or contrary to the provisions of this award.

The award was supplemented by three collective agreements which essentially traded greater workforce productivity and flexibility for wage increases. The collective agreements were negotiated between BHPIO and a single bargaining unit (‘SBU’) representing all of the trade unions whose members included award employees at BHPIO sites. On each occasion the bargaining process included the state unions and their members taking industrial action in furtherance of their claims. The relevant collective agreements were the *BHP Iron Ore Enterprise Bargaining Agreement 1993* (‘the 1993 EBA’),⁴⁰ the *BHP Iron Ore Pty Ltd - BHP Iron (Goldsworthy) Pty Ltd Enterprise Bargaining Agreement 1995* (‘the 1995 EBA’)⁴¹ and the *BHP Iron Ore Enterprise Bargaining Agreement 1997* (‘the 1997 EBA’).⁴² Each collective agreement preserved the operation of the earlier one(s), except to the extent of any inconsistency. The EBAs operate for a period of two years; thus the last EBA, made in November 1997, was due to expire on 25 November 1999.

³⁹ Also referred to as the *Iron Ore Production and Processing (BHP Iron Ore Pty Ltd) Award No. A 29 of 1984*.

⁴⁰ Registered with the Western Australian Industrial Relations Commission in application no C314 of 1993 on 14 July 1993.

⁴¹ Registered with the Western Australian Industrial Relations Commission in application no C339 of 1995 on 24 November 1995.

⁴² Registered with the Western Australian Industrial Relations Commission in application no AG333 of 1997 on 13 January 1998.

In addition to the award and collective agreements there also existed an unregistered Industrial Relations Agreement ('IR Agreement'), negotiated between the BHPIO and the state unions. The IR Agreement dealt with industrial issues of mutual concern, such as processes for resolving industrial problems (clause 3.0) and the use of contract labour (clause 7.0). Three clauses of the Agreement are of special importance. Clause 5.0 of the agreement permitted union officials to take time off work (paid, if the leave was authorised by the company) to deal with their representative roles (in relation to grievances, disciplinary matters, termination of employment and meetings with the company officers) as well as to attend to internal union administrative affairs. Clause 6.0 of the agreement regulated the frequency and duration of meetings of employees for union business and obliged BHPIO to pay normal rostered wages to employees who attend union meetings in some cases. Clause 8.0 permitted either party to withdraw from the agreement with 30 days notice.

In early 1999, BHPIO advised the state unions of its desire to negotiate changes to the 1997 IR Agreement. BHPIO was especially interested in amending clauses 5.0 and 6.0 of the agreement in order to reduce amount of production time lost to union business. Negotiations commenced between the company and the state unions. BHPIO threatened that unless the IR Agreement was varied in the terms sought by the company it would withdraw from the Agreement entirely. On 19 April 1999 BHPIO made good on its threat and gave written notice of its withdrawal from the agreement. The state unions applied for a conciliation conference in the Western Australian Industrial Relations Commission. On 16 July 1999 the parties agreed to revise the IR Agreement; the unions granted significant concessions involving the reduction in the ability of union officials and union members to attend to union business during working time. This outcome contributed to the unions' suspicion that BHPIO's attitude was becoming increasingly antagonistic.

The Operations Review

In the middle of 1999, BHPIO entered into negotiations with Rio Tinto, the proprietor of the Hamersley mining operation, with a view to the merger of their operations in the Pilbara. The merger talks included BHPIO and Hamersley conducting 'due diligence' examinations of each other's operations. Although the merger proposal was abandoned in late July 1999, through the due diligence process BHPIO became intimately acquainted with the industrial relations practices of the Hamersley operation and became aware that the labour costs of its rival were significantly lower than its own. This cost saving, it was assumed, was due to Hamersley's use of individual agreements and the consequent absence of union activity at Hamersley sites.

In light of its insights into Hamersley's business, BHPIO sought to review all aspects of its own operations, with a view to improving its business and enhancing its value. The review was codenamed 'Project Phoenix'. BHPIO was concerned that the system of collective bargaining was hindering its competitiveness. Jeffrey Stockden, BHP Vice-President of Human Resources, stated in an affidavit:

The inability to implement change to address the Respondent's [BHP's] business needs was also highlighted as a result of the differences observed in

the due diligence process for the Respondent's potential merger with Hamersley. There was a substantial cost differential in Hamersley's favour identified which could not be explained other than by increased productivity due to workforce flexibility and the ability to implement change quickly.

In order for the Respondent to become more competitive, the Respondent's operations had to become more efficient. Based upon the ongoing implementation of work changes by the Respondent's competitors, the offering of workplace agreements pursuant to the State Workplace Agreements Act was seen as the most obvious way to do this.

The Negotiations for a New Collective Agreement

The BHPIO unions were initially unaware of the merger talks. The 1997 EBA was due to expire in November 1999 and the state unions expected the continuation of the usual two-year cycle of collective bargaining. The SBU prepared a list of claims, based on union members' expressions of dissatisfaction with working conditions voiced at various union meetings. The list of claims covered wages, allowances, qualifications for allowances, superannuation arrangements, and the classification structure for employees. In March 1999, several months prior to the merger talks and the BHPIO review, the state unions communicated to BHPIO their intent to bargain for a further collective agreement – the proposed '1999 EBA'.

At a meeting in April, BHPIO confirmed that there would be negotiations for a new EBA but that 'there would be no money in it' – ie that while productivity gains were expected there would be no wage increases in return. This comment perturbed the five state unions which feared that BHPIO might be altering its hitherto positive attitude towards collective bargaining and towards unions generally. These fears were worsened in April, during the dispute over BHPIO's attempt to revise the IR Agreement, and in July, when the state unions became aware of BHPIO's merger talks with CRA, a company perceived to be 'aggressively anti-union'. The unions' suspicions were also fuelled by the discovery, in June 1999, of the transcript of an address given in November 1998 by Paul Jeans, Manager - BHP Minerals, to a leadership development program conducted by BHPIO. The speaker concluded his address with this paragraph:

I would like to leave you all with a couple of questions which you may be able to answer. I do not have a view one way or another in respect to these questions. Firstly 'are we in a position to operate as a non union site?' Secondly 'If we could operate without unions how would this impact on the business?'⁴³

Thus by the middle of 1999 the state unions had begun to suspect that BHPIO was at least considering the use of (and was possibly planning to introduce) individual contracts. This possibility was discussed at a number of union meetings from July 1999; on each occasion union activists and union members expressed their opposition to individual contracts and reaffirmed their support of collective bargaining. This position was communicated by the SBU to BHPIO during July and October of 1999.

⁴³ *Australian Workers' Union v BHP Iron Ore Pty Ltd* (2000) 96 IR 422, [41].

Notwithstanding the spectre of the introduction of individual agreements, the SBU pressed ahead with its attempts to bring BHPIO to the bargaining table to negotiate the 1999 EBA. These attempts were ignored or evaded by the company. As late as 20 September 1999 the SBU wrote to BHPIO seeking a response to the timetable for negotiations proposed one month previously by the unions. The unions appear to have expected that the collective bargaining process for the 1999 EBA would be quick and trouble-free, confessing to BHPIO in the letter that their tardiness in joining the bargaining process ‘should not cause any great concern as EBA III is still in term for at least two months.’

BHP Determines Its Strategy

Behind the scenes, BHPIO management decided not to negotiate a fourth EBA with the unions but rather to place all of its employees on WAWAs.⁴⁴ The cost of this strategy was budgeted at \$10 million (assuming a 100% take-up rate), plus an additional \$10 million to cash out accrued sick leave entitlements.

Several reasons were later publicly expressed for this strategic decision. Firstly, BHPIO regarded collective bargaining as painfully slow and incapable of delivering the rapid implementation of flexibilities which its business demanded. As Bob Kirkby, President of BHP’s Steelmaking and Energy Materials Division said in a radio interview on 21 January 2000:

[individual agreements] give us flexibility, people can work more flexibly, we can make changes to the changing world which is changing very rapidly, we can respond to that a lot more quickly than... under the old union structure.

Jeffrey Stockden, BHP Vice-President of Human Resources, cited as an example the implementation of driver-only locomotives, which took seven years to negotiate at BHPIO, but was implemented overnight at Hamersley and Robe River upon the introduction of individual contracts. Of course flexibility was desired in order to achieve BHPIO’s ultimate objective, which was ‘improving its business and enhancing its value’, delivering ‘enhanced shareholder value’.⁴⁵

A second stated reason was BHPIO’s desire to match the practices of its competitors, all of whom already used individual agreements, with substantial cost savings ‘which could not be explained other than by increased productivity due to workforce flexibility and the ability to implement change quickly’. As Paul Anderson, CEO of BHP, said during an interview on the *7:30 Report*:

Well, at this point in time, we are the only major player in the iron ore business who does not have individual contracts. If you look across the industry, everyone else is working on an individual contract basis, they are able to ... implement change on a quicker basis ...

⁴⁴ WAWAs were chosen over Australian Workplace Agreements (‘AWAs’) because the former instruments were used by BHPIO’s competitors: Affidavit of Jeffrey Stockden.

⁴⁵ BHP Investor Relations Investment Briefing Paper (November 1999).

Note however that the BHP Investor Relations Briefing Paper of November 1999 admitted that labour costs were not the only explanation for BHPIO's high costs per tonne of ore produced: 'structural factors', such as mine distances from port and 'stripping ratios' contributed to BHPIO's woes.

Thirdly, it was BHPIO's perception that the unions were impeding the implementation of necessary or desired changes; even a perception that unions were encouraging uncompetitive practices. It was also apparent that BHPIO was concerned by inter-union disputation and competition between unions for membership at BHPIO sites, undermining management's confidence in the unions' ability to work together to implement change.⁴⁶

Lastly, there were some minor suggestions by BHPIO management that they would have preferred a more direct employer-employee relationship. BHPIO briefing notes dated 18 and 23 November 1999 state:

We are not prepared to go back to a system of regulated labour relations without options for a direct employer-employee approach.

...

We must continue to make dramatic improvements in productivity and this will not be possible without introduction of direct employer-employee arrangements.⁴⁷

Despite the unions' allegations that BHPIO's strategy was motivated by an intention to deunionise the workforce, company management were careful to avoid suggestions that the BHPIO dispute was an anti-union strategy. The most anti-union comment that was publicly made was as follows:

The company has no philosophical or ideological preference for dealing with unions. From BHP's point of view, this means we are very comfortable with different approaches to unions at different businesses – at some businesses, unions will work with us and support our objectives, at others they may choose otherwise and we will seek to work without them.⁴⁸

The Introduction of Individual Agreements

Between 9 and 11 November 1999 BHPIO forwarded to the homes of all award employees a package containing an offer of a staff contract. The package included a letter of offer, a short standard-form Western Australian Workplace Agreement ('WAWA'), and a lengthy standard-form 'Staff Contract of Employment' with detailed position description attached.

The WAWA was a short document of two and a half single pages containing only a few clauses. Three of those were compulsory procedural clauses, establishing a duration of five years for the agreement and prescribing a dispute resolution procedure. The fourth clause simply stated that the terms and conditions of employment 'are those terms set out in the Employee's contract of employment and the Staff Handbook as amended from time to time'. Thus the bulk of the employee's

⁴⁶ BHP Investor Relations Investment Briefing Paper (November 1999).

⁴⁷ *Australian Workers' Union v BHP Iron Ore Pty Ltd* (2000) 96 IR 422, [43].

⁴⁸ Steve Keogh (BHP Vice President – Human Resources), *Business Review Weekly*, 14 January 2000.

terms and conditions were in fact determined by the staff handbook and contract of employment, not by the WAWA.

The contract of employment was essentially a standard form document (aside from stating the employee's name and job title, length of shift roster and base salary). It allowed for significant functional flexibility. Employees were required to undertake duties as directed, commensurate with their skills, and were liable to be transferred to other positions, operations or locations provided reasonable notice of such transfer was given. There was also significant temporal flexibility. Although there was an 'expectation' of a 42 to 48 hour shift roster per week, the employee could be required to work overtime (without additional remuneration) 'to ensure that the full requirements of your role are met'. The employer could also unilaterally direct the employee to perform either shift work or day work.

In return for these flexibilities, an annualised base salary was paid which was approximately 7% greater than the base salary under the award. The employee was also eligible for an annual performance bonus designed to pay an average of 7.5% of base salary and an annual salary increase pursuant to a salary review. Both rewards were at the discretion of BHPIO line management and depended on both the employee's individual work performance and the company's business performance. Additional advantages to employees contained in the individual agreement included the ability to cash out accrued leave, greater employer contributions to superannuation, free flights to and from the work site, and a sign-on bonus. This bonus consisted of a back payment representing the difference between the award wages and the WAWA remuneration during the period 28 August to 11 November 1999 and was paid if the employee signed the WAWA before 3 December 1999. BHPIO stated that the purpose of this payment was to align the employees' annual salary review date to the pay period commencing closest to 1 September of each year.

The contract also provided that the requirement that employee must comply with the with Staff Handbook and other company policies. In its 32 pages, the Staff Handbook went into further detail regarding a comprehensive range of topics pertaining to the employment relationship. It stated the company's policies in relation to the employee's working conditions, remuneration, leave, transfers, training, termination and dispute resolution.

The evidence of one employee, Patrick Bashford, who attempted to negotiate changes to the contract was that BHPIO management informed him that the contract was 'not negotiable' and was offered on a take-it-or-leave-it basis.

It is important to note that a 'Comparative Analysis of Individual Staff Employment Contracts' undertaken by Dwyer Durack Barristers & Solicitors and commissioned by the solicitors for the unions revealed that 'the documents, and the conditions upon which the introduction of staff-based employment [at BHPIO] have been based, are much the same' as those utilised by Hamersley Iron and Robe River. This seems to confirm the unions' suspicions that BHPIO either collaborated with or borrowed from its rivals' industrial relations strategies.

Within days of making its offers of WAWAs, BHPIO began actively encouraging award employees to sign on. Information about the offer, urging employees to accept,

were e-mailed or mailed to all employees' homes. Management repeatedly met with employees in small groups or on an individual basis, discussed the offers and invited workers to accept them.

In response the unions provided award employees with two cards to use in response to unwanted approaches from management. The yellow card, headed 'First and Final WARNING', informed management to direct all discussions to the employee's union representatives and stated that further approaches could result in legal action. The red card, entitled 'Notice of intent to take ACTION' informed management that their 'harassment and intimidation' would be brought to the attention of the union with a request that they 'instigate all appropriate responses'. However, this tactic was not able to prevent the flow of award employees onto individual arrangements.

The Breakdown in Collective Negotiations

The immediate effect of the offer of WAWAs on 10 November 1999 was to prompt the unions to try to compel BHPIO to enter into a collective agreement by the only legitimate means available to it under State and federal legislation. Thus on 18 and 19 November 1999 the five national trade unions associated with the state unions present at BHPIO's operations served notices on BHPIO initiating a bargaining period pursuant to s 170MI of the *Workplace Relations Act 1996 (Cth)* ('WRA') in an attempt to create a certified agreement under Part VIB of that Act. This approach was endorsed by mass meetings of BHPIO award employees on 17 and 18 November.

After the bargaining periods were initiated, the applicant unions sought negotiations with BHPIO. On 23 November 1999 Mr Stockden wrote to the SBU:

As you know industrial relations in the Pilbara in general and BHP Iron Ore in relation to its mining operations in particular have always been regulated pursuant to the applicable Western Australian legislative framework. BHP Iron Ore is not prepared to negotiate an agreement with your organisation under the Federal industrial legislation.

Since Stockden's letter did not rule out a collective agreement formed under the equivalent Western Australian legislation, Gary Wood, the secretary of the Western Australian branch of the CFMEU and Chairperson of the SBU, asked Mr Stockden by letter dated 22 November 1999 whether BHPIO was prepared to enter negotiations with the SBU for a new collective agreement on any basis, to cover BHP employees in the Pilbara, and if so, on what basis. On 25 November Stockden responded that BHPIO was not prepared to enter into negotiations for a new collective agreement since that would be inconsistent with their decision to introduce WAWAs.

On the same day the 1997 EBA expired. By this stage Greg Combet, the Secretary-Elect of the Australian Council of Trade Unions ('ACTU') was desperately seeking to intervene on behalf of the union and its members. He guaranteed BHPIO that any collective agreement would 'deliver a competitive position for BHP Iron Ore' and urgently invited BHPIO to enter talks at a national level, involving the company, the ACTU and the unions. However, on 26 November Bob Kirkby, President of BHP Steel Making and Energy Materials Division, replied that there was 'little point in a meeting of the kind you have suggested'.

By 3 December 1999 the unions had had an opportunity to consider the contents of the staff contracts offered. Accordingly the SBU revised its list of claims to achieve some equivalence with the staff contracts. Accordingly, the 'BHPIO Single Bargaining Collective Claim' ('the Claim') sought a 15% wage increase over two years, additional employer superannuation contributions, free travel to site, and incentive-based bonuses. It also sought greater employee protection, such as severance pay and compulsory training.

While the union recognised the need for flexibility, such as redefining artificial job classifications, the Claim sought to preserve the operation of the existing instruments of collective regulation and prohibited BHPIO from seeking to engage employees 'properly covered by the award' on individual agreements. The Claim also sought to limit the use of contractors and to require BHPIO to notify the union and allow it to challenge any 'adverse unilateral variations to an employee's remuneration package' or of any change to company policy which impacts on the 'security, remuneration package or rights of the employees'.

At meetings on 6 and 7 December large numbers of BHPIO award employees endorsed the Claim and affirmed their opposition to individual contracts. However, BHPIO again flatly rejected the proposed collective agreement. Notwithstanding the rejection, Greg Combet again wrote to BHP on 6 December. Once more he guaranteed 'significant change' in BHPIO's workforce to ensure the competitiveness of the company's operations, and again suggested that the ACTU and the national unions take over the negotiating process (and indeed, 'take an active and continuing role in the implementation of any new agreement'). On 8 December BHP once again replied that there was little point in meeting as it would not negotiate a new collective agreement.

The Industrial Action and Litigation

When the ACTU offer was rejected, each of the five national unions involved took the last option open to it under the legislation to compel BHPIO to form a collective agreement: industrial action. On 7 and 8 December 1999, the national unions gave notice to BHPIO of their intention to take protected industrial action, pursuant to s 170MO of the *WRA* and on 13 December there was a 24 hour strike by union members at BHPIO's Port Hedland and Mt Newman sites. In addition, there was an overtime ban by locomotive drivers. Employees who had signed staff contracts did not participate in the industrial action.

A further notice of industrial action was given on 13 January 2000 notifying a four day strike to commence on 17 and 19 January at Mt Newman and Port Hedland respectively. On the evening of 17 January union members picketed the Mt Newman site and prevented the entry of 50 employees (who had recently accepted staff contracts) from entering the site by bus in order to work the night shift.

The picket line remained on the morning of 18 January. BHPIO did not attempt to bus staff employees into the site; each one of the workers had to find their own means of transportation to the site (and cross the picket line) at 6am. One hour's production was lost due to the late start. Picketers also refused access to staff employees arriving to work the night shift at 5:30pm. At that time police officers, at the request of the

company, forcibly removed picketers from the path of vehicles entering the site. Picket lines were also formed at Port Hedland on the morning of 19 January 2000, also blocking access to the 300 employees seeking to enter the site for work. Once again, after forcible police intervention, access was gained to the site.

On the same day (19 January 2000) BHPIO applied to the Supreme Court of Western Australia seeking an injunction to prevent the obstruction of access to its sites. An undertaking was given by the unions not to block access; this was reflected in the order of Heenan J in chambers. All industrial action ceased at 6am on 23 January 2000. The loss to BHPIO caused by the industrial action was estimated at approximately \$380,000.

At the height of the industrial dispute, on 21 January 2000, the five national unions (as well as five representative union members who were employees of BHPIO) made an urgent application to the Federal Court for an interlocutory injunction to restrain BHPIO from offering further WAWAs. The unions complained that the offer of WAWAs reduced the collective bargaining power of those employees who did not accept staff contracts, by diminishing their ability to engage in effective collective action. Furthermore, the offers were said to have caused employees to resign from the unions, since union representation was of diminished value to a staff member. The unions submitted that BHPIO senior management foresaw the effect of WAWAs on union membership and intended that result as the best way to avoid collective bargaining in future. The unions contended that this strategy contravened the freedom of association provisions of the Act,⁴⁹ which prohibited injuring employees in their employment, or altering their position to their prejudice, on the grounds that the employees were union members and/or inducing employees to cease their membership of a union. They also submitted that the offer of WAWA breached the award employees' contracts of employment as it breached cl (5)(14)(a) of the Award.

The interlocutory application was heard by Gray J on 27 January 2000. In his decision dated 31 January 2000,⁵⁰ his Honour found that there was an arguable case that s 298K(b) or (c) was breached by offering superior terms and conditions only to those employees prepared to accept WAWAs, and not to employees who desired to remain under the Award. In reaching this conclusion his Honour decided that an *actual* diminution in the terms and conditions of employment of award employees was not necessary to a finding that there was a breach of s 298K. His Honour also found that there was an arguable case that s 298M was breached by BHPIO's conduct which had the *effect* of inducing employees to stop being members of a union, even if this was not the subjective intention of the employer concerned. Finally, there was an arguable case that BHPIO breached the employees' contracts of employment; the terms of the Award had probably been expressly incorporated in the contract of employment via a letter of engagement.

Gray J strongly rejected BHPIO's argument that employees who took up WAWAs were still able to exercise their right of free association with unions. His Honour found that it was a reasonable inference that BHPIO desired to rid its workplaces of union membership and that it hoped that 'the irrelevance of union membership in its workplaces will lead to a decline in the willingness of its employees to continue to be

⁴⁹ Sections 298K, 298L, & 298M.

⁵⁰ *Australian Workers' Union v BHP Iron Ore Pty Ltd* (2000) 96 IR 422.

union members'. Gray J granted the interlocutory injunction and also dismissed BHPIO's motion to have the proceedings transferred from Melbourne to Perth.

BHPIO applied to the Full Federal Court for leave to appeal the decision of Gray J. The application was heard on 29 February and 14 March 2000 before Black CJ, Beaumont and Ryan JJ as a full appeal. On 7 April 2000 the Full Court granted leave to appeal and also granted the appeal.⁵¹ The Court held that there could not be a breach of s 298K since it was not the active, intentional, conduct of the employer which injured the award employees, but rather their fellow employees' choice to sign WAWAs. Neither could there be a breach of the employees' contracts of employment as the Award had not been intended to be incorporated into the contracts. However, under 298M a threat to induce an employee to stop being a member of an industrial association must be *intentional* – accordingly there was still an arguable case that BHPIO's conduct was motivated by a prohibited reason. The Full Court directed that the hearing for the unions' claim for final injunctive relief should be expedited.

Throughout the litigation process, the unions and BHPIO continued to negotiate with a view to resolving the industrial dispute over the WAWAs. The unions were still hopeful of negotiating a collective agreement with BHPIO and the ACTU shared this optimism. However, by late May 2000 talks had reached an impasse and the unions once again considered industrial action.

On 2 June 2000, the unions gave BHPIO a further notice of their intention to take industrial action in the form of a 24 hour stoppage of work to commence at 6.00 am on 7 June and continuing with rolling stoppages thereafter until 16 June 2000. In response BHPIO applied to the Federal Court, on 6 June 2000, for an order setting aside the injunction originally granted by Gray J. The application was heard by Ryan J on 6 June 2000,⁵² who adjourned the hearing of the motion until 8 June and issued an interim injunction restraining the unions from taking any industrial action until that time.

The unions considered that Ryan J's order seriously prejudiced their cause and sought to have the order stayed pending an appeal. When Ryan J refused to stay his own order, the unions applied orally to Goldberg J at 7:00pm on that evening for a stay of Ryan J's order. They argued that in the absence of a stay, any appeal would be rendered nugatory. Goldberg J refused to stay the order on the basis that he did not have the power to stay another judge's order and, even if he did, to do so would be improper.⁵³

When BHPIO's motion of 6 June was finally heard by Ryan J on 8 June 2000, BHPIO pressed for the continuation, until the hearing and determination of the unions' original January application, of a restraint against industrial action. Alternatively, it was submitted that the interlocutory injunction restraining BHPIO from offering or entering into a workplace agreement with any of its employees be set aside. Ryan J's final order was an injunction restraining all parties from taking any industrial action until the determination of the substantive matter by Kenny J.

⁵¹ *BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 102 FCR 97.

⁵² *Australian Workers' Union v BHP Iron-Ore Pty Ltd* [2000] FCA 770

⁵³ *Australian Workers' Union v BHP Iron-Ore Ltd* [2000] FCA 799.

The full hearing of the unions' application was heard before Kenny J during late 2000. On 10 January 2001 Kenny J handed down her judgment.⁵⁴ Her Honour accepted the evidence of BHP senior management about the motivations for introducing workplace agreements, namely their view that the unions were hindering the introduction of necessary workplace changes and that WAWAs were seen as the best way to improve flexibility and efficiency. Kenny J accepted management's evidence that although union exclusion from the workplace was an objective, the WAWAs were not intended to stop employees being union members. Hence she found no contravention of the *WRA* (nor any breach of contract). The unions' claim was dismissed.

The Outcomes

For many BHPIO employees, the introduction of individual contracts provided a financial boon, and by 24 January 2000 approximately 40-50% of award employees had signed such workplace agreements. These contracts proved to be financially appealing to older employees who had more years of service with BHPIO. In addition to the pay increase, the increased employer superannuation contributions were extremely attractive to employees nearing retirement age. This benefit alone was worth an extra \$10,000 per annum to many employees. Similarly, the pay-out of accrued sick leave was worth \$10,000, on average, to each employee, with some long-serving employees eligible for a cash payment of over \$65,000. A further incentive to older workers (who may have been more prone to ill health in a job requiring physically taxing work) was the sick leave provision of the staff contract, which allowed for salary continuance for up to 12 months in the case of illness. The fly-in, fly-out clause was also an inducement to older workers to sign as it allowed them more time with their families.

However, the introduction of staff contracts bitterly divided the workforce. On one hand, union members who remained award employees vilified those employees who signed staff contracts, crossed picket lines, or otherwise revealed themselves to be a 'scab'. On the other hand, there was significant hostility (and allegedly discrimination) from BHPIO management towards employees (and union members) who remained award employees.

For the unions, the financial attractiveness of the WAWAs substantially undermined their ability to operate at BHPIO. Many employees who signed staff contracts formally resigned from their union or else ceased to participate in union activities. This included many former union officials and activists, including 12 union delegates. The union reported that, as of January 2000, of the 340 union members at BHPIO who had signed staff contracts, 200 had resigned from their union. At least 75% of those workers cited 'signing a workplace agreement' and/or 'taking a staff position' as the reason for their resignation.

Furthermore, the union reported that even those employees who did not formally resign were practically lost to the union movement as they no longer participated in union affairs. As already noted, employees who signed staff contracts did not participate in the industrial action of January 2000. Furthermore, the number of union members attending mass meetings at BHPIO sites fell from 280 on 18-19 November

⁵⁴ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482.

1999, to 220 on 6-7 December, to 170 on 12-13 January 2000. The union reported that members who had signed staff contracts no longer sought the assistance of the union in the resolution of personal grievances or complaints. Several former award employees refused to speak to union delegates at all about their individual contracts.

With the loss of its critical mass of support, it was not possible for the unions to negotiate a new comprehensive EBA, as there were too few employees remaining under the award system to mount an effective collective campaign.

For BHPIO, the outcome of the dispute was an unambiguous victory. The decision of Kenny J vindicated its claim that the WAWAs were introduced as part of a bona fide attempt to introduce work flexibilities in the face of recalcitrant union opposition. The weakening of the union and the cessation of collective bargaining has no doubt allowed BHPIO to pursue flexibilities under the WAWAs with even greater vigour.

CASE STUDY 3: THE COMMONWEALTH BANK DISPUTE

Economic and Industrial Relations Context

The Commonwealth Bank of Australia ('CBA') is one of the four major banks operating in Australia. The bank was originally established as a statutory corporation. During the 1980s the Australian financial system was substantially deregulated, encouraging competition and entrepreneurial activity. During the 1990s the CBA was privatised and was fully listed on the Stock Exchange in 1996.

CBA employ approximately 28,000 employees, 21,000 of whom are members of the Finance Sector Union ('FSU'). The workforce is made up of mostly clerical employees, 70% of whom are female, earning an average base salary of \$27,000. A significant proportion of bank staff is employed on a part-time basis.

Since 1925, conditions of employment for the bank's employees had been the subject of informal agreements made directly between the bank and the predecessor of the FSU, the United Bank Officers' Association. The terms and conditions agreed upon were incorporated into the bank's policy manual and made binding on the bank's employees. This arrangement was stable and co-operative, largely due to the fact of government ownership of the bank in a heavily regulated financial sector.

In 1990 the employment conditions subsisting at the bank were incorporated into the Commonwealth Bank of Australia Officers Award 1990⁵⁵ pursuant to an application by the union. This award was simplified in 1999 and continues to apply.⁵⁶

It is important to note that the award had always contained a provision allowing the bank to engage certain employees on individual contracts. Clause 8 permitted the bank to an agreement with 'specialist' employees exempting them from the operation of the award in relation to 'varied working arrangements' and specified allowances. Employees were protected by the requirement that the agreement would not make them worse off and through the existence of a cooling-off period. Under the provision

⁵⁵ Print J6280[C0290].

⁵⁶ *Commonwealth Bank of Australia Employees Award 1999*, AW772290.

the bank was to provide statistics on the use of such agreements to the FSU on a quarterly basis. Between 1997 and 2000, approximately 5000 staff, mostly managers, accepted AWAs.

In 1992 collective bargaining had resulted in the formation of a consent award, known as the *Commonwealth Bank of Australia Enterprise Award 1992*. Further collective bargaining resulted in the certification of the *Commonwealth Bank of Australia Enterprise Bargaining Agreement 1993* ('1993 EBA')⁵⁷ and the *Commonwealth Bank of Australia Enterprise Bargaining Agreement 1996* ('1996 EBA').⁵⁸

Changes to Management Following Privatisation

With the full privatisation of the bank in 1996, great changes occurred in the management of the bank and of its labour force. The bank was compelled to seek internal change, with a view to increasing efficiencies and decreasing costs, in order to meet the competitive pressures of the deregulated banking sector and to improve the corporation's share price.

In 1996 Mr Les Cupper was appointed General Manager, Group Human Resources for CBA. Cupper was recruited from Rio Tinto where he was the director of Human Resources. At Rio Tinto he was responsible for the aggressive strategy of individualisation and union antagonisation which triggered industrial disputes involving Rio's subsidiary company, Comalco, at its Bell Bay and Weipa sites during 1994 and 1995. The strategy was also implemented without industrial disputation at Hamersley Iron (another Rio Tinto subsidiary) in 1993.

It is worth noting one further link between the CBA case and other industrial disputes involving the push towards individualisation in large companies, including the recent controversies at Telstra and BHP Iron Ore. Mr John Ralph, who was CBA's Chairman of the Board at the time of the dispute, was the Managing Director of Rio Tinto until 1994, when he was appointed as Deputy Chairman of the Rio Tinto Board. From 1997 he was also a member of the Board of BHP. Mr Greg Combet, Secretary of the ACTU, alleges that it was Mr Ralph who, in conjunction with Mr Cupper, introduced into the CBA in 1996 the same industrial relations strategy that had been employed, with some success, at Rio Tinto, and BHP.

This new philosophy caused a deterioration in the bank's relationship with the union. The bank came to view the union as resistant to the changes necessary to make CBA more competitive. The bank became less supportive of the union's role in the workplace, and especially of its role in collective bargaining. Traditionally the bank had consulted with the union on a regular basis concerning issues affecting the workforce. These discussions became less frequent after privatisation and ceased entirely in 1997. Furthermore, in late 1996 or early 1997 the bank discontinued its longstanding practice of deducting union dues automatically from employees' wages. The bank also attempted to restrict the union's right of access to the workplace. Union officials were no longer permitted to confer with members in the lunchroom and were

⁵⁷ *Commonwealth Bank of Australia Enterprise Bargaining Agreement 1993* (1993) Agreement No AG772391.

⁵⁸ *Commonwealth Bank of Australia Enterprise Bargaining Agreement 1996* (1996) Agreement No AG773240.

forbidden to use bank facilities, such as photocopiers and telephones, for union business.

The 1998 Enterprise Bargaining Agreement

In July 1997 the union and the bank began negotiating a new enterprise bargaining agreement: the '1998 EBA'. The bank did not wish the proposed agreement to cover certain employees and accordingly offered Australian Workplace Agreements ('AWAs') to those employees in accordance with the terms of the *Workplace Relations Act 1996* (Cth) ('WRA'). In July 1997, AWAs were offered to employees in the bank's Institutional Banking division; almost all of the employees in that division (several hundred) took up the offer. In September 1997, further AWAs were offered to certain managerial staff, in order to implement promised salary packaging benefits. In November 1997, AWAs were offered to all employees in the Property Division, with an overwhelming take-up rate. These AWAs were strongly performance-oriented.

Furthermore, the bank insisted that it would only enter into the proposed 1998 EBA if it contained a provision expressly permitting it to offer further AWAs to its employees. The bank reassured the union that it wished only to use AWAs selectively to target small groups of employees, especially those employed in non-traditional banking areas. The union acceded to the bank's demands. The clause, as eventually certified,⁵⁹ read as follows:

15. Australian Workplace Agreements

15.1 It is recognised that the Act, provides a number options for regulation of the employer, employee and union relationships.

15.2 During the operation of this Agreement any employee may enter into an Australian Workplace Agreement, which may exclude in part or in whole the operation of this Certified Agreement. In such a case, the Australian Workplace Agreement will prevail over the terms of this Agreement to the extent of any inconsistency.

15.3 The Bank will notify the FSU of its intention to offer Was [sic: 'AWAs' or 'Workplace Agreements'] to new groups and will provide to the FSU, on a half yearly basis, the number of Was [sic] by Business Unit.

15.4 For the term of this Agreement only, the Bank further commits to the following in respect to the offering of WAS [sic]:

- (a) Where, following certification, the Bank offers WAS [sic] to new employees entering the Bank, employees will be offered an AWA as well as the offer of Award/Agreement terms and conditions. This will apply across the Bank. This will exclude Institutional Banking, On Line Services, Property and M level employees.
- (b) Where, following certification WAS [sic] are offered to existing employees as a condition of transfer, promotion or appointment to a

⁵⁹ *Commonwealth Bank of Australia Direct Banking (DB) Enterprise Bargaining Agreement 1998* (1998) Agreement No AG774868 [Print PR904514].

position, employees will be offered Award/Agreement terms and conditions with the exception of Institutional Banking.

After certification of the 1998 EBA, the bank continued offering AWAs to select groups of employees. Based on the figures provided to it by the bank, the FSU was aware that by 30 September 1998 there were 1036 AWAs in operation (537 in Institutional Banking, 310 in Customer Service). Further AWAs were offered to Financial Planners and 'Para Planners' in November 1998, again with almost unanimous acceptance. By 31 March 1999 there were 1267 CBA AWAs in existence (610 in Institutional Banking, 401 in Customer Service). Further AWAs were offered to the bank's Investment Consultants and Investment Advice Managers in September 1999.

In late 1999 two events occurred which placed strain on the relationship between the bank and the union. First, after the financial year ending June 1999, the bank began assessing the performance of some non-retail staff on the basis of a new performance-pay system, the 'Performance Feedback and Review' (PFR) system, instead of the existing 'Performance Development Review' (PDR) system. The FSU was opposed to the introduction of the PFR system as it gave greater discretion to management over performance payments.

The second incident was prompted when a union official disclosed to the media that CBA staff participated in market research on the issue of bank fees. The bank alleged that the union had breached clause 43 of the 1998 EBA, preventing the disclosure of 'commercial in confidence' information to third parties, and consequently claimed to exercising its right under the same clause not to provide any further confidential information to the union, including AWA statistics (pursuant to clause 15.3 of the 1998 EBA). The bank continued to offer AWAs to select groups of staff, offering individual contracts to Branch Managers and employees in the Business Banking section in April 2000. By September 2000 it was estimated that approximately 4,000 bank employees were employed under AWAs.

These two incidents were probably fresh in the minds of management when, in late 1999, the bank undertook a review of its operations, entitled 'Sales and Service 2000+', in which it flirted with the idea of introducing AWAs across the bank's workforce. However, no action was taken on this proposal.

Negotiations for a 2000 Enterprise Bargaining Agreement

The nominal expiry date of the 1998 EBA was 2 April 2000. In late 1999 the FSU began formulating a claim for a new EBA to commence in 2000. After consulting with its members the union formulated a claim seeking redress for its members' concerns about understaffing, unfair work targets and poor salaries, relative to the staff at other banks. The FSU claim sought a wage increase of 13% over two years as well as better 'working life conditions', addressing issues such as staffing targets, overtime, sick leave, training, parental leave, democracy at work, the reintroduction of the PDR performance assessment system, the use of casual and contract labour, job education and part-time work. This claim was served on CBA on 24 December 1999.

Meetings between the bank and the FSU were held in January and February 2000; however the bank did not provide a formal response until 6 March 2000. The bank offered a 4% pay increase without addressing the working life issues raised by the union. It also demanded that the new EBA extend the application of the new PFR performance assessment system to all staff. The FSU was opposed to this as the PFR system greater discretion to management over performance payments.

Ominously, the bank refused the FSU's request that it undertake to negotiate 'in good faith', citing the vagueness of the term. It also expressly reserved its rights to pursue its own employment arrangements without union involvement:

Consistent with the Bank's rights under the Workplace Relations Act 1996 and the 1998 EBA, we will continue to offer AWAs to employees where this meets business needs. We further reserve our right to negotiate 170LK agreements [non-union certified agreements] under the Act.

On 5 April 2000, the FSU initiated a bargaining period under s 170MI of the Act, the 1998 EBA having expired three days earlier. After several further meetings in which the bank refused to deviate from its original position, on 18 May 2000 FSU members voted (96% of the 11,000 voters in favour) to commence industrial action if CBA did not agree to FSU terms by 25 May.

When negotiations stalled again on 29 May 2000, the FSU gave notice of its intention to take industrial action. On 9 June 2000 a 24 hour strike was held. Some 9,500 bank employees did not attend work, necessitating the closure of two-thirds of the bank's branches.

Negotiations recommenced after the strike and on 24 July 2000 the bank put a revised offer to the FSU, proposing a 6.5% pay increase over two years plus a more lucrative performance-pay scheme. The FSU consulted members during the following fortnight; union members overwhelmingly rejected the offer.

In the meantime, on 16 June 2000, the FSU applied to the Federal Court for an interpretation of the award and 1998 EBA, seeking to establish that those instruments required the use of the PDR assessment system and prohibited the introduction of the PFR system. On 26 July 2000 the bank filed a cross-claim seeking a declaration that the FSU's application constituted prohibited industrial action under the *WRA*. Gyles J dismissed the cross-claim of the bank⁶⁰ and his Honour eventually upheld the FSU's claim.⁶¹

⁶⁰ *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16.

⁶¹ *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2001) 106 IR 172.

The Bank Determines Its Strategy

The FSU put a counter-offer to the bank on 8 August 2000. This offer included an 8.5% pay increase plus an adjustment to the performance-related pay scheme. On 11 August the bank rejected the union's offer and insisted that the union accept its previous offer. The bank issued an ultimatum, warning that if its proposal were not accepted by the end of August it would give it 'little option but to consider how its proposals may be delivered directly to employees without the support or agreement of the FSU'. This ultimatum was repeated on 14 August 2000 in a bulletin circulated to bank staff in which employees were invited to talk to their manager if they were interested in accepting the bank's final offer.

The bank began planning to introduce AWAs to its workforce, not as an end in itself but as a means of placing pressure on the FSU to accept the bank's revised EBA offer. The use of AWAs placed pressure on the FSU's bargaining position in two ways. First, both parties were aware, from other employers' experience, that contract employees tended to leave their union. Certainly this has been the FSU experience with respect to the two or three thousand AWAs offered to bank employees prior to the September 2000 dispute. For example, there was a 60% decline in union membership in the Institutional Banking division of the bank when that division was placed on AWAs in July 1997. Of the remaining union members in that division, only two have approached the union for advice during the last three years.

Despite the underlying short-term instrumentalist agenda, the bank publicly maintained that its actions were part of a long-term strategy. For example, Mr Matthews, the bank's Deputy General Manager, outlined the bank's approach in a series of interviews in August 2000.⁶² He stated that CBA had decided in 1999 to set 'progressive targets' for shifting employees off collective arrangements with the goal of eventually having all employees on individual contracts. This was not a strategy of deunionisation but was rather 'part of building one-on-one relationships'. However, he conceded that the bank was well aware that the introduction of AWAs would have the effect of diminishing union membership and compromising the union's role in enterprise bargaining and suggested that '[i]n the medium or long-term future there will be no role for the FSU at the CBA'.⁶³

The second effect of the offer of AWAs was to create tension between the FSU and its members. By incorporating its preferred EBA terms in the AWA, the bank refuted the legitimacy of the union claim that the CBA offer was unacceptable to its members. Each union member who signed an AWA damaged the FSU by sending a message of endorsement of the bank's offer, even if the employee did not actually leave the union.

The bank's strategy was fully deployed on 23 August 2000, when Gail Kelly, Head of the bank's Customer Service Division, informed employees that AWAs would be offered so that workers could accept the bank's EBA offer. The FSU called stop-work meetings to consider the bank's approach. Meetings were held on 28 August 2000 in

⁶² On 25 August 2000 the Australian Financial Review reported; On 30 August 2000 the Sydney Morning Herald reported; On 31 August 2000 Mr Matthews, during an interview broadcast on Sydney radio; On 31 August 2000 the Sydney Morning Herald further reported:

⁶³ Fink [18].

Western Australia and on 1 September 2000 elsewhere in Australia. Approximately 10,000 employees attended meetings, and 12,000 members voted on a resolution (with 99% in favour) calling on CBA to accept FSU terms by 8 September 2000.

The Offer of AWAs

At the end of 31 August 2000 the CBA's take-it-or-leave-it offer for the 2000 EBA lapsed. On 1 September 2000 Mr David Murray, Managing Director of the bank, announced in an open letter to all members of the Federal Parliament that it was, as a matter of policy, offering AWAs to all of its staff. This was the largest single offer of non-union contracts in Australia's history.

Ironically, on or about 31 August 2000 the CBA released its annual profit report, showing a record profit for the bank of \$1.7 billion for the previous financial year, a 20% increase on the figures for 1998-9. This result was seized upon by the FSU as evidence that the bank could afford the 4% pay rise sought by the union for the year 2000 (or even the 6% originally claimed).

On 5 September 2000, AWA packages were sent to each of the bank's managers for distribution to the bank's 21,000 eligible award employees. The 70 page packages had been prepared at a cost of \$400,000 to the bank. Each package included a covering letter, the AWA, a 'Statement of Conditions' and three documents, including the mandatory one from the Employment Advocate, explaining the effect of the AWAs.

The covering letter was in standard form and explained that the offer was open for three weeks. The AWA itself was a one page standard form document containing only three paragraphs. The first paragraph provided that the term of the AWA is two years. The second provided that the CBA award and collective agreements were wholly excluded and that the employee's terms and conditions of employment were totally regulated by the attached 'Statement of Conditions'. The last paragraph provided that the employee would receive a 6.5% salary increase over two years, with subsequent increases 'determined by market rates'.

The Statement of Conditions, containing the bulk of the employee's conditions of employment, was a lengthy document at some 37 pages. On the one hand, the new arrangement retained much of the temporal inflexibility of the collective instruments. The number of ordinary hours and the span of time in which those hours were to be worked were set; overtime penalty rates and loadings applied; weekend work was restricted; and there were detailed provisions concerning the various breaks and forms of leave. On the other hand, all of these conditions were able to be varied by agreement, or cashed out, 'but not so as to disadvantage the employee'. Importantly, the employee was obliged to 'perform the duties and roles as directed by the Bank at any location' and the bank had the discretion to alter the manner in which work was graded or classified.

In return, employees received an annualised salary as well as a performance-related bonus. Depending on classification and individual performance, this bonus amounted to 3 to 15% of annual base salary. However, the bank was empowered to alter the scheme in its discretion but not so as to reduce payments available. Once again, the employee could agree to alternative arrangements or salary packaging so long as he or

she were not disadvantaged as a result. All disputes were required to be resolved internally with no provision for employee representation or external mediation.

The Litigation in the Federal Court

On 13 September 2000 the union applied to the AIRC seeking conciliation of the matter under s 170NA of the *WRA*. The matter was listed for conciliation on 25 September. The union also commenced proceedings against the bank in the Federal Court, on 19 September 2000. It argued that the bank's objective was to reduce the power and influence of the FSU by encouraging employees to enter into AWAs. It was submitted that the bank was aware that this would cause so many employees to leave the union that the capacity of the union to function (and to collectively bargain) would thereby be reduced or eliminated entirely. The FSU claimed that by reason of this strategy the offer of AWAs contravened the freedom of association provisions of the *WRA* (s 298K and s 298M). Furthermore, the union argued that the bank had contravened the anti-duress provisions of the *WRA* which relate to AWAs (s 170NC and 170WG) by coercing or misleading employees into signing workplace agreements.

The application was heard on 22 September 2000 by Finkelstein J. On 28 September 2000 his Honour granted an interlocutory injunction, pending trial, restraining the CBA from offering further AWAs.⁶⁴ Finkelstein J found that there was an arguable claim that the bank had breached ss 298M, 170NC and 170WG(2) of the *WRA*. However, deferring to the earlier Federal Court Full Bench decision in *BHP Iron Ore Pty Ltd v Australian Workers' Union*⁶⁵ (where it was held that s 298K required a subjective intention to induce an employee to leave the union) he found that there could not be a breach of s 298K on the facts. His Honour's final orders allowed the CBA to continue offering AWAs to those groups of employees which had been targeted prior to September 2000.

Pursuant to two applications made by the bank, the judge's order was amended, on 3 October and on 27 October, to preserve the ability of CBA to offer AWAs to employees in those categories in which AWAs were offered prior to September 2000 (eg Branch Managers, Investment Consultants, etc). The bank sought and obtained a further hearing before Finkelstein J on 8 December 2000, seeking to further vary the interlocutory order by including additional categories of exemption. Specifically, the bank wished to be able to offer AWAs to employees within its Human Resources group, its Australian Financial Services group and its Financial and Risk Management group. The bank claimed that the exemption would allow the bank to continue its longstanding policy (since June 1997) of offering AWAs on a small scale to specific sectors of its workforce. The union argued that the proposed AWA offers were linked to the deadlock in the negotiations for the certified agreement, and thus would contribute to conduct that Finkelstein J had already ruled was prima facie unlawful. His Honour agreed with the union and, in a ruling dated 12 December 2000, refused to further vary the scope of the injunction. The trial was listed for hearing commencing on 2 April 2001, for four weeks' duration.

⁶⁴ *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 IR 139.

⁶⁵ (2000) 102 FCR 97.

Resolution of the Dispute

Negotiations for the creation of the 2000 EBA, in settlement of the legal action, continued between the bank and the union in the lead up to the trial. In November 2000, in the context of the announcement of massive profit increases, the bank agreed with the union to award all staff a salary increase of 3 to 4.5% (depending on classification), backdated to May 2000. This was greater than the 2-4% increase originally proposed by CBA for the year 2000.

Once it became clear that the bank could afford to pay for most increases in entitlements sought by the union, the 'only major outstanding issue' was CBA's continued insistence on an expansion to its ability to offer individual contracts (those permitted under clause 8 of the award). The bank wanted the EBA to enable offers of these contracts to any employee, and it also wanted to extend the list of exemptions from the award and EBA, providing more 'flexibility' on hours of work, weekend work, shiftwork, additional allowances, loadings (shift, late/start etc).

However on 6 April 2001 the bank backed changed its position and withdrew its proposal to extend Clause 8. This allowed the CBA and FSU to agree on 'Heads of Agreement' upon which to base a 2000 EBA acceptable to all parties. The Federal Court litigation was suspended until 18 May 2001, pending FSU membership approval of a draft EBA 2000.

The Heads of Agreement essentially secured CBA's desired terms, although the FSU was able to secure acceptable remuneration increases, reform to the performance-based bonus system and the inclusion of 'working life' issues. Existing staff were to maintain current working arrangements (unless they volunteer otherwise), although more flexible use could be made of new and part-time staff. Employees were to receive an overall remuneration increase of 8.8% over 2000/2001, comprised of an additional 4% increase in base salary. The performance assessments would not be based on sales targets and would take into account factors beyond the employee's control; a rating of 'meets expectations' would guarantee the payment of the minimum bonus. The bank made commitments on training, staffing levels and union entry to the workplace.

The 2000 EBA retained the status quo on the use of individual agreements. First of all, the EBA included substantially the same AWA clause as that contained in the 1998 EBA, which allowed employees freedom of choice of employment arrangements. Secondly, it included the equivalent of clause 8 of the award. However, by replacing the term 'Award' with 'Award and EBA', the 2000 EBA substantially increased the safety-net against which the benefit of these contracts were to be measured.

The eligible FSU members at CBA voted to accept the proposed 2000 EBA in early May 2001 and the agreement was certified on 25 May 2001.⁶⁶ The FSU ceased its litigation in the Federal Court and the dispute came to an end.

⁶⁶ *Commonwealth Bank of Australia (Core) Enterprise Bargaining Agreement 2000* (2001) Agreement No 807994 [Print PR904514].

The Outcome

Unlike the other two disputes, the present dispute had no major effect on the membership and power of the union involved. First, only a small number of employees resigned from the FSU due to their acceptance of an AWA. Second, union power was not diminished and soon after the dispute ended the FSU was able to institute a new round of collective bargaining, leading to the creation of the next EBA in the series.⁶⁷

The dispute resulted in significant benefits for bank staff under the 2000 EBA. CBA acquiesced to a 7% pay increase for staff over 2000/2001 and agreed to a less discretionary, more fair and generous performance-related-pay scheme. It agreed to increase staffing levels and to modify bank policy to allow union representatives to use bank facilities. Most importantly, the bank abandoned its efforts to secure an enhanced ability to offer individual contracts under the 2000 EBA. This prompts the question: why did it do so?

Perhaps it was because the bank had already achieved its objective, namely to force the union to abandon its 13% wage claim, and did not seriously desire further changes. Another reason may have been the bank's fear of losing its case at trial, a result that would permanently stifle its progress along the path to individualisation. However, although Finkelstein J had been strongly critical of its actions, the result in the BHP and Rio Tinto disputes on similar facts should have reassured the bank that its chances of victory were fairly high. A greater influence on the bank's decision not to pursue the individualisation option may have been the bank's sensitivity to negative media attention in an atmosphere of intense popular hostility towards banks,⁶⁸ and the consequent threat of governmental regulation of their activities.⁶⁹

Another possible explanation has to do with the dramatic change in the Australian political climate in early 2001. Unexpectedly, conservative governments lost the Queensland and Western Australian elections, and the Australian Labor Party ('ALP') won the by-election for the federal seat of Ryan. ALP policy at that time was to abolish AWAs.⁷⁰ Were Labor to win the federal election, due at the end of 2001, and repeal the AWA provisions of the *WRA*, the prospect of any future use of individual contracts at CBA would be thrown into doubt. Therefore it became important to the bank to retain a 'Labor-proof' mechanism by which at least some degree of individualisation (mainly of specialist staff) could be pursued. The only lawful method to achieve this required the inclusion of facilitative provisions in the award and/or EBA. This would require a healthy relationship with the union: first, because

⁶⁷ *Commonwealth Bank Of Australia Retail Banking Services Enterprise Bargaining Agreement 2002* (2002) Agreement No 817514 [Print PR921065]. This agreement provided for a 4% pay increase and did not advance the use of individual agreements.

⁶⁸ Probably motivated by CBA's closure of 438 branches over the last five years: Zanny Begg, above n 19.

⁶⁹ Australian Labor Party ('ALP'), *Labor's Plan For Better Banking* (2001) <<http://www.alp.org.au/policy/pdpbanking260301.html>>; Chris Connolly and Khaldoun Hajaj, *Financial Services and Social Exclusion* (2001) [University of New South Wales, Chifley Research Centre].

⁷⁰ ALP, *Australian Labor Party Platform 2000*, as adopted at the 42nd ALP National Conference (31 July-3 August 2000) <http://www.alp.org.au/policy/platform2000/chapter_08.html> Ch 8, ¶71.

collective bargaining is required to create or modify those provisions;⁷¹ and second, because the union has a role to play in securing the support of the workforce for individual contracts.⁷² Accordingly, perhaps the bank decided that it was strategically important to maintain a good relationship with the FSU.

CONCLUSION

In the Introduction to this set of case studies it was suggested that there is a range of motivations which might lie behind an employer's choice to introduce AWAs or other individualised agreements into a hitherto collectively regulated workforce. These motives include a desire for cultural change, the need to reduce labour costs, and finally a strategy of weakening trade union opponents, whether for the limited purpose of attaining a more favourable collective agreement or else as part of an attempt to deunionise the workplace. It was also noted that in the published studies on the CRA Weipa dispute, three different motivations were given for the strategy adopted by management in that case.⁷³

The three case studies which make up the content of this paper have examined the evidence of the economic and industrial relations context at each site, the breakdown in the collective bargaining process and the introduction of individual agreements, and have followed the legal action instigated by trade unions. Some trends are evident in the process of individualisation. First, each of these disputes arose at a time when the employer's business was suffering challenges which required cost reductions. Comalco and BHP Iron Ore were facing significant local and international competition as well as falling commodity prices, while the Commonwealth Bank was attempting to transform itself commercially in the wake of privatisation.

Second, each dispute was preceded by strategic reviews of company operations in which certain individuals in middle management became the driving force behind strategies endorsed by the highest levels of management. At Comalco, it was Mr Thorne who actively pursued the individualisation agenda devised by CRA chairman John Ralph. At BHP Iron Ore, it was Mr Stockden who oversaw the introduction of individual agreements which had been approved by Mr Kirkby and the BHP board. At the Commonwealth Bank, Mr Cupper was in charge of the AWA strategy, with the blessing of the bank chiefs.

Third, once the strategy had been decided upon, the employer in each dispute ceased to engage in bona fide collective bargaining. At Comalco, it was the failure of the Kaolin employees' collective agreement which triggered the roll-out of individual agreements. BHP refused point-blank to negotiate an enterprise agreement once it had decided upon the use of WAWAs. The Commonwealth Bank did persist with formal negotiations but essentially refused to depart from its preferred bargaining position.

⁷¹ Assuming that collective bargaining occurs with the FSU (ie not with employees organised independently of the FSU, pursuant to s 170LK of the Act).

⁷² For example, to prevent the FSU from encouraging workers to terminate their contracts under clause 8.1.5 of the Award.

⁷³ See above nn 7–9.

Differences between the three disputes begin to emerge at the point at which the individual agreements were offered. The contracts at Comalco provided for significant temporal flexibilities, while those at BHP sought functional flexibilities; both involved a significant increase in managerial prerogative. However, the AWAs offered by the Commonwealth Bank were not designed to significantly vary working practices but rather to enshrine the performance-based remuneration arrangements preferred by the bank.

Another difference is that, in the case of Comalco and BHP Iron Ore, the agreements were designed eventually to place the entire workforce on individualised arrangements. In those cases, the offer of staff conditions was open for an unlimited period, and the financial incentives to enter into the individual contracts were substantial. In contrast, the Commonwealth Bank's offer was open for only three weeks, and provided very modest financial benefits compared with the benefits which were likely to be secured under a collective agreement.

These differences in process are reflected in the different outcomes noted. In the case of Comalco, within a very short period of time almost the entire workforce was working under individual agreements, unrepresented by unions, and without the benefit of collective bargaining. BHP Iron Ore were at least half way along this route by early 2001. In contrast, the Commonwealth Bank dispute has not resulted in additional employees working under individual arrangements; indeed, it has become *more* difficult to implement individual agreements under the new collective agreement. Nor have there been any significant reductions in union membership or power on site, and collective bargaining continues according to its normal pattern.

Given that differences in both the processes and outcomes of a similar strategy have been observed, what can be said about the *motives* lying behind the adoption of such a strategy? This series of case studies confirms that a strategy of individualisation may serve a variety of purposes. In the CRA Weipa dispute, the evidence appears to support the contention of McDonald and Timo that the main motivation for the introduction of individual contracts was the desire of management to rid its workplace of militant unions. In contrast BHP, which had enjoyed a robust though ultimately workable relationship with the unions, appears to have been genuinely pursuing work flexibilities, with deunionisation a necessary (but perhaps not a wholly regrettable) incident of that strategy. The Commonwealth Bank, which enjoyed the most benign industrial relations of the three employers, was seeking neither deunionisation nor greater flexibility, but rather was seeking to pressure the union into accepting an enterprise agreement involving a lower total wages bill. This finding is consistent with those made by Bill Ford in the context of a different dispute.⁷⁴

Accordingly it can be predicted that the strategic use of AWAs will depend on the nature of industrial relations at a given workplace. Where unions are non-existent or weak, or where they pursue co-operative relations with the employer, AWAs may still be used for cost-cutting purposes. Where unions robustly oppose the introduction of functional and temporal flexibilities, AWAs may be used to subvert their position and introduce the desired reforms by stealth. Finally, where aggressive employers wish to rid their workplaces of militant unions, AWAs may be an extremely effective weapon.

⁷⁴ Ford, above n 4.

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