The Other Side of Flexibility
Unions and Marginal Workers in Australia

edited by
Mark Bray & Vic Taylor

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1 Introduction: Flexibility, Marginal Workers and Unions

Mark Bray & Vic Taylor

INTRODUCTION

Industrial relations analysis, policy and practice have been remarkably influenced during the 1980s and 1990s by a strong belief in the desirability of flexibility, especially labour flexibility. In some circles the virtues of labour flexibility have acquired an almost cultish following and it is not surprising in such a milieu to find advocates of labour flexibility, along with their policy-making followers, lionising its elixir qualities. But what is surprising is that these advocates appear to come from almost all points of the political and ideological spectrum. Those located towards the libertarian right have always, of course, hankered for the textbook world of competitive markets, seeing the labour market as little different to any other. Their model, built upon Hobbesian behavioural assumptions combined with Benthamite philosophy and Paretian theorems of economic welfare, has always led them to a position which sees market 'frictions' and 'imperfections' displayed in the real world as profligate situations, sustained by powerful interest groups. Accordingly, greater flexibility, which requires the elimination of these impediments to the smooth operation of market forces, is considered a highly desirable and an appropriate direction in which policy-makers, both private and public, should progress.

Some on the political left, though certainly not all, see merit in greater flexibility for different reasons. In their view, the postwar settlement in the West, built as it was according to Keynesian welfare state political precepts and Fordist mass production arrangements in industry, foundered in the face of new forms of global product market competition which began to take grip during the 1970s. The left had long been critical of the Fordist production system because of its tendency to generate highly standardised and narrowly defined jobs, located in mechanistic organisations directed by autocratic and hierarchical managements, with the aid of inbuilt technological controls. In this context, the newly advocated post-Fordist production systems, often
associated with 'flexible specialisation', are seen to herald a new era. Such systems offer both a measure of relief from the Fordist task regime and the basis on which a new socialist politics might be constructed.

This consuming enthusiasm for flexibility neglects a number of potential problems. First, flexibility is a tantalizingly ambiguous concept. Agreement upon the desirability of flexibility can thus disguise considerable differences in interpretation of both means and ends. Second, despite the many potential benefits arising from increased labour flexibility, there are also potential costs. The costs are frequently neglected or underestimated in the enthusiasm for change. Third, the benefits and costs of flexibility can be unequally distributed among individuals and groups in the labour market, often reinforcing the position of existing disadvantaged groups. These ambiguities, costs and inequities suggest that there is another side to the flexibility debate.

This collection explores this 'other side of flexibility' with two aims in mind. First, it seeks to remind advocates of labour flexibility of all persuasions that their visions of the future often neglect large numbers of workers whose incomes, working conditions, job security and life chances are radically changed, if not seriously jeopardised, by the quest for flexibility; these workers are referred to here as 'marginal workers'. Second, and even more central to the following chapters, the collection seeks to examine both the impact of marginal workers on unions and the attempts by unions to respond to this challenge.

In this context, the task of the present chapter is to provide some conceptual and empirical background to the later chapters. The chapter is structured as follows. The first section examines the concept of flexibility, arguing that there are two sides to the quest for flexibility - two alternative ways of defining the ends and means of flexibility. The second section discusses the types of workers required by the alternative forms of flexibility; in particular, exploring the category of marginal workers. The third section briefly presents some of the issues surrounding the union response to marginal workers - issues which will be explored in more detail in subsequent chapters. The final section explains the schema of the collection and introduces each of the chapters in turn.

THE TWO SIDES OF FLEXIBILITY

The debates surrounding the issue of labour flexibility quickly gained momentum during the 1980s, proceeding on a number of different levels with an often bewildering combination of analysis and prophesy. Much of this debate has focused on flexibility being achieved through new production techniques and more broadly defined jobs, which in turn require a new type of worker, who was highly skilled in a range of tasks and functions. This
conception of flexibility (and its associated policies) is akin to what has been called 'qualitative' or 'functional' flexibility (Boyer, 1987; Atkinson & Meager, 1985).

A benchmark contribution in this area was Piore and Sabel's *Second Industrial Divide* (1984), in which the authors link what they see as the product market crisis of the West in the 1970s with a shift towards new systems of production characterised as 'flexible specialisation'. Their optimistic, if not romantic, interpretation of this new system of production saw it as requiring workers with significantly increased skills and greater control over their work. In some quarters these skill requirements were identified as so profoundly different to those of the past that the term 'polyvalent' was coined to describe the type of worker needed.

Piore and Sabel's grand picture of changing production systems and social structures inspired both supporters and critics. In Britain, a group associated with the monthly *Marxism Today* seem to count amongst the former. The position presented by this group is that current trends towards flexibility represent a significant transition within the capitalist mode of production. Like all transitions, the pattern of change is seen to be uneven so that Fordism and post-Fordism co-exist (as, indeed, does pre-Fordism) in different sectors of the economy. However, the 'New Times' group argue that it is post-Fordism which is at the forefront of change and which is setting its imprint on the process and outcome of change. Such a situation, they suggest, requires a new political stand by the left if it is to retain relevance (Communist Party of Great Britain, 1989).

In Australia, strong support for the Piore and Sabel analysis is provided by Mathews in his *Tools of Change* (1989). In its structure, content and policy prescriptions, this work endorses and extends to an Australian context the ideas of flexible specialisation developed in *The Second Industrial Divide*. Indeed, Mathews is quite explicit concerning the desirability of such ideas as part of the strategy for labour when he argues:

In the face of the post-Fordist challenge, a labour movement strategy must draw on all the concepts identified in their various ways by Kern and Schumann, Piore and Sabel, and Cooley and Rosenbrock. It will rest on a notion of *strategic accommodation* between capital and labour. Employers and unions may pursue their own interests, but with a common interest defined by the need to develop a flexible, innovative and efficient industrial system. We shall call this a post-Fordist strategy. (Mathews, 1989, 38-9) (emphasis in original)

These themes which permeate much of Mathews' work correspond to a large degree with the goals and methods of the ACTU and the Australian Labor Party (ALP) federal government in their advocacy of award restructuring in Australia (Campbell, 1990). They see a shift towards new production techniques and flexible specialisation as a necessary step if
Australian manufacturing industry is to survive and if the broader economy is to withstand the challenge posed by balance of payments problems which emerged during the mid-1980s. The encouragement of this type of flexibility also holds the promise of more co-operative industrial relations and a more highly skilled workforce in which workers have better career prospects, higher incomes and more interesting work (Morris, 1989; ACTU, 1989; Tito, 1989).

Thus, the first side of the flexibility debate is broadly associated with the pursuit of functional flexibility and its advocates make many claims about the advantages of such an approach for workers, employers and national economies alike. However, this approach also has its critics. Notable here are Albo (1986), Hyman (1988), Pollert (1988a and 1988b), Tomaney (1990), Campbell (1990) and Bramble & Fieldes (1990). Although these writers express diverse concerns about the analysis, empirical evidence and merits of flexibility initiatives, a common element detectable in much of their work is an agnostic stance towards the often implicit universalistic advantages said to flow from such measures. The criticism here is that flexible specialisation (or post-Fordist) writers have overgeneralised their arguments on the basis of very selective empirical evidence. The labour processes of all industries do not easily lend themselves to structural reorganisation along flexible specialisation lines, at least not within the confines of a capitalist logic of production. Moreover, the changes brought about by flexibility strategies often vary within firms, with different groups of workers being affected in very different ways. Campbell makes this point when he criticises post-Fordist theories for their emphasis on the increased skills gained by workers as a result of flexible specialisation:

... these changes [i.e. increased skills] only concern a minority of (often already-skilled) workers in just a few industries... in the case of other workers in the same enterprise, in other enterprises in the same industry, or in other industries it is possible to point to quite different changes and quite different trends, including with respect to skill requirements as a result of changes in product technology. It is difficult to see why new skill requirements should be privileged and examples of developments such as casualisation, increased work burdens, and increased use of sub-contract labour should be neglected. (Campbell, 1990, 14)

These criticisms suggest that there is another side to the flexibility debate. This broadly concerns a definition of flexibility and the advocacy of policies which seek to achieve flexibility through a reduction of labour costs, a trimming of the size of the workforce and an adjustment of the number and pattern of working hours to more closely suit the changing demands of production. Such strategies have been referred to as the pursuit of
'quantitative' or 'numerical' flexibility (Boyer, 1987). Hyman, for example, calls numerical flexibility 'the "other face" of flexibility' (1988, 50) and claims of it that:

The central objective is to render workers disposable rather than adaptable. Amongst the means adopted are the recruitment of workers on short-term contracts; the use of subcontractors rather than direct employees; resort to hire-and-fire policies; employment of part-time workers who fall outside job protection legislation. (ibid., 56)

In a similar vein, Kuhl (1990) reviews developments in the European Community and identifies twenty forms of 'non-standard' work arrangements now in place. He groups these arrangements into three broad categories - 'contingent' workers, 'life of project' workers and 'fake' self-employment - all of which are sources of increased numerical flexibility.

This other side of flexibility (ie. the pursuit of numerical flexibility) can also be observed in the Australian policy debates of recent years. For example, employers had some success in achieving numerical flexibility objectives under the two-tiered wage system in operation in 1987 and 1988, with many agreements allowing for increased use of casual and part-time workers (Rimmer & Zappala, 1988). These developments led to criticism of the ACTU from the left (for example, Bramble, 1989). The ACTU also encountered considerable opposition from employers when it attempted to confine award restructuring to an agenda of issues focusing on functional flexibility. While accepting the need for such measures, employers' submissions to the Industrial Relations Commission's review of the operation of award restructuring in February 1989 sought to expand the agenda to specifically include reference to:

(i) removing award restrictions on the contract of employment regarding the employment of casual, part-time, temporary, fixed term and seasonal employees and introducing more flexible provisions in relation to the definition of ordinary hours and in the arrangement of working hours, including the working of and payment for overtime;...
(Industrial Relations Commission, 1989, 3)

Thus, there are two sides of the flexibility debate (associated here with functional and numerical flexibility), each of which has different consequences for workers, labour market institutions, social structures and the broader political economy. It must, however, be acknowledged that recognition of this division (or something similar to it) is hardly new; indeed, it can be seen in the work of many scholars working from different intellectual traditions. At least as long ago as the 1970s, dual labour market writers identified the emergence of segmentation within the labour market between a primary sector, characterised by jobs with high pay, good working conditions, employment security and chances of advancement, and a secondary sector where the features of jobs were low pay, poor working
conditions, high labour turnover, little chance of advancement and close supervision of workers (Doeringer & Piore, 1971; Peck, 1989).

Another example at a different level of analysis is Goldthorpe (1984), who identifies an emerging social dualism within developed nations. This trend towards dualism, he argued, was sparked to a considerable degree by imperatives underlying the pressures to create flexible labour markets and a retreat from mass market conditions. Lash and Urry (1987) also see a major transformation underway, namely a shift from what they term 'organised capitalism' to its 'disorganised' counterpart. They suggest that this trend comprises not only temporal and economic elements, but also extends to spacial, organisational, political and mass cultural facets of society. Thus, in their analysis, the phenomenon of labour flexibility appearing in production is but one manifestation of the new major phase in the development of capitalist society.

Only slightly less ambitious is a contribution by Streeck (1987), who detects a concurrent shift taking place in the underlying philosophy of social regulation of employment in the form of a regression from status-based rights for workers back towards a contractual base which underpinned labour arrangements in an earlier phase of industrialisation. He suggests that this process of change in the rationale underlying the labour relationship is driven by growing demands for flexibility, principally coming from industrial employers, finance capital and the state.

Focusing on internal labour markets, Atkinson (1984; 1987) claims to detect the emergence of a new 'flexible firm', in which management segments the type of labour utilised in order to provide the flexibility regarded as necessary to cushion fluctuations in demand. Atkinson's ideas sparked considerable controversy, with challenges to both the conceptual clarity and the empirical foundation of his analysis (for example, Pollert, 1988a).

This brief and highly selective review of debates surrounding flexibility serves several purposes. First, it demonstrates the potency of flexibility in theoretical and policy debates in recent times. Second, it shows that despite the current preoccupations and hegemony of flexibility, the concepts associated with flexibility are not purely creatures of the 1980s and 1990s; indeed, they often have long pedigrees. Third, it reveals the fundamental ambiguity of flexibility as a concept. Fourth, out of this ambiguity two sides of the flexibility debate have emerged: one associated with functional flexibility and one associated with numerical flexibility. Such an distinction helps to identify the central focus of subsequent chapters of this collection; namely, numerical flexibility. Finally, and this leads directly to the next section, recognition of the different flexibility strategies highlights the different types of workers and employment relationships which can be produced by the quest for flexibility.
NUMERICAL FLEXIBILITY AND MARGINAL WORKERS

Workers who supply labour power under conditions of numerical flexibility have been the subject of many typologies and have thus acquired a variety of titles to describe them and their work situations. Irrespective of the labels used, the effect of these typologies has almost always been to divide paid work activities into two distinct categories. The first category usually comprises those workers who sell their labour under conditions which are consistent with some 'standard' or 'typical' reference. The 'standard' or 'typical' worker is most often legally defined as an employee and is engaged on a full-time permanent basis in a position which provides access to a wide range of legal and statutory protections and benefits, normally including job security, guaranteed minimum wage rates and working conditions, paid leave for various purposes, training and superannuation benefits.

In contrast, the second category of workers constitutes all others who provide labour on the market. In this volume, this second category is referred to as 'marginal workers' (see also Lane 1989; Leighton 1986a), and it includes part-time workers, casual workers, temporary workers, contract and subcontract workers, outworkers, self-employed workers, trainees and other workers engaged in the 'black' or 'informal' economy. However, many other labels have been used - often rather haphazardly - to describe similar groups of workers. Two recent attempts have been the 'atypical' worker (Leighton, 1986b; Cordova, 1986) or 'non-standard' worker (Muckenberger, 1989). Dual labour market analysts draw a distinction between 'primary' and 'secondary' labour markets (Doeringer & Piore, 1971), the latter comprising jobs and workers commonly associated with numerical flexibility. Atkinson's model of the flexible firm adopts the terms 'core' and 'periphery', the latter describing workers who mostly deliver numerical flexibility to a firm's management (Atkinson, 1984). Additional labels include 'precarious' workers (Rodgers, 1989; Rubery, 1989), 'vulnerable' workers (Leighton & Painter, 1987) and the 'flexible workforce' (Hakim, 1987).

Considerable energy could be devoted to analysis of these various labels and the different intellectual traditions which inspire them. However, for present purposes, the main point is that workers in this second category share one or more of the following characteristics which distinguish them from typical (or standard or core or primary) workers.

(a) **Ambiguous or Non-Employee Legal Status:** At common law, many marginal workers are either non-employees or they occupy an ambiguous legal position somewhere between employee and other legal identities like independent contractor; obvious examples here are self-employed workers, contractors and subcontractors, and outworkers. Because of their legal status, these marginal workers are often deprived of many common law and statutory benefits and protections which are readily available to employees (see Chapter 3).
(b) Poor Rewards from Work: For reasons of labour market position and/or lack of minimum standards, marginal workers commonly receive low pay. They also have limited, if any, access to non-wage benefits, such as paid leave, superannuation and other fringe benefits. This poor economic position is sometimes the result of irregularity of income (because of fluctuations in the amount of work available) rather than (or as well as) low rates of pay.

(c) Non-Standard Temporal Work Arrangements: The working hours (or working year) of marginal workers differ significantly to those of standard workers. They may work less hours each week than is the normal expectation (i.e. part-time workers); they may be temporary workers who work (on a part-time or full-time basis) for the life of a project or for a specified period of weeks or months; or they may be casual workers who work irregular hours which vary from week to week or month to month.

(d) Insecurity of Employment: Marginal workers usually lack security of employment. Because they work on a casual or temporary or contract basis, their employment can be terminated a short notice.

These four characteristics help to define marginal workers as an ideal type. However, in many ways this category is a residual one which encompasses all workers not included in the standard or typical group. As a result, it is also important to recognise the diversity amongst marginal workers because not all marginal workers share all these characteristics. Of the groups examined in the following chapters, outworkers in the clothing industry are perhaps the quintessential marginal workers, suffering in all four categories. In contrast, computer contractors or consultants are defined as marginal because of their legal status, non-standard temporal work arrangements and insecurity of employment, but their powerful position in the labour market means that they enjoy attractive financial rewards from their work. The features of part-time workers, owner-drivers and building contractors and subcontractors not only differ from each other, but also vary within each group. For example, some owner-drivers work permanently on contract with a single company, thus enjoying reasonable security of employment and attractive financial returns, while others operate in far more insecure situation in which they seek work wherever they can find it and suffer financial hardship. Thus, despite their inclusion in the same category, the employment experiences of marginal workers vary considerably.

UNIONS AND MARGINAL WORKERS

The dilemma which lies at the heart of this collection concerns the relationship between flexibility, marginal workers and unions. As has already been shown, the quest for labour flexibility has widespread support among
governments, employers and significant sections of the labour movement. And yet, if this quest is pursued by reliance on numerical flexibility, then the marginal workforce must increase. Such a development is seen by many to pose a threat to the effectiveness of the system of industrial regulation, and to the size and power of the union movement. The Australian union movement is certainly wary of this threat. Apart from the fears and remedial actions by individual unions (some of which are detailed in later chapters), the congress of the ACTU debated in 1983 the effects of what it called 'anti-union employment practices', which included many marginal work arrangements. In 1984, the ACTU and individual unions sought in submissions to the Hancock Inquiry to expand the coverage of the federal arbitration system to include many workers engaged under these anti-union employment practices (ACTU, 1984). A number of affiliated unions subsequently sponsored a major research project designed to examine such practices (TNC, 1985) and the ACTU again expressed its concerns at its 1985 Congress:

Anti-union employment practices are also a key element in the strategy to undermine unionism in Australia. The practices include requiring individual employees to enter into individual contracts of employment the terms of which are set without reference to unions or industrial tribunals...

The anti-union employment practices also include certain forms of self-employment, sub-contracting, and outwork. The aim of these practices is to sever the ordinary employment relationship; to evade personal income tax and pay-roll tax; to avoid awards and other standards with respect to sick leave, annual leave and workers compensation; to isolate workers from unions; and to undermine apprenticeship and other training schemes and safety and other standards. They also seek to replace union organisation and solidarity with individualism and competition between workers.

These practices do not merely constitute a threat to the hard won benefits fought for by unions over the decades. They have also led to exploitation of workers by unscrupulous employers. (ACTU, 1985, 179)

The ACTU succeeded in persuading the Hancock Inquiry that the inclusion of 'quasi-employees' within the jurisdiction of the federal arbitration system should be recommended (Committee of Review into Australian Industrial Relations Law and Systems, 1985, Volume 2, 355-67). However, despite lobbying of the federal ALP government, such provisions to not included in the new Industrial Relations Act (Australian Financial Review, 14 April 1987, 4; 5 May 1987, 4). The failure of these initiatives in the federal system left the issue to state labour councils and individual unions to pursue as best they could.

This brief account suggests a number of questions about marginal workers and unions which will be examined in the following chapters. First,
does the marginal workforce really constitute a threat to the Australian union movement? More specifically, what problems do marginal workers create for unions? Second, if marginal workers do challenge the union movement, how have Australian unions responded to marginal workers? What practices or policies or strategies have unions pursued in the face of the problems posed by marginal workers? Third, how effective have these counter-strategies been? The answer to this final question will determine whether the outcome of the marginal worker challenge will be an inevitable defeat for Australian unions or whether the unions can overcome the problems and meet the challenge.

THE SCHEMA OF THE MONOGRAPH

The chapters of this collection examine different aspects of marginal work or different groups of marginal workers, with the aim of illuminating the relationship between marginal workers and trade unions. Chapters 2 and 3 provide an overview of the labour market and legal positions of marginal workers in Australia. In Chapter 2, Burgess examines recent changes in the Australian labour market in an effort to clarify the role of marginal workers. He begins by distinguishing between 'core' and 'marginal' employment, and then uses aggregate statistical data, mainly from the Australian Bureau of Statistics, to analyse trends in the distribution of the two categories. Within the marginal group, he gives special attention to casual employment, part-time workers, the self-employed and homeworkers. Burgess also presents a brief analysis of the relative incomes of marginal workers and draws out some of the implications of the labour market trends for trade unions.

In Chapter 3, Brooks explores the legal status of marginal workers and the consequences of this status for marginal workers themselves and for trade unions. This task requires an examination of both the common law and statutory law, as well as an account of the position of marginal workers before industrial tribunals and in trade unions. Themes which dominate the chapter are the inadequacy of the law when confronted with workers who do not easily fall within the typical legal model of employment and the failure of trade unions (and other groups) to fully exploit the few opportunities which exist within the existing law to protect marginal workers.

After these overview chapters, Chapters 4 - 8 present case studies of particular groups of marginal workers and their relationships with unions. In Chapter 4, Lever-Tracy argues that before the mid-1980s unions mostly pursued negative, defensive policies towards part-time work in an effort to protect the interests of full-time workers. Such policies failed, she suggests, not only because employers' demand for the flexibility of part-time employment grew, but also because such an approach failed to recognise the advantages of part-time employment for workers whose life circumstances no longer conform to the traditional picture of family and work. She goes on to show that only in recent years have unions in a range of industries begun to
adopt more progressive policies, which hold the promise of effectively regulating part-time work, satisfying the demands of workers and managers, and attracting part-time workers to union membership.

Ellem's account of outwork and unionism in the clothing industry in Chapter 5 first explores the peculiar circumstances in which outwork became a common employment practice and in which the workers performing outwork came to be mostly migrant women. This broader context, along with factors associated with the internal government of the union, help to explain the failure of the Clothing and Allied Trades' Union before the 1980s to effectively regulate outwork and recruit outworkers. Changes in the union itself during the 1980s led to new policies towards outwork and new efforts to recruit outworkers into the union.

Chapter 6 by Underhill compares the strategies of two building unions in confronting the problems raised by contract workers in both the housing and commercial construction sectors of the industry. The Building Workers' Industrial Union in New South Wales and the Victorian Operative Bricklayers' Society have approached the regulation of contract work differently in the two sectors and the comparison allows Underhill to isolate the explanatory factors at work: structural features of the industry sectors, the strategies and policies of employers, and internal characteristics of the respective unions.

In Chapter 7, Bray examines attempts by the Transport Workers' Union to overcome the problems presented by owner-drivers in New South Wales road transport. The unusual feature of this case study is that the union's long-running efforts, dating back to the 1940s, achieved a degree of success: in 1979 unique legislation was passed bringing owner-drivers within the jurisdiction of the state arbitration system. The path which led to this outcome and the operation of the system since 1979 are described in some detail, while an explanation of these unusual events is said to lie in a combination of the union's regulatory strategies with certain features of the broader political economy of the industry.

Probert and Wajcman provide an account of a very different group of marginal workers in Chapter 8. The emergence of new computer technologies in recent years, a general shortage in the supply of workers skilled in designing, programming and operating these technologies, and economic and ideological developments in public sector management have led to a situation where computer work in the federal public sector is often performed by contractors and consultants rather than public sector employees. This group of marginal workers has generally eschewed union membership and avoided regulation, but its strong market power has protected it from exploitation. Nonetheless, its rise has created significant problems for unions in this area. The authors explore the nature of these problems and the difficulties confronting the unions in mounting an effective response.
Finally, Chapter 9 returns to some of the issues raised in Chapter 1. The aim is to draw together the material presented in the preceding chapters in an effort to illuminate the relationship between marginal workers and unions. There are two main conclusions. First, the forms of marginal work are so diverse and the relationships between marginal workers and unions so varied that generalisation should be undertaken only with caution. Second, while acknowledging the diversity of experience and exercising the necessary caution, the chapter attempts to discuss the more common causal factors behind the rise of marginal workers, the peculiar problems they create for unions and the manner in which unions have responded to these problems.

REFERENCES


Chapter 1


Chapter 2

2 Marginal Workers and the Australian Labour Market

John Burgess

INTRODUCTION

The character of the Australian labour force has undergone profound change over the last two decades. Major changes have occurred in the composition of employment by industry and occupation, the gender and age distribution of the labour force, the extent and duration of unemployment and in the extent of part-time employment. These trends are not unique to Australia but have been present across most economies in the Organisation for Economic Co-operation and Development (OECD) (see Burgess, 1990). Table 1 summarises these broad changes in the Australian labour force.

Unemployment became entrenched and endemic during the 1980s across all OECD economies (see Burgess 1989a). In this decade the average rate of unemployment nearly doubled as compared to the 1970s, as did the average duration for unemployment. Unemployment rates were especially high for youth, while the average duration was greatest for older aged workers. On average, participation rates increased, with the fall in male participation rates, the ageing of the population, increasing school and post secondary retention rates and earlier retirements being more than offset by the increase in female participation rates, especially for married females. Females are an increasing share of the labour force, they dominate part-time employment and employment growth in the service sector. Manufacturing and blue collar occupational employment has declined, in part this accounts for the fall in male participation rates. The archetypical employment model based on the male, full-time, permanent, unionised and blue collar worker is becoming an endangered species. The labour force for the 1990s is increasingly becoming feminised, non-full-time, non-permanent, non-unionised and white collar. This has important implications for the analysis of labour markets, for the role of trade unions in the economy, for the operation of labour legislation, for the bargaining framework in industrial relations and for the distribution of income and opportunity in the community.
Table 1: Trends in the Australian Labour Force, 1968-1988*

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<td>8.5</td>
<td>9.2</td>
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<td>10.9</td>
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<td>Unemployment rate (%)</td>
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<td>1.8</td>
<td>6.2</td>
<td>9.9</td>
<td>7.2</td>
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<td>9.3</td>
<td>26.2</td>
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<td>60.8</td>
<td>59.7</td>
<td>62.3</td>
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<tr>
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<td>82.1</td>
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<td>75.9</td>
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</tbody>
</table>

* Population and survey revisions means that the data is not strictly comparable, however, trends should be unaffected. All annual observations in all tables refer to August for the specified year.
** All industries excluding agriculture, mining and manufacturing.
*** Revised occupational classifications in 1986 prevents comparability after that date.

Sources: Reserve Bank of Australia, Occasional Paper 8A; ABS The Labour Force (Cat. 6203.0); The Treasury Economic Round Up

The above changes in labour markets have promoted debate over the reasons for such changes and the implications they suggest in terms of industrial relations and work organisation. Some analysts, such as Brown (1989), view the changes with pessimism, regarding the developments as indicative of an alteration in the balance of bargaining power towards employers, marginalising and impoverishing large sections of the work-force, increasing the labour intensity of production and reducing investment and productivity growth in the economy. Others, such as Atkinson (1987), view the developments more optimistically as the consequence of a conscious shift in the organisation of the firm towards a more flexible and adaptable work organisation better able to meet the challenges of greater international integration of markets, increased competition and increased uncertainty. The result will be a clear division of the labour force into a multi skilled core of permanent workers, and a residual of temporary, part-time and casual workers who will bear the burden of any downturn in demand and sales. Critics of this 'flexibility' model, such as Pollert (1988), view these developments only as a continuation of the fragmentation and segmentation of labour markets which has occurred in the past.
The debate has relevance in Australia given the documented growth in non-full-time, non-permanent and non-employee employment, such as part-time employment (Lever-Tracy, 1988), casual employment (Dawkins and Norris, 1989), self-employment (Burgess, 1988) and out-working (Probert and Wajcman, 1988). Additionally, there is evidence that through the wages arrangements of the ALP-ACTU Prices and Incomes Accord that the labour intensity of production is increasing and that rates of labour productivity growth are falling (Burgess and Macdonald, 1989). The process of award restructuring together with the calls for labour market reform in Australia have promoted the idea that the labour market should become more flexible and more deregulated in order to meet the pressures of a more open and more competitive business environment (Business Council of Australia, 1988). Australian trade unions are facing a crisis of representation and survival (Berry and Kitchener, 1989). A combination of prolonged periods of unemployment, structural changes to the composition of output and changes away from full-time, permanent employment have undermined trade union representation in the workforce. Additionally, trade unions are having to adapt to new forms of organisation and production as well as counteract a well orchestrated political attack on their rationale and very existence (Taylor, 1990).

This chapter will seek to outline the trends in the Australian labour force between 1973 and 1988 with respect to core and marginal employment. Detailed analysis of the reasons for changes occurring or the implications of such changes will be left to other chapters. The year of 1973 was selected as the starting point because it marks the end of the low unemployment postwar period, from 1974-75 the era of high unemployment emerged in Australia. A taxonomy of employment forms will be outlined in order to clarify the discussion of marginal employment. The theoretical reasons for changes to the tenure of Australian employment relations will be only briefly reviewed.

Evidence on marginal employment can be obtained from case studies or from official employment data. This chapter will confine itself to official aggregate employment sources since many of the other chapters present sector case studies. However, the official data are far from complete, consistent, reliable or up to date; a broad picture of the trends and developments in core and marginal employment may be obtained, but with no confidence of accuracy. Sections will be devoted to core and specific marginal employment forms. Components of marginal employment, such as outwork, tend to be on the periphery of recorded employment data. The approach here explicitly omits unrecorded employment, the bulk of which is marginal in character; hence there is an implicit understatement in the estimate for marginal employment. The overall picture which emerges is of a more marginal and less secure workforce in Australia, one in which the relevance of trade unions and the award system for many workers can be questioned. Indeed, the very long term viability and representative nature of trade unions may be questioned by these trends.
Chapter 2

ANALYSING LABOUR MARKET TRENDS

The discussion of labour market analysis contained in this section falls into three sub-sections concerned with describing labour market trends, the limitations of the official data and explaining labour market trends respectively.

Describing Trends in Labour Markets

The traditional market framework analyses employment and earnings on the basis of differences in the distribution and quality of human capital. However, the evidence in Australia (Whitfield, 1987, Chapter 5) and elsewhere (Reich et al., 1980) points towards clear divisions in workforce status and earnings being explained not by differences in human capital, but by other variables such as personal characteristics, including age, ethnicity and gender. A range of theories dealing with the division of the labour force have been developed to offer an explanation for such outcomes. These theories fundamentally involve the division of the workforce into two or more segments according to three main criteria. The first criterion is the nature of the employing firm, its size and market power, extent of its investment and deployment of technology; such structural divisions are emphasised in the dual labour market and internal labour market theories (see Doeringer and Piore, 1971). The second is the personal characteristics of labour, such as race and gender, which are emphasised in the segmented labour theories (see Reich et al., 1980). The third is the characteristics of jobs, including the permanency of employment, the hours of employment and access to a career path. This is part of the flexible firm model of Atkinson, in which the company workforce is divided into a core of essential and permanent workers being supported by a periphery of secondary, untenured workers (Atkinson, 1987).

The descriptive taxonomy used in this chapter emphasises the differentiation between core and marginal workers, or between core and marginal employment. Core workers are regarded as those who occupy full-time, permanent positions, who have employee legal status (see Chapter 3), and who work on-site. As a result, most core workers are subject to award conditions of employment and have access to trade union representation. Marginal workers are, firstly, non-permanent; that is, their employment tenure is casual, temporary, seasonal or contract. Marginal workers can also be non-full-time in that they work part-time or short-time. Marginal workers also include non-employees, such as the self-employed, agency workers, subcontractors and unpaid helpers. Marginal workers also often work off-site as homeworkers or outworkers. In general, marginal workers are not subject to award conditions of employment and have difficulty getting access to trade union representation.
As discussed in Chapter 1, despite its usefulness, this type of dichotomy (here between core and marginal workers) is fraught with difficulties. Apart from the statistical problems discussed below, the demarcation between the two categories is not always clear-cut, there is some overlap between the categories and some groups of workers are excluded completely. For example, the groups excluded from the core-marginal dichotomy include the official and hidden unemployed, who as a group are completely detached from employment benefits. This omission is the result of this chapter’s analysis being based on recorded employment. Overlap occurs because some full-time employees can be located away from the enterprise in order to reduce many labour on-costs, while full-time employees can be casuals. Part-time workers can be working for an agency external to the firm on a permanent or a casual basis. Part-time workers may be permanent, work on-site and have a career path.

It is also easy to regard the workforce division in normative terms as a differentiation between core workers, who have 'good' jobs, and marginal workers, who have 'bad' jobs. However, this simple division overlooks the many full-time employees in low paying, low status and unpleasant jobs. Some full-time employees are not employed under award conditions, nor do they have trade union representation, a situation especially common for small business employees (see Burgess, 1989b). As well, included in the marginal workforce are self-employed professionals who have status, security, flexible working hours, independence and high earnings. Thus, the implication should not be drawn that all marginal employment is low paying and insecure nor that all core employment is high paying and permanent. However, on average the marginal workers are employed under less secure conditions and are more likely to be outside of award and trade union coverage.

The Limitations of the Official Data

The object of the analysis in this chapter is very modest: in terms of the above division between core and marginal workers, the aim is to address three questions. First, is marginal employment in Australia increasing? Second, if marginal employment is increasing, in what areas is it increasing? Third, what are the implications of such trends for trade unions?

Unfortunately, the official statistical data do not allow these aims to be easily achieved because a clear distinction cannot be made between core and marginal workers. The official estimates are biased towards employee status and full-time employment. The reasons for this bias are that employees have traditionally constituted the largest group in employment by status, the estimates can be cross-checked from surveys of employers or from payroll tax returns, there has been a macroeconomic policy interest upon wages and earnings growth for employees and interest in employment generation (or reducing unemployment rates) has largely focused upon employee growth. The Australian Bureau of Statistics regularly publishes labour force information (ABS, Cat. 6203.0 and Cat. 6204.0) which provides estimates for
both full-time and part-time employment, self-employment, and employees. Irregular labour force surveys (for example, ABS, Cat. 6334.0) provide additional information on forms of marginal employment, such as casuals. Compared to core employment, information is less obtainable and less frequent with regards to the marginal employment forms. Additionally, the characteristics of those in marginal employment are not as fully articulated as those of employees (Scherer, 1987, 17). The official data do not allow precise demarcation between many of the marginal employment forms because of definitional difficulties, incomplete data and overlap; the areas of part-time, casual, temporary and homework can all overlap. Official data do not explicitly measure either casual or temporary employment, while homeworking has been the subject of one survey. It is possible to derive an approximate estimate for casual employment but not so for temporary employment. Furthermore, data on wages and other employment conditions largely concentrate upon full-time employee status. This can create policy problems, for example the assessment of the wages outcome under the Accord between the Australian Labor Party (ALP) and the Australian Council of Trade Unions (ACTU) (see Moore, 1989) invariably only examines full-time average weekly earnings (sometimes male only), at a time in which both full-time employee status and male employment are declining in relative terms.

Official data and surveys are subject to revision, the Census of Population (Cat. 2487.0) held every five years provides additional information and is a means of cross checking the survey estimates. Nevertheless, there are problems with the official estimates: until 1988 Australia included unpaid family helpers if they worked over 15 hours per week, the international convention is over one hour per week (ABS, Cat. 6102.0, 21). Part-time work is defined as being less than 35 hours per week; some awards (eg the mining industry) are already approaching 35 hours per week as the full-time working week. There is also the problem of unrecorded work. Official surveys will not capture all forms of employment since some employment will be hidden for clandestine and illegal purposes, other forms of employment will escape the official estimation and classification measures. For example, Haber et al. (1987) reported that the extent of small business ownership and employment in the USA was understated by official self employment data by about 60 per cent because of the high incidence of casual business operations, including weekend businesses, and multiple job holdings including part-time businesses. The estimates in Australia count primary jobs only for multiple job-holders (ABS, Cat. 6102.0, 21).

Thus, the official data presented in this analysis should be viewed with some circumspection. They are likely to understate the extent of marginal employment because of the sources used and their emphasis upon employee status. In addition, there is not sufficient detail provided in the official estimates to examine all forms of marginal employment.
Explaining Labour Market Trends

The taxonomy adopted in this chapter explicitly accepts a duality in the structure and composition of the labour market. Segmented labour market models reject the notion of atomistic wage competition in labour markets and instead highlight the differences which exist between jobs in terms of such characteristics as tenure, on-the-job training and a developed internal labour market; the differences between labour on the basis of personal characteristics, such as race and gender; or the differences between employing enterprises on the basis of size and product market concentration. There are a range of segmented theories of the labour market (see Whitfield, 1987, Chapter 2; Norris, 1989, Chapter 5) each identifying different criteria for separation and each associated with different public policy implications.

Although orthodox economists tend to dismiss the segmented theories as either being mere descriptions of the labour market or manifestations of human capital theory (see Cain, 1976), the fact remains that the labour market does remain a source of inequality for large sections of the community (McNabb and Ryan, 1990), even after allowing for differences in human capital. There are several disadvantaged groups in the Australian labour market who have a high representation in unemployment, poverty and low paying jobs (see Whitfield, 1987, Chapter 5).

As mentioned before, the simple dualistic structure outlined here should not be seen as a simple division between good and bad jobs. However, certain features of marginal jobs need to be emphasised in that they are associated with various combinations of the following characteristics: less-than-full-time, non-permanent tenure, non-trade union representation, non-award coverage and external employment. These characteristics could also apply to core sector employment, especially in the small firm sector, but on balance their greater propensity lay with marginal jobs.

This chapter does not investigate in any great detail the characteristics of those workers employed in marginal jobs, nor the conditions of marginal jobs, such as pay and other entitlements. However, a preliminary observation would suggest that part-time, casual and homeworking employment is dominated by females. That is, the jobs are not only marginal in their very nature, but they are also marginal in terms of their domination by an identified disadvantaged group in the labour market.

Apart from the debate associated with the simple dualistic taxonomy presented, another fundamental issue to be explained is the reason for a shift in the structure of employment through time towards marginal employment forms. On this question there are a number of possible explanations, some of which are interdependent. Overall, nine possible reasons for such a shift are identified:
(1) There have been structural shifts in the composition of output towards those sectors which have traditionally utilised marginal employment forms.

(2) It reflects the effects of a prolonged period of high unemployment, which in terms of Thurow’s job-competition model (see Whitfield, 1987, Chapter 2) leads to a lengthening of labour queues and allows employers to utilise increased bargaining power.

(3) A shift in the preference of some forms of labour supply has occurred towards more flexible, shorter time working arrangements. Such preferences will be manifested through increases in part-time and casual employment.

(4) A shift in the structure of the workforce has taken place in which identified disadvantaged groups, such as newly arrived migrants and females, have increased their representation. This in turn enables employers to increase the extent of marginal jobs in the workforce.

(5) There has been a shift in the relative bargaining position of labour and capital, through which capital can exercise more discretion over employment terms and conditions. Such a shift may be associated with increasing unemployment, increasing segmentation of the labour force by personal characteristic, or through effective actions by the state or employers to diminish the power of trade unions.

(6) It results from technological change which either generates labour displacement and results in a rationing of available employment, or shifts production away from large scale (core employment) enterprises towards small scale (marginal employment) enterprises.

(7) There have been employment shifts from sectors of high seller concentration to sectors of low seller concentration and, as a result, employment becomes less secure and more prone to product market pressures. Segmented employment conditions come to reflect the segmented industrial structure of the economy.

(8) It results from a decline in the quality of labour, whereby employers are not inclined to invest in on-the-job training and offer secure employment conditions.

(9) There has been a fundamental re-organisation of production and work, through which the importance of a full-time and stable workforce is diminished. Such a shift is associated with the flexible firm model (Atkinson, 1987) and the shift away from Taylorism in the manufacturing sector.
In this analysis the reasons for increasing duality in the workforce are not explored as such, although some cursory evidence on some of the above reasons will be explored. What is pertinent to this analysis is whether the trends which are outlined can be viewed as being permanent and irreversible, and if so, what implications they suggest, especially for Australian trade unions.

THE CORE WORKFORCE IN AUSTRALIA

Trends in the core workforce can be estimated by reference to three types of indicators: full-time workers as a proportion of total employment; employees as a proportion of total employment; and the distribution of full-time employees by industry, occupation and gender. Although adjustment can subsequently be made to exclude casuals and homeworkers who are included in the core, the resulting estimates will at best be approximations: many full-time jobs are marginalised and low paying, many of the full-time jobs are functionally inflexible with limited career paths, many of the elite core of workers may for convenience and taxation reasons be classified as being in self-employment or be employed on a part-time basis. In addition, the data on employees (ABS, Cat. 6248.0) do not distinguish between permanent and temporary full-time jobs.

This data can also be manipulated to provide a first approximation of the impact of structural change upon the composition of employment; that is, do the trends represent a conscious shift away from full-time employee status, or do they represent a shift in the composition of output away from sectors which traditionally use full-time employees? The contribution of two other explanatory factors are also briefly assessed: the impact of unemployment and the impact of the feminization of the labour force.

Table 2: Trends in Core Employment in Australia, 1973-1988

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time employees/total employees</td>
<td>89.4</td>
<td>85.0</td>
<td>83.4</td>
<td>80.8</td>
</tr>
<tr>
<td>Employees/total employment</td>
<td>86.4</td>
<td>84.2</td>
<td>83.6</td>
<td>83.5</td>
</tr>
<tr>
<td>Full-time employees/total employment</td>
<td>77.2</td>
<td>71.6</td>
<td>69.7</td>
<td>67.5</td>
</tr>
<tr>
<td>Male full-time employees/total employees</td>
<td>63.0</td>
<td>59.6</td>
<td>57.7</td>
<td>54.4</td>
</tr>
<tr>
<td>Male full-time employees/total employment</td>
<td>52.7</td>
<td>50.2</td>
<td>48.4</td>
<td>45.6</td>
</tr>
<tr>
<td>Full-time employees/labour force</td>
<td>75.2</td>
<td>67.1</td>
<td>65.0</td>
<td>62.7</td>
</tr>
</tbody>
</table>

Source: ABS The Labour Force (Cat. 6203.0 and 6204.0)
The broad trends are apparent from Table 2: full-time employment is declining, non-employee status is increasing its share of total employment, and males constitute a falling share of full-time employees. The cumulative consequence is that the share of full-time employees in total employees and in total employment has been declining. If the effects of recession and unemployment were included, the impact would be more dramatic: as a proportion of the labour force, core workers constituted 75 per cent of the total in 1973, but by 1988 they had fallen to 63 per cent. Limited evidence on employee benefits suggests that for the years 1983-87, approximately 91 per cent of full-time employees received holiday and sick pay (ABS, Cat. 6334.0). This implies that 91 per cent of full-time employees were permanent and the other 9 per cent were casual employees. This further reduces the relative size of the core. Thus, the initial evidence suggests a shrinking core workforce and, by implication, a growing marginal workforce.

Table 3 takes the analysis further to look at the composition of full-time employment by industry. Only a selection of industries are represented. Those industries for which full-time employment has been dominant have become less important in terms of total employment in the economy, this especially applies to manufacturing. Where employment growth has taken place, such as in community services, full-time employment has been a relatively small proportion of total employment. In general both full-time employment and employee status has declined across all industries.
Table 3: Trends in Core Employment by Industry, 1973-1988 *

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Manufacturing</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employees/total employment</td>
<td>96.0</td>
<td>95.8</td>
<td>95.2</td>
<td>93.6</td>
</tr>
<tr>
<td>Full time employment/total employment</td>
<td>95.1</td>
<td>94.0</td>
<td>93.3</td>
<td>92.0</td>
</tr>
<tr>
<td>Industry share in total employment</td>
<td>23.9</td>
<td>19.9</td>
<td>18.1</td>
<td>16.3</td>
</tr>
<tr>
<td><strong>Construction</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employees/total employment</td>
<td>75.4</td>
<td>70.0</td>
<td>62.9</td>
<td>64.0</td>
</tr>
<tr>
<td>Full time employment/total employment</td>
<td>95.8</td>
<td>91.2</td>
<td>88.7</td>
<td>87.8</td>
</tr>
<tr>
<td>Industry share in total employment</td>
<td>8.7</td>
<td>8.1</td>
<td>6.2</td>
<td>7.2</td>
</tr>
<tr>
<td><strong>Wholesale and retail trade</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employees/total employment</td>
<td>78.9</td>
<td>79.9</td>
<td>80.3</td>
<td>82.4</td>
</tr>
<tr>
<td>Full time employment/total employment</td>
<td>87.1</td>
<td>78.8</td>
<td>76.3</td>
<td>72.1</td>
</tr>
<tr>
<td>Industry share in total employment</td>
<td>20.5</td>
<td>20.8</td>
<td>19.5</td>
<td>20.4</td>
</tr>
<tr>
<td><strong>Community services</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employees/total employment</td>
<td>96.7</td>
<td>96.5</td>
<td>96.5</td>
<td>95.8</td>
</tr>
<tr>
<td>Full-time employees/total employees</td>
<td>79.5</td>
<td>74.8</td>
<td>73.7</td>
<td>71.2</td>
</tr>
<tr>
<td>Industry share in total employment</td>
<td>12.0</td>
<td>15.4</td>
<td>17.3</td>
<td>17.8</td>
</tr>
<tr>
<td><strong>Finance, property &amp; business services</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employees/total employment</td>
<td>86.2</td>
<td>86.4</td>
<td>86.8</td>
<td>85.1</td>
</tr>
<tr>
<td>Full-time employment/total employment</td>
<td>87.3</td>
<td>85.0</td>
<td>82.6</td>
<td>81.6</td>
</tr>
<tr>
<td>Industry share in total employment</td>
<td>5.5</td>
<td>6.5</td>
<td>7.8</td>
<td>10.9</td>
</tr>
</tbody>
</table>

* Representative industry sample only.

Source: ABS The Labour Force (Cat. 6203.0 and 6204.0)

Table 4 indicates that full-time employment declined across those selected occupations represented, although occupational recategorisation in 1986 prevents continuity of the data beyond that year. Significant declines in the proportion of full-time workers in sales and clerical occupations coincides with high female representations in those occupations. Male dominated occupations such as trades and administration continue to have a relatively high, though declining, proportion of full-time workers.
Table 4: Trends in Core Employment by Occupation, 1973-1986 *

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>Professional</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time/total employment</td>
<td>86.2</td>
<td>82.5</td>
<td>82.2</td>
<td>84.7</td>
</tr>
<tr>
<td>Occupation share in total employment</td>
<td>11.8</td>
<td>13.8</td>
<td>15.6</td>
<td>15.7</td>
</tr>
<tr>
<td>Administrative</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time/total employment</td>
<td>96.3</td>
<td>95.4</td>
<td>94.7</td>
<td>90.7</td>
</tr>
<tr>
<td>Occupation share in total employment</td>
<td>6.0</td>
<td>6.8</td>
<td>6.7</td>
<td>7.1</td>
</tr>
<tr>
<td>Clerical</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time/total employment</td>
<td>86.0</td>
<td>80.8</td>
<td>78.8</td>
<td>75.0</td>
</tr>
<tr>
<td>Occupation share in total employment</td>
<td>16.3</td>
<td>17.2</td>
<td>17.9</td>
<td>18.4</td>
</tr>
<tr>
<td>Sales</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time/total employment</td>
<td>75.8</td>
<td>70.9</td>
<td>68.6</td>
<td>62.6</td>
</tr>
<tr>
<td>Occupation share in total employment</td>
<td>8.6</td>
<td>8.9</td>
<td>8.8</td>
<td>9.1</td>
</tr>
<tr>
<td>Tradespersons, process workers, labourers</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time/total employment</td>
<td>96.2</td>
<td>94.2</td>
<td>93.8</td>
<td>84.6</td>
</tr>
<tr>
<td>Occupation share in total employment</td>
<td>34.6</td>
<td>31.8</td>
<td>28.1</td>
<td>27.8</td>
</tr>
</tbody>
</table>

* Selected occupations only. Full-time covers all forms of employment status.

Source: ABS The Labour Force (Cat. 6203.0 and 6204.0)

The picture to emerge so far is one of declining core employment across most industries and occupations, and by implication, a growing marginal pool of employment for most industries and occupations. One reason for the apparent decline in full-time employment is the shift of employment away from those sectors with relatively high proportions of full-time employment towards those sectors with relatively low proportions of full-time employment. To test for the effects of such structural change upon employment composition, the following procedure was adopted. Sector employment shares were calculated for 1973 and 1988. Full-time employment shares were then calculated for each sector for 1973 and 1988. Finally, sector employment shares for 1973 were assumed for 1988 and the actual full-time employment shares 1988 per sector were used to calculate hypothetical employment data for 1988. The results of this procedure are summarised in Table 5. This provides a broad indication only of the effects of structural change, since relative and absolute productivity levels are assumed to remain constant. The evidence is that structural change in the composition
of employment contributed 2 points of the 9 point decline in full-time employment between 1973 and 1988. The major factor in the decline in full-time employment is the decline in full-time shares across all sectors.

Table 5: Effects of Structural Change on Core Employment

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full-time employment share, 1973</td>
<td>0.88</td>
</tr>
<tr>
<td>Actual full-time employment share, 1988</td>
<td>0.79</td>
</tr>
<tr>
<td>Difference</td>
<td>0.09</td>
</tr>
<tr>
<td>Calculated share 1988</td>
<td></td>
</tr>
<tr>
<td>(1973 industry weightings, 1988 industry FT shares)</td>
<td>0.81</td>
</tr>
<tr>
<td>Contribution of structural change</td>
<td>0.02</td>
</tr>
<tr>
<td>Contribution of other factors</td>
<td>0.07</td>
</tr>
</tbody>
</table>

Another possible contributing factor to the decline in core employment is the effect of a prolonged period of high unemployment. This lengthens the labour queue, allows employers to become more selective, and forces persons into jobs (especially part-time employment) that they would otherwise not have considered under more buoyant economic conditions. In the absence of time series data for casual employment and homeworking, attention must be focused upon part-time employment and self-employment.

With respect to part-time employment three main observations can be made. First, part-time employment growth occurred in the period prior to the significant increase in unemployment rates. For example, in 1965, just over 9 per cent of the workforce were employed on a part-time basis, at a time when the unemployment rate was 1.2 per cent. By 1970, the unemployment rate was still relatively low at 1.4 per cent, yet the proportion of part-timers had increased to 10.6 per cent. Similarly, from the mid 1980s the unemployment rate declined, and yet the proportion of part-timers continued to increase. Second, on a gender basis, the evidence suggests that there was a significant increase in female part-time employment, coinciding with the increase in unemployment rates in the years 1973-1975. Although the female part-time proportion has increased over the longer term, this proportion increased significantly in the mid 1970s when unemployment jumped (see Table 6). Third, in keeping with the above observation, the effects of recession may have been to increase the extent of involuntary part-time employment as a result of workers being forced into part-time work who otherwise would have
preferred full-time work. On this point, Robertson (1989, 393) demonstrates a 65 per cent increase in involuntary part-time employment for the 1978-1984 period.

**Table 6: Part-time Employment and Unemployment, 1973-75**

<table>
<thead>
<tr>
<th>Year</th>
<th>Ratio of Part-Time / Full-Time:</th>
<th>Unemployment Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Males</td>
<td>Married Female</td>
</tr>
<tr>
<td>1973</td>
<td>0.038</td>
<td>0.574</td>
</tr>
<tr>
<td>1974</td>
<td>0.036</td>
<td>0.587</td>
</tr>
<tr>
<td>1975</td>
<td>0.041</td>
<td>0.663</td>
</tr>
</tbody>
</table>

**Source:** ABS *The Labour Force* (Cat. 6203.0)

With respect to self-employment, a similar scenario can be observed to that outlined above for part-time workers. Stricker and Sheehan (1981, 31-32) document the significant increase in self-employment in the mid 1970s, coinciding with the dramatic increase in unemployment rates. Furthermore, Covick (1984) and Burgess (1988) demonstrate that the coincidence between self-employment growth and high unemployment continued into the 1980s, even though unincorporated enterprise income was falling in both real and relative terms.

**Table 7: The Effects of Increasing Feminization of the Workforce, 1973-88**

<table>
<thead>
<tr>
<th>Year</th>
<th>Workforce Share:</th>
<th>Ratio Part-Time / Full-Time:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Males</td>
<td>Females</td>
<td>Males</td>
</tr>
<tr>
<td>1973</td>
<td>0.664</td>
<td>0.336</td>
<td>0.038</td>
</tr>
<tr>
<td>1988</td>
<td>0.595</td>
<td>0.405</td>
<td>0.074</td>
</tr>
</tbody>
</table>

Difference part-time/full-time ratio 1973-1988 = +0.116
Effects of increased female share = +0.052
Effects of other factors = +0.064
The other possibility to be explored is the effect of increasing feminization of the workforce. Has the increase in female participation rates been responsible for a declining core? Females may have a preference for part-time work, they may be occupationally segmented into those areas of relative employment growth, or they may be 'additional' workers responding to the effects of recession. Increasing feminization as such may not explain the trend away from core employment since increasing feminization may be a response to both the previously outlined cyclical and structural factors affecting the composition of employment. An approximate test is to compare the gender distribution the workforce in 1988 against a hypothetical workforce which would have existed if the 1973 distribution of part-time work between males and females had applied. These results are contained in Table 7. These data suggest that increasing feminization of the workforce has contributed towards an increase in the extent of part-time employment. On the basis of the unrealistic assumption of constant cyclical and structural factors, the increase in the female proportion of the workforce accounts for just over 40 per cent of the increase in the part-time employment share. Other factors such as cyclical conditions, structural change and shifts in labour supply preferences also have a potential explanatory role.

**MARGINAL WORKERS IN AUSTRALIA**

Given data and conceptual problems, the analysis of the marginal workforce presented here is suggestive only. As mentioned previously, there is an overlap between the different employment categories and, consequently, each group should not be viewed as a separate and discrete category. Despite these problems, the longer term trends do emerge with some clarity. The analysis will proceed with the following employment groups: casual workers, part-time workers, the self-employed and homeworkers.

**Casual Employment**

The data on casual employment is incomplete and approximate. There is firstly the problem of defining casual employment. Dawkins and Norris (1988) discuss several definitions of casual employment in labour economics and in law and finally settle on the statistician's view that casual employees are those who are not entitled to paid holiday or sick leave. This is not an interpretation which captures the labour economic's view that casual employment represents an irregular and non-continuing employment relationship. The official view assumes that those who do not receive the usual entitlements associated with permanent employment must be casuals. In reality, they may only be employees who are not in receipt of award entitlements. The only reliable estimate for casual employment comes from the survey of employment benefits (ABS, Cat. 6334.0), although prior to its publication an approximate estimate could be made from the survey into alternative working arrangements (ABS, Cat. 6341.0). Both are irregular
series and data is available only for the 1983-87 period. Despite these problems, a trend is evident. During the 1983-87 period, casual employment was increasing, it was heavily represented in part-time and in female employment, and it had a high representation in the agricultural, construction and wholesale/retail trade sectors. About two-thirds of total casual employment is located in the wholesale/retail trade, community services and recreation sectors. About 70 per cent of casuals are employed in three occupations: salesperson, labourer and clerk.

Table 8: Casual Employment in Australia, 1983-87

<table>
<thead>
<tr>
<th>Indicator</th>
<th>1983</th>
<th>1985</th>
<th>1987</th>
</tr>
</thead>
<tbody>
<tr>
<td>Casuales/total employees</td>
<td>17.2</td>
<td>17.4</td>
<td>20.2</td>
</tr>
<tr>
<td>Casual full time/total full time employees</td>
<td>7.2</td>
<td>7.4</td>
<td>8.3</td>
</tr>
<tr>
<td>Casual part-time/total part-time employees</td>
<td>67.5</td>
<td>67.1</td>
<td>69.0</td>
</tr>
<tr>
<td>Casual male/total male employees</td>
<td>10.5</td>
<td>11.9</td>
<td>13.2</td>
</tr>
<tr>
<td>Casual female/total female employees</td>
<td>28.0</td>
<td>28.8</td>
<td>29.9</td>
</tr>
</tbody>
</table>

Source: ABS Employment Benefits (Cat. 6334.0)

Table 8 details the broad trends in casual employment for the 1983-87 period. As mentioned earlier, there is some casual employment in full-time employment. In terms of the core definition, this will act to further reduce the size of the core workforce. Much of the casual employment is part-time in hours, occupied by females, and located in those industries and occupations which are relatively below average in terms of core employment proportions. Given their lack of access to paid entitlements such as holiday leave, casual employees are generally entitled to a higher hourly award rate of pay than permanent employees. However, Dawkins and Norris (1988, 18) note that on average and on an equivalent hourly basis, the earnings of casuals are about 85 per cent of those of permanent workers.

Overall, there is a growing trend in casualization of employment which is associated with other workforce trends, notably the increasing feminization of the workforce and the growth in part-time employment. Such casualization may represent an employer response to prevailing economic circumstances, including a lengthening job queue and the growth of labour on-costs (Business Council Bulletin, 1987). The casualization of employment provides employers with greater flexibility with respect to labour costs and avoids many non-wage labour on-costs. This trend also means that award restructuring has less relevance for a growing part of the workforce.
Part-Time Workers

Part-time work constitutes the largest marginal employment category. The part-time workforce has grown in absolute and relative size in Australia over recent years, it is predominantly female, and it is located in a narrow range of occupations and industries. As indicated above, a large proportion of part-timers are employed on a casual basis. The trend towards increasing part-time employment across Western economies has been documented by de Neubourg (1985), who notes that the majority of part-time jobs are either filled by females aged 25-44 years or by younger workers 15-24 years of both sexes. The evidence on working time preferences, suggests that the majority of Australian part-time workers - about 80 per cent - do not wish to work longer hours (ABS, Cat. 6203.0). In other words, part-time work is the preferred option for most part-time workers. Despite this, the proportion of involuntary part-time workers did increase significantly over the 1978-84 period (Robertson, 1989). Lever-Tracy (1988) has documented the growth in part-time employment in Australia, highlighting its gender concentration and the implications it raises for trade unions who have long held a suspicion towards part-time employment as a potential source of erosion of full-time working conditions.

Available survey evidence on the new part-time jobs generated in Australia from 1983 to 1988 (380,000 jobs or 36 per cent of total employment growth), suggests that there are grounds for trade union concern and sound reasons for including part-time employment in the marginal worker category. Sharpe (1987), for example, cites South Australian evidence (ABS, Cat. 6203.4) which indicates that three quarters of all part-time jobs were casual and received lower hourly earnings than the equivalent full-time jobs but without the benefits such as long service and holiday leave. As suggested in the previous section, there is also a strong connection between the growth of casual employment and part-time employment; many of the additional part-time jobs are casual in their nature.

Part-time employment growth represents the outcome of a number of different pressures. First, there is the preference of many workers, especially females, for shorter and more flexible working hours. Second, the increase in female participation rates has meant more persons actively seeking part-time work. This applies especially to married females in the 25-44 years age group. Third is the relative growth of employment in those industries and occupations which have traditionally had a high representation of part-time employment. The trends in part-time employment have been summarised in Table 1, while Table 9 documents its distribution by gender. The previous section on core employment discussed the impact of structural change, cyclical variation and feminization of the workforce upon the decline in core employment and on the growth in part-time employment.
Table 9: Part-time Employment in Australia by Gender, 1973-1988

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Part-time male/total male employment</td>
<td>3.7</td>
<td>5.4</td>
<td>6.1</td>
<td>7.0</td>
</tr>
<tr>
<td>Part-time female/total female employment</td>
<td>28.2</td>
<td>34.5</td>
<td>36.4</td>
<td>39.5</td>
</tr>
<tr>
<td>Female part-time/total part-time</td>
<td>79.4</td>
<td>78.3</td>
<td>78.0</td>
<td>77.6</td>
</tr>
</tbody>
</table>

Source: ABS The Labour Force (Cat. 6203.0 and 6204.0)

Table 9 shows that both male and female part-time employment have increased. However, females account for the majority of part-time jobs. On an industry basis, part-time employment has increased across all industries, even in the male-dominated manufacturing and construction sectors (see Table 10). However, most new part-time jobs tend to be in the growing service sectors, which have both a high representation of females and part-time jobs. The gender segmentation of occupations has contributed to the growth of marginal employment and to the perpetuation of the disadvantaged status of females in the Australian labour market. In 1988, over 50 per cent of females were employed in just two occupations: clerks and salespersons, these two occupations account for about 15 per cent of male employment. In turn, the same occupations account for close to 60 per cent of total female part-time employment.


<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturing</td>
<td>4.9</td>
<td>5.9</td>
<td>7.3</td>
<td>7.9</td>
</tr>
<tr>
<td>Construction</td>
<td>4.1</td>
<td>8.1</td>
<td>11.7</td>
<td>12.0</td>
</tr>
<tr>
<td>Trade: wholesale, retail</td>
<td>16.3</td>
<td>21.9</td>
<td>23.7</td>
<td>27.7</td>
</tr>
<tr>
<td>Finance, property</td>
<td>11.9</td>
<td>15.8</td>
<td>17.4</td>
<td>26.3</td>
</tr>
<tr>
<td>Community service</td>
<td>20.5</td>
<td>24.0</td>
<td>26.3</td>
<td>28.7</td>
</tr>
</tbody>
</table>

Source: ABS The Labour Force (Cat. 6203.0 and 6204.0)

Thus, the general picture is one of increasing part-time employment as a share in total employment and across industries, occupations and employment status. Part-time jobs tend to be filled by females in the faster growing service industries and to be located in those occupations which tend to be low paying and have limited career paths, especially in the sales and
clerical areas. The available evidence does not answer the question of whether part-time jobs are being deliberately substituted for full-time jobs as an employer flexibility strategy. However, the evidence on the interdependence between part-time and casual employment growth does suggest that employers are increasingly able to avoid many of the labour on-costs associated with full-time and permanent employment status.

The Self-Employed

The 1980s witnessed significant growth in self-employment in both the USA (Haber et.al., 1987) and in the UK (Hakim, 1988). For Australia, similar trends in self-employment growth have been documented by Covick (1984), Norris (1986) and Burgess (1988). It is a matter of debate whether this trend represented a renewal of the entrepreneurial spirit or was the consequence of high unemployment and the resulting absence of employee vacancies. For their part, Stricker and Sheehan (1981) regarded the growth in self-employment in Australia as a response to increased unemployment rates and as a form of hidden unemployment.

In the Labour Force Survey (ABS, Cat. 6203.0) the self-employed are defined as those who operate a business without employees. The self-employed are supposed to be the sole traders of the economy. However, this classification is arbitrary. It includes, for example, subcontractors who may be dependent upon employment from one contracting firm and could therefore be regarded as surrogate employees. There is also the likelihood that many casual businesses and many clandestine business operations are excluded from the official estimates of self-employment. Evidence on multiple job holding (ABS, Cat. 6216.0) for August 1987 indicates that 71,000 second jobs were of self-employment/employer status and that 28 per cent of all second jobs were in this category. That is, if multiple job holdings were included in the total workforce, then the relative size of the core group would be slightly reduced.

In theory, the self-employed possess complete flexibility in employment: hours, income and tenure are all a matter for the market and individual preference. Since the self-employed are mostly outside of the industrial relations and award system, there is the possibility that through such practices as subcontracting and outworking, employers can utilise these advantages to reduce both direct labour costs and on-costs. On the other hand, self-employment growth in Australia has been identified in some studies as representing a fundamental erosion of work and award conditions (Transnational Co-operative, 1985). Similar concerns have been expressed with respect to the incidence of self-employed female homeworking in the clothing, child care and publishing industries (NSW Women's Directorate, 1987).
Table 11: Self-Employment in Australia, 1973-1988

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Self employment (000s)</td>
<td>450</td>
<td>595</td>
<td>653</td>
<td>742</td>
</tr>
<tr>
<td>Self employment/employees (%)</td>
<td>9.0</td>
<td>11.8</td>
<td>12.4</td>
<td>10.2</td>
</tr>
<tr>
<td>Male self-employment/total self employment (%)</td>
<td>76.4</td>
<td>72.4</td>
<td>71.2</td>
<td>68.2</td>
</tr>
<tr>
<td>Part-time self-employment/total self employment (%) n/a</td>
<td>23.2</td>
<td>24.3</td>
<td>24.9</td>
<td></td>
</tr>
<tr>
<td>Female part-time self-employment/total part-time self-employment (%) n/a</td>
<td>n/a</td>
<td>71.8</td>
<td>68.6</td>
<td>67.6</td>
</tr>
</tbody>
</table>

**Source:** ABS *The Labour Force* (Cat. 6203.0 and 6204.0)

Table 11 summarises the broad trends in self-employment in Australia. In general it has been the fastest growing area by employment status. The significant self-employment growth up to the mid 1980s reversed the postwar stagnation in self-employment and coincided with the increase in unemployment. The recent slowdown in the relative growth of self-employment has coincided with the decline in the unemployment rate and adds some credence to Stricker and Sheehan’s (1981) hidden unemployment thesis. To further support this view, Covick (1986) demonstrated that incomes of the self-employed declined significantly in absolute, real and in relative terms to average employee earnings at the time the number of self-employed was increasing.

The self-employed tend to be male and full-time; although there has been significant growth in both female and part-time self-employment. Beyond this, the official data displays a shortage of details on the characteristics of the self-employed. In this way, the Labour Force Survey (ABS, Cat. 6203.0 and 6204.0) still reflects the dominance of the employee model, with many details on employee characteristics including age, ethnicity, and earnings being published, with no similar details being published for those of non-employee status.

Not surprisingly, male self-employment tends to be located in the agricultural and construction industries which together account for about 70 per cent of male self-employment. Female self-employment is more evenly spread across industries, with the agricultural, retail sales and recreation/services sector accounting for about 55 per cent of the total. In occupational terms male self-employment is dominated by the manager/administrator (including farm management) and trades categories. For females, the dominant occupations are manager/administrator, salesperson and clerical. Once again, females tend to dominate the faster growing service sectors and occupations, and these also tend to be the areas for homeworking and outwork (Probert and Wajcman, 1988).
Homeworkers

There has been sporadic publicity about the conditions associated with homeworking, especially in the clothing and textile industry (see Centre for Working Women Co-operative, 1986; Powell, 1987). Discussion has centred upon the low wages and below award conditions associated with such employment. While homework may constitute a form of outwork, especially in the clothing and textile industry, not all outwork is performed in the home. For example, business premises may be used as a location for subcontracted textile outworking. Additionally, not all homework is inherently exploitative or associated with the textile industry. Probert and Wajcman (1988) have highlighted the growth in homeworking in some of the service areas, such as word processing and computer programming, while many professionals (eg. architects) may conduct their business from home. Homework is one of those non-employee areas where information is sparse and the employment relationship is ambiguous. As the previous section indicated, homeworkers may on the one hand be regarded as a special case of self-employment. On the other hand, where the work is regular and contractual in nature, they may also be regarded as surrogate employees. In the past (eg. Probert and Wajcman, 1988), estimates of homeworking numbers have been derived from questions in the population census (ABS, Cat. 2487.0) covering the method of travel to work. More recently the Australian Bureau of Statistics has released a survey of homeworking (ABS, Cat. 6275.0). As a consequence, it is possible to observe the trends in homeworking from 1981 to 1989, although the data are not comparable. Apart from the survey-census inconsistency, there is the problem of defining the 'home'. In the census, homeworkers include farmers working on their property, while in the survey they are not regarded as homeworkers. The survey covers only homeworkers for whom homeworking was their principal employment form, thus excluding multiple job holders for whom homeworking was a minor employment source.

Table 12: Homeworking in Australia, 1981-89

<table>
<thead>
<tr>
<th>Indicator</th>
<th>1981*</th>
<th>1986*</th>
<th>1989**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of homeworkers (000s)</td>
<td>439</td>
<td>367</td>
<td>266</td>
</tr>
<tr>
<td>Female homeworkers/total homeworkers (%)</td>
<td>50.0</td>
<td>52.9</td>
<td>69.9</td>
</tr>
<tr>
<td>Total homeworkers/total employment (%)</td>
<td>7.0</td>
<td>5.6</td>
<td>3.4</td>
</tr>
</tbody>
</table>

Sources:  
* ABS Census of Population (Cat. 2487.0)  
** ABS Persons Employed at Home (Cat. 6275.0)

Table 12 summarises the broad trends in homeworking. The 1986 and 1989 figures are not comparable. Once again, females dominate this marginal employment form and the majority of homeworkers in 1989 (about
two-thirds) worked on a part-time basis. Over half the males are classified as managers or professionals, whereas over half the females were clerical workers. Only one-third of homeworkers were classified as employees, for these the dominant payment method was by the hour. There was very little evidence either through occupation, industry or payment method of homeworking for the textile industry. This suggests that: the claims concerning textile outwork have been exaggerated (Centre for Working Women Co-operative, 1986), outwork is performed away from the home or in a second job capacity, or that such employment has been concealed.

The 1989 estimates of homework can be modified to include those workers who worked some hours at home, but were holding jobs elsewhere. When these are included, the extent of homeworking increases to 23 per cent of total employment, with the proportions being 24 per cent of males and 21 per cent of females. Of those who worked at home only, just over half were classified as self-employed and about 60 per cent were part-time workers. Of the employees who worked at home, 25 per cent were male, two-thirds of whom were employed on a full-time basis; in turn, just over half were permanent. In other words, these figures suggest that the estimates of the core workforce could be further reduced. The survey indicates that the majority of home-workers were not trade union members, nor were they in receipt of those entitlements associated with full-time award employment conditions.

Overview

The marginal employment categories have been assessed in isolation from each other, and separately from the core workforce. Data limitations prevent a detailed trend analysis of all categories concurrently but, through some juggling and assumptions, it is possible to generate a snapshot of the structure of employment in Australia for 1988. Such a snapshot is presented in Table 13.
Table 13: Estimates of the Composition of the Australian Workforce, 1988

<table>
<thead>
<tr>
<th>Category</th>
<th>Full-Time</th>
<th>Part-Time</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>000s</td>
<td>000s</td>
</tr>
<tr>
<td>Employees</td>
<td>4964</td>
<td>1160</td>
</tr>
<tr>
<td>(Casual Employees*)</td>
<td>199</td>
<td>561</td>
</tr>
<tr>
<td>Self-employed</td>
<td>557</td>
<td>184</td>
</tr>
<tr>
<td>Employers</td>
<td>317</td>
<td>61</td>
</tr>
<tr>
<td>Unpaid family helpers</td>
<td>18</td>
<td>51</td>
</tr>
</tbody>
</table>

The above estimates include:
- Involuntary part-time
  - Homeworkers**: 177
  - Homeworker Employees: 36

Full-time employees, non-casual, non-home-working:
- Number (000s): 4729
- As a percentage of total employment (%): 64.5
- As a percentage of the labour force (%): 60.0

* 1987 proportions assumed for 1988
** 1989 proportions assumed for 1988

Sources: ABS Part-Time Workers - South Australia (Cat. 6203.0), Persons Employed at Home, (Cat. 6275.0), Employment Benefits, (Cat. 6334.0)

Table 13 suggests that around 65 per cent of the workforce in 1988 could be regarded as being in core employment. As a proportion of the labour force - that is, including the unemployed - the core declines to about 60 per cent. This figure would be slightly reduced if multiple job-holdings were included, for which the majority of second jobs are either part-time or non-employee status. The other third of the workforce is either employed on a part-time basis, are not employees, work in the home or are employed on a casual basis. These others have been referred to as marginal workers, although many of this grouping such as employers and self-employed professionals, are not necessarily employed under poor conditions nor with low levels of remuneration. The bulk of part-time, casual and homeworkers are females, while the majority of these workers are located in the service sector. A combination of the following trends should further increase the marginal component of the workforce in the future: increasing feminization of employment, an increasing share of service sector employment, and an increase in part-time employment across all sectors. If there is a downturn in the economy, with increasing unemployment, this should further increase the proportion of marginal workers in the workforce. These trends present trade unions with a serious challenge to their ability to represent the workforce and to participate in the policy formulation agenda.
THE RELATIVE INCOMES OF MARGINAL WORKERS

It is assumed, but not proven, that on average the income of marginal workers will be significantly less than core workers. Given the data problems, it is not possible to present a continuous comparison of relative income outcomes. However, it is possible to draw on isolated surveys and estimates to provide a momentary comparison. Evaluation is difficult because the hours worked are not identical - especially for part-time and casual workers. Any estimate will understate the relative income status of marginal workers since they are faced with the possibility of any of the following: less than full-time employment, non-continuous employment, and few non-wage entitlements. Hence, comparison of, say, hourly earnings will in general understate the relative income status of many marginal workers. Any income changes through time may also reflect occupational and industrial shifts in the workforce, changes in gender distribution and changes in the mix between junior and adult employees.

The following points emerge from a range of studies. The first concerns part-time workers. A South Australian survey (ABS, Cat. 6203.4) found an average hourly wage rate for part-timers of $9.11, while the distribution of earnings (ABS, Cat. 6310.0) reveals that average hourly earnings for full-time workers in South Australia was about $10.00. Furthermore, the ratio of average weekly earnings for part-time to full-time employees has declined from 0.45 in 1978 to 0.42 in 1988 while average weekly hours in a relative sense have increased for part-timers (ABS, Cat.6310.0).

The second point relates to casual employment. Dawkins and Norris (1988, 19) note that casuals on an equivalent hourly basis are paid about 85 per cent of the rate paid to full-time employees. This may be related to the greater mix of juniors, females and service sector casual workers.

Third, Covick (1986, 40) notes that the rise in self-employment numbers examined earlier coincided with a decline in average real non-farm self-employed income, which declined in every year between 1972/73 and 1982/83. Over this period, the total decline in average real non-farm income for the self-employed was 45 per cent. Over the same period, real average full-time weekly earnings for male employees increased by 11 per cent.

THE IMPLICATIONS FOR TRADE UNIONS

Australian Bureau of Statistics estimates from two sources point to a declining trade union representation among employees. *Trade Union Statistics* (ABS, Cat. 6323.0), which are obtained from a trade union survey, suggests that a declining proportion of employees are trade union members, with the fall being from 57 to 53 per cent during the 1980s. On the other hand, the survey
of employees (Cat. 6325.0), suggests that the fall was from 50 per cent to 41 per cent. The latter is regarded as being more accurate, since the former may include members who belong to more than one union and members who are retired or unemployed. More detailed trends in trade union membership for the 1980s are outlined in Table 14, while a profile of trade union members in 1988 is contained in Table 15. For the 1980s trade unions have been under strong political and legal pressure (ACTU, 1987), to this must be added the pressure of a declining representation among employees.

**Table 14: Trade Union Membership in Australia, 1980-1988**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Trade union membership/total employees:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trade union survey</td>
<td>55</td>
<td>56</td>
<td>55</td>
<td>54</td>
</tr>
<tr>
<td>Employee survey</td>
<td>na</td>
<td>48</td>
<td>45</td>
<td>41</td>
</tr>
<tr>
<td>Trade union membership/total workforce:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employee survey</td>
<td>na</td>
<td>40</td>
<td>37</td>
<td>34</td>
</tr>
</tbody>
</table>

**Source:** ABS Trade Union Statistics (Cat.6323.0), Trade Union Members (Cat. 6325.0), Labour Force (Cat. 6203.0)

Trade unions are aware of the membership problems facing them and have canvassed options for improving their representation (see ACTU, 1987; Berry and Kitchener, 1989). However, the point is that a significant proportion of the marginal workforce is not unionised. Moreover, the representation of trade unions among employees will decline as long as recent workforce trends are perpetuated including:

(a) growth in part-time and casual employment;
(b) a shift away from public sector towards private sector employment;
(c) a shift towards service sector employment;
(d) an increase in the share of female employment;
(e) a relative decline in blue collar occupational employment;
(f) a shift towards small firm employment.

Table 15 highlights the effects such shifts would have on the trade union density. Berry and Kitchener (1989; 19) predict that if current trends continue only 25 per cent of employees will be unionised by 2000. In apportioning the decline in trade union density, Crean and Rimmer (1989) suggest that over half of the decline in trade union density is explained by those structural and workforce shifts outlined above, the rest being explained by a declining 'propensity' towards unionization. Their estimates are replicated in Table 16, the point to note is that the growth in both part-time and casual employment are important factors explaining the declining trade union density.
Table 15: Characteristics of Trade Union Members, 1988

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Union Density Rate*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Sector</td>
<td>68</td>
</tr>
<tr>
<td>Private Sector</td>
<td>32</td>
</tr>
<tr>
<td>Full-Time</td>
<td>46</td>
</tr>
<tr>
<td>Part-Time</td>
<td>25</td>
</tr>
<tr>
<td>Permanent</td>
<td>47</td>
</tr>
<tr>
<td>Casual</td>
<td>20</td>
</tr>
<tr>
<td>Male</td>
<td>46</td>
</tr>
<tr>
<td>Female</td>
<td>35</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>48</td>
</tr>
<tr>
<td>Wholesale and retail trade</td>
<td>23</td>
</tr>
<tr>
<td><strong>Average</strong></td>
<td>42</td>
</tr>
</tbody>
</table>

* union density rate = total union membership/total employees

Source: ABS, Trade Union Members (Cat. 6325.0)

The representation of trade unions will be further diminished if there continues to be growth in the non-employee forms of employment where trade union density is extremely low. Table 14 indicates that as a proportion of the workforce, declining trade union representation has been even greater than suggested by the official employee estimates which measure density as a proportion of employees.

Table 16: Factors Contributing to Changes in Union Density, 1982-88

<table>
<thead>
<tr>
<th>Factor</th>
<th>Contribution to changes in union density</th>
</tr>
</thead>
<tbody>
<tr>
<td>Growth in white collar employment</td>
<td>-0.48</td>
</tr>
<tr>
<td>Change in industry structure</td>
<td>-0.87</td>
</tr>
<tr>
<td>Decline in public sector employment</td>
<td>-1.00</td>
</tr>
<tr>
<td>Growth in female employment</td>
<td>-0.52</td>
</tr>
<tr>
<td>Ageing workforce</td>
<td>+0.02</td>
</tr>
<tr>
<td>Growth in part-time employment</td>
<td>-0.58</td>
</tr>
<tr>
<td>Growth in casual employment</td>
<td>-1.71</td>
</tr>
<tr>
<td>Total effects of above</td>
<td>-4.35</td>
</tr>
<tr>
<td>Unexplained</td>
<td>-2.65</td>
</tr>
</tbody>
</table>

Source: Crean & Rimmer (1989, 17)

For marginal workers who are often disadvantaged and include a high proportion of females the need for trade union representation is apparent. However, a growing proportion of the workforce is located outside the trade
union umbrella. This has important implications in terms of the political propriety of the ACTU in claiming to represent the workforce in peak representative negotiations such as those associated with the Accord. Indeed, the trends outlined can be used to question the very legitimacy of the ACTU as a representative of labour in the Australian workforce. Furthermore, it throws into doubt the relevance of workplace reforms such as those associated with the process of award restructuring given the majority of employees are not trade union members together with the fact that a large proportion of employees are employed on a less than full-time and/or non-permanent basis.

CONCLUSIONS

In terms of the available official and aggregate data, there is a clear trend of decline in the proportion of core workers in Australia. These official estimates understate marginal employment given that the official estimates are more extensive in their coverage of employees and that unreported employment is likely to be marginal in character. The taxonomy adopted for dividing the workforce is arbitrary and not accurate, but it is doubtful whether even more sophisticated schema would reveal different trends in the face of the structural, cyclical and gender changes occurring in the Australian workforce since 1973.

Official employment data are, for a number of reasons, biased towards the collection of information on employee status, the predominate workforce classification. As a result, the information on non-employee status tends to be partial, infrequent and incomplete. As well, there are many areas of overlap in the marginal area between part-time employment, casual employment, temporary employment, homeworking and self employment. As a consequence, it is difficult to provide a detailed profile of the marginal workforce. Available information suggests that in the main marginal employment tends to be dominated by a narrow range of service industries and occupations, in turn these have been the major areas of employment growth in the Australian economy. Marginal employment has also grown because of the increase in female participation rates (and declining male rates) and the increase in part-time employment. In other words, demographic, social and structural factors have had an important role to play in the growth of the marginal workforce.

A growing marginal workforce has a number of implications. First, despite the indication that 85 per cent of all employees (ABS, Cat. 6315.0) are covered by awards, the proportion of the total workforce covered by awards seems to be declining. Second, trade union densities with respect to employees have been gradually falling during the 1980s. Again, the implication is that trade unions are covering an even smaller proportion of the total workforce in the face of the decline in the proportion of employees in the workforce. Third, there is the danger that with a growing section of the
workforce being located outside of traditional employment forms and outside of award and trade union access, segmentation between an elite core and a peripheral marginal workforce is intensifying. Available evidence highlights the high representation of females in many marginal employment forms, which will in turn intensify the disadvantage suffered by a large number of females in the Australian workforce. Finally, there are implications for the distribution of income and for the operation and framework of the industrial relations system. As long as the marginal workforce continues to grow, it is likely that income distribution in Australia will become more skewed. Moreover, the representative nature and the relative bargaining position of trade unions must also be questioned.

APPENDIX

The series issued by the Australian Bureau of Statistics used to derive the estimates of the core and the various secondary components of employment are as follows.

<table>
<thead>
<tr>
<th>Catalogue</th>
<th>Title</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>2487.0</td>
<td>Population Census of Population and Housing</td>
<td>Every 5 years</td>
</tr>
<tr>
<td>6102.0</td>
<td>Guide to Labour Statistics</td>
<td>Irregular</td>
</tr>
<tr>
<td>6203.0</td>
<td>The Labour Force, Australia</td>
<td>Monthly</td>
</tr>
<tr>
<td>6204.0</td>
<td>The Labour Force, Australia</td>
<td>Annual</td>
</tr>
<tr>
<td>6203.4</td>
<td>Type and Conditions of Part-Time Employment, South Australia</td>
<td>Irregular</td>
</tr>
<tr>
<td>6315.0</td>
<td>Incidence of Awards, Australia</td>
<td>Irregular</td>
</tr>
<tr>
<td>6216.0</td>
<td>Multiple Job Holding, Australia</td>
<td>Irregular</td>
</tr>
<tr>
<td>6323.0</td>
<td>Trade Union Statistics, Australia</td>
<td>Annual</td>
</tr>
<tr>
<td>6325.0</td>
<td>Trade Union Members, Australia</td>
<td>Irregular</td>
</tr>
<tr>
<td>6275.0</td>
<td>Persons Employed at Home, Australia</td>
<td>Irregular</td>
</tr>
<tr>
<td>6334.0</td>
<td>Employment Benefits, Australia</td>
<td>Annual</td>
</tr>
<tr>
<td>6341.0</td>
<td>Alternative Working Arrangements, Australia</td>
<td>Irregular</td>
</tr>
</tbody>
</table>
REFERENCES


NSW Women's Directorate (1987) *Self Employed or Employee?*, Department of Industrial Relations, Sydney.


3 Marginal Workers and the Law

Adrian Brooks

INTRODUCTION

Over the last half-decade, observers and commentators have begun to discuss a phenomenon variously described as 'marginal' or 'atypical' employment. This description embraces a number of work arrangements: part-time work, casual work, outwork, volunteer services, job-sharing, agency employment, fixed-term employment, independent contracts, persons selling under franchise, and so on. The proportion of the total workforce involved in these arrangements has, over the last decade, increased substantially. And yet, the recognition of these structural changes in the workforce, and the commentary on their advantages or disadvantages, have so far taken place largely outside the legal arena (for an exception, see Muckenberger, 1989).

This neglect is particularly unfortunate in Australia because the parameters of debate about 'marginal' or 'atypical' employment are, perhaps more than in any other country, determined by entrenched legal doctrine. Underlying the whole system of compulsory conciliation and arbitration of industrial disputes, and the highly centralised system whereby wages and conditions of work are regulated, run the archaic formulations of the common law. Though it is common to regard the conciliation and arbitration system, and the attendant provision by direct legislation of benefits such as workers' compensation, annual holidays, long service leave, reinstatement rights and protection in the event of redundancy, as being the creatures of statute, the entire edifice is predicated upon common law principles - which are arguably as outdated as they are internally confused.

To be eligible to be a member of a trade union,\(^1\) to be covered by an award,\(^2\) to be entitled to workers' compensation,\(^3\) guaranteed annual holidays with pay,\(^4\) long service leave\(^5\) and reinstatement,\(^6\) a worker must be an 'employee' as defined according to the principles of the common law. The system is thus centred on common law definitions and principles. To understand properly, therefore, the manner in which marginal workers are
regarded by the industrial tribunals and parliaments, and provided for in awards and statutes, the first task is to examine how they are seen by the law in terms of common law principles.

That examination reveals that basically the common law does not 'see' marginal workers at all. That is not to say that they are not covered by common law and subject to its requirements. It is to say, instead, that the common law does not see them as a distinct category, and therefore makes no provision for the features of their work arrangements which differentiate them from 'typical' workers. In the eyes of the common law, one either is or is not an employee - it matters not whether one is marginal or otherwise.7

However, while not treating marginal workers as distinct in terms of principle, the common law is not ignorant of the particularities of their situation. Its principles have evolved in response to what it regards as 'typical' employment. The common law has an idea of the context of employment drawn from what it believes is its 'true' form - that employees work in set and uniform shifts in large groups in a single location, under 'the shadow of the smokestack' and under the control of the employer or his/her delegates; and on the basis of that believed context, it has formulated its principles. Because these principles are directed to a different set of work arrangements, they fail to give protection to marginal workers. That failure becomes more serious when we realise that marginal work arrangements are not a small category of departures from a numerically overpowering norm; but that they are themselves numerically significant, if not superior. Traditional common law doctrines of employment are thus based on a doubtful centre; and we need to produce a reformulation that turns employment law inside out, to demarginalise what has been treated as marginal, and to decentralise what has been treated as standard. We need, in fact, to do away both with a separate law of 'employment' and with the use of 'employment' as the criterion for eligibility to statutory protection. Instead, we should develop a common law of work relationships, adapted to the particular features of the various types of work relationships, and to develop criteria for eligibility to statutory protection and benefits appropriate to the relationship between particular protections and benefits, on the one hand, and particular work arrangements on the other.8

The inadequacy of the law as it currently stands in its application to marginal workers is unsatisfactory at all levels. At the first level is the basic vehicle which the common law uses to conceptualise work arrangements - the contract. The philosophy of contract sees arrangements between people as between juridical equals of matched bargaining power. Most marginal workers do not have bargaining power equal to that of those for whom they work (an observation which is of course true of employees also). We ought to decontractualise the law of work (Smith, 1975). We certainly ought to decontractualise the law applying to the work of marginal workers because contract is an inappropriate vehicle for the work arrangements of most, if not
all, marginal workers and because, while contract is the chosen vehicle, it leaves one group of marginal workers - voluntary workers - completely outside the system of the law.

The second level at which the law is unsatisfactory in application to marginal workers is that of the typology of contract which the common law uses for the regulation of work arrangements. Its categorisation of work arrangements into employment and independent contracts, allied to its presumptions regarding the 'typical' features of employment situations and to the fact that its protection of workers, inadequate as it is, is directed predominantly to employees, means that the particular needs of marginal workers are ignored.

The third level at which the law is unsatisfactory is at the level of direct provision of statutory benefits. Since the criterion for eligibility to these benefits is the existence of an employment relationship, the benefits are unavailable to marginal workers unless they can bring themselves within the common law definition of employee.

The fourth level of unsatisfactory legal treatment is the level of the industrial tribunals. Since the tribunals limit themselves, for the most part and, in the federal sphere, almost entirely, to coverage of employees, those marginal workers who do not qualify as employees are outside the purview of the tribunals; and since the tribunals have absorbed the common law's presumptions about the identifying features of employment, their provision for those marginal workers who qualify as employees is again incompletely tailored to their real needs.

The final level at which the law is unsatisfactory in its application to marginal workers is at the level of the union. The tribunal structure recognises only unions of employees, and the eligibility rules of unions working within the system thereby limit access to membership to employees. Even where marginal workers qualify for union membership as being employees, the policies and programmes of the unions are affected by the tribunals' views of 'typical' employment, and - with honourable exceptions - do not adequately address the particular needs of their marginal worker members.

The structure of this chapter reflects these levels of inadequacy in the law. The first section examines the treatment of marginal workers by the common law, while the second focuses on statute law. Attention then turns in the third and fourth sections to the industrial tribunals and trade unions respectively. The final section summarises the argument and draws out the implications of the analysis for the future of the law and trade unions.
MARGINAL WORKERS AND THE COMMON LAW

To date, the only real avenue of legal protection for marginal workers has been to establish themselves as employees, so as to gain some access to statutory control of their work situation and to statutory benefits. The identification of an employment relationship has perennially been one of the most vexed issues in employment law (Merritt, 1982, 105ff; Brooks, 1988, 48-53), and while the definitions of an employment contract have changed over the years, all present pitfalls to the marginal worker. The original control test, whereby a contract was one of employment when the person for whom the work was done controlled not only what was to be done, but how it was to be done, is clearly inappropriate to many marginal work situations. Similarly inappropriate is the modified control test whereby it was sufficient if there was control in incidental aspects of the work and whereby it was not necessary that the employer actually exercised control over how the work was to be done, provided that he/she had 'ultimate authority' to exercise it if he/she so chose.

The modified control test was followed by an extended control test. A contract was one of employment if it exhibited both control - simple, incidental or authorised - plus one or more of other factors claimed by the law as being particular to or common in employment contracts. One of these factors was a requirement of personal service by the worker. The second additional factor was a requirement that the terms of the contract, other than those authorising control and stipulating personal service, be not inconsistent with the contract being one of employment. The terms which the courts hold inconsistent with contracts of employment are those which differentiate the 'shadow of the smokestack' work arrangements, the presumably typical arrangements, from the presumably atypical. Both the requirement of personal service and of consistency with 'typical' features of employment operate to exclude many marginal work arrangements from definition as employment.

The only definition of employment contracts which offers any hope to marginal workers is the so-called integration test, which asks 'is the worker integrated into the employer's business or is he/she part and parcel of the employer's organisation?' or, conversely, 'is the worker in business on his or her own account?' The difficulty with this definition is that it is the least highly regarded by the courts, and is either used in combination with the others, the control, inconsistency, or control/personal service/ inconsistency amalgam, or it is rejected as 'raising more questions than [the judges] know how to answer'.

The one ray of hope, then, for marginal workers seeking to obtain legal protection by bringing themselves within the scope of the common law of employment is the ad hoc practice of some judges, generally covert
(Brooks, 1988, 91-92) but occasionally acknowledged, of tailoring their answer to the question of whether the contract is one of employment to the reason the question was put.

Thus, all of the tests or combination of tests used to define a contract for the performance of work as being one of employment or one between principal and independent contractor present difficulties for marginal workers seeking to gain some legal protection by classification as employees. Not all tests are barriers to all types of marginal workers, but the trend to applying all or most in combination will mean that all marginal workers are likely to be at risk from some part of the combination. And the more marginal a particular type of marginal worker is, the greater the risk.

What are the consequences of marginal workers failing to qualify for classification as an employee? As has already been discussed, such an event excludes marginal workers from access to numerous statutory benefits. However, there are also differences in the obligations of employers and principals and the rights of employees and contractors in the common law contracts, and in the remedies available for breach of employment and independent contracts, which will result in a weaker legal position for excluded marginal workers. The common law of employment imposes certain implied obligations on employers which will not be similarly imposed by implication (or not imposed to the same extent) on principals. The common law of employment imposes onerous implied obligations on employees which will, where the factual context is appropriate, be imposed on independent contractors. Thus, marginal workers held not to be employees lose the benefits which would flow from the obligations of the employer, but do not escape the burdens which flow from the obligations of the employee. There is thus a disadvantage to marginal workers in the tendency of the law to treat them as independent contractors, not only in the resultant exclusion from statutory benefits and protection, but also in the exclusion from protection at common law arising from the 'status' of employee.

MARGINAL WORKERS AND STATUTE LAW

Not only are marginal workers classified as independent contractors legally disadvantaged by exclusion from statutory benefits and protection, but even those who achieve classification as employees may not receive statutory benefits and protection on the same scale as 'typical' employees. Many of those benefits and protections are framed with the presumed circumstances of 'typical' employment in mind, and this will result in differential treatment of those whose work circumstances do not tally with the presumptions, and will cause differential access to enforcement of the rights created. This section will concentrate on this differential treatment of those marginal workers who are classified as employees.
Workers' Compensation Benefits

There are several ways in which workers' compensation entitlements will be less advantageous for marginal employees than for their 'typical' employee fellows. Firstly, it may be more difficult for them to establish that they are 'workers' within the legislation. A second way in which workers' compensation entitlements benefit marginal employees less than 'typical' employees is that marginal employees whose marginality involves working in isolation from other employees (for example outworkers) may well be unaware of their rights to claim when injured. Outworkers from non-English speaking backgrounds may not even know of the existence of the workers' compensation scheme; workers without access to the experience of others, and with diminished or no access to advice from trade unions, may not realise that a particular injury is compensable, may not know how to get or fill out a claim form, may not know whether the payments they receive are correct, may not know how to proceed if the claim is contested.

Workers' compensation is paid for injuries received or diseases contracted in the course of employment. The circumstances of much marginal employment may make it problematical to establish that an injury has been received or a disease contracted 'in the course of employment'.

Where the employer of an injured worker is, in breach of his/her obligations under the legislation, uninsured for workers' compensation, the injured worker can make his/her claim against statutorily-established funds, which may then proceed against the employer for sums paid out. There is a much greater likelihood that employers of marginal employees will be uninsured than of employers of 'typical' employees being uninsured. Where a marginal employee is injured, makes a claim and is told by the employer that there is no policy to cover him or her, the circumstances of the marginal employment will make it more difficult for the worker to discover his/her rights to claim against the uninsured liability fund and to gain assistance in so claiming.

Long Service Leave

Few marginal employees will be able to receive benefits arising under long service leave legislation. Entitlement to long service leave arises as a result of a set period, varying slightly from state to state and territory, of continuous employment with the one employer. The period is either ten or fifteen years. Few marginal employees will be employed by the one employer for even ten years. Where the period of employment is less than the ten or fifteen years required for leave, the employee may be entitled, on termination of his/her employment with an employer, to be paid a proportion of the wages which would have been paid during long service leave corresponding to the proportion that the period of his/her employment bears to the period of
entitlement for leave. But this pro rata entitlement is also premised upon a set period of service. A Again, it is unlikely that marginal employees will have even that period of continuous employment with the one employer.

Even in the unlikely situation that a marginal employee remains in continuous employment with an employer for ten or fifteen years and becomes entitled to long service leave, the entitlement to leave may be of reduced value. An employee entitled to long service leave is entitled to two to three months leave from the employment of the employer at his/her ordinary rate of pay from that employer. A 'typical' employee can afford to apply for and to take long service leave because the rate of pay received during the period of leave is (basically) the same as that which he/she would have received if working. Where a person works part-time or on a regular casual basis with an employer, that person may be doing only one or two days work a week with that employer, and making up the necessary income by working part-time or on a casual basis on the other days with one or more other employers, or even working on the other days on an independent contractor basis. If that person then becomes entitled to long service leave from one employer, he/she will be entitled to receive one or two days pay from that employer, without work, for two or three months. But that will not enable that person to have two or three months respite from work, unless he/she is simultaneously entitled to leave from the other employers. While there is obviously some advantage flowing to such a person from the legislation - it is better for him or her to be able to get five days pay for three days work than to have to work five days for the same pay - the benefit which the legislation primarily envisages is that workers will be able, without loss of income, to have a complete break from work for two or three months, but the procedure adopted to confer that benefit is structured around 'typical' employment, and thereby disadvantages marginal employees.

As with workers' compensation, marginal employees are also more likely to be unaware of their long service leave rights, such as they are, and of the procedures to be taken to enforce them if the employer does not fulfil his/her obligations under the legislation.

Annual Holidays

Only three states provide statutory entitlement to paid annual holidays for employees outside the purview of awards. In New South Wales, the Annual Holidays Act 1944 provides (s. 3) that all employees are entitled to four weeks paid leave for each 12 months continuous service with an employer. The leave is to be paid at the ordinary rate of pay. Any marginal employee who works for the same employer for 12 months under one contract of employment will thus become entitled to paid holidays. However, as with long service leave, if the person concerned has been working for the 12 months in a part-time or job-sharing capacity, the leave will only be paid at the weekly rate which the person was receiving from the employer concerned - perhaps based on one or two days work a week only. To be able to afford to
take four full weeks holiday, that person would therefore need to be entitled at
the same time to holidays in relation to employment with other employers
during the remaining days of the week. There could be real practical
difficulties in organising to be simultaneously entitled to holidays in part-time
jobs making up a full week's work, and thus a full week's pay. (Where part-
time or casual employment is covered by an award, that award commonly
prescribes a slightly higher rate of pay in lieu of annual leave entitlement.)

Section 4 of the NSW Annual Holidays Act 1944 provides that where
an employee's employment is terminated within 12 months of its
commencement (or within 12 months of the end of annual holidays accrued
and taken), the employee is to receive, on termination, a sum equal to one
twelfth of the pay for the period of service. Under this provision, a marginal
employee on a series of short term contracts could, by the end of 12 months,
have accumulated payments equal to the pay for four week's work, and
theoretically could afford to use that sum to finance four weeks without work.
In practice, however, if the person concerned has been employed at low rates
of pay, he or she will not have been able to leave these payments in respect of
accruing holiday entitlements untouched, and will have had to spend them to
meet financial commitments as they arise. The same difficulty will eat away
the value of the loadings on rates of pay for casual workers covered by
awards.

In Victoria, the Annual Leave Order passed pursuant to s. 58 of the
Industrial Relations Act 1979 provides for employees not covered by awards
three weeks paid holiday after 12 months of continuous service, and - where
employment is terminated before the right to leave has fully accrued - to a
payment equal to 3/49 of the pay for the period worked. The position of
marginal employees in relation to both the taking of leave and the receipt of
the payment in lieu of leave rights not fully accrued will be subject to the
same difficulties as discussed in relation to the New South Wales provisions.

In Western Australia, there is no across-the-board statutory coverage
of employees not covered by holiday provisions of awards. However,
employees not covered by awards employed in factories are entitled to four
weeks paid holiday after 12 months continuous service by s. 59 of the
Factories and Shops Act 1963. This is unlikely to benefit many marginal
employees since few would be employed in factories as defined in the Act.

In South Australia and Tasmania, there is no statutory provision for
paid holidays but only award coverage. Section 81 of the (SA) Industrial
Conciliation and Arbitration Act 1972 empowers the Full Commission of the
South Australian Industrial Commission to determine a 'general standard' for
paid holidays for employees not covered by awards, but the Commission has
not yet exercised this power. In Queensland also, there is no statutory
provision distinct from awards. Section 11.15 of Queensland's Industrial
Relations Act 1990 requires all awards to contain provision for paid annual
leave for a period to be determined by the Industrial Commission. This will not, however, benefit workers not covered by awards - and thus, the majority of marginal employees.

Thus, in the only two jurisdictions where statutes apparently extend the right to paid annual holidays to the marginal workforce generally, the details of the provisions and the work arrangements of many marginal employees will prevent them from receiving in full the benefit which the statutes were intended to provide.

**Occupational Health and Safety Legislation**

The Occupational Health and Safety Acts, variously entitled, of the states and territories, oblige employers to take reasonable care for the health and safety of employees. This obligation will, in theory, cover the health and safety of marginal employees as well as 'typical' employees, but the circumstances of marginal employment may result in a narrower scope for the obligation. Provided the duty is so worded that the employer is to take care for the employees at work, or to take care in relation to the health and safety of the employees' working environment, it will cover the multifarious circumstances in which marginal employees work. Most of the statutes do refer to care for employees 'at work', or to provision of a safe and healthy 'working environment'. However, the Tasmanian Industrial Safety, Health and Welfare Act 1977 states (in s. 32) that:

> [e]very occupier of a work place and every person carrying on an industry shall take reasonable precautions to ensure the health and safety of persons employed or engaged at that work place or in that industry. [emphasis added]

The duty would thus seem to be limited in scope to the premises of the employer/occupier, and not to cover the working environment of employees who work away from those premises. The Northern Territory Work Health Act 1986 states (s. 29) that:

> [a]n employer shall provide and maintain, so far as is practicable, a working environment at a workplace that is safe and without risk to the health of his workers or any other persons working at the workplace. [emphasis added]

This formulation also suggests limitation to the employer's own premises, though the definition of workplace (s. 3) as 'a place, whether or not in a building or structure, where workers work' possibly overcomes the apparent limitation. However, the wording of the section seems to be designed to describe a situation where employees and contractors are working side by side, and this would suggest strongly that the 'workplace' referred to is that of the employer, and not the premises of a contractor working away from the employer/principal's factory, office, workshop etc. The Tasmanian Act
similarly defines workplace (s. 3) as 'any premises or place in which persons are employed or engaged in industry'. It is less easy to use this definition to extend the employer's duty to cover the worker's premises as well as the employer's own because of the wording of s. 32: 'the occupier of a workplace'. Does a manufacturer who contracts with an outworker, for example, become by virtue of that contract the 'occupier' of the part of the outworker's residence where he/she works? The section awaits judicial interpretation on this issue, but in the meantime it is possible that it is inadequate in its coverage of the working environment of marginal workers.

Moreover, the particularisations in most of the statutes (without prejudice to the generality of the basic duty) of what taking care for health and safety of employees will entail, are directed clearly at the circumstances of 'typical' employment, and give little guidance as to the steps necessary to provide safe and healthy working environments for workers in 'atypical' work situations. The Victorian Occupational Health and Safety Act 1985, for example, refers in s. 21(2) to provision and maintenance of safe plant and systems of work, arrangements for safe use, handling, storage and transport of plant and substances, maintenance of workplaces under the control and management of the employer in a safe and healthy condition, provision of adequate facilities for welfare of employees at workplace under the control and management of the employer, provision of information, instruction, training and supervision necessary to enable employees to perform their work in a safe and healthy manner. Furthermore, s. 21(4) obliges employers to monitor the health of employees, keep information and records relating to the health and safety of employees, employ or engage qualified occupational health and safety personnel to provide advice, monitor conditions at workplaces under the control and management of the employer, and provide information to employees, in appropriate languages, with respect to health and safety. These matters have clearly been formulated in relation to workplaces where large groups of employees work together, and not to the diffused and isolated working environments of many marginal workers.

Legislation directed to health and safety at work differs from most other legislation conferring benefits and protection in respect of work situations in that it does not confine the intended protection to employees. This is particularly true of the newer 'occupational health and safety' statutes, variously entitled. These Acts not only require employers to take care for the health and safety of employees, but also require them to take care for the health and safety of persons not their employees regarding risks arising from the conduct of the employers' enterprises, and require contractors and principals of contractors to take care for the health and safety of others not their employees regarding risks arising from the conduct of the contractors' work or the principals' enterprise. The protection of these Acts is thus extended to non-employees, and therefore, where applicable, to marginal independent contractors. This extension can occur in two ways: an employer must take care not only for his/her employees, but for contractors and the employees of others who work alongside his/her employees; a principal must take care for the health and safety of his/her contractors. But the wording of
the sections imposing these duties may limit their application in the case of marginal independent contractors who work away from the premises of the employer or principal concerned. For example, the New South Wales Occupational Health and Safety Act (in s. 16) requires every employer to:

ensure that persons not in his employment are not exposed to risks to their health and safety arising from the conduct of his undertaking while they are at his place of work.

This would mean that a person who had a number of employees working at his/her premises and who had contracted for the performance of other work with an independent contractor would be obliged to take care for the contractor's health and safety where the contractor was performing the work at the employer's workplace, but would not be under obligation to ensure the health and safety of the contractor while working if the contractor worked at his/her own premises. Thus, the marginality of the contractor's work situation would take him or her outside the scope of the protection offered by the section. The same result would apply under s. 16(2) where the contractor's principal had no regular 'employees'. Section 22 of the South Australian Occupational Health, Safety and Welfare Act 1986 is possibly limited in the same way.

In Tasmania, the duties in relation to employees and contractors are expressed in composite form, and the limitation of the scope of s. 32 discussed above would thus prejudice marginal independent contractors as well as marginal employees. Since working away from the premises of the person for whom the work is done is one of the aspects of marginality which could result in the contract being identified as independent, this limitation of scope would probably affect more marginal independent contractors than marginal employees. The possible limitation in scope of s. 29 of the Northern Territory Work Health Act (which covers employees as well as non-employees) has already been noted. The relevant section of the ACT Occupational Health and Safety Act 1989 (s. 28) seems definitely to be limited to the employer/principal's premises.

The formulae used by the other Acts would allow the employer/principal's obligations to take care to extend to the independent contractor while working at his/her own premises. They are directed to risks arising from the work the contractor is doing for the principal, rather than from the work premises of the principal.

The Occupational Health and Safety Acts of all the states and of the ACT provide also for structures for employee participation in health and safety matters and/or for joint management-labour consultation on health and safety issues and programmes. The sections outlining these structures (and the Regulations covering them, where passed) clearly envisage that employee safety representatives and employee delegates to the joint health and safety committees will be drawn from the ranks of employees working at the employer's premises, and will not include marginal employees working at
their own premises. While there would obviously be limitations to the capacity of external employees to represent those working at the employer's premises, external employees nevertheless need representation and input into joint consultation also, and the failure of the Acts to provide for this prejudices marginal employees. Except in the ACT, there is no provision for independent contractors to be involved in the processes of participation and consultation; and even in the ACT, contractors' access is limited to those working on designated construction sites - that is, at the principal's 'premises'. Marginal independent contractors are thus completely excluded from formal participation and consultation.

The purview of the specifications-standard health and safety legislation (such as the Factories-type Acts and Regulations, Construction Safety Acts and Regulations, and Acts and Regulations relating to mines) is predominantly directed to the premises of the employer or principal, and therefore offers little protection to marginal workers who work away from those premises. That is because these Acts and Regulations are predominantly directed at specific work places - factories, construction sites, mines. However, where the marginality of work arrangements, be they employment arrangements or not, does not include working away from the premises, the marginal workers will be protected to the same extent as 'typical' workers. The Acts and Regulations prohibit specific practices in the places covered, and their intention is to protect from the dangers of those practices those who might be foreseeably injured by them: employees and others working in or at the premises.

**Anti-Discrimination Legislation**

This is one area of protective legislation where there seems to be no restriction in the protection offered in the case of marginal workers; nor, clearly, should there be, for many of the attributes giving rise to the discrimination which the legislation forbids are attributes which are common among marginal workers. If, as is the case, women make up a greater proportion of the marginal workforce than do men, and the scope of prohibition against discrimination in employment on the grounds of sex were limited in the case of marginal workers, the value of the alleged prohibition on sexual discrimination would be substantially diminished. This is not, however, the case. The various anti-discrimination statutes prohibit discrimination in offering work and in the conditions on which work is offered, and in the termination of work arrangements, on a number of grounds. Some of the details of what amounts to discrimination in employment will not be applicable to a number of marginal workers; for example, the Acts prohibit an employer from treating an employee less favourably in relation to promotion or access to educational opportunities by reason of one of the specified grounds (race, sex, marital status etc).

This prohibition is unlikely to affect the situation of many marginal workers whose
work arrangements have no avenues of promotion or access to educational opportunities. But that is a restriction attaching to the work arrangements, not to the legislation.

Moreover, the protection of the legislation is available to contractors as well as employees. All but one of the various anti-discrimination Acts define employment to include work under a contract for services - that is, an independent contract - and all of them prohibit not only discrimination by an employer in relation to entry into employment, termination of employment and conditions of employment, but also discrimination by a principal against an independent contractor in relation to the offer of work and the conditions of work.

However, as with the other statutes which create benefits, or avenues of redress of grievances, marginal workers are likely to have less access than 'typical' workers to the procedures for redressing discrimination, either through ignorance of the rights, created by the Acts, to freedom from discrimination, or through ignorance of the mechanisms for asserting those rights. It may also be true in many cases that marginal workers, because of their habituation to aggressive and unsympathetic attitudes by employers and principals, do not recognise elements of discrimination in their work arrangements.

Overview of the Adequacy of the Legislation

The survey of protective legislation set out above demonstrates that many of the statutes offer limited benefits to marginal workers, even where they are able to show themselves to be employees. As a result, marginal workers will often be limited in their capacity to take action to enforce their rights to the benefits which the statutes allow them. Most of these statutes provide not only avenues by which the intended beneficiaries can individually enforce contested claims, but also establish an inspectorate to enforce compliance with the requirements imposed and make failure on the part of employers (and, where relevant, principals) to grant legitimate claims offences, for which the inspectors will prosecute the offenders.

However, the circumstances of many marginal work arrangements will present serious difficulties for the inspectorate. They will be unaware of the work relationships, and therefore unable to make any random checks to ensure that those relationships are being conducted in accordance with the requirements of the relevant statutes. They will be able to check only where complaint has been made to them, alerting them to the existence of the particular relationship, and such complaints will only be made where someone concerned is aware that statutory requirements may be being flouted, an awareness which, as has already been argued, will frequently be absent. Moreover, even when such complaint is made, if the statutory requirement in question is one dependent on a relationship of employment, the determination that the relationship is of that kind is subject, as we have seen, to considerable legal confusion and this fact, coupled with the chronic understaffing of the
inspectortates, may result in at least a temptation to let the matter lie. It can be argued that the difficulty of enforcement is, in fact, the major reason why marginal workers receive less benefit from protective legislation than 'typical' workers do.  

Constitutional Background to Statutory Benefits

The survey of protective legislation also raises the issue of the limitations on protection of marginal workers created by the Constitution. The various sections dealing with particular types of statutory benefit examined are predominantly state legislation. Commonwealth legislation discussed applies only to Commonwealth employees (except in the case of the Commonwealth Race and Sex Discrimination Acts). Legislation for the protection of, or for the conferral of benefits on, workers could be categorised as legislation relating to health or to industrial relations (as including conditions of work). The Commonwealth Parliament has no exclusive power to legislate in these areas. They are areas of concurrent power. Moreover, in relation to industrial relations, the Commonwealth power to legislate has been traditionally seen as limited by the terminology of s. 51(XXXV) of the Constitution to 'conciliation and arbitration for the prevention and settlement' of interstate industrial disputes, and thus as not encompassing laws directly providing benefits for workers or setting conditions of work (Creighton & Stewart, 1990).

Of course, the fact that the Commonwealth enjoys legislative power in a particular area concurrently with the states does not prevent the Commonwealth from exercising that power; and the limitations which s. 51(XXXV) of the Constitution places on the Commonwealth's power as regards industrial relations need not prevent general Commonwealth legislation on benefits and conditions, since other heads of Commonwealth power exist under which such general legislation could be validated. However, the Commonwealth has historically eschewed utilization of those alternative heads of power or of the areas of concurrent power for the establishment of a national framework of work-related benefits, on the professed ground that these matters are more properly the concern of the states.

There is probably little current disadvantage to marginal workers in this situation. The diminution of statutory benefits for marginal employees outlined above results basically from the factual context of their work arrangements, and this would probably have the same effect even if the benefits were contained in Commonwealth legislation. The exclusion of many marginal workers from statutory benefits by use of the criterion of employment would also probably operate even were there Commonwealth statutes providing such benefits on a nationwide basis, since such Commonwealth legislation as there is in this area adopts that criterion also.

It is, however, possible that if the Commonwealth should decide to legislate in the area of statutory benefits to workers on the basis of the external affairs power, to give effect to the provisions of International Labour Organisation (ILO) conventions signed or ratified by the
Commonwealth, the content of those conventions would dictate a broader approach than one circumscribed by adoption of the common law concept of employment as the criterion for entitlement.

There is an additional way in which the Commonwealth could regulate access to the types of benefit provided by the legislation discussed above, and that is by federal award provisions dealing with these matters. It would be most unlikely to see award provisions dealing with workers' compensation; the workers' compensation system requires a whole bureaucracy to administer the scheme and a financial burden which the Commonwealth would scarcely wish to accept. Constitutionally, however, there should be little difficulty in doing so; though the industrial relations power is probably too limited, other heads of power exist, such as the insurance power, the health power and the external affairs power backed by international conventions. Annual holidays and long service leave, on the other hand, are matters which can easily be brought within the jurisdiction of the Commonwealth tribunals through s. 51(xxxv) simply by being put into dispute by unions in logs of claims, and in fact Commonwealth awards frequently prescribe minimum annual holiday entitlements.

The (then) Conciliation and Arbitration Commission also made an award relating to occupational health and safety in the vehicle building industry in 1986 which largely reproduced the provisions of the Victorian Occupational Health and Safety Act 1985 (AMI Toyota Ltd v ADSTE 29 AILR para. 18; 31 AILR para. 71). Occupational health and safety is clearly an 'industrial matter' within the jurisdiction of the Commonwealth tribunal, and all that was necessary to justify the tribunal's consideration of the matter was an interstate dispute. Whether the tribunal's granting of the claim was desirable is more debatable. The Commission identified as relevant:

considerations relating to the industry itself and... practical considerations involving the policing of the award. The fact that the old-type State legislation has sat comfortably alongside Federal award coverage for some eighty two years and that only one Australian state (Victoria) has given full statutory implementation to the Robens philosophy are also germane to the determination of the ultimate question. So too is a consideration of penalties for breach. (ibid.)

The Commission decided, on consideration of these matters, to make the award, referring to:

the inter-dependence of [the industry's] employers, the intra-dependence as between establishments of individual employers and the unique production policies which prevail throughout the industry... the established mechanisms within the industry which have engendered and maintained grassroots awareness of safety at the workplace... the Federal award orientation of the industry, its policies
toward union membership and the common desire for Federal
prescription of employers and the industry union, of which all
employees are eligible for membership... (*ibid.*)

However, against the benefits of uniform coverage across states of
workers in a particular industry must be placed the fact that handling such
matters by award results in fragmented coverage within a state industry by
industry. In addition, the penalties for breach of this award were substantially
less than those imposed by most state's occupational health and safety statutes.
Finally, there is some internal confusion in an award encapsulating the
Robens scheme of occupational health and safety regulation: central to that
scheme is the belief that occupational health and safety should not be a matter
for industrial disputation and bargaining; central to the creation and operation
of awards is that they result from industrial disputation and bargaining.

Whatever the problems of award coverage of matters dealt with by the
statutes discussed in this section, and whatever the constitutional or political
limitations on provision of such coverage, there seems little advantage at
present for marginal workers in such coverage in place of statutory coverage,
for reasons suggested earlier and expanded upon below. The award system is
limited to employees, either constitutionally, statutorily or as a matter of
practice, and award treatment of marginal employees inadequately provides
for the particularities of their work arrangements.

MARGINAL WORKERS AND INDUSTRIAL TRIBUNALS

The preceding section of this chapter demonstrated that those marginal
workers able to bring themselves within the range of protective legislation by
classification as employees may nevertheless receive a lower level of benefit
as a result of their marginality, and earlier sections indicated that access to the
industrial tribunals was almost entirely limited to employees and thus
unavailable to the many marginal workers who fail to achieve categorisation
as employees. This section argues that the treatment by the industrial
tribunals of even those marginal workers qualifying as employees is also
disappointing. Despite their seeming to be more aware of the realities of
industrial relations than the common law courts, the tribunals have failed to
address fully the particularities of marginal work situations and the
disadvantages and inequities to which workers in those situations are subject.
But before substantiating this claim, it is necessary to confront the argument
that the Commonwealth tribunals are constitutionally barred from regulating
by award the work relationships of non-employee workers.

As mentioned earlier, the direct power of the Commonwealth as
regards industrial relations is found in s. 51(***xxv) of the Constitution,
whereby the Commonwealth Parliament may make laws 'for the peace order
and good government of the Commonwealth with respect to:
Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.'

On the basis of this power, the Commonwealth Parliament has established (first by the Conciliation and Arbitration Act 1904 and now by the Industrial Relations Act 1988) a system of regulation of industrial relations through binding awards made by Commonwealth industrial tribunals in settlement of antecedent disputes between organisations of employees and employers or their organisations. The scope of this system is limited first by the wording of s. 51(xxxv) and second by the statutes made under it. The interpretation given by the High Court to s. 51(xxxv) has broadened substantially in the past decade, but the framework of Constitutional limitation remains basically the same (Creighton & Stewart 1990).

First, under this placitum, the Commonwealth cannot legislate directly on conditions of work. Commonwealth regulation of conditions of work can take place only in the context of conciliation and arbitration of disputes. Second, the bodies established by the Commonwealth to conciliate and arbitrate have jurisdiction only in relation to the prevention or settlement of disputes. Third, the conciliation and arbitration must be in relation to disputes as interpreted - that is, a claim made by one party on another party which has been refused. Fourth, the dispute to be arbitrated must be an industrial dispute as interpreted by the High Court. Currently this means 'industrial' according to the common sense interpretation of the 'person in the street' of a dispute between employers and employees about an 'industrial matter', which by statute and interpretation means a matter pertaining to the relations of employer and employee. 46 Fifth, the dispute must be one which extends beyond the limit of any one state. Despite these limitations, the procedures developed by the relevant legislation and by the tribunals have the result that the awards of the tribunals provide extensive regulation of the conditions of work of substantial groups of employees in a substantial number of industries.

However, as indicated, the Commonwealth's power to legislate on industrial relations is concurrent with the power of the states, and the states are subject to no constitutional limitations on the way they may exercise that power (except in so far as state legislation in the area is inconsistent with Commonwealth legislation). The states have exercised their industrial relations power both by legislation directly and generally regulating conditions of work and conferring benefits on workers, and by the establishment of state conciliation and arbitration tribunals to settle intra-state disputes by award. Unions registered with the state tribunals may seek awards in settlement of disputes relating to their members and their employers. Unions registered with the Commonwealth tribunal may seek awards in settlement of interstate disputes relating to their members and their employers. The vast majority of employees in Australia work under either Commonwealth or state awards. Particular employers may be bound, in
relation to the various categories of their workers, either by a single Commonwealth or a single state award, or by several Commonwealth or several state awards, or by several awards, both Commonwealth and state.

Commonwealth awards relate only to employees, because of the interpretation given to the constitutional reference to industrial disputes, and the resultant provisions of the Commonwealth statutes. State awards relate almost entirely to employees because, although there is no constitutional bar to state awards covering non-employee workers, the state legislation has chosen to limit the jurisdiction of state tribunals to 'industrial matters', defined as being matters pertaining to the relations of employer and employee.

For nine decades, the orthodoxy has been that the constitutional reference to 'industrial disputes' bars the Commonwealth tribunal from dealing with disputes between principals and independent contractors, that 'industrial disputes' are limited to those between employers and employees. This is generally believed to be the import of R v Judges of the Commonwealth Industrial Court; Ex parte Cocks (121 CLR 313), a 1968 decision. That is not, however, a necessary implication from the decision in that case. Cocks' case concerned an application for a writ of prohibition against the Industrial Court to prevent it from enforcing a clause in the Dry Cleaning and Dyeing Industry Award 1966 which, it was argued, prevented employers bound by the award from contracting out work to independent contractors for performance outside the employers' workshops or factories. This argument was based on the grounds that such clause was invalid as being in excess of jurisdiction, not being about an 'industrial matter' within the meaning of the Conciliation and Arbitration Act.

The High Court granted the application on the grounds argued. It did not, therefore, decide that the clause was invalid on constitutional grounds. The definition of 'industrial matter' derives from the Conciliation and Arbitration Act, not from the constitution, though obviously the statutory definition must fall within the constitutional limits, and the interpretation of 'industrial disputes' involves the dispute being one concerning an industrial matter. It does not, however, necessarily follow that the statutory definition of 'industrial matter' is of equal breadth with the implication of that concept in the constitutional concept of 'industrial dispute'. As Windeyer J. noted in Cocks' case, '[w]e are not concerned I think in this case with the power of the Parliament under s. 51(xxv). We are concerned with the manner in which it has been exercised'. It was s. 4 of the Conciliation and Arbitration Act that defined 'industrial matters' as being matters which pertained to the relationship of employer and employee. The Constitution did not directly confine 'industrial disputes' by that requirement. If, then, the High Court was right in arguing that the award clause in question did not pertain to the relationship of employers and employees, it was correct in holding that clause to be in excess of jurisdiction, but that is the limit of the significance of the case. That limit, however, leads to a number of further points.
First, was the High Court right that the clause did not pertain to the relationship of employers and employees? Could it not be strongly argued that contracting out by an employer is a practice which has obvious significance for his/her employees and an obvious effect on the terms and conditions of their work? Just such a clause had been upheld by the High Court in *Federated Clothing Trades of the Commonwealth of Australia v Archer* (27 CLR 207). The members of the court in Cocks' case disposed of that decision. Barwick, Taylor and Owen JJ (at p. 319) stated that two of the judges gave no reason in justification, and expressed their disagreement with the judge who did give a reason - Higgins J., who had said that:

Even on the narrowest view of 'industrial matters' it is of vital importance to the members of the union that an employer shall not have facilities for evading the award rates and conditions, or for resorting to the individual bargaining which homework often involves, or for getting women and girls who have other aids to support to accept work at low prices. (27 CLR 217)

Menzies J. argued (ibid., 328) that Archer's case was inconsistent with earlier and later authority.

Even if this criticism of Archer's case is valid, it would appear that Cocks' case itself has been overtaken by later authority. In *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (140 CLR 470), the High Court upheld the tribunal's jurisdiction to arbitrate on the AWU's demand for a clause regulating the terms and conditions of employees of persons in a contract relationship with the employer. In *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (163 CLR 656 at 661) in 1987, the Full High Court stated, in relation to the question whether the Commonwealth tribunal had jurisdiction to make an award ordering the reinstatement of a dismissed employee:

Whilst some reinstatement disputes may not pertain to the relations of employers and employees, it must be accepted that many such reinstatement disputes are agitated, not merely by or on behalf of the former employee, but by and on behalf of the remaining employees who have a direct industrial interest in the security of their own employment and in the attitude in practice adopted by an employer to the termination. These matters, like questions of manning and recruitment [issues also held to be not industrial matters in the Cocks' era of interpretation], have a direct and not merely consequential impact on the employer-employee relationship.

This passage would seem to provide equal support to the validation of the clause in question in Cocks' case, even while the [now] Industrial Relations Act defines the tribunal's jurisdiction as limited by the need for 'impact on the employer-employee relationship'.
Second, however, this analysis would allow the Commonwealth tribunal to make awards affecting non-employees only from the standpoint of employees and not directly as protection for the non-employees or in resolution of their disputes with those for whom they worked. If the tribunal is to be able to regulate marginal workers who are not employees in their own interests, it must be constitutionally possible to amend the Industrial Relations Act so that the definition of 'industrial dispute' in s. 4(1) does not limit jurisdiction to disputes 'about matters pertaining to the relationship between employers and employees'. Does the reference in s. 51(fffv) of the Constitution to 'industrial disputes' of necessity involve the implication that those disputes pertain to the relations of employers and employees?

That question has yet to be judicially faced directly. As long as the statutes have limited the tribunal to such disputes, there has been no opportunity to raise it. For at least the first six decades of the Commonwealth arbitration system's existence, the structure of industry (and the mindset which that produced) made such limitation seem appropriate. There are, however, straws in the wind which suggest that, if the Parliament were persuaded to make such amendment to the Industrial Relations Act, the new definition would survive constitutional challenge.

In *R v Coldham; Ex parte Fitzsimmons* (137 CLR 153 at 174) in 1976, Murphy J. said he found 'no justification' for the prosecutor's contention that 'industrial dispute' in the Constitution was limited to matters relating to the employer-employee relationship. He argued that s. 51(fffv):

is not limited to employer/employee relationships and it would be absurd to limit it to the common law concepts of master/servant relationships. If industry ceased to be conducted on an employer/employee basis, it would not mean that the constitutional power would be inapplicable. In recent years, significant changes have occurred in industrial relations. In some industries, work previously carried out on an employer/employee basis is now done under the contract system. Industrial disputes within s. 51(fffv) can arise between those who are not employers and employees.

Four years later, Macken J. of the NSW Industrial Commission argued (in Mills, 1980, 55-56) that these 'significant changes' had become a trend, and that that trend:

will accelerate. It will grow in significance and ultimately have a profound effect on our industrial relations scenario. I believe that in time it will transform our laws and practices touching the master-servant relationship as well as the landscape of unionism and industry itself.
If the Constitution is a living document and not frozen by the circumstances of 1900, it must be able to cope with that transformation. The High Court of the 1980s has extended considerably the interpretation of s. 51(xxxv) (in the CYSS case 153 CLR 297) and the range of 'industrial matters' (see below). It would be in keeping with these decisions, which apply the words of the Constitution in the light of the industrial realities of the present, to make the further extension suggested. In that respect, the following passage from the CYSS case (ibid., 312-3) is a small pointer:

It is, we think, beyond question that the popular meaning of 'industrial disputes' includes disputes between employees and employers about the terms of employment and the conditions of work. Experience shows that disputes of this kind may lead to industrial action involving disruption of the supply of goods and services to the community [the motivation behind the industrial power of the Commonwealth]. We reject any notion that the adjective 'industrial' imports some restriction which confines the constitutional conception of 'industrial disputes' to disputes in productive industry and organized business carried on for the purpose of making profits. The popular meaning of the expression no doubt extends more widely to embrace disputes between parties other than employer and employee, such as demarcation disputes, but just how widely it may extend is not a matter of present concern.

For the moment, however, as the statutes stand, marginal workers may only be covered by Commonwealth awards and will only be covered by state awards if they are classified as employees, and the tribunals have been no more imaginative, and frequently less so, than the common law courts in determining who is and who is not an employee.

One result of this exclusion of non-employee marginal workers from award coverage is that those excluded are thereby robbed of the benefits flowing from the expansive approach of the 1980s High Court to matters previously held to be non-arbitrable as being 'managerial prerogative'. Such matters include consultation as to technological change (Federated Clerks' Union of Australia v Victorian Employers' Federation 154 CLR 472), superannuation (Re Manufacturing Grocers' Employees Federation of Australian; Ex parte Australian Chamber of Manufactures 160 CLR 341), manning scales and recruitment practices (Re Cram; Ex parte New South Wales Colliery Proprietors' Association Ltd 163 CLR 117), and claims for reinstatement (Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia 163 CLR 656; Re Federated Storemen and Packers' Union of Australia; Ex parte Wooldumpers (Victoria) Ltd 84 ALR 80).

Even where marginal workers achieve the classification of employees, they receive inadequate coverage; the award conditions made in relation to them are insufficiently directed to the particular features of their marginal employment. As suggested already, a substantial reason for this is that the tribunals, like the common law, see the workforce in terms of a majority who
are 'typical' and a minority who are 'atypical'. Marginal workers then are seen as being basically like other workers except that they work only part-time, or only for very short periods for one employer, or work at home. And provisions made for them will therefore simply be directed to those areas of exception. Particular rates of pay for casuals will be set, requirements for sick pay will be declared inapplicable, rights to paid holidays will be substituted by pay loadings, and so on. Thus, the tribunals look not at the real situations of these workers, but only at a limited range of aspects of their situations. They are treated, in fact, not as themselves, but as mutant 'typical' workers. It is as if a blacksmith, in shoeing a horse, regarded the horse not as a valid species in itself but as a mutant human being, and adapted to its 'mutation' by producing for it four, as opposed to two, leather brogues. To be sure, this recognises one of the differences between a horse's and a human being's method of ambulation, but it does not meet the horse's needs.

Perhaps it is unfair to place all the blame for this approach on the tribunals. The federal tribunal, at least, is constitutionally limited in the terms and conditions it can impose by the claims made by the parties. The log of claims put forward by (most commonly) the union creates the matters in dispute. The federal tribunal is, as seen, empowered to make awards only 'for the prevention and settlement of industrial disputes'. Matters not raised in the log of claims are not in dispute, and the federal tribunal cannot deal with them.\textsuperscript{50} If it attempted to do so, it could be restrained from proceeding by a writ of prohibition from the High Court. The union, by its formulation of its log of claims, thus sets the ambit for the provisions which the tribunal may make. Responsibility for the unimaginative treatment of marginal workers in federal awards thus really rests with the unions seeking award coverage of those workers.

The state tribunals are not subject to constitutional limitation of their powers. They may do anything their enabling Acts entitle them to do. For the most part, those Acts restrict the tribunals to dealing with the ambit of the disputes brought before them by application of the parties.\textsuperscript{51} However, the NSW Industrial Commission is empowered by s. 31(b) of the Industrial Arbitration Act 1940:

at any time on its own initiative or in proceedings commenced before it in the same way as proceedings for the exercise of its jurisdiction under section 30 -

(i) to make an award or to vary or rescind any award..... [emphasis added]

In Queensland, the Industrial Relations Act 1990 (s. 4.13) empowers the Industrial Commission to 'hear and determine':
(a) all questions... brought before it or that it considers expedient to hear and determine for the purpose of regulating any calling or callings;

(b) all questions arising out of an industrial matter or involving the determination of the rights and duties of any person in respect of an industrial matter;

(c) all questions that it considers expedient to hear and determine in respect to an industrial matter...

Section 4.13(2) gives the Industrial Commission particular jurisdiction:

(a) on reference by an industrial organisation, an employer, or twenty employees (not being members of an industrial organisation of employees and not covered by an award) in any calling, or by the Minister, or of its own motion, to regulate the conditions of any calling or callings by an award;

(b) on application by any person interested, by direction of the Minister, or of its own motion, to hold an inquiry into or relating to an industrial matter and to report the result of such inquiry to the Minister. .... [emphasis added]

In South Australia, the Industrial Conciliation and Arbitration Act 1972 (s. 6) defines 'industrial matter' as including any matter, situation or thing affecting or relating to:

(k) all questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of society as a whole,

and by s. 25, the Industrial Commission has jurisdiction to hear and determine 'a) any matter or thing arising from or in relation to any industrial matter'. These provisions would appear to entitle the tribunals concerned, when making awards covering marginal workers, to go beyond the particular types of conditions sought for marginal workers in the logs of claims presented by trade unions having coverage of such workers.

Nevertheless, the practice of the state tribunals is to confine themselves to the ambit of the disputes as created by the unions' logs of claims, and therefore, even in the three states referred to above, the major responsibility for the inadequate coverage of marginal workers in awards must lie with the trade unions.
MARGINAL WORKERS AND TRADE UNIONS

The unions' failure to give full representation to marginal worker members (and, a fortiori, their failure to offer protection to marginal workers who are non-members) is explicable, even if regrettable. Unions are constrained, by resources and by organisational politics, to concentrate on the issues of concern to the larger groups among the membership. If marginal workers are numerically weak within the unions, or are assumed to be so, their interests will be neglected. He/she who pays the piper, in terms of making the major contribution to funds through membership fees, calls the tune. Coverage of marginal workers in awards will be dictated less by a desire to protect those workers than to prevent their employment posing a threat to the conditions of the members who make up, or are assumed to make up, the bulk of the membership. Thus, for example, claims relating to rates of pay for part-timers and casuals are motivated predominantly by a concern to prevent poor pay rates for those workers prompting a lessening of employment opportunities and a downward pressure on conditions for full-time workers.

This situation could be reversed by a significant increase in the unionisation of marginal workers, but this in turn is beset by problems. Firstly, their eligibility to membership may be in doubt because of the confusion regarding their status as employees. Secondly, marginal workers are hard to find because of the scattered, isolated and irregular context of their working arrangements. Thirdly, they will include a disproportionate number of non-English speakers, which will increase the difficulties and costs of membership drives. Fourthly, a disproportionate number of marginal workers are women, who are perceived as being more difficult to unionise than men, a perception which may lead to a disinclination on the part of organisers to make the effort to seek them out for membership. Fifthly, the barriers of language, dispersion and isolation will make it more difficult for the marginal workers themselves to initiate applications for membership. Sixthly, the language barriers will make it more difficult for them to articulate their needs even if membership has been achieved. Finally, this last factor, coupled with the experience to date whereby marginal workers may see few benefits attaching to union membership, will result in many of them regarding the fees for membership as not being money well spent, a point of view which will continue until the presence of more marginal workers within unions results in a greater level of action on marginal workers' behalf by unions. Again, a 'Catch-22' is created whereby unions (for the most part) do little for marginal workers because few marginal workers are members of unions, and few marginal workers are members of unions because (among other reasons) unions do little for marginal workers.

It must be acknowledged that, while the paragraphs above are a fair description of the general situation in respect of the treatment of marginal workers by tribunals and by trade unions, there are honourable exceptions. One of the best examples of such exceptions is the achievement by the Clothing and Allied Trades Union of Australia of the 1987 variation of the Clothing Trades Award 1982, which extended award coverage to outworkers.
in the garment industry. As Chapter 5 shows, it is perhaps not completely coincidental that the union seeking that variation was one with women in senior positions. Be that as it may, the decision of Deputy President Riordan\textsuperscript{52} clearly departs from the norm described above in its recognition of the realities of the centrality (as opposed to marginality) of outwork in the garment industry, and in its presentation of the context of such work as a matter to be dealt with on its own terms and not simply as an insignificant aberration from the normal context of work in the industry. The decision thus involves the abandonment of those labels of 'marginal' and 'atypical' which, as this chapter has argued, underlie the inadequacy of the present law. Deputy President Riordan's decision also recognises that one of the major difficulties in providing adequate legal protection to so-called marginal workers is ensuring enforcement.

The clothing union's campaign to gather the necessary information and evidence, the claim which the union took to the Commission and the Commission's response to that claim contrast strongly to the typical approach of unions and tribunals which has been criticised above, and in so doing point the way to the approach which it is necessary for unions and tribunals to take to ensure adequate protection of the marginal workforce.

CONCLUSION

The legal position of marginal workers has been shown to involve a number of levels or areas: their position under common law, their eligibility to statutory benefits and protection, their access to union membership and to coverage in industrial awards. The survey of their position in terms of these various aspects of law has demonstrated that at all levels, they are disadvantaged; the facts of their work situations and the legal consequences that flow from those facts, result in marginal workers receiving far less protection from the law than do the workers regarded as 'typical'. It has also been demonstrated that ability to enforce legal rights is as important as possession of them, and that marginal workers will be severely hampered in enforcement of even those less than adequate legal rights which they possess. The rapid increase of 'flexible' work arrangements and the moves in some quarters to encourage further increase must therefore be accompanied by changes in all aspects of the legal position of persons involved in such arrangements.

Because of the significance of enforceability of rights and the generally simpler procedures for enforcement within the system of awards and tribunals, it is at the level of union membership and award coverage that change to the legal position of marginal workers is most urgent. This will require both legal and attitudinal change. There will need to be legislative amendment to open eligibility to union membership to marginal workers by removing the barrier of the 'employment' criteria. There is no reason why state-registered unions and the state tribunals need to be strait-jacketed in this
way. Trade unions are essentially organisations of workers. Neither principle nor history, but merely habit, requires that they be organisations of workers who happen to be classified as 'employees' (see Brooks, 1968, 95-100). Nor is there any such imperative in the case of federal unions and the federal tribunal. The only imperative is that provided by the wording of s. 51(xxxv) of the Constitution, with its reference to the settlement of 'industrial disputes'. That has been interpreted as requiring a dispute about an 'industrial matter', 53 and that is a logical interpretation. What is not logical is an interpretation limiting the 'industrial matters' about which there can be an 'industrial dispute' to 'matters pertaining to the relationship of employer and employee'. 54 The same commonsense interpretation of 'industrial dispute' which was finally adopted in the CYSS case 55 leads logically to the recognition that a dispute between workers and those for whom they work about the terms and conditions under which that work is to be performed is an 'industrial dispute'. The trade union movement should campaign and lobby for such statutory amendments.

Whether or not the Commonwealth Parliament could be persuaded to make the necessary amendments to the Industrial Relations Act and the High Court persuaded to adopt that interpretation, and whether or not the state Parliaments could be persuaded to make the necessary changes to their Acts, attitudinal change is needed to make the law at the level of the tribunals more protective of marginal workers (that is, marginal employees under current legislation, and marginal workers generally, if the above amendments could be achieved). The attitudes of marginal workers to unions and of unions to marginal workers must change; there must be vastly increased unionisation in this area of the workforce, and there must be recognition by unions of the needs of this area of the workforce and preparation and lodgment of logs of claims for conditions to cater fully to those needs.

While the level of unions, awards and tribunals is where the need for change to the law is most immediate, and where changes if achieved would have most practical effect, change is also needed to the common law to allow proper protection to marginal workers as regards their individual work arrangements with those for whom they work. The law of the contract of employment was very largely a creation of the judges (Merritt, 1982), and it is theoretically possible for them now to determine that there are not two distinct types of contracts for the performance of work - employment contracts and independent contracts - but rather one general type, the exact terms of particular instances depending on the factual context and the necessary implications therefrom (Hepple, 1986).

That change will be very difficult to achieve, however, without legislative intervention because of the tenacity of the common law concepts; the orthodoxy may, as argued, be confused, erroneous, contradictory, but it is orthodoxy, and the vast majority of judges have an orthodox approach to the law. The best that can be hoped for in the way of judicial development is that judges may become more willing to accept various marginal work situations
as classifiable as employment contracts. The state parliaments can change
common law rules by legislative fiat; but such a wholesale change as is
needed here is unlikely. It would probably become more likely if the
suggested changes to the trade union legislation and the arbitration systems
had been made, incorporating all work arrangements within the jurisdiction of
the industrial tribunals.

Where legislative change is a more feasible prospect is in relation to
the criteria for benefit under the various statutes discussed earlier. It is not too
fanciful to hope that, if a statute is to be designed to give a benefit to workers
having a need for it, success could be achieved by pushing through
amendments to the way those statutes identify those workers who have such a
need so that they are accurately and comprehensively identified. To do so
would not change the intention of the statutes, but merely ensure that their
intention was given effect. It is in the interests of the trade unions, even if
their coverage remains limited to employees, to campaign and lobby for such
changes, since the extension of statutory benefits to non-employees would
lessen the motivation of employers to move away from full-time, award-
protected employment as the basis of their workforce arrangements.

It must be acknowledged, however, that the prospect of legal change is
uneven and, even where brightest, it would entail a concerted campaign of
public education. To gain sufficient attention to launch and carry through
such a campaign, the essential starting point is the explosion of the myth of
marginality. The size and penetration of the marginal workforce must be
demonstrated, for the law's unfounded and, with respect, lazy assumptions on
this matter result in current labour and employment law being 'inside out'.

ENDNOTES

1 See, for example, (NSW) Trade Union Act 1881, s. 31; (TAS) Trades Unions Act
1889, s. 2(1); (VIC) Trade Unions Act 1958, 3(1); (WA) Trade Union Act 1902, s. 2.
2 See definitions of 'industrial matter': (NSW) Industrial Arbitration Act 1940, s. 5(1);
(QLD) Industrial Relations Act 1990, s. 2.2(1); (SA) Industrial Conciliation and
Arbitration Act 1972, s. 6(1); (TAS) Industrial Relations Act 1984, s. 3(1); (WA)
Industrial Relations Act 1979, s. 7(1).
3 See definitions of 'employee' or 'worker': (CTH) Commonwealth Employees'
Compensation and Rehabilitation Act 1988, s. 5; (NSW) Workers' Compensation
Act 1987, s. 3(1); (QLD) Workers' Compensation Act 1990, s. 2.1(1); (SA) Workers'
Rehabilitation and Compensation Act 1986, s. 3(1); (TAS) Workers' Compensation
Act 1988, s. 3(1); (VIC) Accident Compensation Act 1985, s. 5(1); (WA) Workers'
Compensation and Assistance Act 1981, s. 5(1).
4 See definition of 'worker': (NSW) Annual Holidays Act 1944, s. 2(1); (VIC) Annual
Holidays Order, cl. 3(1); and definitions of 'industrial matter' in endnote 2 above.
5 See definitions of 'employee' or 'worker': (CTH) Long Service Leave
(Commonwealth Employees) Act 1976, s. 10(1); (NSW) Long Service Leave Act
1955, s. 3(1); (SA) Long Service Leave Act 1987, s. 3(1); (TAS) Long Service
Leave Act 1976, s. 2(1); (VIC) Industrial Relations Act 1979, s. 64(1); (WA) Long Service Leave Act 1958, s. 4(1); and definitions of 'industrial matter' in the other states in endnote 2.

See definitions of 'industrial matter' in endnote 2.

Thus, for example, a market researcher undertaking interviews in the subjects' own homes and an outworker attaching heels to shoes in her own home were 'employees'. See Market Investigations Ltd v Minister of Social Security [1969] 2 WLR 1; and Airfix Footwear Ltd v Cope [1978] ICR 1210.

For a detailed explanation of and justification for these suggestions, see Brooks (1988).

On occasion, some groups of contractors may be expressly covered by provisions of the state's industrial legislation: for example, owner drivers of road transport vehicles, or some bread carters, milk vendors, cleaning contractors etc in New South Wales (see Industrial Arbitration Act 1940 s.88E and Chapter 7 below).

There have been some (frequently amended) attempts in federal conciliation and arbitration legislation to recognise the rights to union membership of non-employees entitled to membership of state-registered unions under state legislation; see Conciliation and Arbitration Act s. 132(1) and Industrial Relations Act 1988 s. 188(1).

See endnote 1 above.

Other than in exceptional circumstances, such as the eligibility of owner drivers to membership of the 'Transport Workers' Union in New South Wales; see Chapter 7.

See, for example, Yellow Cabs of Australia Ltd v Colgan [1930] AR 137; Federal Commissioner of Taxation v J. Walter Thompson (Aust) Pty Ltd (1944) 69 CLR 227. The distinction between control over what is to be done and how it is to be done is derived - anomalously - from Yewens v Noakes (1880) 6 QB 530; see, as to the anomaly, Brooks (1988, 56-57).

See Zuijs v Wirth Bros Pty Ltd (1955) 93 CLR 561 at 571-573.

Ibid., 571.

See Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 at 515; Mills (1979, 229); and Mills (1982, 270-2).

See Ready Mixed Concrete, ibid.; Australian Mutual Provident Society v Chaplin (1978) 18 ALR 385 at 387.


See Ready Mixed Concrete, op. cit., 524.

For example, in ATWU v Monoar Sawmills Pty Ltd, 160 CLR 16.

See Ready Mixed Concrete, op. cit.

See M. Borg and Olympic Industries, 26 AILR at para. 363.

For example, the exclusion from the definition in New South Wales of persons employed for one period only of not more than five days other than for the purposes of the employer's trade or business - all of whom would fit within the target group of marginal workers. See definitions in (CTH) Commonwealth Employees' Rehabilitation and Compensation Act 1988 s. 5; (NSW) Workers' Compensation Act 1987 s. 3(1); (QLD) Workers' Compensation Act 1990 s. 2.1(1); (SA) Workers Rehabilitation and Compensation Act 1986 s. 3(1); (TAS) Workers Compensation Act 1988 s. 3(1); (VIC) Accident Compensation Act 1985 s. 5(1); (WA) Workers'
Compensation and Assistance Act 1981 s. 5(1).

25 See definition of 'injury' in (NSW) Workers' Compensation Act 1987 s. 4; (QLD) Workers' Compensation Act 1990 s. 2.1(1); (VIC) Accident Compensation Act 1985 s. 5(1); see definition of 'disability' in (SA) Workers Rehabilitation and Compensation Act 1986 s. 30(2); (WA) Workers' Compensation and Assistance Act 1981 s. 5(1); see entitlement to compensation in (TAS) Workers Compensation Act 1988 s. 25(1).

26 (NSW) Workers' Compensation Act 1987 s. 140 (against the Uninsured Liability Fund); (TAS) Workers' Compensation Act 1988 s. 126 (against the Nominal Insurer); (WA) Workers' Compensation and Assistance Act 1981 s. 174 (against the General Fund). In Queensland, there is a single compensation fund established in the State Treasury and all claims are made on that fund. Employers insure with the Workers' Compensation Board and premiums are paid into the Fund and compensation payments made out of the fund. Employees whose employer has not insured are nevertheless entitled to make claims upon the Fund: (QLD) Workers' Compensation Act 1990 ss. 4.1 and 4.9. In South Australia and Victoria, there are compensation funds established by the Workers Rehabilitation and Compensation Corporation and the Accident Compensation Commission respectively, made up from levies on employers calculated in relation to payroll, and all payments are made out of these funds: (SA) Workers' Rehabilitation and Compensation Act 1986 ss. 14, 59 and 66; (VIC) Accident Compensation Act 1985 ss 33, 186-187.

27 (NSW) ibid., s. 145; (QLD) ibid., s. 4.15; (TAS) ibid., s. 130; (WA) ibid., s. 170 (which provides for recovery of the unpaid premium rather than the benefits paid to the worker). In South Australia and Victoria, unpaid or underpaid levies may be recovered: (SA) ibid., ss. 70-71; (VIC) ibid., s. 228.

28 See (CTH) Long Service Leave (Commonwealth Employees) Act 1976, ss. 11 and 16; (NSW) Long Service Leave Act 1955 s. 4; (QLD) Industrial Relations Act 1990 s. 11.22; (SA) Long Service Leave Act 1987 s. 3(1) and 5(1); (TAS) Long Service Leave Act 1976 ss. 7A and 8; (VIC) Industrial Relations Act 1979 s. 67(1) and (2)(a); (WA) Long Service Leave Act 1958 s. 8(1) and (2).

29 It is ten years under the Commonwealth, New South Wales and South Australian Acts and fifteen years under the other Acts.

30 See (CTH) Long Service Leave (Commonwealth Employees) Act 1976, s. 17 (one year); (NSW) Long Service Leave Act 1955 s. 4(2)(a)(iii) (five years); (SA) Long Service Leave Act 1987 s. 5(3) and (4) (seven years); (TAS) Long Service Leave Act 1976 s. 8 (seven years); (VIC) Industrial Relations Act 1979 s. 67(2)(c) (ten years); (WA) Long Service Leave Act 1958 s. 8(3) (ten years).

31 The periods of leave are: NSW - two months; QLD, SA, TAS, VIC and WA - three months.


33 (NSW) ibid., s. 15(2); (QLD) ibid., s. 9(2); (SA) ibid., s. 19(1) and (3); (VIC) ibid., s. 21(2) and (4); (WA) ibid., s. 19(1); (ACT) ibid., s. 27(2); (NT) ibid., s. 29(2) and
(3).

(NSW) OH&S Act 1983 s. 16(1); (QLD) WH&S Act 1989 s. 10(1); (SA) OHS&W Act 1986 s. 22; (TAS) ISH&W Act 1977 s. 32; (VIC) OH&S Act 1985 s. 22; (WA) OHS&W Act 1984 s. 21; (ACT) OH&S Act 1989 s. 28; (NT) WH Act 1986 s. 29 in conjunction with definition of 'employer' in s. 3(1).

(NSW) ibid., s. 16(2); (QLD) ibid., s. 10(2); (SA), (TAS) (VIC) (WA) ibid.; (ACT) ibid., s. 31.

(NSW) ibid., s. 23 (joint health and safety committees); (QLD) ibid., s. 62 (health and safety representatives), s. 71 (health and safety committees); (SA) ibid., ss. 27-28 (health and safety representatives), s. 31 (joint health and safety committees); (TAS) ibid., s. 34 (health and safety representatives); (VIC) ibid., ss. 29-30 (health and safety representatives), s. 37 (joint health and safety committees); (WA) ibid., s. 31 (health and safety representatives), s. 37 (joint health and safety committees); (ACT) ibid., ss. 36-40 (health and safety representatives), s.58 (joint health and safety committees).

For example, (NSW) Committees in Workplaces Regulations, reg. 6.


See Bonser v Country and Suburban Stock Feeds Pty Ltd (1964) 65 SR(NSW) 198; Mummery v Irwins Pty Ltd (1956) 96 CLR 99 at 108.

The specified grounds of prohibited discrimination, statute by statute, are as follows: (CTH) Racial Discrimination Act 1975: race; (CTH) Sex Discrimination Act 1984: sex, marital status, pregnancy; (NSW) Anti-Discrimination Act 1977: race, sex, marital status, pregnancy, physical or mental impairment, homosexuality; (SA) Equal Opportunity Act 1984: race, sex, sexuality, marital status, pregnancy; (VIC) Equal Opportunity Act 1984: religious or political belief, sex, marital status, pregnancy or parenthood, race, impairment; (WA) Equal Opportunity Act 1984: sex, marital status, pregnancy, race, religious or political conviction, impairment.

(CTH) RD Act 1975 s. 3; (CTH) SD Act 1984 s. 4; (NSW) A-D Act 1977, s. 4; (VIC) EO Act 1984 s. 4; (WA) EO Act 1984 s. 4.

(CTH) RD Act 1975 s. 15; (CTH) SD Act 1984 s. 14; (NSW) A-D Act 1977, ss. 8, 25, 40, 49B, 49Q, 49ZH; (SA) EO Act 1984 s. 30; (VIC) EO Act 1984 s. 21; (WA) EO Act 1984 ss. 11, 37, 54, 66B.

(CTH) SD Act 1984 s. 16; (NSW) A-D Act 1977, ss. 10, 27, 42, 49D, 49S, 49ZI; (SA) EO Act 1984 s. 32(3); (VIC) EO Act 1984 s. 23(2); (WA) EO Act 1984 ss. 13, 37, 56, 66D.

The same point is made by Deputy President Riordan in his decision on the 1987 variation of the Clothing Trades Award 1982.

As the High Court approved in Koowarta v Bjelke-Petersen (1982) 153 CLR 168; and in Commonwealth v Tasmania (1983) 46 ALR 625.

R v Coldham; Ex parte the Australian Social Welfare Union - the CYSS case -153 CLR 297.

It has also been widely believed that Cocks' case involved a finding that outworkers are not employees. It did not. There was no doubt that the worker in question in that case was performing outwork as an independent contractor. Whether or not the Commonwealth tribunal will hold outworkers to be employees will depend on the application of the traditional tests for contracts of employment to the facts of the particular cases. Clearly, the tribunal has on many occasions considered particular
outworkers to be employees, as the numerous awards governing outwork in the garment industry testify. In his 1987 variation of the Clothing Trades Award, Deputy President Riordan expressed the opinion that 'the great majority' of outworkers in the garment industry were employees (C. No. 4546 of 1985, & April 1987, 31). This finding did not involve any departure from the decision in Cocks' case which, as the Deputy President pointed out (ibid., 37), did not apply.

121 CLR 313 at 329.

The variation to the Clothing Trades Award is a signal exception to this approach.

This was the true ratio decidendi in the constantly misinterpreted case of Australian Federation of Air Pilots v Flight Crew Officers' Industrial Tribunal (1968) 119 CLR 16.

See (NSW) Industrial Arbitration Act 1940 ss. 25A and 74; (QLD) Industrial Relations Act 1990, s. 4.13(1); (TAS) Industrial Relations Act 1984 ss. 19 and 23; (VIC) Industrial Relations Act 1979 ss. 11, 12A; (WA) Industrial Relations Act 1979 ss. 23 and 31; definitions of 'industrial matter': (NSW) IA Act 1940 s. 5(1); (QLD) ICA Act 1961 s. 5; (SA) Industrial Conciliation and Arbitration Act 1972 s. 6(1); (TAS) IR Act 1984 s. 3(1); (WA) IR Act 1979 s. 7(1); and definition of 'industrial dispute': (VIC) IR Act 1979 s. 3(1).

In the matter of an application by the Clothing and Allied Trades Union of Australia to vary the Clothing Trades Award 1982 in relation to contract work, Australian Conciliation and Arbitration Commission, C. No. 4546 of 1985, 7 April 1987.

An interpretation given statutory force by the (CTH) Conciliation and Arbitration Act 1904 s. 4(1). See also, (CTH) Industrial Relations Act 1988 s. 4(1).

See (CTH) Conciliation and Arbitration Act 1904 s. 4: definition of 'industrial matter'; see (CTH) Industrial Relations Act 1988 s. 4(1): definition of 'industrial dispute'.


REFERENCES


4 Reorienting Union Strategies on Part-Time Work

Constance Lever-Tracy

INTRODUCTION

In May 1990, the Australian Council of Trade Unions (ACTU) adopted and issued a new policy document, *Guidelines and Negotiating Exhibit on Part-Time, Casual Work and Job Sharing*, after first circulating it for comment to affiliated unions. The need for such a statement was by then urgent. The Industrial Relations Commission's National Wage Case decisions of August 1988 and August 1989 had called for a review of every award with a view to 'structural efficiency adjustments', and had included in this a review of 'the incidence of, and terms and conditions for, part-time employment and casual employment' (cited in ACTU, 1990, 4). Employer pressure on many unions for such a review had been mounting for a number of years. Already in 1985 the ACTU Congress, while reaffirming for the time being its existing general principles on part-time work, had decided that its guidelines needed rewriting. The length of time taken by the policy revision is an indication of the major reorientation that has been involved.

The prior, longstanding policy on part-time work had been essentially defensive, where possible excluding it altogether or permitting it only under stringent conditions and quotas. In this way, it primarily sought to discourage its spread, rather than to protect part-time workers. The first priority of trade unions, the policy asserted, was the protection and preservation of full-time employment opportunities. While demanding that any part-time work should attract full *pro rata* entitlements, its main emphasis was negative, insisting that unions should monitor any changes to ensure such jobs were not created at the expense of full-time jobs, were not 'used as a means of reducing unemployment' or as a 'substitute for a genuine reduction in standard working hours', and that no workers were pressured into accepting them (ACTU, 1985).

A major advance occurred when the ACTU policy on superannuation enabled its extension to part-time and casual workers. In 1989, their Women's Employment Strategy called for a campaign of recruitment of part-timers to unions, the negotiation of part-time work agreements, the extension of all
employment benefits to part-time workers and for access to career paths and training for part-time workers (ACTU, 1990, Appendix B).

The 1990 Policy Guidelines develop these themes in some detail. They seek above all to promote 'permanent', regular and continuous, rather than casual part-time work, with the same termination and redundancy rights as full-time workers (ibid., 8), with hours ranging from 16-30 and a minimum of four in any day, with changes to regular rosters only with notice and by agreement of the worker and with longer hours than the normal roster to be paid at overtime rates and to be voluntary (ibid., 8-9, 12). Full pro-rata benefits are spelt out to include superannuation and leave loading as well as all other award benefits (ibid., 10-11). The policy seeks to integrate part-time workers, giving them access to all posts, promotions and training opportunities and allowing worker-initiated conversions from full-time to part-time and back, with no loss of status or accumulated rights and with union monitoring to guarantee this (ibid., 12-13). Finally, while it accepts that some unions may wish to retain or introduce quotas on such permanent part-time positions, it warns that these must not be so low as to block the access to them of existing casual part-timers, and that 'unions should ensure that part-time employment applies to males as well as females, and applies to all classifications and categories and is not reserved as a 'ghetto' for low paid workers' (ibid., 13-14).

Traditional union policy on part-time work had been based on very genuine fears that:

(a) The extension of part-time employment could erode full-time jobs, pushing out those who need and want them, or driving them to accept less than full pay. The one oft cited example here was that of shopworkers where, despite workforce growth, full-time numbers had been declining absolutely.

(b) It could worsen the terms of the wage-effort bargain for workers, increasing managerial control and significantly intensifying labour, often at a cheaper cost. Part-time workers could be worked more intensively, for lower pay and because of their insecurity were less likely to resist. In addition, the splitting up of jobs made possible the extension of the division of labour and deskilling into smaller workplaces.

(c) It was likely to segment and divide the workforce, especially on lines of gender. Part-time workers were almost invariably women, who were trapped in poor, dead end jobs.

(d) It would weaken the trade union movement by the loss either of members or at least of active and committed members. Part-time workers had a lesser commitment to the work force and to the long term goals of trade unions. They were notoriously difficult to organise, and subject to employer intimidation.
It was not any assuaging of these fears that initiated the moves towards policy revision in the mid-1980s. Indeed, a decade or more of high unemployment, coupled with a continuous spread of part-time work in certain sectors had, if anything, accentuated them. Three factors did, however, indicate the need for a new policy. The first reason was the growing employer pressure for 'flexibility', increasingly backed by the government and the Industrial Relations Commission, which offered benefits for full-time workers as a trade off for concessions in this area.

The second reason was the obvious failure of the defensive strategy, which in some respects had proved a self-fulfilling prophecy. Not only had there been a rapid increase in part-time workers, from 13.6 per cent of the employed workforce in 1975 to 18.8 per cent in 1985, but union policies had themselves contributed to the uneven distribution of these workers, concentrated in a narrow range of dead end, female jobs.

Finally, it became clear that a large majority of part-time workers had no desire for longer hours, while many full-time workers were also planning to reduce their hours at a future stage of their life cycle. A union policy which gave avowed first priority to the protection of full-time jobs was clearly seen as discriminating against a growing section of the workforce, mainly women. While some of these became vocal and put pressure on their unions, others were simply alienated, again providing the self fulfilment of union fears.

In a period when union membership in Australia was beginning to decline, it was perhaps the alienation of workers which had the most urgent impact, tending to a new emphasis on attracting and serving women workers, including the many who were or wanted to be part-time. This was not a simple convergence of demands from employers and workers. The new approach involved quite different part-time terms and conditions from those which employers would have freely sought, leading to a general union policy reorientation, from the discouragement of part-time jobs to their upgrading. There is, of course, yet a long way to go before this new policy approach becomes effective in all unions, and even longer before it can be incorporated generally in awards and in real practice, but the direction is now clearly mapped out.

The remainder of this chapter is based on interviews with 34 union officials from 24 state branches in South Australia and Queensland (with a small number in Victoria and New South Wales), six federal offices and the ACTU. The unions cover the liquor industry, bankworkers, clerks, shopworkers, telecom technicians, municipal officers, state and federal public servants, railway workers, teachers, metalworkers, printers, meatworkers and building workers.\(^1\) The interviews were carried out in late 1985 and 1986, and the first version of this paper (from which the remainder of this chapter has been taken) was written in 1986.\(^2\) From time to time, where possible, an updating in the situation has been provided in notes.

The main focus of this chapter is therefore historical in that it describes the background and early stages of the policy reorientation, which
has now been adopted by the ACTU and many unions. The argument falls into three main sections. The first examines the traditional union approach to part-time work and its failures. The second section suggests some principles upon which alternative union policies could (and should) be based. The third shows that despite the pervasiveness of the traditional approach to part-time work, some unions were by the mid-1980s embarking upon policies which complied with these principles.

THE FAILURE OF TRADITIONAL POLICIES

The rethinking and co-ordination of union strategies on part-time work was not before time. The most obvious reason was the failure of most existing approaches in their own terms. In a period of recession, part-time jobs had been increasing fast and many of these had been casual and insecure, super-exploited and concentrated at the lower levels of a limited range of occupations. Those groups who had sought or been driven to part-time work (the unemployed, women with children, those in poor health, and so on) had thus been ghettoised. Rarely had such workers been fully integrated into the labour movement. When account was taken of the dual pressures coming from both the employers and sections of workers, and the momentum which these had already built up, there could be little doubt that a further spread of part-time jobs was likely.

Still more disturbing was the argument that some union policies had directly exacerbated the negative aspects of the situation or had hindered the unions from acting to improve it. Some examples will bring the point home. In 1975, the bank workers' union had been forced by the Conciliation and Arbitration Commission to accept part-time tellers, up to a three per cent quota. After initial attempts to prevent this (which failed to obtain rank and file support) the union settled down to police the boundaries of the encroachment. Careful counts were kept and forwarded to the national office. A precise teller job description was sought and members were instructed to watch that this was not transgressed, to ensure the part-time workers were kept to the corner allocated to them. Meanwhile, no action was taken nor complaint made on the underpayment of these workers, who were restricted to the 21 year-old rate plus two fixed increments; as the official interviewed admitted, 'because we had a philosophical opposition to part time work, we never did anything about it'. Yet, these workers were obliged to join the union and many were erstwhile full-time workers suffering demotion.

In 1982, the same union traded an increase in the part-time quota, to 11 per cent in branches and 15 per cent in the data processing centres, in return for a shorter working week (a benefit mainly for full-time workers). Having made such a bargain, and realising that part-timers were now a growing proportion of their membership, the union somewhat shamefacedly tried to remedy their default:
Once we accepted the fact of part-time work and had actually negotiated an increase in its level, we got over the problem of principle and got our feet on the ground. We put in an anomalies claim for full pro rata salaries.

The claim was lost at the end of 1985 (long neglect had entrenched the precedent), but at least considerable backdated increases in the value of the two increments (unchanged since 1975) were granted. The claim had been rejected on the grounds that the restricted range of duties, imposed at union insistence, was normally only carried out by very young full-time workers. The union had undermined its own case for wage justice. That part-time workers might nonetheless respond positively, even to such a belated and halting concern for their interests, had been evidenced by the activism of a new part-time sub-committee in Adelaide and the good attendance (between 30 and 40 members) at the two meetings it had called in 1985. However, on many issues, as a part-time representative said, 'the banks had a free hand for years, it's a bit late and very hard to correct things now'.

An official of the Adelaide branch of the clerks' union expressed some scorn for the bank union's willingness to accept more part-time work and considerable hostility towards such workers, who could be used 'as a pack of scabs'. He was proud that his union had made almost no concessions on the issue and had, at that time, no part-time clause in any major award. The employers were, however, apparently accommodated by a very loose clause on casual work, which placed no restrictions on numbers or on the duration of their employment, which could run into years. The employers' desire for part-time workers, even for effectively permanent ones, could be thus provided for. The union claimed to believe that the casual loading of 20 per cent was sufficient to deter employers from multiplying such casual workers, a 'self policing' device. It seemed a convenient belief, letting a weak union off the hook. Had it been true, one might still question whether the burden of insecurity thus imposed on any part-time clerical worker could be justified. In fact, officials of several other unions had questioned whether the casual loading even fairly covered the employers' savings on other benefits.

The proportion of the union's membership employed on a casual or part-time (in a few minor awards) basis had risen from probably under 10 per cent a decade or so previously to 17 per cent. To what extent casual employment had multiplied outside the union ranks, he did not know. In relation to one flagrant case, he said the union 'could not really criticise Murdoch's News for employing copy boys', some working 45 or 50 hours a week for years on a casual basis, 'since new technology would make them redundant and it would be a worse problem [why?] if the employer put in full-time people and then retrenched them'.

The liquor trades union, with nearly 70 per cent of its South Australian members employed as casual workers, showed none of the same complacent confidence that what in their case was a 50 per cent casual loading could act as an effective deterrent, and clearly saw regular part-time work as a lesser evil. Yet, an official in the federal office spoke of cases where full-time members had preferred to work with casuals than with regular part-time
workers. Casual workers were not in real terms more expensive, he thought, but being in the last resort unreliable, their extensive use was premised on a core of regular workers, perhaps with substantial overtime to cover the spread of hours. An increase in regular part-time work might pose a threat to this core. While somewhat uncomfortable with this divisive way of posing the issue (which would block access to regular hours to existing casual workers), the union believed in supporting rank and file demands.

A strongly organised union like that of the Telecom technicians, which was effectively blocking the introduction of both permanent part-time and casual work, had been unable to prevent the subcontracting of Telecom cleaning jobs. The result was that the Telecom unions had lost all influence on the pay and conditions and the permanent status, as well as on the hours of these workers. Undoubtedly there were other cases where subcontracting has been imposed as a way of getting round the absence of part-time clauses in the award.

An interesting contrast can be made between the state public service associations in South Australia and in Victoria. The former (impelled by an active rank and file based part-time committee) had pressed for the introduction of permanent part-time work and had a significant input into its terms, which they judged satisfactory (see below). The latter, however, had opposed the introduction of a similar scheme by the Victorian government in 1984. Their concern was to restrict the scheme, and this led to measures about which they themselves were coming to have serious doubts. They had initially proposed keeping permanent part-time workers as a separate stream, preventing them from applying for full-time jobs. When it was introduced as a system which allowed full-timers to convert to part-time at their own request, they at first insisted that any freed hours be filled by a temporary appointment (so there would be no obstacles to the officer's future return to full-time work in the same post). While it seems they had changed their minds about this creation of insecure work, their continuing hostility to part-time work was introducing a discriminatory element into a current decasualisation drive. While the Commonwealth Administrative and Clerical Officers' Award allowed casual part-time workers to have access to permanent part-time status, the Victorian union had failed to seek this. The union had obtained an agreement to give permanent full-time status by June 1986 to 2,500 of the state government's temporary employees. In the case of access to permanent part-time status, however, the official said 'we would not want to highlight the question, as the government may use it to get around having to offer permanent jobs on a full-time basis'. And yet the union had no idea how many of its casual members might want and need permanent part-time work, as it had deliberately refrained from surveying the membership on this issue, again 'not wanting to highlight it'.

Had the union movement as a whole been able to hold the line against the encroachment of part-time work across the economy, there would at least have been some real gains to counterpose to the losses: the continuing entrapment of women in the home and the prolonged and damaging interruption of their working life; and the continuing excess pressures of full-
time work on others who could not cope with it or did not want it. Such a result, however, was scarcely conceivable in a situation where unions were weakened by recession, employers were strongly motivated and considerable groups of workers were also strongly motivated in the same direction. What we in fact had was not a dyke, but a series of fortified high points and a tide flowing in around them, breaking through wherever employer pressure or incentives had been greatest, or unions weakest. Unwittingly, union policies had at times contributed to the very results they feared - the super-exploitation of a section of the workforce, the segmentation of the labour market, trapping some workers in such super-exploited positions, and the weakening and division of the working class. Moves to reconceptualise strategy and to move to remedy the situation were clearly required.

ALTERNATIVE PRINCIPLES

Instead of seeing part-time work as an advancing evil, or at least as a lesser or mitigated evil, it could be seen as a terrain of conflict. Depending on who controls it and how it is cultivated, part-time work can bring forth very different fruits and serve quite opposed interests. Even in its existing form, part-time work was clearly seen by many workers as of positive value, or at least as necessary.

Growing numbers in the unions were coming to the view that it was not part-time work as such that had to be resisted, but the conditions commonly associated with it - super-exploitation, casualisation, ghettoisation, the weakening of the workers and the reduction of job opportunities for those definitely wanting full-time work. The advantages to employers of part-time work were clearly so numerous and diverse that there could be considerable bargaining power to improve these conditions, if the unions agreed to the extension of part-time work where previously it had been forbidden. To restrict and disadvantage part-time workers or to misuse bargaining power by selling part-time work in return for advantages for full-time workers (shorter hours, for example) without seeking to ameliorate part-time conditions, was to short change and alienate a growing section of the membership (actual or potential). To then blame these workers for their lack of union commitment was to add insult to injury.

An alternative set of principles could guide union policy, such that the issue would not be seen in terms of more or less part-time work, but rather in terms of regulating the type of part-time work and the conditions under which it is created. The first principle concerns the necessity for full pro rata pay and benefits for part-time workers. There should be no exceptions to this policy, thus including bonuses and other over award payments, maternity and long service leave, as well as equitable superannuation.

The second principle focuses on decasualisation. Unions have always opposed casual work, but had often had to concede its necessity to employers. Where they had resisted, it was often introduced via subcontracting. A
positive approach to regular part-time work could use it as a wedge to displace casual employment, eliminating the insecurity, arbitrariness and favouritism associated with the latter. Part-time work had normally been associated with working a regular proportion of a full working week. If it were extended to cover a regular proportion of days in the month or even of weeks in the year, it could be possible to push for decasualisation of a substantial amount even of genuinely intermittent or seasonal work. Even where the work was unavoidably sporadic and unpredictable, it was possible to aim for a kind of subcontracting where the workers were employed regularly (full-time or part-time) by a central body for the trade or industry, or by an agency. While only 24 per cent of part-time workers in 1981 had wanted to work longer hours, most casual workers had expressed a desire for permanent employment (ABS, 1981, 16). It is true that a substantial minority of them (around 40 per cent) did say they preferred casual work, with its hourly pay loading, but this was arguably a short sighted choice of monetary gain over longer term security and advantages, and the preference may often have been only a mild one, based on acceptance of the status quo. Since such insecurity weakened the whole membership, an active union campaign to decasualise could win substantial support from the majority and would probably draw in many of those who currently accepted their status.

The third principle demands the integration of part-time and full-time work. This would involve continuity and free movement between them and the access to part-time work throughout and at all levels of the occupational structure. If part-time work was available as a non-disadvantaging and non-entrapning option to all workers, many of the problems associated with it could be resolved. In this situation, a worker choosing to convert to part-time work would lose no accrued entitlements or position and would continue working in the same job at the same level. They would be guaranteed the right (after proper notice) to reconvert similarly to full-time work. While such easy movement may be more difficult amongst smaller employers, it should at least be possible to demand that existing full-time and part-time employees be given priority in access to part-time and full-time opportunities and that the onus of proof of impossibility lie with the employer. The extension of part-time work (on the terms specified here) to a much wider range of jobs and levels would have met considerable trade union resistance, yet (in the absence of an overall substantial reduction in all kinds of casual and part-time work) it was only thus that the currently ghettoised and dead end nature of such jobs could be overcome and working class unity strengthened.

A particular continuity problem was that of superannuation. Even where part-timers were included in the schemes, the benefits were often related to income in the last years before retirement. Part-time work in the form of 'tapered retirement' thus would involve not only pro rata losses for the period worked part-time, but also loss of the accrued value of the preceding years of full-time work.

The fourth principle promotes the maximisation of jobs, according to workers' needs. The defence of the jobs of full-time workers and of the unemployed seeking full-time work required that any extension of part-time
work must be at the initiative of an incumbent full-time worker. There should be no novel employer initiatives with regard to conversion of existing jobs or the advertising of new jobs as part-time. Indeed, it was important that a job that had been converted to part-time at a worker's request should revert to full-time when it was vacated. Part-time job creation left in the hands of employers could preempt the creation of full-time jobs and push workers into part-time work they do not want. However, the refusal of the ACTU to accept some possibility for part-time job creation increased and the stress on the defence of full-time work rather than of full-time workers, tied union hands until recently. If a worker voluntarily converted to part-time work and the hours freed were given to a newly employed part-timer, there would be a double gain and no loss even though, strictly speaking, no new hours had been created and there was one less full-time job. However, in the absence of union pressure the vacated hours may not be refilled at all. While unions should not be blackmailed into accepting part-time work on unacceptable terms under the excuse that it would create jobs, they should nonetheless seek to gain any job creation advantages that could be won.

THE FIELD IN A NEW PERSPECTIVE

If the situation in 1985 was seen in terms of the above four principles rather than simply in terms of resistance to the encroachment of part-time work, then the field became much more complex, yielding gains as well as losses. Precedents had also been established, some of which provided the opportunity of extension, while others warranted vigorous defence. In practice, many unions were already taking up these issues on an ad hoc or pragmatic basis. A few were elaborating them into a policy, but finding themselves at cross purposes with other unions in the same area. This can be illustrated by looking at each principle in turn.

Full Pro Rata Pay and Benefits

Over the decade to the mid-1980s there had been been considerable progress towards full pro rata pay and benefits. Initially, regular part-time workers had usually been covered only for pay, sick leave and holidays, but had increasingly obtained other benefits as well. On the whole, very firm union principles against cheap labour had operated but, as mentioned earlier, it took the bank employees' union a considerable time to take up their responsibilities even on the question of full wages. They had also achieved long service leave and superannuation very recently. In October 1981, they had also gained inclusion for part-time workers in the ANZ profit sharing scheme.

An other example is teachers on short contracts, which were first used in South Australia in 1977. Initially they were paid only for days worked. In 1980 they obtained pay for public holidays and sickness, and long service benefits, as well as increments according to the total of the accumulated days worked. At first these rights were wiped out by any break of employment, but then could be accumulated across breaks of up to six weeks.
Decasualisation

Here the balance sheet had by the mid-1980s been mainly negative. The volume and proportion of casual work appeared to have been rising. However, there had been some significant recent gains, notably in some areas where the tide had previously been running in the other direction. For example, in New South Wales in 1984, the shop workers' union made an industrial agreement with four major retailers which had had a major decasualising impact. The agreement severely restricted the employment of casual workers to very limited cases and not exceeding 15 per cent of the hours worked in any shop. Part-time work was permitted in the range of 16 to 30 hours a week, with at least four hours per shift, hours which would normally debar school children, who were also explicitly excluded from both casual and part-time employment. Justice Macken had concurred with the view that the employment of school children had significantly reduced the employment opportunities of school leavers and was undesirable. The agreement included other features, including shorter hours, and involved the considerable union concession on later opening hours. The impact of the agreement in its first 10 months (a phasing-in period) had already been considerable (see Table 1).

It is noteworthy that the right-hand column of Table 1 (compiled and supplied by the union) only calculates in percentage terms the decline in casual employment and the increase in full-time workers. Yet, clearly, the major change (one which must in the circumstances also be seen as a significant gain) was the huge growth in regular part-time work - up by some 420 per cent in the four stores. If the union movement was to mount a co-ordinated and effective drive to decasualise part-time work, it needed to be explicit about what it was doing.

Another important precedent was obtained with union support in the same industry in South Australia, with the judgment in the case of Cotter v. Coles in October 1985. In this case, the court decided that despite the fact that the plaintiff had been paid a casual loading, the fact that she had regularly and uninterruptedly worked part-time hours (over 20 hours a week since October 1983) entitled her to the pro rata maternity leave rights of the part-time clause contained in the award. This decision clearly created considerable potential for the unions to generalise and extend this precedent as rapidly as possible to counter abuses of casual employment. Perhaps it could be held to confer full-time status on a casual worker doing full-time hours in an uninterrupted way. Could the legality of awards whose casual clause provided no time limit also be questioned?
### Table 1: Changes in the Employment of Shop Assistants Under the 1984 Industrial Agreement

<table>
<thead>
<tr>
<th>Category</th>
<th>August 1984</th>
<th>June 1985</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. COLES - Comparable stores - N.S.W.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>4,998</td>
<td>5,743</td>
<td>+14.9%</td>
</tr>
<tr>
<td>Part-time</td>
<td>106</td>
<td>3,590</td>
<td></td>
</tr>
<tr>
<td>Casual</td>
<td>10,846</td>
<td>5,382</td>
<td>-50.4%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>15,950</td>
<td>14,715</td>
<td></td>
</tr>
<tr>
<td>2. WOOLWORTHS - Comparable stores - N.S.W.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>3,264</td>
<td>3,422</td>
<td>+4.8%</td>
</tr>
<tr>
<td>Part-time</td>
<td>374</td>
<td>1,252</td>
<td></td>
</tr>
<tr>
<td>Casual</td>
<td>5,375</td>
<td>4,426</td>
<td>-17.7%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>9,013</td>
<td>9,100</td>
<td></td>
</tr>
<tr>
<td>3. GRACE BROS. - Comparable stores - N.S.W.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>2,458</td>
<td>2,747</td>
<td>+11.8%</td>
</tr>
<tr>
<td>Part-time</td>
<td>1,167</td>
<td>2,197</td>
<td></td>
</tr>
<tr>
<td>Casual</td>
<td>3,559</td>
<td>2,087</td>
<td>-41.4%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>7,184</td>
<td>7,031</td>
<td></td>
</tr>
<tr>
<td>4. TARGET - Comparable stores - N.S.W. (includes clerical staff)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Full-time</td>
<td>449</td>
<td>492</td>
<td>+9.6%</td>
</tr>
<tr>
<td>Part-time</td>
<td>104</td>
<td>294</td>
<td></td>
</tr>
<tr>
<td>Casual</td>
<td>845</td>
<td>687</td>
<td>-18.7%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1,398</td>
<td>1,473</td>
<td></td>
</tr>
</tbody>
</table>

**Source:** Compiled by the Shop, Distributive and Allied Employees' Union, NSW Branch.

The secretary of the liquor employees' union in South Australia, despite his vehement hostility to all forms of part-time work, regarded regular part-time as a lesser evil to casual work, which was perhaps more prevalent in his union than in any other. With the hope of arresting the absolute slide to casualisation, the union had obtained a change to the award redefining the hours range of those classified as part-time from 20-34 to 15-30 hours. As a result, regular part-time work in South Australia had risen from 12 per cent to 15 per cent of the union's membership, the transfer all coming from the near 70 per cent of casual members. A minor change, but in the right direction.
Amongst teachers, the new and accelerating trend to casualisation had produced a significant and partially successful union reaction. In 1982-83, there were 15,000 teachers in South Australia, of whom 2,300 (700 full-time equivalents) were on contracts ranging from four weeks to a year. In 1985, only 35 per cent of newly qualified teachers had obtained permanent jobs. In confronting this growing problem, the union had looked to Victoria as its model. There in 1979-80 the Liberal Government had sought to put all new recruits on limited tenure. The union had thrown its weight into the election campaign behind Labor, in return for specific promises for an end to limited tenure and for the setting up of a system of permanently employed relief teachers. Labor won the election and, in 1983-84, the 22,000 Victorian primary teachers were backed up by 675 permanent relievers. These relievers were employed under a three tier system, which distinguished between those who could be sent: (a) anywhere in the state; (b) throughout Melbourne; and (c) locally. The South Australian union started its campaign for similar policies in 1982 by putting pressure on the Labor Party, which was then in government. 'Employable teachers' (qualified but without regular posts) became an active and organised group within the union, given discounts on their subscriptions, with a monthly newsletter and an officer allocated to their concerns. In 1983, the campaign had some success, with six 'permanent relievers' being appointed, and by the end of 1985 there were 39. These teachers were guaranteed a regular salary, but were obliged to go wherever they were sent in the state, for a 17.5 per cent loading and travel and accommodation allowances. In early 1984, 300 contract teachers were converted to tenure, producing a new category of permanent teacher (PAT - Permanent teacher Against Temporary vacancy), with the right to a job but no permanent location. At the end of 1985, the union obtained a promise to convert 'as many as possible' of full-year contract jobs to permanency the following March. One new form of conversion involved 'clusters', where a teacher was offered permanency if willing to teach in a cluster of two or three equidistant schools. If there was not enough regular work they might top it up with relieving in the cluster as well. Clearly the fact that the work is casual does not necessarily entail the worker being so.

Integration of Part-Time and Full-Time Work

Decasualisation involves the conversion of casual to regular workers. However, there was in many private sector awards and agreements little concern for a right or a priority in access of part-time workers to full-time vacancies. In fact, a right to convert from full-time to part-time work was scarcely conceived of and would at that time have been anathema to many unions. Yet, in reality, a lifetime pattern of movement from full-time to part-time and later back to full-time work (with one or more interruptions which are increasingly sanctioned by leave-without-pay provisions) is normal for most women (and might make sense for quite a few men). Where such transfers did in fact occur, they were normally classified as a new contract of employment and, even where there was no break, might involve workers losing substantial entitlements.
By the mid-1980s, some unions had begun to concern themselves with the consequences of such transfers. In June 1984, the banks appeared to have given an assurance that such conversions would not be regarded as a breach of continuity, but it became clear the following year that this was far from established. In March 1985, Mrs F, having worked for Westpac in Queensland for ten years, chose to change (without a break) to part-time work. It cost her not only *pro rata* reductions and the reversion to the 21 year-old's pay rate, but also forfeiture of 70 days of accrued sick leave entitlement and the cancellation of her right to maternity leave (which would now have to be regained by another 12 months service). She would, of course, have no claim to return to a full-time job at a later date. The union took up the question of her loss of accrued entitlements and asserted its refusal to accept such transfer as a break in continuity.8

The most innovative developments in the mid-1980s concerned the introduction of permanent part-time work among public servants and teachers. The trailbreaker here had been the South Australian public service. There was in this state a convergence in 1976 and 1977 between public service board policy and an active committee within the public service union agitating for permanent part-time contracts. The union submission on the question was largely incorporated into the scheme, which came into effect in 1978. The principle was for permanent employees to be able to apply for conversion to regular part-time hours, with a minimum of 15 per week (the union had asked for 10), with full *pro rata* payments and increments, continuity of entitlements and status, and the right to apply for promotion. Those workers previously in casual part-time positions could also apply, but there would need to be a permanently available suitable position. There was to be no reduction of anyone's hours except at the incumbent's request. Moreover, there was no guaranteed bridge back to full-time work, but it was possible to seek reconversion, and favourable consideration was promised, and it was also possible to apply for transfer or promotion to a full-time post. While neither the public service board nor the union said they had any knowledge of cases where such a return had been blocked, it seems probable that the absence of a guarantee would have inhibited at least some would be part-timers. Several men I spoke to, who had converted, stressed the importance of this in preventing others from following their example. The union file since 1978 revealed no complaint about employer pressure on any employee to reduce their hours. Employer initiated cases have occurred only in rare cases where a vacancy could not be filled by a full-time applicant, and the board had responded to occasional union concern, by stressing to department heads that permanent part-time work was designed to meet employee needs. The union's central concerns were positive rather than defensive - to monitor and liaise with the board to overcome the resistance of some department heads to the new procedures, to encourage publicity and to facilitate appeals against the (relatively few) refusals. By 1983, 4.4 per cent of permanent public servants were part-time (88 per cent of these being women).

Among South Australian teachers permanent part-time status was introduced in 1979, again by mutual agreement between the department and the union, with full *pro rata* benefits, and rights to transfer and promotion
(though senior teachers, deputy principals and principals were not allowed by the department to work part-time). The department policy was to allow all requests, with the onus on principals to justify any refusal. Despite an appeals procedure, the union had been concerned at a recent resistance to applications by principals and sought to prevent any retreat from what they saw as a valuable members' right. While such a part-timer desiring to return to full-time work had until then been given priority (but no guarantee), the union was currently worried by reports that this priority was being questioned in one of the regions, though no complaints of blocked bridges had actually been received. Superannuation was calculated on the last three years' salary prior to retirement. The union officer responsible for part-time workers felt that this (in conjunction with the lack of a guaranteed bridge back) was a serious inhibitor to many men in particular.9

It was only in the mid-1980s that similar permanent part-time policies spread to some other states, and in March 1986 there was talk of strike action by the state public service association in New South Wales in favour of its introduction there. The South Australian model has also been adopted as policy by the relevant union in New Zealand.

The experience of South Australian public servants and teachers also provided an impetus to Commonwealth clerical and administrative officers in that state, and the union branch set up a part-time work committee. The Queensland branch responded by also setting up a committee. This committee subsequently developed a policy which was then served as a national log of claims. Most of the claims were accepted by the then federal Public Service Board and a consent award was made at the end of 1985. The award contained a compromise between traditional union hostility to part-time work and member pressure in its favour (by men as well as women) by imposing an initial 3 per cent quota. In addition, people who had been working as non-permanent part-timers since August 1984 were be entitled to permanence if there was a 'reasonable expectation' of the continuation of need for their position. In a considerable improvement on the South Australian situation, a bridge back was specifically guaranteed, to the same or an equivalent position, at any time. Another advance was that the award provided for detailed consultation and monitoring by the union, with the job content of the new post to be negotiated and approved by them. According to an officer of the South Australian Administrative and Clerical Officers' Association, the ACTU was happy with the award and suggested its use as a model.

The Maximisation of Jobs

The experience of public servants in South Australia and the more precisely specified terms of the Commonwealth clerical officers' award indicated modalities whereby the initiation of part-time work was primarily in the hands of the employee and where any employer initiative was quite rigidly controlled and limited to a maximum of 1 per cent of total employment. Pressure on existing full-time workers and on potential applicants for full-time jobs to accept lesser hours was thus obviated (the guarantee of a bridge back
to full-time work also removed this danger). The Commonwealth award also
specified that when a position converted to part-time by employee initiative
was vacated, 'then the position shall either be abolished or reverted to a full-
time position'.

The impact over the eight years up to 1986 of permanent part-time
conversion in South Australia on the number of jobs was difficult to
determine. A conversion had been defined as a new post and the leftover
hours had originally gone into a central pool. The union complained that this
was a disincentive to department heads to approve such conversions. After
1981, a general decentralisation of procedures had left these hours within the
department's discretion. Insofar as part-time workers were counted on a full-
time-equivalent basis, this should have created new jobs (either part-time or
full-time by amalgamating hours). In practice, it seems many departments
had been overstaffed, operating above a centrally defined and negotiated
ceiling. Leftover hours had thus operated in the same way as natural attrition
- not altering staffing targets, but perhaps accelerating projected reductions
(though their impact relative to that of turnover rates would be very small). It
seemed a pity that the union did not seek to obtain the replacement of these
hours and their exclusion from the normal processes of attrition. It would
seem they were inhibited here by the ACTU warning that part-time work
could not be used as a means of reducing unemployment. The union
expressed concern to ensure that such leftover hours were handled in a way
that did not disadvantage the staff or the person converting. It avoided,
however, any suggestion that the filling of these should be pursued in the
interests of job creation. While the possible positive contribution of such
part-time conversion schemes to resolving unemployment were at best very
small, it was clear that the existence of any positive effects must depend on
deliberate union pressures to ensure opportunities were not wasted.

The Commonwealth ACOA award of 1985 seemed to provide a good
model and one whose principles should be widely adopted wherever unions
were strong enough to obtain and enforce them. This, however, had to be
done warily for otherwise such schemes could be 'turned' to quite different
effects. For example, the Telecom consultative council (with representatives of
the employer and seven unions) had been meeting to discuss Telecom
proposals supposedly to extend the ACOA precedent. The Telecom position
paper, however, clearly involved significant modifications to the model, of a
kind to arouse deep (and justified) suspicions in unions, such as the
technicians, who already opposed part-time work. The absence of a quota
was the one provision that concerned them most, but others were more
significant. The Telecom paper presented to the council referred to both staff-
initiated and management-initiated proposals, aimed not only at retaining
people who would otherwise leave, but also at 'catering for peak work load
duties... [to] assist in matching staff to workload needs and facilitating
redeployment as necessary'. It was proposed that Telecom could initiate part-
time work 'in those positions which, by virtue of the nature of their duties, can
be converted or created as permanent part-time work', including cases 'where
the work required to be undertaken cannot justify the utilisation of resources
on a full-time basis'. Such employer-initiated proposals were not even to be
limited to vacant positions, though there must be 'regard to the views of the staff member in this position with regard to any change in his or her hours or alternative placement if necessary'. It was specified that 'as a general rule reversion to full-time status which is initiated at the request of the officer concerned will be subject to the availability of a suitable position'. Thereafter, the technicians union excluded part-time work from its area of coverage, while the ACOA was able to reestablish, for its area of coverage in Telecom, most of the exclusively employee initiative, guaranteed bridges and union involvement in the implementation which the original model provided. A divided union side, however, had an uphill battle in this case.

CONCLUSION

The long established union stance towards working hours has been to aim for common hours for all and progressive reduction in these common hours, while both resisting any concomitant reduction in incomes and accepting the need to concede effort and other productivity offsets. Such a position has become increasingly difficult to maintain in the new situation where there are multiple family earners and where a growing proportion of the workforce has a lifecycle progression best suited by movements back and forth between part-time and full-time work. In addition to the pressures resulting from this new worker situation, employers may be seen as often having strong and threatening reasons for introducing part-time work, and can obtain a wide range of benefits from it, while gaining significant anti-union propaganda amongst the unemployed and those seeking part-time work. In these circumstances, union resistance to part-time work was foolish. On the one hand, it tended to alienate workers whose variable needs were being ignored and it divided union members. On the other hand, it served to reinforce the segmented labour market which the unions feared, with barriers being erected between those areas where union resistance had succeeded and those where it had failed.

The alternative strategy, which was beginning to surface in parts of the union movement from the late 1970s onwards, which was advocated in this paper and which is now formal ACTU policy, involves a reshaping - a 'turning' - of part-time work, rather than an attempt to block or corral it. The stress here is on decasualisation, full pro rata benefits, integration of part-time work into full-time seniority, entitlement and career paths and an emphasis on the right of employees (but not employers) to initiate part-time conversion, with guaranteed bridges back to full-time work. Such policies not only promise to help unions regain the initiative, attract members and encourage unity, but they also have potential benefits for aggregate employment. While they are no panacea for unemployment, union efforts could also increase the possibility of some job creation resulting from any 'leftover hours'.

While the kind of part-time work advocated may be less appealing to employers than the free hand they sought, there is evidence that it still holds some advantages for them, and that therefore such a union push is not utopian.
Chapter 4

It was tempting, in a period when unions were on the defensive, to cling to well established policies and to avoid innovations which could have represented the thin end of dangerous wedges. In the long term, however, this path was likely to be disastrous, and the fact that the alternative has been chosen is a cause for optimism.

ENDNOTES

1 This research was funded by the Division of Administration at Griffith University, Brisbane. The author wishes to thank the many people who found time in a busy work schedule to grant interviews and in addition provide copies of awards, legal decisions and union policy documents. A variety of material from the files of the ACTU, the telecom technicians' union, and the South Australian teachers' union was also made available, while the South Australian state public servants' union and bankworkers' union branch gave full access to their part-time work files.

2 The first version of the paper was, in fact, never published in Australia, although it appeared in Britain (Lever-Tracy, 1987) and it circulated in this country in a collection of papers from the 1987 Conference of the Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ). Some passages have also appeared in an article in *Labour and Industry*, where the question of the nature of part-time work and of its uses to employers is discussed in a broader context (Lever-Tracy, 1988). More importantly, copies of it were sent to all the officials interviewed, and the author would like to think it had some influence in the trade union movement. The ACTU's *Guidelines and Negotiating Exhibit on Part-Time, Casual Work and Job Sharing* (1990) does cite the paper and includes several pages from it in an appendix.

3 By 1990 the part-time quota in banks had been negotiated progressively up to 17 per cent and the employers were pushing for the introduction of some casual workers, at least to cover for temporary absences. On the other hand, an extensive job restructuring had taken place, and in the new job evaluation system, part-timers were paid the same hourly rate as full-timers and the full range of positions and career ladders was in theory open to them. The union is working on establishing a right for workers to convert from full-time to part-time and back, with no loss of continuity. Such a right was already established in Westpac bank. The union now feels that significant gains for part-time workers have been achieved.

4 The ACTU argues that 20 per cent is the minimum required just to compensate for loss of award benefits to casual employees (1990, 16).

5 So far as I could gather from speaking to copy boys, no attempt had been made to recruit them into the union, though they worked under the Clerks' Award.

6 The ACTU (1990) suggests a transition clause, allowing casual workers whose status is changed to that of permanent part-time or full-time workers (who thus would obtain the benefit of regular hours, severance pay and so on) to choose between continuing receipt of the casual loading and specified benefits such as sick pay and holidays.

7 The forms of superannuation negotiated in more recent years avoid this double jeopardy.

8 See endnote 3 above.
Since then, several of these problems have been resolved. Principals who object to part-time conversions now have to demonstrate the difficulties it would cause to the satisfaction of a field superintendent. The superannuation scheme now deducts no more from the final entitlement than is justified by the actual period of lower payments. In access to full-time vacancies, teachers who have earlier reduced hours are given a priority over those with equal transfer points who have not, although there is still no guarantee.

Since then, the ACOA award has been implemented undramatically and with few problems, and the union had no evidence of any abuses. The scheme they felt had worked 'remarkably well'. So far, the 3 per cent quota had overall been only 70 per cent filled, although the take up varied considerably between agencies and states. Some of this variation may have been due to different attitudes on the part of the immediate supervisor. Only some 20 per cent were men, mainly seeking time for study purposes.

REFERENCES


Chapter 5

5 Outwork and Unionism in the Australian Clothing Industry

Bradon Ellem

INTRODUCTION

At first sight, the Australian clothing industry provides a clear example of a union changing its policies in response to an increasing use by employers of 'flexible work practices'. In this case, the union in question is the Clothing and Allied Trades' Union (CATU) and the flexible work practice is outwork. During the 1980s, CATU abandoned its traditional cry for the abolition of outwork and sought to persuade the Australain Conciliation and Arbitration Commission (ACAC) to extend award coverage to outworkers. However, closer examination reveals a more complex picture. While outwork and union response must be studied in the light of the industry's changing product markets and production processes, they cannot be properly understood without recognising the influence of broader social forces. In particular, any analysis of outworkers and the policies of CATU must pay special attention to both the position of migrants and women in the Australian labour market and the role of pressure groups which emerged to represent the interests of these groups in the 1970s and 1980s.

Before pursuing such issues, some definitions are required. The many forms taken by outwork in the clothing industry make it difficult to define, but it can generally be said that outwork is a stage of the production process or a set of production tasks which workers are engaged by manufacturers or contractors to complete in their homes. The stage of production so completed is almost always the machining of garments, while the other stages of production remain factory-based. Outworkers receive from the manufacturer or contractor materials or 'overlocked' garments which they then sew, usually on a 'flat' sewing machine. Contrary to popular perceptions, the work is often detailed with employers insisting upon high quality product.

Outwork in the clothing industry certainly has created a group of marginal workers, but an understanding of the nature of this 'marginality' requires a distinction to be made between the worker and the work. Most
outworkers are almost quintessentially marginal: firstly, they are part of an industry in which the skills of the majority of workers - women - have been under-valued; secondly, many are newly arrived immigrants and are therefore 'socially marginal'; and, thirdly, they form a cheaper and more disposable labour force than the core labour force working in factories. Outwork itself, however, is neither new nor peripheral. To the industry, the outworker is as central a figure as the factory worker. Making clothes at home may be temporary or part-time labour for outworkers themselves, but this form of labour has proved to be anything but transient.

Little more can be said by way of definition until outwork is placed in an appropriate context. The chapter therefore proceeds by way of analysing clothing product markets, production processes and labour markets. Running through all these contexts can be discerned wider patterns of political-economy and society which have constructed outworkers as marginal labour. Having placed outwork in its context, attention turns to the problems outwork creates for the workers and the union concerned. Only then can union strategies be examined. This task requires, once more, a broad social and historical approach, examining, amongst other things, the vital role of agencies outside the union in moulding the union's response to outwork. Finally, some of the continuing difficulties for and challenges to trade unionism will be discussed, emphasising the importance and the difficulty of enforcing award conditions.¹

CONTEXT

Although outwork is not new, it has expanded in recent years. This expansion has occurred in a volatile context characterised by markets which have changed rapidly and factory production processes which have developed more quickly than at any time since at least the 1930s. Underlying many of these changes have been major alterations to the role of the state and to the relationships between different sectors of capital. It is, then, a bewildering context for both unions and observers.

Product Markets

The clothing industry's market contracted in the early 1970s and over subsequent years the market compared poorly with other manufacturing sectors (O'Donnell, 1984, 109-11). Unemployment, an aging population and changing fashions contributed to this market decline. However, since then there has been something of a recovery. Increases in market size over recent years have been particularly significant in fashion and quality casual clothes; a 'yuppie-led recovery', perhaps. In these growing fashion sectors, the focus of competition is on style rather than price.
The effect of these market trends was exaggerated by the ubiquitous activities of the state. Over the previous eighty years, the Australian clothing market had been a protected one, with tariffs and quotas defending the local industry. However, by the 1970s, rapid advances in the industry overseas and the switch in import-source to Asia undermined the effectiveness of these measures. At the same time, significant reductions in protection beginning in 1974 exacerbated this trend (O'Donnell, 1984, 108). The result was, of course, increasing price competition and declining markets. During the 1980s, the Hawke Government's initiatives on industry policy, with their emphasis on further reductions in protection, increased these pressures. However, there was also the intention of shifting the industry up-market by improving its technology and concentrating production in areas where the industry can compete with overseas suppliers (Button, 1987). This has reinforced the swing towards quality fashion production.

What these developments - the first shrinking, then changing market - meant for outwork is not absolutely clear. On the one hand, it is fairly certain that the pressure to reduce costs in the face of increasing price competition meant that factory hands were less likely to be re-employed 'indoors' than to be recruited as outworkers. On the other hand, and perhaps surprisingly, the emphasis on quality garments did not necessarily favour factory work. Whilst quality control procedures may lead manufacturers to favour factory supervision, it is also the case that outwork makes most sense for small production runs where variety of design and colour is essential. Interestingly, there is some evidence from Europe of outwork and technological change advancing at the same time as each other (Mitter 1986 46-7, 51-2). In summary, there seems to have been considerable incentive for manufacturers to shift production towards the use of outworkers.

Other important trends in clothing product markets also suggest that manufacturers were moving in this direction. The 1980s, for example, saw the size of establishments in the Australian clothing trades contract. Those establishments with four or more employees employed an average of 34 workers in 1980. In 1988 this was down to 27 employees. In the same period, the number of establishments with fewer than four employees rose from 439 (with a total of 936 workers) to 540 (with a total of 1,121 workers). At the other end of the scale, the proportion of all employees working in establishments with one hundred or more workers fell from 44 per cent of the industry total to 41 per cent (ABS, 1987-88). This should not suggest that large companies were unimportant in the industry - in 1988, the largest twenty enterprise groups, representing only 1.1 per cent of the total 1,772 enterprises, employed 13,631 workers or 26.8 per cent of the total factory workforce (ABS, 1987-88) - it simply shows that the size of establishment was declining and suggests similarities with Europe by hinting at a proliferation of subcontract networks. The industry's structure is, perhaps, more divided than ever, enabling the union still to work with some employers against others.
At the same time that company structure and size were changing within the clothing industry, important changes were also taking place in the retail industry. The 1980s saw considerable concentration in Australia’s retail trade, with many mergers and takeovers. These affected clothing production because manufacturers were now selling into a market where the real - and powerful - customer was a giant retail conglomerate. The sale to a customer is merely the final link in a long chain. One of the outcomes of these conflicts within capital has been greater pressure on labour (ACAC, 1987a, 18; Rosewarne, 1983, 33-4). To keep costs down, to keep business, to satisfy the dominant retailers, many clothing firms decided to send more work outside their factories and others insisted on still lower rates for existing outwork. Outworkers have carried the burden of these shifts in power, just as they have when changing product markets and overseas competition have affected the local industry.

Production Processes

The clothing industry’s labour process changed very little for about a century, from the introduction of the sewing machine until the advent of micro-electronics in the 1970s. Of course there were innovations in those hundred years - such as new and faster machines, a greater range of operation-specific machinery and an ever more detailed division of labour - but the production process changed by degree rather in kind. And whatever changes took place and whatever regulation was introduced, little happened to diminish the scope for outwork.

There were - and remain - four main stages of production: cutting, sewing, pressing and examining. Craft status was chiefly eroded in the sewing and pressing stages as a result of technological advances, the availability of a pool of cheap, home-taught female labour and the fixing of breadwinning wages for men only. Cutting and its associated tasks, grading and marking, remained the craft bastion until the most recent times, being factory-based, apprenticed male-labour. At the turn of the century, saws and knives did not upset this and the introduction of computer-aided design and manufacture from the late 1970s has not done so either. However, cutting is changing and is pivotal to the present restructuring of the Australian industry. Massive productivity increases are possible through time-saving and material-saving, whilst computerisation enables rapid responses to changes in consumption patterns (Ellem, 1990; Rush and Šoete, 1984, 189).

Unlike cutting, sewing has been women’s work since at least the creation of the factory system. This led, amongst other things, to a poisonous relationship between these workers and the union craftsmen. Women were perceived as a threat, a problem whose 'suppression' the crafts at first fought for. Outwork provided the most extreme manifestation of this relationship and the two concerns were to overlap in later years. The sewing of clothes was not simply part of the public, paid economy: it was also household labour
and labour carried out by a skilled (although this was not recognised) labour force, trained by mothers or schools, not by firms (Ellem, 1989, especially Chapters 1-3).

Today, the scope of machining is more varied and demanding than previously. There are dozens of operation-specific machines, used where there are long production runs or when a single task requires substantial repetition. On some of these there is the potential for pre-programming - the only significant micro-electronic advance (so far) into sewing. Other changes, such as clamps, automatic needle-positioning and thread-trimmers, help to reduce handling-time. Many of these machines are confined to factory production because of cost and run-size. However, there are several obstacles to further change - and these obstacles sustain outwork as an alternative strategy. Firstly, the size of the product market has limited the scope for further advance. Secondly, the speed of some machines cannot now be improved because operators cannot keep up. Thirdly, handling time remains the greatest technical problem confronting management. Only 10 to 30 per cent of production time is spent machining, up to 90 per cent is handling the material. These intractable problems limit the scope for advance and, given the continued existence of a skilled, home-based labour force, managers may continue to look for outworkers to reduce costs (Ellem, 1990).

Limited as they were, these changes nevertheless allowed management to re-shape patterns of control. Within factories there was, generally, a decline in the range of tasks performed by workers and increased bureaucratisation of work relations. In short, the balance of control over work shifted to management. For outworkers, the question of control is presented in a different light. Their machines are usually more basic than those in the larger factories and the workers have not experienced all of the most recent bout of changes. Control by management over the outwork labour process is achieved in other ways. For example, despite their location, outworkers remain an integral part of the production process and, as the CATU argued in the Commission in 1987, they work to 'rigid specifications' and their work is subject to close scrutiny (ACAC, 1987a, 37). Garments are often returned to the machinist and no payment made if employers deem the work unsatisfactory. Low rates of pay and consequently long hours of work both result from and intensify a loss of control on workers' part. Finally, the spatial characteristics of outwork limit workers' resistance: outworkers are isolated one from another in their own homes. Managerial control and workers' weakness arise from these social relations as much as from the technical aspects of production.

Thus, outwork is confined essentially to one stage of the production process. The other stages, pressing and examining, remain, like cutting, factory-based. Outwork tends, too, to be limited to garments with short production runs, arising as a solution to the problems of capital in an industry traditionally technologically backward and yet increasingly competitive.
Labour Markets

The Australian clothing industry's labour force can be divided into two main segments: the factory labour force and the outworkers. At the end of June 1988, the total number of 'persons employed' in establishments with four or more employees was 50,934 with a further 1,121 working where fewer than four were employed - a total of 52,055 (ABS, 1987-88). Although no recent detailed breakdown exists, earlier research by CATU showed, as the previous section suggested, that the greatest number of these workers were machinists - about 70 per cent (CATU, 1981).

The size of the outwork labour force is more difficult to estimate because, not surprisingly, there are no accurate statistics. The most common union assessment (more or less accepted by the ACAC) is that there were around 60,000 outworkers in Australia in the mid-1980s. All parties agree that outwork has grown in recent years (Interviews, Booth, 1988 and 1989), but the evidence is, again, incomplete. Several accounts of the growth of outwork were tendered to the ACAC in 1987: a representative of a major manufacturer referred to outwork's 'ominous growth' in the previous ten years, and he and others recorded their alarm at the shift from factory work to 'invisibility'; CATU's South Australia Branch Secretary put the growth at 500 per cent in 'recent years'; and CATU's federal Research Officer, argued that poorly controlled increases in imports had led to redundancies, which in turn led not to long-term unemployment but to more outworking (ACAC, 1987a; 11-12,15-16). It can of course be objected that all these 'observers' had a vested interest in emphasising outwork's growth. Two points, though, can be made: firstly, the perception and belief of increasing outwork are themselves important in shaping action; and, secondly, the 'on the ground' evidence of shifts from factory to home is widespread and comes not only from the union and employers but also from other research (for example, Centre for Working Women Co-operative Limited, 1986, 6-7; Illawarra Migrant Resource Centre, 1984, 5).

The composition of the outwork labour force and the dynamics of the outwork labour market can only be explained by reference to theories of gender and the family and ethnicity and culture. Here analysis must be simplified by looking at the (admittedly limited) material available for Australia. Some core characteristics can be identified: the outworker will be a woman and mostly a woman of migrant background with limited or no English language skills. Many outworkers have young children but, equally, many are aged from 35 to 55 and are former factory workers. (As the population ages such women will likely become nurturers to older relatives where once it was children keeping them home.) They are located where the industry is, although recently firms seem to have followed labour - setting up in the suburbs of Sydney and Melbourne. Depressed industrial centres such as Wollongong and Newcastle are also important locations. Overall both immigrant labour and outwork remain essentially urban phenomena (CATU, 1981; CATU, 1987; Peck, 1989, 12-15).
The domination of outwork by females is at least partly related to the fact that sewing has remained women's work, hovering between factory and home. The social significance of this type of work is thus poised between production and reproduction. Traditionally, the Australian industry was a very clear example of the closeness of these tasks: in the nineteenth century, the product market's development was so great that outwork and factory output both increased (Ellem, 1989, Chapter 1).

The ethnic composition of the outwork labour force arises from the propensity of employers in clothing, like so many other Australian employers, to draw labour power for outwork from among the most recent migrant arrivals. Until World War Two there was little ethnic diversity within the working class and so outwork labour markets were relatively uncomplicated (but probably smaller than today). Outworkers were poor, urban women from English-speaking backgrounds, particularly those with invalid relatives, young children and no regular male bread-winner. However, after 1945, there was a series of new and exposed groups of workers from first European and then Asian backgrounds, for whom material and ideological pressures against 'going out to work' often meant that paid work came into their homes.

There is some evidence that recent immigration has also had two more specific effects. Firstly, each successive wave of immigrants (insofar as this is a meaningful term) has been harnessed by makers-up - so, recently, Vietnamese women have been the most common recruits. Secondly, it has been shown in England that intra-ethnic networks have been significant not only in organising the labour market but in subsequently tying the women in with feelings of obligation and, at the same time, allowing some of the men to rise to positions of relative 'respectability' (Mitter, 1986, 55-9; also Hoel, 1982, 90).

Why do women take up outwork? Many answers focus on the motivation of the worker, but before considering this, much of what has gone before should be reiterated. In brief, changing product markets, obstacles to technological change, capital's search for cost-cutting as well as cultural practices and family structures have created or maintained a savagely exploitative labour market. In sum, women's decisions about outwork are made in an environment not of their making. What is often quite striking is the lack of options, particularly if child-rearing is taken as given as women's primary, home-based activity.

CATU research reinforces this argument. Several overlapping processes affect choices about outwork. To begin with, there are problems of communication and cultural difference. Language difficulties may not only deter workers from joining the factory workforce, but may also lead to reduced income should workers be unable to grasp instructions. At a broader cultural level, there are the cultural shocks of a new society and its work relations, as well as outright hostility from other workers. These factors should be seen to be at least as important as the often-stated (though rarely
examined) belief that some ethnic or racial groups (or men amongst them) disapprove of women going 'out' to work. Any one of these cultural problems, however, might well be an incentive for women to engage in paid labour in their homes. Similarly, child-care or provision of support for relatives still ties women, of all ethnic backgrounds, to the home. CATU now emphasises that this need not be insurmountable: 'appropriate and accessible community support mechanisms' are essential to widen women's area of choice (CATU, 1987, 8). As many feminists have argued for some time, a reformulation of all forms of work is indispensable. If neither of these changes takes place, a potentially vulnerable outwork labour market will continue to exist.

CATU has also identified two other sets of factors which act as disincentives to women joining the factory workforce. Firstly, there are difficulties in the nature of the work itself: when workers have little training or experience, their earnings, under piece-rate systems of payment, will be low. At home, machinists can work at their own pace. (The trap, of course, is in the resulting long hours worked.) For many women, the sexual harassment, male supervision and poor conditions of the factory are all too much. Although none of these characteristics is unique to the public workplace, the response of many women to these factors will be to work at home. Secondly, there are various ways in which the social structure itself presses in on some families, making outwork seem an attractive proposition. For example, poor public transport and fears for personal safety may encourage outwork; delays in workers' compensation may produce the same result as income dries up; and shortfalls in social security can also force women into the 'invisible' workforce (CATU, 1987, 7-9).

Some of these factors help to account for what is perhaps the central issue - the growth of the outwork labour market. New immigrant groups are beset by language difficulties, changing demographics may be putting pressure on more women to stay at home, whilst it could well be that some elements of government policies (mainly cut-backs) have affected child-care, transport, workers' compensation and social security. In turn, this would facilitate the growth in the supply of outwork labourers. This underscores the point that outwork must be understood in terms of the social whole of which it is a part.

Other pressures might also merit attention. Although it is fragmentary, there is some evidence from Wollongong that lack of training under factory conditions and low household income are central determinants of attitudes towards outwork. It must also be recognised, as it was in the building trade, that there are problems with tax evasion and social security 'double-dipping', and that once locked into these types of problems, there is no way out for the women. The makers-up have them 'by the throat' (IMRC, 1984; Interviews, anonymous).
The outwork labour market is, then, a specialised one, overwhelmingly made up of women from non-English speaking backgrounds. The reasons they have chosen outwork show just how difficult it is to regulate home production and how impracticable calls for abolition have been.

THE OUTWORK PROBLEM

When the political, economic, social and industrial contexts shaping outwork are drawn together, the nature of outwork as a problem becomes clearer. This can be seen by looking more closely at the outwork process itself, concentrating upon the implications firstly for the workers and then for the union.

Few retailers or 'reputable' manufacturers employ outworkers directly. Rather, they put their work out to contractors or makers-up who, in turn, employ outworkers to sew for them. Two long-standing problems can be discerned immediately: firstly, the originating party (sometimes called the principal) disclaims any responsibility for the conditions under which the goods are produced; and, secondly, the principal can argue that outworkers are not employees but rather subcontractors, who are not covered by award conditions. Under these circumstances, unions and the state exercised very little control of the outwork production process. Outworkers were at the beck and call of their contact. Hours of labour and piece-rates were effectively set unilaterally by the makers-up or contractor. In practice, the size of the pile, the quality of the goods, the nature of the material and the speed of the machine would determine time spent by the outworker on a batch of work and the income received from it.

The outcome of this process was, as has been widely documented, outworker wages and conditions truly reminiscent of nineteenth-century sweatshops or, perhaps more to the point, the creation of something like third world production conditions within a supposedly advanced liberal democracy. Because piece-rates were the norm, it is difficult to be sure about hourly rates, but something between $2 and $3.50 was the most common estimate in the mid-1980s - and probably towards the lower end of this range. It was not uncommon for outworkers to be at their machines for 80 hours in a week. Within this working week, however, there might be enormous fluctuations including periods of frenetic activity followed by shortages of work. For example, a pile of garments might contain say 40 hours work, but frequently it would be delivered on a Thursday with the requirement that it be ready on Monday morning. Under such circumstances, wages were not the only problem: health was another, with eye and back problems alongside the machinist's worst dread, repetitive strain injuries (ACAC, 1987a; Booth, 1987; CATU, 1987; IMRC, 1984).
All this hints, too, at the nature of the problem for a union. Outworkers represent a workforce cruelly exploited and one which could be expected to be crying out for defence, but they are also a workforce which is utterly fragmented and often suspicious of union policy. The problems and contradictions can be drawn out by summarising the different contexts discussed earlier. The changing product market put greater pressure on those who were already outworkers and it also increased the volume of outwork, reducing union strength in factories and union profile in the industry as a whole. This fuelled the belief that outwork was, of itself, a threat to trade unionism, rather than focussing attention on the base issues like the nature of markets, overseas producers and the power of local retailers.

Similarly, the labour process presented difficulties. For factory workers and the union, the issues at stake were those of control, skill, health and job satisfaction - as they were for outworkers - along with basic problems of earnings and hours. The underlying concern, however, was that outwork arose as a managerial solution to technical obstacles to change in the labour process. Because its basic rationale was cost-cutting, outwork inspired dual responses from unionists: it was perceived as a social injustice and it was also a threat to factory employment.

Finally, the nature of the labour market also presented difficulties for the union, throwing into sharp relief the overall ethnic and sexual contours of the industry. Problems in organising and regulating this work were immense in themselves, given the scattered and geographically isolated location of the outworker. But this problem was compounded by the fact that the union had traditionally had anti-outwork policies and male English-speaking personnel. Both were a world away from the social and economic imperatives which had created the immigrant woman as an outworker.

The context in which outwork grew and in which CATU policy changed was, then, a complex one. Even if it is confined to the narrowest of explanations - within the structures of the industry itself - it is clear that to regulate outwork, whilst defending such intensely exploited women and securing the union’s position within the trade, would be difficult. The problem becomes more intense, though, when placed in a proper social context. For then patterns of ethnicity and the dynamics of gender relations become clearer. Outwork’s social function has been, amongst other things, to reconcile the contradictions between the demands of capital and of men upon women: it provided a labour force still able to perform unpaid domestic labour. Tangling with this would require changes within the union itself - and it is there that the next section begins.
UNION STRATEGIES

Before the mid-1980s, CATU was dominated by craftsmen who had little sympathy for outworkers and little understanding of outwork. As a result, the union had no real strategy by which the outwork problem might be addressed. It was only when the union itself began to change - changes which were themselves linked to other external forces - that a more effective strategy could emerge. The account of these issues below begins with the union before the 1980s and its traditional approach to the outwork problem. The changes in the union and the consequent changes in outwork strategy during the period of the 1980s are then described.

Tradition

Before the mid-1980s, CATU was a union almost solely made up of factory workers. In the early 1980s, its 30,000 membership broadly reflected workshop profile: 85 per cent were female and most were from non-English speaking backgrounds. The union's leadership, from committees up to branch and federal officers, was unrepresentative. The typical official was, as had been the case since the 1920s, an Australian-born male of British or Irish stock. Since most of these officials were former craftsmen from the ranks of cutters and markers, there was no direct experience of the factory machinist's lot, let alone the lot of the outworker. CATU's structure was also static. It remained a loose collection of (often antagonistic) state branches, with a weak and usually ill-funded federal office. Indeed, until the late 1970s it was hardly possible to speak of a proper federal office. That this was a body poorly equipped to deal with many of its members' problems and with the apparently insoluble outwork dilemma was a perception shared by many, not least a growing number of senior officials.

During this pre-1980s period, CATU had few policies on anything - like most unions it was essentially a reactive organisation. Ideas about outwork reflected the union's membership and leadership, and were built out of craftsmen's traditions, set-backs from earlier attempts at regulation - and resignation. The only consistent union thread was a preference for the abolition of outwork. This had been articulated by Melbourne's tailors as long ago as 1890, when an unsuccessful attempt was made to exclude women from the industry (Amalgamated Society of Tailors, Minutes, 3 December, 1890). This pointed to an enduring problem: outwork, the sewing of garments, was characterised as women's work, work carried out in the private sphere, the home. Outwork then was doubly damned because it was performed by women at low rates and performed in the scene of unpaid labour. Outwork undermined the restriction of numbers in, and credibility of, 'the trade'. The union's official stance remained drawn from the nineteenth-century crafts - that outwork was not a legitimate form of labour and that it must be abolished. This was formally declared as late as 1982 in New South Wales when the Branch Executive told the Illawarra Migrant Resource Centre that 'outwork could and should be abolished' (IMRC, 1984, 37).
These attitudes were reflected in the union's policies towards outworker membership of the union. By the mid-1980s, the growth of outwork and decline of factory production meant that, crudely measured, the CATU was only about half its potential size. In effect, a non-union labour force had been recruited by employers from immigrants and former factory workers. The very existence of such a labour force signalled a divergence of interests amongst workers, making it possible for some to maintain the traditional perspective that the interests of outworkers and factory workers were not only divergent but that outwork was antagonistic to factory workers' working standards.

What of the union's actions towards outwork? From the first federal clothing award of 1919, there were intermittent attempts at control of outwork (13, CAR, 647), but the only relatively successful period was after 1939, when new clauses to control subcontracting were introduced into the award (39, CAR, 251). Employers respondent to the federal award would themselves issue permits to their subcontractors (a function previously performed by the registrar and the union) and lodge the names with the Court and CATU. In an attempt to ensure control over the industry, the award declared that respondents would be responsible for breaches of conditions and that only CATU members should be employed. Other clauses were more traditional in their focus, with an apparent concentration on policing the outworkers themselves. However, with no organisational campaign to support the award (and, possibly, a shift to factory production during the war), the outwork clauses were not notably successful. Instead, they seem to have led to better control of subcontractors' small-scale factories.

Subsequent developments, however, weakened all aspects of the award. Employers argued that the union was obstructive in its handling of permits and they succeeded in persuading the Court, in 1957, to allow more subcontracting and remove previously-existing obstacles to small firms hiring outworkers. Commissioner Chambers argued that making all employers respondent to the award would help to eradicate outwork and he essentially fell back to a system under which outworkers secured a permit from the registrar. This effectively drove outwork further underground, with employers simply ignoring registered workers (87, CAR, 327; also Ellem, 1989, 180-1, 256-6). Any further possibility of controlling outworkers was washed away, officials believed, by the High Court judgement in Cocks' case in 1967. In this case, which is discussed in some detail in Chapter 3, the High Court ruled that Commonwealth awards did not cover subcontractors, which outworkers were deemed to be (121, CLR, 313). From then until the mid-1980s, the union's view was that outworkers were not employees but subcontractors, and therefore beyond the scope of federal awards.

Thus, before the mid-1980s, CATU's approach to outworkers, along with a number of its other traditional postures such as uncomplicated commitments to protectionism and suspicion of technological change, was unbreakable. The union and its policies had barely changed since its creation.
When outwork began to increase again in the late 1970s, then, there were deep and complex issues to resolve before the union could articulate a policy.

**The Beginnings of Change**

In 1983 and 1984 CATU's approach to outwork began to change. In February 1983, the Federal Secretary told the New South Wales Executive that the union should attempt to regulate, not abolish, outwork and he urged the union's annual Federal Council not to 'reject' outwork (CATU, NSW Branch, Minutes, 7 February 1983; Federal Council, Minutes, 29 March 1984). With Labor governments in New South Wales and Victoria, there was some agitation for legislative redress of the outwork problem, but the major campaign would unfold in the arena where the union had previously been thwarted - the federal arbitration system. In March 1984, Federal Council was told that Cocks' case was, in legal eyes, 'discredited' and that an attempt to rework the outwork clauses in the federal award could be made (Minutes, 29 March 1984). From here the union's case was to proceed to its successful conclusion in 1987.

At this stage, there was no similar change in relation to the recruitment of outworkers nor any provision of special conditions to encourage them to join the union. Council discussed how outworker delegates might be elected, how 'support services' could be provided, and how to secure factory employment where possible, but the details of these policies and any action taken towards their implementation were left to the branches, as this was the union's traditional mode of operation (*ibid.*).

How did the CATU come to this new approach? There were a number of factors which contributed to the union's change of tack. For example, several court decisions questioning the power of Cocks' case gave an opportunity to adopt a new approach. There was also the role of women's and migrant groups outside the union and the role of state agencies. These groups were important because outwork was in many ways a 'women's issue', a 'migrant concern' and a 'community problem' as well as 'union issue'. Furthermore, these other groups actually led the way because they, unlike the union, were unencumbered by past feelings and internal contradictions. For example, as early as 1976 Melbourne's Centre for Urban Research and Action published an account of migrant women's paid work and, in the same year, a Centre for Working Women was established in Melbourne's western suburbs. Both bodies paid special attention to the plight of outworkers. In the 1980s, there were similar undertakings by the South Coast Labour Council and the Illawarra Migrant Resource Centre (both in Wollongong) and initiatives by some local councils. Running through all these years was steady work by individual women in the Victorian and New South Wales state bureaucracies.

The public agitation of these groups and their links with Labor Party governments, which held power at both State and federal levels at the time, helped to put the outwork issue on the political and union agenda. For
example, federal and State governments made funds available for 'new' concerns such as occupational health, union research, language issues - and outwork. These funds resulted in new union resources and positions which, as will be shown below, were almost always filled by clothing trades' women.

But perhaps the most important factor explaining the new union approach was the much deeper changes taking place which re-structured the union itself. CATU changed as its world - of a static industry defended and regulated by the state - changed and as traditional patterns of gender and ethnicity were challenged. These are complex processes but they may be summarised in this way. Firstly, the growth of outwork, coinciding with a depressing outlook for the factory industry, set up intense contradictions within the union's 'ignore or exclude' approach to outworkers. Secondly, it became clear that neither traditional protectionism nor the industry's backward technology had delivered either job security or decent wages. This meant that all assumptions about the nature of work could be examined. Thirdly, in this context, industry planning required that outwork be taken into account. Officials came to argue that unregulated and ill-controlled work was contrary to the stated aims of government industry policy: outwork must be made visible. Fourthly, these industry-based changes took place in a society where, for some time, women workers and their allies had been agitating for changes within unionism itself (Interview, Booth, 1988; Ellem, 1989, Chapter 8).

These developments affected the personnel and structures of the union and, in turn, affected union policy towards outwork. This process began in the 1970s in Victoria, where the branch executive quickly lost its 'craftsmen's club' profile as women from the shop-floor and from non-English speaking backgrounds took more and more positions. In the 1980s this trend accelerated as these women became organisers and took up new positions such as outwork officers and occupational health officers. Similar transitions took place in New South Wales and both branches employed women from the shop-floor to look at outwork (CATU, NSW and Victorian Branch Minutes, Election Reports). In the union's federal office, too, there were new appointments and the growing importance of industry policy resulted in an increasingly powerful role for these new officials. The importance of these developments was many-sided; for present purposes, the most significant changes were that outwork was now being discussed more frequently and it was being discussed by people able to look at the outworker's plight more sympathetically.

Revamping outwork policy was no easy matter. Perhaps because it was so clearly related to the other changes in personnel, structure and ideas, the outwork question was argued long and hard. The appointment of a new Federal Secretary, Anna Booth, in 1987 encapsulated (and furthered) these conflicts. Booth was the first woman to be federal secretary, but her appointment was also a breakthrough because her university-background and inexperience at the branch level were unique. There were court challenges to Booth's eligibility at the same time as sustained and bitter arguments about the
principle of attempting to cover outworkers and the practical details of such a policy. All these disputes and transitions lay behind the 1984 decision and subsequent plans to proceed before the Commission and enact new policies (Interviews, Booth, 1988 and Wood, 1988; Ellem, 1989, Chapter 8).

The Breakthrough: An Award for Outworkers

In March 1985, CATU's Federal Council formally resolved to test the traditional interpretation of Cocks' case, applying before the ACAC's Deputy President Riordan to vary the Clothing Trades Award's two clauses dealing with outwork. Not all parts of the claim were new - the notion of shifting responsibility to the principal revived an approach from the late 1930s - but there were two especially significant and quite novel points. Firstly, outworkers would no longer be registered; instead, employers would have to 'register with the Industrial Registrar when desirous of employing outworkers'. Despite the efforts of seventy years of Commonwealth regulation and some recent advances within New South Wales registration of outworkers had proved ineffective - not least because employers would simply steer away from registered outworkers to the massive majority who were not registered. Secondly, the union sought to reverse the onus of proof: thus, if union representatives asserted that any outworker was an employee rather than a subcontractor, it would be up to the employer to prove otherwise. For successful implementation of this scheme, and to sheet home responsibility to the principals, the union also sought provisions forcing principals to keep detailed work records, pay rates and hours and holidays for all clothing trades workers, factory workers and outworkers alike (ACAC, 1987a).

The judgement in Cocks' case did not prove to be an obstacle. Riordan was sympathetic to CATU's claim that several decisions since 1979 had rendered the case irrelevant or redundant. Simply put, if outworkers were not subcontractors, then Cocks' case did not apply. Riordan indicated that the facts were 'in no way analogous to the facts in Cocks' case' (ACAC, 1987a, 7). Further, he seemed to imply that since 1967 CATU officials had been unnecessarily overwhelmed by the decision. The inaction characteristic of the years since then 'was said', noted Riordan, 'to have been on account of the belief by the Union's officers, based on considered legal advice that the provisions were unenforceable' (ACAC, 1987a, 7). Riordan had no doubt that the issue was now straightforward: it was about respondents to the award arranging 'to have work performed by individual workers away from the workplace at substantially lower wages and conditions than those provided by the award' (ACAC, 1987a, 9).

The hearing did not bring out any serious opposition to the union's claim. Riordan asked for any other interested parties to come forward. All those who did - three State governments, the federal government and the ACTU - supported CATU, whilst evidence from researchers and employers also fell the union's way. Some employer representatives expressed doubts
about the Commission's jurisdiction and some of the details of the claim, but generally they supported regulation of outwork, hoping that fairer competition would result (ACAC, 1987a, 20).

The decision was handed down on 7 April 1987, the full and final orders on 7 October, to apply from 5 November. The decision broadly acceded to CATU's claim and imposed a bans clause against any encouragement towards breaching the award. As Riordan's early remarks indicated, he found that the great majority of outworkers were employees and that employers opted for outwork solely and simply to subvert award conditions. The result, he said, was 'a very distressing situation which has no place in a society which embraces the concepts of social justice' (ACAC, 1987a, 6).

By every test, outworkers were employees: their work (as has been emphasised earlier in this chapter) was part of a wider production process, major decisions about that work were not under the worker's control and there were obvious consistencies with the nature of factory work. Logically, the Commission would have to require that the same conditions be set. The only problems would be the way to set these out and to enforce them. The major change here was, as the union had sought, that obligations be placed on the principal - not the outworker or any intermediary - to ensure that award conditions apply. Makers-up (the contracting 'middle-men') would have to make agreements with respondents and outworkers. For the first time, the Commission also attempted to regulate hours of work: no more than enough work for 38 hours, between Monday and Friday, would be sent to an outworker. The time for each garment or piece would be calculated and piece-rates worked out accordingly.

For the first time the ACAC acted on the assumption that outwork was widespread and complex. The varied sections of the award (Clauses 26 and 27) were extremely detailed and precise, attempting to allow for the distinctive nature of home, as against factory, work. There were provisions for calculation of pay, holidays and annual leave designed to provide, in the words of the variation, 'terms and conditions no less favourable than those prescribed by this award'. Enforcement, of course, would be the key. It was to this end that the bans clause was inserted and, further, the onus of proof reversed. An outworker who, through a Statutory Declaration, claimed to be an employee would be deemed as such: it would be up to the employers to show otherwise. Details of the work, the name and address of the respondent and calculation of benefits would all be made available to the outworker (ACAC, 1987b).

In some ways, CATU's strategy seemed high risk. There were no more outworker permits and no obligation on employers, therefore, to hire only registered outworkers. A long-standing rule that there be set ratios for employers of outworkers to factory hands was also eliminated. However, all these clauses had proved to be ineffective and, prior to 1987, had only served
to drive this form of labour still further underground. Registering and checking on employers, recruiting outworkers as union members and addressing the peculiarities of home-based production would, now, be the hard tasks confronting the union.

The Challenge: Enforcing the Award and Recruiting Outworkers

The incorporation of the new outwork provisions in the federal award represented a significant victory for CATU, but the formidable challenges of enforcing the newly-won conditions and enrolling outworker members into the union remain. The basic task is a familiar one, for CATU will be seeking to take cases before the (newly named) Industrial Relations Commission or Boards of Reference to ensure the award is enforced and, in the process, to establish a high profile amongst outworkers for the union. The union is also moving to register employers and enrol outworkers as members. These tasks may be no more than basic unionism, but wide-ranging policies will be needed to enrol non-factory workers and to police work in the home.

As the union geared itself for the award, immediate plans included the following: extension of the work of outwork project officers, liaison with outworkers about their rights and unionism, training union officials to deal more effectively with outwork, distribution of information especially through ethnic and community organisations and ethnic media, 'the active assistance' of the Commonwealth and State bureaucracies and conducting meetings and courses for outworkers in their respective languages (CATU, 1987; Interview, Carbone, 1988). These initiatives sprang from the multi-sided nature of the outwork problem and were designed to overcome problems of language, peculiarities of different ethnic groups and the union's past inadequacies, whilst continuing to draw on the links with the state. All these policies, then, were a more or less explicit recognition that outwork was not a form of exploitation which could be redressed or even modified in the same way as work could be regulated in the mainstream economy.

Although the CATU federal office and the ACAC were the centres of attention during the award variation, the later tasks of enforcing the award clauses and recruiting members lay very much with the State branches. The two branches most involved were the two biggest, Victoria and New South Wales. By the middle of 1988, the New South Wales Project Officer was able to report on the branch's progress. This consisted mainly of publicity and contact work, although a total of $60,000 in underpaid wages had been reclaimed for 15 outworkers, whilst another six had received worker's compensation payments. Over a thousand telephone contacts had been made in a campaign drawing on the resources of the State's Ethnic Affairs Commission and the Department of Industrial Relations and Employment. In all, the branch had been able to utilise eleven languages and had developed new techniques for reaching the non-English speaker, including announcements on radio stations. In this way, the branch officials attempted to contact outworkers and keep them informed, but there was some concern
that more could be done, especially for those who were described perhaps rather loosely as 'Asian' women. The need to push beyond the union office and even beyond Sydney was also recognised, with some regional meetings taking place (CATU, NSW Branch, 1988).

In Victoria, similar policies were enacted, building upon a more substantial basis of change in the branch and of contact with community, ethnic and womens' organisations. While the federal arbitration case was running, the branch ran an advertising campaign through several media and, with the Department of Labour and Industry (DLI), organised a hotline which received over 4,000 calls from or about outworkers. Officials and the outwork project officer, worked closely with officers of the DLI, a development which emphasised the importance of sympathetic State governments (Interview, Carbone, 1988).

In both branches, initial policies were concerned with communication and with trying to earn workers' trust. For example, Victoria's outwork officer, along with a number of part-time translators, worked in this way for two years or more. A recruitment campaign as such was not really planned until 1990. Even then, there was considerable reluctance amongst outworkers to join the union. By September 1990, there were still only about 500 outworkers in the Victorian branch (Interview, Wood, 1990). Elsewhere, it was not possible to trace developments; the New South Wales branch, for example, did not keep separate records of outworker membership.

The activities of the Victorian outwork officers show just how much the union has changed - and how broad their campaigns need to be. There were phone calls with outworkers and there was daily contact with ethnic media, community organisations, ethnic groups, tenants' councils, community health centres, child-care centres and some local councils. Running through all this was the fundamental need to regain outworkers' confidence (ibid.). Often, indifference was only broken by hostility. Evidence from New South Wales indicated that, typically, outworkers knew little about unionism, that employers had scared them away from unions, but also that many feared their work might be ended by the union. Others, with experience of unionism in their own countries, were disappointed with CATU's action (or inaction) (IMRC, 1984; Interviews, anonymous). In this regard, changes in the union perspective, made material through a transition in personnel and policy, were at least as necessary as the crossing of language barriers and co-operation with other interested bodies.

Although there were similar branch policies in New South Wales and Victoria, the detailed policing of the award unfolded in different ways. Essentially the Victorians extended their initiatives so that they were working from the bottom up, whilst in New South Wales the task was carried out from the top down. This meant that New South Wales's officers would focus on the principals, determine where outworkers were likely to be employed and ensure, firstly, that registration had occurred and all information would be
handed over and, then, the workers would be signed up as union members. In Victoria, there was a greater emphasis on getting in touch with outworkers themselves (as the long list of regular contacts suggests). The branch also ensured firms were registered and, like New South Wales, prepared cases and regained wages (Interviews, Booth, 1988 and Carbone, 1988; CATU, NSW Branch, 1988). Each approach in fact is symptomatic of the individual branch's wider practices and traditions - another example of how outwork policy must be placed in a broad explanatory framework. So recent are the changes and so great the task, that it is not yet possible to evaluate the implications of the award or of policies to implement it.

The outwork claim indicated the extent of the change and also itself transformed wider union strategy. Questions of membership and conflicts of interest were now quite different. Since 1987 it has been possible for complementary processes to unfold, in the regulation of outwork and the unionisation of this hidden labour force. In September 1987 Booth emphasised that CATU's hopes for regulating outwork would be doomed without proper organisation of outworkers. History had shown, she said, that 'the law and the organisation of outworkers must be activated simultaneously' (Booth, 1987, 11). And of course if outwork were to continue, the union would be seriously threatened if it could not organise these workers.

Industry Policy, Award Restructuring and the Future

The future of outwork is unclear. Capital will still find it a cheap form of production for, even if proper wages and conditions apply, there are still fixed costs which the firm will not incur. The real test may be whether or not industry planning and an 'up-market' industry in a less protected environment will still require massive volumes of outwork. Whatever the outcome, union strategies, as outlined here, will need to be pursued vigorously. Just as importantly, traditional areas of factory work need examination; that is, the disincentives to factory production need to be looked at, to facilitate a situation in which women can make a choice between forms of paid labour.

The sometimes quite distinct perceptions of the outwork problem (as discussed earlier) are nowhere more important than in this area. There is, for example, considerable anecdotal evidence that outworkers themselves believed that effective regulation of outwork would put them out of a job. Naturally, this did nothing for their view of CATU. Since the award's variation, this issue has not received much discussion. In itself, regulation is not as important as other changes discussed here, notably reduced protection. As uncertain as outcomes are, a re-direction by the union (and policy-makers) is necessary to cater for changes in the industry and, potentially, union membership.

New, or expanded, policies may therefore need to be considered. Training (or re-training) and the acquisition of appropriate skills will have to involve outworkers as well as factory hands, whilst areas once considered
non-union must be examined - as, indeed, some CATU branches have begun
to do. Three examples will suffice for now: firstly, childcare must be
addressed thoroughly. Recent changes in the union, again reflecting wider
social change, have seen this become important. If all the common assertions
about women being involuntarily tied to the home are valid, then this is a
central policy concern for 'female unions'. Secondly, other, once sacrosanct,
principles such as opposition to shiftwork should be examined with the
intention, once more, of making 'factory or home' a more genuine choice. If
outwork employment options fall off, this becomes all the more important.
Thirdly, the needs of outworkers - as unionists - need to be considered. As
with other marginal workers they have little, if any, access to the union's
management. If this changes, then there could be divergent interests within
the union because the work experience, material conditions and expectations
of outworkers differ from those of factory workers. This might well lead to
further changes in the union's structures and policies. It is too early to be
certain about the implications for the union of these changes, just as it is for
the nature of outwork itself.

CONCLUSIONS

Outwork in the Australian clothing industry and official union attitudes
towards it, sprang from a complex set of inter-related processes. Only when
changes took place in some or all of these was the development of a thorough
and attainable outwork policy possible. Changing product markets and
production processes produced a sustained growth in outwork which was,
itself, only the starting point for the change. Because outwork was enmeshed
in questions of family structure, ethnicity and culture as much as the purely
industrial questions, it was no surprise that the union was not the only agent
for change. Indeed, it was probably not the first. Certainly, women's and
migrant groups and parts of the state apparatus opened the way to re-thinking
the issue.

The processes leading to these developments and some of the groups
themselves also worked on CATU. As genuine structural and ideological
change took place, as an outcome of contradictions between traditional
stances and an evolving society, outwork became a central concern for CATU
- and it did so in quite new ways.

It is still sensible to insist that, given the constraints of market size,
product and technology, outwork was a cost-saving measure from capital's
perspective. However, it is also true that to deal with outwork, policies quite
distinct from those of traditional industrial relations were required. The
outwork award clauses were, as most unionists recognised, simply the starting
point for a widespread publicity and organisational campaign. Other
questions, from childcare to skills, would also have to be addressed and a
wide range of allies sought to make the most of what had been won in the
arbitration arena. Despite the far-reaching changes of recent years and the breakthrough in the ACAC, the most difficult task for the union still lies ahead: that is, in enforcing award conditions for outwork. Under any circumstances this would be a continual struggle, but it will be particularly acute given the powerful political and economic pressures throughout the global economy towards de-regulation.

ENDNOTE

1 The author wishes to thank those interviewed; also Kate Johnston, Women's Directorate, Department of Industrial Relations and Employment (Wollongong) and Warwick McMillan, South Coast Employment Development Project; and Sam Fonte whose adeptness on the word processor saved a novice from despair.

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6 Unions and Contract Workers in the New South Wales and Victorian Building Industries

Elsa Underhill

INTRODUCTION

The building industry has a long tradition of self-employment which, until approximately 15 years ago, coexisted alongside conventional employment without union intervention. From the 1970s, however, the number of self-employed workers increased and the nature of self-employment evolved from predominantly small business operations into a marginalised form of employment. Building industry unions responded to these changes by challenging both the form and extent of this system of work.

Commonly known as 'contract workers', these marginalised workers bear many similarities to employees. Thus, apart from tools of the trade, they generally provide only their labour power in return for a contract for work. What then are the essential differences between contract workers and employees in this industry? A legal distinction can be drawn between the two, and arising out of this are important economic differences with respect to award and statutory obligations. Contract workers can be paid at a lower hourly rate; they are not entitled to sick leave, annual leave, public holidays, inclement weather payment, and so on; they have qualified access to workers' compensation; they must pay their own long service leave contributions (payments are made by employers on behalf of employees); and they must enforce their contractual rights through costly and difficult litigation (whereas award employees have more accessible remedies). Subject to market conditions, these differences mean contract workers can be utilised at a lower cost to the builder than award employees. There is another important difference which concerns the manner in which work effort is controlled. Award employees cannot be paid under piece rates, while contract workers can.¹ These are the essential differences between contract work and employment.
Significantly there are not substantial differences with respect to legal obligations on engagement and termination of both types of workers. Awards empower employers to terminate employees on one day's notice, while contract workers can be terminated without notice - a difference of little economic importance to employers.²

Contract workers take several forms in this industry, the differences lying in the detailed nature of the service supplied rather than distinct contractual practices. One common form comprises either individuals, two-person partnerships, or 'gangs' composed of a few tradespersons assisted by a labourer, who contract their labour with tools of the trade to builders and building subcontractors. Another form is 'supply-and fix' contractors - an arrangement in which manufacturers supply both contract labour and materials, such as doors and tiles. The least common form consists of contract workers who supply plant and equipment such as scaffolding which they either own, or hire for the duration of the contract. Continuity of work with a single builder can occur with each of these forms, but the majority of contract workers are itinerant and shift between companies according to the availability of work. For the purposes of this study, these variations in form are largely inconsequential. Their effect on contract workers' industrial behaviour is negligible, causing the unions to respond to these workers as a common group.

Contract work, which is legal, should be distinguished from 'cash-in-hand' employment, which is not. The first arrangement requires the self-employed building worker to declare income and to pay income tax. Implicit in the second arrangement is joint tax avoidance. Within the building industry there is an extensive black market in cash-in-hand employment which is popular with both employers, who can reduce their overall labour costs, and with workers, who simultaneously gain higher net income. Attempts to stamp out cash-in-hand employment have been frustrated by the practical difficulty of distinguishing this practice from contract work - both involve a non-taxed lump sum payment to the worker with the distinction between the two resting on fine legal technicalities.

The first main section of this chapter describes the industrial context of the building industry. The opportunity for employers to use contract workers arises largely from the unique characteristics of the building industry. The industry's production processes, product markets and labour markets contribute to the development of contract labour as an alternative to conventional employment, whilst limiting the choice of strategies open to unions in response. The overall industry pattern is, however, far from uniform with clear divisions existing between the commercial sector, where contract labour is relatively limited and controversial, and the housing sector where it is much older, more widespread and rarely, if ever, challenged. The second main section then summarises the contract labour problem. The third main section turns to the responses of two union branches to the contract labour problem; the two unions in question are the Building Workers' Industrial
Union (New South Wales Branch) (BWIU) and the Victorian Operative Bricklayers' Society (VOBS) (since amalgamated and now known as the Victorian State Building Trades' Union). These two unions have been challenged by contract labour in a similar manner yet their responses have differed in several respects. Some of these differences can be explained by the different industrial contexts they face, although there are other factors which also play a part in their choice of strategy.

CONTEXT

There is a common view that the practice of contract labour arises directly from certain production process, product market, and labour market characteristics of the building industry. These factors are influential. However, any explanation which depends exclusively upon them is inadequate. The reasons for this are two-fold. Firstly, most of this explanation hinges upon the inherently volatile demand and short-term nature of employment in the industry. Whilst contract labour may seem suited to such conditions, the award system has also adapted to them in the provisions governing employment. Secondly, certain aspects of the production process make direct supervision of work effort more difficult. Contract labour offers alternative methods of control over work effort which may overcome this problem. While this argument has more force, it does not apply universally throughout the industry. It should be recalled that the central difference between contract and award labour rests on costs. Employer strategy is contingent largely upon this factor, and therefore must be linked to what is perhaps the most important product market characteristic of the industry - intense competition between firms. However, there is no necessity for such strategies to be employed, as suggested by their uneven use. There is also every reason to expect union counter strategies.

Production Processes

Two aspects of the production process in building are relevant to the use of contract labour. Firstly, the process consists of many discrete sequential steps, each requiring different trade skills and materials. Thus, in the opening stages of construction, specialist workers are used for excavation and foundation laying work; scaffolding, crane operation, concrete work, carpentry and bricklaying follow; once the basic structure is built, finishing tradespersons such as plumbers, tilers, electricians, and plasterers complete the building. These steps vary in duration and complexity according to the size and design of the building. For example, a major commercial construction project may require particular trades for several months, whilst a smaller commercial site will require like trades for only a number of weeks. On housing sites, one step in the process may take as little as one hour for an entire house, with thirty or more separate steps involving up to twenty specialist trades being required for the construction of an average low cost
brick veneer house (Woodhead, 1978, 81). Because of this production process, each particular specialist trade is only engaged on a project for a relatively short period of time and for a specific part of the production process. Hiring is consequently for limited duration, which under certain circumstances, may encourage builders and subcontractors to use contract labour. The nature of these circumstances is explored below in the context of labour and product markets.

Secondly, production processes are labour intensive, requiring predominantly skilled tradespersons. Skilled and experienced workers customarily exercise a high degree of autonomy in the performance of their work, a characteristic further encouraged by the dispersal of workers across a building site and beyond the reach of on-going direct scrutiny. Supervision of workers is correspondingly looser, the tasks of supervisors taking a more specialised form. In the commercial sector, worker supervision is largely the domain of subcontractors, site supervisors being confined to safety, co-ordinating subcontractors, and industrial relations issues. Supervision by subcontractors encompasses quality, discipline and pace of work, but their preference is often to achieve this control through payments for completion of the job (contract labour). In the housing sector, however, standardised tasks between houses further enable high worker autonomy so that the supervisors' role focuses on little more than the co-ordination of tasks and materials rather than the direct supervision of labour (Woodhead, 1978, 80-81). Again a market system of control is preferred by builders, this commonly taking the form of contract piece rates.

Contract labour is only feasible in building and construction to the extent that these two conditions - finite discrete steps in production and skilled autonomous workers - are to be found. This is demonstrated by the low incidence of contract work amongst labourers. On commercial sites they are rarely allocated a particular step in the production process. Instead, they are directed to a miscellany of tasks as required. Because of this, their work cannot be measured and costed for a contract rate. Also, since they lack the independence of skilled workers, direct supervision is needed to ensure they are efficiently employed. In the housing sector, labourers are usually employed as wage labour by groups of tradespersons for much the same reasons.

Product Markets

The building industry is composed of two distinct product markets: the commercial sector and the housing sector. Buyers in the commercial sector are usually investors, such as insurance companies, whilst the housing sector sells to consumers who, although many in number, purchase the product infrequently. Nevertheless important similarities exist in the product markets for both sectors.
Firstly, a highly volatile level of demand for the product is common throughout the building industry. Regarded as a leading economic indicator, the demand for building construction fluctuates strongly and quickly in response to changes in the level of macroeconomic activity. This is a major factor determining the level and type of demand for labour, and the behaviour of employers competing in an environment which lacks certainty. Sharp and unanticipated downturns in the level of activity impact particularly heavily on the profitability of the smaller firms, seriously undermining their economic viability. Larger firms are less susceptible to fluctuations in the level of activity, being cushioned to an extent by their reliance on smaller firms in the production process. Secondly, the product markets for both sectors are highly localised. Whilst demand is predominantly influenced by broader macroeconomic factors, the range of firms, the available labour, and the demand for the product tend to be constrained within a given local market. Thirdly, the lower end of both markets can be entered relatively easily by new firms with minimal financial outlay, facilitating intense price competition amongst a large number of small firms.

Of these three dimensions of the product market, the first - its volatility - is most often considered to contribute to the use of contract labour. Such arrangements seem perfectly suited to an industry in which labour demand is unpredictable. The second factor - regionalisation of product markets - may also be deemed important since no individual employer can sustain sufficient permanent employment within the region in which a worker would normally seek work. The third factor - ease of entry - creates competitive pressures which are conducive to the use of contract labour which is normally cheaper than wage labour. However, a fuller explanation of the use of contract labour must go beyond these universal product market characteristics of the industry to focus upon differences between the commercial and housing sectors. Relevant here are differences in the degree of concentration in these sectors and the structure of the relationship between large and small firms.

While the commercial sector of the building industry is characterised by a dichotomy between a small number of large firms and a large number of small firms, there is a significant degree of market dominance by the former. Unfortunately, sufficiently detailed statistics are only available for 1985. In that year, there were 953 firms in the commercial sector in New South Wales, of which 268 (28 per cent) had a turnover of less than $100,000 whilst 69 firms (7 per cent) had a turnover greater than $5 million (mean equals $20.7 million). In Victoria there were 797 firms, of which 240 (30 per cent) had a turnover of less than $100,000 whilst 39 firms (5 per cent) had a turnover greater than $5 million (mean equals $22.8 million) (ABS, 1987a; ABS, 1987b).

Among the larger firms, a distinction can be drawn between developers and builders, with the former predominantly constructing buildings which are then sold or leased on completion, and the latter generally
constructing for clients. Developers form the minority of larger firms and are predominantly private, family companies. Apart from subcontracting finishing and specialist trades, such as carpet-laying and electrical work, developers typically employ their own workforce on a continual basis. Builders, on the other hand, generally subcontract the majority of construction work to smaller subcontractors so that a commercial relationship exists between the small and large firms within the industry. There generally exists a dependent relationship between large and small firms - the latter depending upon the former for business rather than seeking commercial contracts independently. This moderates the impact of price competition amongst large firms who can exploit the large number of small firms whose market position is that of price takers.

The critical factor for both small and large firms is the intensity of price competition. At all levels, firms compete for work through various tendering systems, whereby contracts are generally allocated to the firm offering the lowest bid. The pressure to minimise costs intensifies at the subcontracting level where the smaller firms are compelled to operate within the builder's specified cost constraints. The only respite from these cost pressures comes from rise and fall contract clauses, although these do not moderate competition at the tendering stage.³

A further characteristic of larger firms in the commercial sector is the high financial commitment required to enter and produce at this level. The figures cited above give an indication of annual turnover per firm, however, the financial commitment to a single building project can be much greater and is a more significant determinant of behaviour (for example, a 1989 estimate of a major building project in Melbourne totalled $340 million extending over 4 years). Two consequences flow from these large financial outlays. Firstly, excessive delays to construction time add significant costs to the builder. Secondly, there is an incentive for the builder to place full cost liability on individual subcontractors for any delays resulting from the subcontractors' practices. Both of these factors play an important role in determining industrial relations practices in the commercial sector.

The housing sector of the building industry also has a clear dichotomy between large and small firms, although there is a much larger number and proportion of small firms than in the commercial sector. Again, detailed data are only available for 1985. In New South Wales in that year, there were 5,997 firms in the housing sector in 1985, of which 3,302 (55 per cent) had a turnover of less than $100,000 whilst 23 firms (0.4 per cent) had a turnover greater than $5 million. In Victoria there were 5,725 firms, of which 3,060 (53 per cent) had a turnover of less than $100,000 whilst 21 firms (0.4 per cent) had a turnover greater than $5 million (ABS 1987a; ABS 1987b). Although dependent commercial relationships similar to those in the commercial sector exist between some small and large firms, there can also be a direct competitive relationship. Economies of scale are negated by the labour intensive nature of house construction, so that larger firms compete on
a similar cost basis to smaller firms building completed houses. Hence, builders producing say four or five houses per year compete directly with larger firms, forcing them into adopting similar working arrangements, notably contract labour.

Unlike many product markets, purchasers usually enter the housing market on a one-off basis allowing little scope for builders to develop client loyalty or maximise effective product differentiation. To the extent that segmentation of the housing market occurs, the divisions are based on the size and price of the house (for example, first home-buyers relative to higher income customers), rather than strong product differentiation within a given price bracket. This only serves to intensify price competition within the housing market.

Cost pressures apply throughout both sectors, but they are modified by differences in industrial structure. The commercial sector is far more concentrated, with a smaller number of firms, a bigger proportion of large firms, and a dependent relationship of small firms upon large ones. The housing sector is more dispersed, with a large number of small firms directly competing with the few large firms. These differences in industrial structure have a vital influence upon the incidence of contract labour, and correspondingly upon the degree of threat posed to unionism, and the reactive strategies adopted by unions.

Labour Markets

The labour market in the building industry possesses a number of characteristics which are conducive to contract labour. Several of these stem from the product market characteristics outlined above. First is the extent to which the number of workers fluctuates in response to changes in the level of building activity. Table 1 gives employment figures for the total industry, which show that employment can vary by as much as 80,000 persons from year to year, creating job insecurity and affecting the type of worker likely to supply labour to the industry. During boom periods, the industry attracts workers from other industries who view building employment as transitory rather than long-term. In times of high product demand, the pay levels for trade and non-trade workers can increase significantly relative to other industries and act as an inducement to workers who would otherwise not enter building and construction. These short-term employees are one source supplying the pool of workers necessary to meet the fluctuating demand for labour. Another source is to be found in the self-employed and small subcontractors who can enter the industry with ease given the low capital outlay required. Workers attracted to the industry under these circumstances tend to be less committed to employment security, unionism and the maintenance of industry standards than core industry workers. They are more susceptible to offers of contract work and cash-in-hand payment.
A second characteristic is high labour turnover. Employment in the commercial sector is terminated typically on the completion of each subcontractor’s involvement in the construction of a building, resulting in an average employment duration of only 18 weeks (ACAC, 1987, 4). To some extent this arises from the localisation of the labour market, which is closely linked to the geographical structure of the product market, although it also flows from the production process. Because of high labour turnover, employees in this sector are regarded largely as employees of the industry rather than a building firm. All worker entitlements based on duration of employment, such as long service leave and superannuation, are calculated on length of service in the industry rather than with a single employer. Two consequences flow from this high labour turnover. On the one hand, it encourages an attitude which places a low value on award entitlements, such as annual leave and sick leave, which accrue from continuity with a single employer. In contrast, building workers tend to place a higher value on short-term remuneration. On the other hand, high labour turnover increases the likelihood of workers having to accept contract work, especially when the industry is depressed and it is the only work on offer.

Table 1: Employment in Building and Construction, Number and Percentage of Industry Total, Australia, 1978-1989

<table>
<thead>
<tr>
<th>Year</th>
<th>Employers(^1)</th>
<th>Self-Employed(^1)</th>
<th>Employees(^2)</th>
<th>TOTAL(^3)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>000s</td>
<td>%</td>
<td>000s</td>
<td>%</td>
</tr>
<tr>
<td>1978</td>
<td>44.6</td>
<td>9.2</td>
<td>101.0</td>
<td>20.8</td>
</tr>
<tr>
<td>1979</td>
<td>40.9</td>
<td>8.8</td>
<td>111.8</td>
<td>24.0</td>
</tr>
<tr>
<td>1980</td>
<td>42.4</td>
<td>8.8</td>
<td>121.8</td>
<td>25.2</td>
</tr>
<tr>
<td>1981</td>
<td>52.4</td>
<td>11.1</td>
<td>116.3</td>
<td>24.6</td>
</tr>
<tr>
<td>1982</td>
<td>39.5</td>
<td>8.5</td>
<td>123.8</td>
<td>26.7</td>
</tr>
<tr>
<td>1983</td>
<td>34.4</td>
<td>8.9</td>
<td>109.6</td>
<td>28.3</td>
</tr>
<tr>
<td>1984</td>
<td>36.1</td>
<td>8.5</td>
<td>116.6</td>
<td>27.6</td>
</tr>
<tr>
<td>1985</td>
<td>41.1</td>
<td>8.8</td>
<td>120.1</td>
<td>25.6</td>
</tr>
<tr>
<td>1986</td>
<td>43.0</td>
<td>8.7</td>
<td>134.1</td>
<td>27.3</td>
</tr>
<tr>
<td>1987</td>
<td>38.9</td>
<td>8.0</td>
<td>136.4</td>
<td>28.1</td>
</tr>
<tr>
<td>1988</td>
<td>53.5</td>
<td>10.2</td>
<td>130.1</td>
<td>24.7</td>
</tr>
<tr>
<td>1989</td>
<td>59.7</td>
<td>10.0</td>
<td>164.4</td>
<td>27.3</td>
</tr>
</tbody>
</table>

**Sources:**
Thirdly, the majority of commercial sector workers are employed by subcontractor firms (ACAC, 1987, 2). Two distinct employment problems emerge as a result. To begin with, the ease of entry into the industry by subcontractors often compounds instability as inexperienced subcontractors enter and exit on short notice. This discourages workers from accepting award employment because they cannot pursue the subcontractor, who has abandoned the industry, to secure their award entitlements; instead, they will opt for higher immediate cash payments. In addition, the cost constraints on smaller subcontractors make it difficult for them to meet all of their obligations under awards and other industry regulations. As a result they prefer the use of temporary cash-in-hand employees and contract labour. The crux of the matter is that in such a setting both the transient subcontractor and the equally transient worker can gain financially through tax avoidance with only a small chance of detection.

These labour market characteristics - volatility, turnover, and employment by subcontractors - contribute significantly to the use and acceptance of contract labour. These factors tend to apply in both the commercial and housing sectors of the industry. However, the incidence of contract labour differs between these sectors.

The most distinctive feature of the labour market in the housing sector is the low proportion of conventional employees. Table 2 shows that in New South Wales and Victoria in 1985, 53.3 per cent and 57.0 per cent respectively of all on-site workers in this sector were not employees but working proprietors and partners. This is in marked contrast to the commercial sector where the same category of on-site workers in the respective states accounted for 5.4 per cent and 7.6 per cent of the workforce. These figures must, however, be approached cautiously. The major parties in the industry estimate that as few as ten per cent of the workforce in housing are employees (Housing Industry Association, 1984, 3). As wage employees in the housing sector tend only to be labourers working for 'gangs' of tradespersons, a realistic assessment of their number, in a sector of the industry relying predominantly on self-employed skilled tradespersons, is likely to be low.
**Table 2: Number of Construction Establishments, and Status of On-Site Workers, NSW and Victoria, June 1985**

<table>
<thead>
<tr>
<th></th>
<th>Number of Establishments</th>
<th>Working Proprietors and Partners</th>
<th>Employees</th>
<th>Total On-Site Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>NEW SOUTH WALES</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>House Construction</td>
<td>6,080</td>
<td>4,680</td>
<td>4,101</td>
<td>8,780</td>
</tr>
<tr>
<td></td>
<td></td>
<td>53.3 %</td>
<td>46.7 %</td>
<td></td>
</tr>
<tr>
<td>Residential Building</td>
<td>470</td>
<td>254</td>
<td>1,061</td>
<td>1,315</td>
</tr>
<tr>
<td>Construction</td>
<td></td>
<td>19.3 %</td>
<td>80.7 %</td>
<td></td>
</tr>
<tr>
<td>Non-Residential</td>
<td>961</td>
<td>423</td>
<td>7,378</td>
<td>7,801</td>
</tr>
<tr>
<td>Building Construction</td>
<td></td>
<td>5.4 %</td>
<td>94.6 %</td>
<td></td>
</tr>
<tr>
<td><strong>VICTORIA</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>House Construction</td>
<td>5,778</td>
<td>4,582</td>
<td>3,458</td>
<td>8,040</td>
</tr>
<tr>
<td></td>
<td></td>
<td>57.0 %</td>
<td>43.0 %</td>
<td></td>
</tr>
<tr>
<td>Residential Building</td>
<td>421</td>
<td>248</td>
<td>476</td>
<td>724</td>
</tr>
<tr>
<td>Construction</td>
<td></td>
<td>34.3 %</td>
<td>65.7 %</td>
<td></td>
</tr>
<tr>
<td>Non-Residential</td>
<td>799</td>
<td>441</td>
<td>5,359</td>
<td>5,800</td>
</tr>
<tr>
<td>Building Construction</td>
<td></td>
<td>7.6 %</td>
<td>92.4 %</td>
<td></td>
</tr>
</tbody>
</table>

**Source:** Australian Bureau of Statistics, *Construction Industry Survey, N.S.W. and Victoria, 1984-85*, AGPS, Canberra, Cat. No. 8772.1 and 8772.2

What have been the trends in the use of contract labour in the building industry as a whole and in its constituent sectors? The figures in Table 1 highlight the shift towards an increasing number of self-employed workers in the total industry. Since 1978, the percentage of self-employed workers has risen from 20.8 per cent to 27.3 per cent of the workforce and the number of employers has remained relatively stable, whilst the number of employees has declined from 69.9 per cent in 1978 to 62.7 per cent in 1989. If, as is generally acknowledged by industry representatives, the degree of self-employment in the housing sector has remained stable since the early 1970s, the increased proportion of self-employed workers can only be located in the commercial sector. The definition of self-employed used in the compilation of these statistics excludes self-employed persons employing others, suggesting that this growth has not resulted from an increase in the number of smaller firms, but it is a rough indication of the extent to which contract labour has been adopted as an alternative to employment.
Anecdotal evidence concerning the period prior to the availability of official statistics on self-employment (since 1978) suggests that the growth of contract labour in the commercial sector can be traced back much further. Until the early 1960s, construction projects were typically completed by builders employing their own workforce, as is still the practice of developers. A trend began in the 1960s towards subcontracting portions of the project to smaller firms who in turn employed the workforce. Accounts of changes in the industry indicate that the upward trend in self-employment began in the early 1970s. By the mid-1970s a network of pyramid-contracting had evolved. Pyramid-contracting involves the 'repeated sub-letting of a contract or a portion of a contract to persons in the same trade or type of work as the principal subcontractor' (Building Industry Investigation Committee, 1983, 5), and is generally accompanied by declining contract rates as the pyramid extends. Contract rates at the base of the pyramid allegedly fell so low that only contract labour or cash-in-hand employees could be hired because they were significantly cheaper than wage labour (Building Industry Investigation Committee, 1983, Chapter 6).

From the preceding discussion, it can be seen that there are numerous ways in which the production process, product and labour market characteristics of the building industry facilitate the use of contract labour. However, it should be asked whose interests are served by this practice? For the most part, contract labour has evolved through the initiative of builders and the acquiescence of itinerant workers who both gain from the practice. In contrast, long-term building industry workers and their unions perceive contract labour to be contrary to their interests.

THE CONTRACT LABOUR PROBLEM

Prior to its introduction into the commercial sector, building industry unions had experienced the consequences of contract labour through its extensive use in the housing sector. The threats posed to unions by changes in the commercial sector were measured by the problems which had evolved in the housing sector. Two consequences were of overriding importance: the potential for undermining award conditions and the possible decline in union membership.

Significant differences in levels of pay and conditions existed between housing sector workers and those in the commercial sector. This differential was largely due to the operation of awards and other regulatory instruments in the commercial sector and the largely unregulated nature of housing, where the rates paid to workers were determined according to market forces in an industry characterised by price competition. As a result, the rates were not only subject to fluctuations according to the level of housing activity, but also subject to undercutting by other like sellers. As noted by the TNC Workers Research:
During times of high building activity the subcontractor is assured of work and in most cases his contract rates are reasonably good. However, during times of economic recession the contract workers' pay rates and conditions are particularly vulnerable. With increased competition for contracts, builders want to reduce costs inevitably at the expense of the contract worker; by using contract workers as and when required employers can transfer risks to workers. When builders already employ workers on a contract rather than an award basis, their next step to reduce costs is to freeze or cut contract prices. (TNC Workers Research, 1985, 96)

Conditions of work, such as hygiene and safety factors, were also often sub-standard as a result of contracts based on payment for the job, or piece rates, which prioritised completion times over working conditions. As a result of this experience in housing, unions feared that a sufficient increase in the number of contract workers in the commercial sector had the potential to undermine existing award standards and conditions. In particular, unions were concerned that contract workers accustomed to such conditions in the housing sector would infect the commercial sector with their attitudes on those occasions when they entered the commercial sector.

The competitive basis for obtaining contract work in the housing sector had a further impact on unionism through an emphasis on individualism and the promotion of 'own boss' attitudes. For these workers, unions promoting collective values were not seen simply as irrelevant, but were often regarded with hostility for interfering with and undermining individual rights. By the late 1970s the level of unionism in the housing sector had declined so significantly that several unions had virtually ceased enrolment campaigns altogether. Unions feared that similar attitudes and problems could grow from the expansion of contract work in the commercial sector.

UNION STRATEGIES TOWARDS CONTRACT WORKERS

All building industry unions have developed strategies to overcome problems associated with the increased number of contract workers. However, the BWIU and the VOBS were the first to implement strong policies. As this section will make clear, their policies differ considerably. A range of factors have a bearing upon this - the extent to which a particular union's membership is concentrated in the commercial or housing sectors, whether or not individual employers straddle these two sectors, the proportion of self-employed among the membership, the ideology of the union leadership and their capacity to develop policy, and the degree to which the unions possess sufficient industrial strength to impose policies. This section offers a comparison of these two unions' responses to contract workers.
The BWIU is a federally registered union organising in every state and covering a range of building trades including bricklayers (except in Victoria), carpenters, tilers, and their respective assistants. It has a strong presence in the commercial sector, with weaker groups of members in housing and non-building industries. Self-employed workers make up a relatively small proportion of its membership (Odco Case, 1989, 38). It is the largest building union, with 71,000 members in 1989, following its absorption of members from the deregistered Builders Labourers' Federation (BLF) (Australian Council of Trade Unions [ACTU], 1989). The union is considered to have a radical ideology, a preference for inter-union campaigns, and a progressive leadership. The union also has a reputation for industrial strength and militancy (Frenkel and Coolican, 1984). This discussion concerns only the New South Wales branch, for although the federal contract labour policy applies in all states, the New South Wales branch instigated this policy and continues to have most to do with its implementation.

The VOBS was a much smaller federally registered union enrolling only bricklayers and their assistants in Victoria. It had 3,500 members in 1985, which increased to approximately 5,500 following its amalgamation in 1989; the amalgamation drew in plasterers and absorbed some labourers from the BLF (ACTU, 1985; ACTU 1989). As pre-caste concrete slabs progressively replaced brickwork in commercial construction, the VOBS increasingly drew its membership from the housing sector, where it had approximately 70 per cent of its members. Nevertheless, its bargaining power still resided in the commercial sector. It was estimated that, throughout the 1970s, 65-70 per cent of its membership were self-employed (Senate Select Committee on Industrial Relations Legislation, 1982, 554). This union is considered to have a more conservative ideology and a leadership which, while conciliatory, has proven its effectiveness.

The objectives of both unions were to eliminate the use of contract labour in the commercial sector, and to regulate contract rates in the housing sector. The logic of this dual approach arises first from the vital importance of the commercial sector for these unions. Whilst they have members located in other industries, and to a degree in the housing sector, the key area of their membership is in the commercial sector since only this sector provides scope for improving award standards which can then be passed on to other members. Unions in the commercial sector have special industrial muscle which comes from characteristics peculiar to that sector, such as financial pressures on builders to avoid delays, the vulnerability of subcontractors to industrial action, and the relatively concentrated number of workers on a single site. The bargaining power created by these factors has been reinforced by closed shop agreements which require all on-site workers, irrespective of their employment status, to be members of a union. Hence, a critical issue for unions was to protect this sector from any potential decline in union membership and award standards, which they felt could be achieved only by eliminating contract labour from commercial sites altogether. In addition, unions commonly regarded contract labour arrangements in the commercial
sector as a sham, bearing little resemblance to self-employment and serving mainly to evade award provisions. It should be noted that attempts to regulate contract rates in the commercial sector were not considered a viable option. Competitive forms of engagement associated with contract labour would almost inevitably result in the lowest rate dominating, and open the sector to extensive undercutting in labour costs which would effectively eradicate the existing award system.

In contrast to the commercial sector, contract labour was already entrenched in the housing sector, leaving little scope for change beyond enrolling contract workers and establishing minimum contract rates. Unions thus believed that recruiting contract workers was a prerequisite to achieving minimum rates, whilst minimum rates in turn were often the only attraction union membership held for contract workers.\(^6\) Success in eliminating other less desirable features of the contract system, such as sub-standard working conditions, would flow from unions gaining the support of contract workers and establishing minimum contract rates. Once minimum contract rates were accepted, the threat posed by the housing sector to working conditions in the commercial sector would be diminished. Furthermore, once collective organisation was established among housing contract workers, the likelihood of these workers offering their services on an individual basis in the commercial sector would also decline.

To understand these unions' strategies, it must be recalled at the outset that neither state nor federal legislation provided a means of eliminating the use of contract labour or establishing minimum contract rates. As Chapter 3 has shown, federal parliament has traditionally regarded 'independent contractors' as constitutionally beyond the jurisdiction of the federal tribunal. At the state level, only the New South Wales Industrial Arbitration Act has permitted the regulation of contract rates, but this is restricted mainly to owner-drivers in road transport (see Chapter 7). Industrial legislation in other states provided only for the regulation of employees. Unions have tried to change this state of affairs. In fact, the BWIU actively lobbied both the ACTU and the federal government to support legislative amendments which would enable contract regulation (Correspondence, 1984; ACTU, 1984, 40-1). However, the failure of these efforts has meant that alternative strategies were necessary. In particular, they have been forced to rely on industrial action and collective bargaining.

**Union Strategies in the Commercial Sector**

*The NSW Building Workers' Industrial Union:* The BWIU's response to developments in the commercial sector in the early 1970s was directed at individual subcontractors and contract workers. Whenever a contract worker, or a cash-in-hand employee (who may have been a contract worker) was detected on a building site, the subcontractor was forced by industrial action to 'convert' the worker to employee status, and abide by award standards and conditions (Building Worker, June 1974, 5). The BWIU expressed a more
general concern with the extent of pyramid contracting and declared a ban upon it, but there is little evidence of the ban being effectively applied at this time (Sutton, 1979, Chapter 5).

This BWIU strategy encountered considerable resistance from members employed as contract workers who perceived their short-term financial interests, which often entailed receiving higher cash payments via tax avoidance, being undermined by the union. In addition, they tended to see the union strategy as largely irrelevant since they had a low level of commitment to the future of the building industry, an outcome of the short-term nature of employment in the industry, and saw little immediate evidence of a threat to award conditions of employment (Odco Case, 1988, 192).

To overcome these problems, the BWIU modified its strategy in two ways. First, it demanded that whenever a contract worker was detected on site, the worker would, upon conversion to employment, receive full award conditions plus the same net cash pay. This placed an additional cost burden on recalcitrant employers. However, for this new strategy to be effective, it relied heavily on ad hoc methods of detection (Interview, T. McDonald). In order to go beyond this approach, the union turned to a second modification. In the mid-1970s the union pursued a ban on both pyramid contracting and contract labour by means of industrial action aimed at employers. A long campaign ensued, with the support of other New South Wales building industry unions. An agreement on pyramid contracting was finally reached with the Master Builders' Association of New South Wales (MBA) in 1979 (Building Worker, Feb. 1979, 2).

The agreement banned pyramid contracting, and by implication, contract labour. It provided that the builder employ the workforce or, alternatively, the builder sub-let each trade area to a subcontractor who then employed the workers involved. Further sub-letting was only allowed for specialist trades, or when the construction project involved more than one building. In addition, all-in-payments and cash-in-hand were prohibited, with labour-hire permitted as an emergency supplement to the workforce providing an approved firm supplied the labour. Thus, the intention of the agreement was to attack a contracting structure which, at its worst, rested on illegality. For the most part, a stable employer responsible for keeping tax records would be identifiable. Also, workers evading tax ran the dual risks of expulsion from the site and, since the employers' tax records were available, detection by the tax office. The agreement applied only to the commercial sector and was to last for six months. Enforcement was to be brought about by unions compelling builders to remove offending subcontractors from sites, with the subcontractor's work force then being employed either by the builder or by an agreed subcontractor (Building Worker, Feb. 1980, 3).

Enforcement of this agreement posed continual problems for unions, often culminating in accusations that the MBA supported practices banned by the agreement. In reality, the main problem was that the MBA had little
control over its members' actions and could only encourage members to abide voluntarily by the agreement. The MBA's apparent reticence to go beyond this can be explained, at least in part, by concern over loss of membership if it encouraged practices resulting in higher labour costs.\textsuperscript{10} Whilst the MBA is a major employer association in this sector, estimates indicate that it covers only 10 per cent of builders (although these tend to be large firms), while there exists a further 95 associations available to builders and subcontractors (Plowman, 1982, 392). Employer solidarity is correspondingly low. In addition, subcontractors who were not MBA members were not parties to the agreement. Nevertheless, they were expected, where their principal contractor was an MBA member, to abide by an arrangement which forbade them from further subcontracting. In such a competitive environment, the agreement could only be effective in the unlikely circumstance of all subcontractors allowing for the cost of the new practices in their tenders. Notwithstanding these difficulties, this agreement was renegotiated in New South Wales in both 1980 and 1982.

In 1983, the first national agreement was negotiated, based on the New South Wales agreement but with some important differences which would assist implementation. Firstly, the parties to the agreement were broadened to include the Australian Federation of Construction Contractors and all building industry unions, thus widening the application of the agreement and reducing the potential for it to be undermined. Secondly, a fundamental breach of the agreement entitled all workers to leave the site for the day, at the expense of the guilty party (Memorandum, 1984). This provided a significant inducement to subcontractors to abide by the agreement, as well as an incentive for union members to detect breaches.

The national agreement was unsuccessfully presented to the Australian Conciliation and Arbitration Commission (ACAC) in support of a wage package in 1983 (ACAC, 1987, 2). In 1984, with the support of the ACTU, it became part of a broader agreement introducing superannuation into the building industry (ibid.). The agreement was presented again to the ACAC in 1987 as part of the building industry 'second tier' package, this time with separate but similar agreements for all states (ibid.). In approving the overall package, the ACAC noted the extent of consensus prevailing in the building industry, and the degree of commitment by the parties to ensuring the agreement's effectiveness (ibid.). Anecdotal evidence of the agreement's success varies, particularly with respect to the ban on cash-in-hand payments, but the evidence weighs in favour of the ban on pyramid contracting being upheld on major building sites.

What explains the change in attitudes of builders towards the agreement over the period from the first 1979 agreement to the 1987 ACAC decision? Part of the answer can be found in continual industrial action in support of the agreement which wore down employer resistance. Equally, the parties point to the demise of the BLF as a factor leading to a more conciliatory approach by builders to agreements with unions (ACAC, 1987,
2). Other factors further assisted the implementation of the agreement. Identification of the employment status of workers on building sites was introduced for the purposes of superannuation and long service leave entitlements, hence minimising lengthy confrontations over whether they were employees or contract workers. Also, the National Building Trades Construction Award was varied in 1985 to allow union officials to inspect PAYE records of employers, further improving the ability of unions to detect breaches of the agreement (ACAC, 1985). The significance of these changes is that they consolidated employer compliance. In the initial stages, the employer associations could arguably agree to the union demands knowing full well that enforcement problems would minimise the impact of the agreement. Once these problems were reduced, the employer associations had little choice but to back their written word with action, since to abandon the agreement completely created a strong risk of industrial action. The present situation is that the agreement is working reasonably well and contract labour has been contained.

The Victorian Operative Bricklayers' Society: The initial strategy of the VOBS in the commercial sector resembled that of the BWIU. Whenever a contract worker was detected, the subcontractor was forced to 'convert' the worker to employee status. As with the BWIU, this policy was resisted by individual members who preferred the status of contract worker. However, unlike the situation in New South Wales, poor relations existed between Victorian building unions which prevented any widespread joint union campaign to persuade builders to agree to a ban on pyramid contracting. Instead, unions generally relied on ad hoc detection to minimise the impact of this system. The extensive resources required to implement such a strategy limited its effectiveness, particularly for smaller unions like the VOBS.

Confronted with these problems, the VOBS developed an alternative strategy designed to eliminate the incentive for subcontractors to use contract labour. The union sought to remove some of the competitive pressures on subcontractors which were seen as the main reason subcontractors used contract labour. To do this, in 1978 the VOBS established an association within the union to cater for the needs of subcontractors (Victorian Bricklayer, May 1982, 1). The closed shop agreement in the commercial sector meant that these subcontractors were members of the union anyway. This special association provided services which were not fully provided by any other association, whether of employers or unionists. In particular, the VOBS developed an association to meet the specific needs of subcontractors without them having to compromise with large builders. Known as the 'Major Sub-Contractors Association' (sic), membership did not flow automatically from membership of the VOBS, but was conditional on subcontractors employing award employees and not contract workers. A range of services was offered to attract subcontractors into the association. One of these was assistance in establishing tender rates for subcontractors which were sufficiently high to enable them to engage employees rather than the cheaper forms of contract labour or cash-in-hand (Victorian Bricklayer, Dec. 1984, 11, Nov. 1985, 6).
Backed by the closed shop, this sub-association came to organise approximately 90 per cent of bricklaying subcontractors in the commercial sector, and achieved its goal of eliminating continual undercutting of rates. Further, it enabled the VOBS to re-establish award employment for bricklayers working in the commercial sector. Builders were compelled to accept the higher subcontract rates entailed by this system; if they did not, they would be required to hire bricklayers directly themselves. Few builders possessed the capacity to direct bricklayers' tasks as efficiently as the subcontractors, who were invariably bricklayers themselves. Consequently builders preferred to fall in with the new arrangements (Interview, W.C. Giles).

Such a novel approach to the contract worker problem can be explained by both practical and ideological factors in the VOBS. Firstly, since it was a small union, it could not rely on an ad hoc detection policy. Secondly, with its membership being confined to bricklayers, the protection and promotion of bricklaying became its raison d'être. If this meant developing a closer relationship with subcontractors, then the benefits accruing to bricklayers were accepted as outweighing any ideological objections to such a compromise. Thirdly, most of the subcontractor members were bricklayers by trade, and it appears that craft identity was a particularly strong binding force instilling the solidarity needed for this strategy to work. Other factors may also have been influential, but those listed above appear to be the most important considerations. In later years, the VOBS has also become a party to the National Agreement banning pyramid contracting and all-in payments - a development flowing from the strategy of the BWIU. But for the most part, it continues to rely upon a unique strategy it has developed for itself.

Notwithstanding the apparent success of the BWIU and VOBS strategies, recent developments suggest the employment practices achieved through their different approaches are still vulnerable. In the late 1980s Troubleshooters Available (TA), a labour-hire firm, was banned from several Melbourne building sites following their alleged supply of all-in paid employees. In 1987, TA gained interlocutory injunctions against the BWIU and VOBS to overcome the bans, and proceeded to take legal action against both unions. TA argued, firstly, that the unions' actions breached the secondary boycott provisions of the Trade Practices Act by preventing building firms from utilising TA's services and, secondly, that the bans were an inducement to breach of contract. The unions had banned TA from sites in the belief that their workers were all-in employees, supplied contrary to the industry agreement. Hence, the unions' defence rested largely upon whether TA workers were employees or independent contractors - contract labourers by another name. In the ensuing judgment TA workers were held to be independent contractors, whilst the union bans amounted to both secondary boycotts and inducements to common law breaches (Odco, 1988). Furthermore, whilst TA's intermediary role between builders and workers
resembled pyramid contracting, it did not fulfil the definition of pyramid contracting contained in the industry agreement, hence precluding another defence under the Trade Practices Act for the unions.  

The industry agreement was renegotiated in Victoria in 1989 and now includes a specific reference to contract labour - that a supplementary agreement on contract labour will be determined in the future - indicating the sensitive and on-hold nature of the issue. In early 1990 the unions appealed the TA decision to a Full Bench of the Federal Court, but at the time of writing the decision had not yet been handed down. It appears likely that whichever way the appeal decision falls, a further appeal to the High Court of Australia will take place, and the practical ramifications for employment practices in the industry will not be known for some time.

The capacity of the industry agreement to prevent contract labour from working on commercial building sites has been thrown into doubt by the decision in the TA case. Any reversion to earlier contract labour practices by the major commercial builders would be incompatible with those changes in attitudes alleged to have taken place in recent times. Employers may also be induced to adhere to present agreements through fear of industrial unrest brought on by staunch union opposition to firms such as TA. But such reluctance may only apply in the short-term. Potential exists for a snowballing effect should contract labour once again secure a significant foothold in the industry. The analysis in this chapter suggests that the co-existence of employees and contract workers is inherently unsustainable in the longer term. The continued success of union strategies therefore appears to rest heavily upon the sanctions that unions can apply to major builders. The voluntary support of employers is likely to be unreliable given the cost pressures upon them, schisms and deficiencies in their employer associations, and the possibility that the Federal Court decision on TA will be upheld, enlarging the scope for individual builders to claim a legal right to use contract labour.

Union Strategies in the Housing Sector

**The NSW Building Workers' Industrial Union:** The BWIU's policy on regulating contract rates in the housing sector took shape only after years of outright opposition to contract labour had failed to make inroads into contracting practices. As early as the 1940s, the BWIU had actively opposed contract workers who were viewed as piece workers operating under a payments system equally opposed by the union. Its staunch opposition largely alienated contract workers who in turn developed strong anti-union sentiments. In the 1950s and 1960s there was a lull in union activity over contract workers, accompanied by an increasing decline in their membership of unions (Sutton, 1979, Chapter 5).
It was not until the early 1970s that the BWIU began once more to take an active interest in contract workers in housing. Initially, the union maintained opposition to contract labour, using a strategy to eliminate it that was similar to the methods employed in the commercial sector. The union insisted that contract workers be converted to employees. Such a strategy, however, never had any real chance of success given the geographic dispersion of housing construction, the entrenched nature of contract labour, and the existing level of resistance to unions. Experience with these difficulties eventually resulted in the BWIU accepting the existence of contract work in principle, and coming to terms with the fact that some workers preferred to work on this basis. Its strategy then evolved towards establishing a means of protection for workers within the broad framework of a contract payment system. This could be achieved through regulating minimum contract rates, while remaining opposed to what it described as the 'most obnoxious features' of the contract system (TNC, 1985, 116-3).

From the mid-1970s, a series of agreements on contract rates were negotiated between the BWIU and some individual companies. However, these agreements were fraught with instability. The intense competition in this sector and the continual opposition of the Housing Industry Association (HIA), the major housing industry association, to these agreements, prevented a more secure industry-wide settlement. As with commercial sector subcontractors, the union was predominantly dealing with price-takers in the market, not companies with sufficient market power to be able to withstand an increase in costs. Consequently, companies that negotiated with the union were subject to under-cutting of their tenders and rates by companies not subject to any agreement with the union. Under-cutting by contract workers opposed to union intervention was also common.14 Unlike the commercial sector, the low level of union membership prevented on-going large-scale campaigns, and instead implementation of the policy relied on piecemeal agreements on the rare occasions when sufficient support was forthcoming from the contract workers.

To attack these problems, the union decided to educate contract workers about the extent of their exploitation and the importance of collective action as a means to achieving gains at the workplace (BWIU, 1984, 4). Separate committees, organisers, and union journal columns were established to meet the needs of housing contract workers, and to draw attention to the services the union offered contract workers. However, developing the collective consciousness of some contract workers could not of itself overcome the unwillingness of major builders to be parties to an agreement, particularly when other contract workers willingly worked for lower rates. Despite employer opposition, the spread of company agreements increased significantly in 1984 as the union waged a new campaign against major builders in the industry. This campaign concentrated on large firms, viewed as price-makers by the BWIU. It capitalised on the fact that, unique to NSW, such firms operated in both the housing and commercial sectors. The union could use its leverage in the commercial sector by banning work on an
employer's site unless an agreement was conceded for the company's counterpart workers in the housing sector (TNC, 1985, 122). This campaign met with considerable success.

Whilst these gains were significant, reliance on voluntary agreements required continual active enforcement and renegotiation by the union to an extent not necessary if legal minimum rates could be applied. Thus, concurrent with the development of company agreements, the BWIU actively lobbied the New South Wales state government for legislative support for minimum contract rates similar to the provisions applying to owner-drivers. The establishment in 1982 of a government enquiry into subcontracting in the housing sector was initially viewed as a victorious outcome of this campaign, but the enquiry eventually recommended retaining the status quo of non-regulation (Burns, 1981). In 1985, however, the New South Wales parliament legislated to prevent unfair, harsh or unconscionable contracts for work in the building industry. Whilst similar in intent, the legislation differed from that applying in the road transport industry (see Chapter 7). The BWIU's first application under the legislation resulted in an order for the HIA and the union to negotiate contract rates, but the HIA appealed the decision. The appeal decision, in turn, held that the legislation could apply only to particular contracts and could not become the basis for common minimum rates (Industrial Commission of NSW, 1987). Drafting inconsistencies, which were the basis for the appeal decision, are unlikely to be amended given the change to a Liberal/National Party government in 1988. To date, the current government has attempted to repeal this legislation on two occasions. The practical implications of all this are that, even though specific types of contracts can be outlawed, collective agreements with individual builders still remain the only means to regulate minimum contract rates in the New South Wales building industry.

The Victorian Operative Bricklayers' Society: Bricklaying is one of the few trades in the housing sector with a long-standing tradition of self-employment. Throughout this century the self-employed bricklayer commonly quoted a lump sum price for a contract and accepted employer responsibility for labourers and apprentices as was necessary. The VOBS had always enrolled such self-employed bricklayers, and so changes in the nature of contract work in the housing sector raised different concerns for the VOBS compared with the BWIU (Echelon, August 1969, 14). Of major concern was the trend away from lump sum pricing to piece rates, and the effect that increasing numbers of contract workers were having on price competition, reducing the level of rates and creating poorer working conditions. Other problems associated with contract labour, notably the lack of written contracts, also influenced rates and impinging on the ability of the VOBS to service its members effectively (Victorian Bricklayer, April 1980, 4). The changes that took place throughout the 1960s and 1970s undermined alike the rates and conditions of traditional self-employed bricklayers as well as those of employees. With the rising
proportion of VOBS members relying on housing sector work, it is likely that some action would have been taken by the VOBS irrespective of the threat posed by contract labour to employment in the commercial sector.

The VOBS's initial response was to attempt to educate contract workers on the need to take a more professional approach to contracts, and particularly to point out the consequences of undercutting for all bricklayers (for example, Echelon, 1970, 2), but this appears to have had little impact on contract workers. Consequently, in 1978 the VOBS applied for piece rates to be inserted into their state award (Echelon, August 1978, 15). Although the VOBS was traditionally opposed to piece rates, the difficulties encountered in dealing with new rate-cutting practices led it to believe that the only means of placing a floor under the contract rates was by applying minimum piece rates. However, the MBA successfully opposed the application to vary the award. It appears that objections could have arisen concerning either the relevance of this change to employees, who were not generally engaged in bricklaying, or the applicability of any award variation to contract workers, who made up the bulk of bricklayers (Echelon, August 1978, 15).

Around the same time, the VOBS began placing industrial pressure on the MBA to accept minimum contract rates in housing. There had been earlier attempts in the 1960s to apply minimum contract rates in housing, but these had been ineffective as demonstrated by widespread undercutting in the 1970s. It was not possible to use the strategy adopted by the BWIU in New South Wales of placing a ban on the commercial sites of large individual builders to force them to concede agreements in the housing sector. This was due to a difference in the structure of the Victorian building industry. In Victoria, builders either operated in the commercial sector or the housing sector, but rarely both. The VOBS thus turned to a similar strategy, in this case linking the commercial and housing sectors at the industry level through the employer association. This involved placing industrial pressure on the MBA, through the MBA's members on commercial sites, to negotiate an industry agreement to regulate minimum contract rates for its members in the housing sector (Victorian Bricklayer, October 1980, 5; Interview, W.C. Giles).

Over a number of years, the MBA conceded the VOBS's demands, and agreed to minimum contract rates for the housing sector. There are clear differences, however, between the VOBS's form of contract regulation and that of the BWIU. Firstly, the rates are for the entire industry and are intended to be only a minimum rather than a paid rate (Interview, W.C. Giles). The VOBS did not intend to place restrictions on the freedom of its members to negotiate above the rate, although it appears unlikely that such negotiation would occur given the rate cutting which gave rise to the policy in the first place. Secondly, the rates are not agreed to by individual builders and hence there is no compulsion for firms to abide by them. In practice, the MBA informs members of the rates if they enquire, but it does not actively
encourage builders to follow them (Interview, MBA Official). The enforcement of these rates upon individual builders must therefore depend upon the ability of the VOBS to withdraw its members from housing sites.

The significance of the MBA/VOBS agreement should not be exaggerated. The MBA does not have comprehensive coverage of employers in housing, either in Victoria or New South Wales. It is relevant that VOBS has no agreement with the HIA which is opposed to industry-wide regulation of minimum contract rates in both states. Furthermore, for every step taken in this direction, the HIA is equally active in promoting the role of contract workers as examples of the free enterprise spirit (for example, HIA 1984).

Comparison of Union Strategies

It is apparent that important differences can be found in union strategy to deal with contract work. Firstly, a contrast can be drawn between the two unions, the BWIU's approach clearly differing from that of the VOBS. Secondly, there are intra-union differences in the way both unions have tackled the commercial and housing sectors. What, then, explains these divergent strategies?

The first important factor is the degree of membership concentration of the unions in the commercial and housing sectors. It should be recalled here that contract labour is entrenched in housing but not in the commercial sector, and that the BWIU's membership is predominantly in the latter, whilst the VOBS lies in the former. As a result, the BWIU's hostility towards contract labour in the commercial sector carried over into the housing sector and initially took the form of outright opposition. In contrast, the VOBS was not so opposed to the principle of self-employment of which contract work was the least preferred form, and consistently directed its efforts to minimum rate regulation. The BWIU only adopted this strategy after it failed to make inroads with its more confrontationalist policy and had already lost membership support.

A second explanatory factor is the extent to which employers operate in both sectors of the industry. The commercial sector is the major locus of bargaining power for both unions. In New South Wales, individual cross-sector employers opened the way for the BWIU to impose company agreements applying in the housing sector. In Victoria, the absence of such employers meant this strategy could not be used, forcing the VOBS to seek an industry agreement with the MBA, whose membership was cross-sectoral.

The third point is the proportion of self-employed among the members in a union. For reasons connected with its location primarily in the commercial sector, the BWIU possesses a relatively high proportion of employee members (perhaps as high as 90 per cent) compared with the VOBS (closer to 30 per cent) which depends more on the housing sector. This factor clearly had a strong influence upon the strategies of both unions, predisposing
the VOBS towards involving subcontractors in its strategy to eliminate contract labour in commercial building - a strategy not accessible to the BWIU - and towards correcting the abuses of self-employment evident in contract labour.

A fourth possible explanation is union ideology. Perhaps most important here is the contrast between the broad solidaristic approach of the BWIU, characterised by its enthusiasm for inter-union campaigns as well as its own multi-craft membership and ambitions to become an industry union, and the narrow craft sectionalism of the VOBS. The BWIU has developed strategies, in particular to eliminate contract labour in the commercial sector, based upon collective action and agreements across a broad front and preferably involving other unions. Any less comprehensive approach was always difficult to apply effectively. The VOBS, on the other hand, instigated a strategy which relied on the craft identity of its members binding small employers, self-employed and employees within the union. By this means, the VOBS was able to minimise the use of contract labour by its subcontractor members in the commercial sector. The difference between the two unions can be related to the distinction drawn by Turner (1962, 139-168) between 'open' and 'closed' unions.

The fifth and final factor is whether unions possess sufficient industrial strength to implement their policies. For both unions, a high level of industrial power in the commercial sector has enabled them to gain builder compliance with their policies to eradicate contract labour. Underpinning this bargaining power are a number of factors including employer vulnerability to stoppages, compulsory unionism, and worker concentration on large sites. The housing sector, by contrast, lacked these pre-conditions. While it is difficult to assess the effectiveness of contrasting union and sectoral policies, it is nevertheless plausible to conclude that union strategies have been founded on a realistic assessment of the unions' capacities to enforce them, and that this has partly dictated the forms these strategies have taken.

CONCLUSION

Contract labour has expanded in the building industry over the post-war period, and most notably since the early 1970s. It is now the accepted method of work in the housing sector, but is largely controlled, although occasionally contested in the commercial sector. The reasons for its growth are quite simple: it is usually cheaper for the builder, it provides a more effective means of controlling work effort, and it is associated with individualist attitudes amongst workers. For these reasons, it has been the preferred arrangement amongst some employers and building workers, but not amongst unions.
However, the conditions under which contract labour can develop are considerably more complex. Relevant here is a production process which depends largely upon autonomous craftspersons engaged in short, discrete, measurable tasks. Also important is a product market distinguished by its volatility, regionalism, and competitiveness which combine to discourage durable job contracts. Following from this are labour market characteristics including strongly fluctuating employment, rapid labour turnover and engagement by subcontractors, which again tend to be seen as incompatible with stable wage labour. Despite the widespread incidence of these conditions and employers' uniformly strong attraction to contract labour, its incidence is uneven both between and within sectors of the industry. Much of this difference can be attributed to union policies which first developed in the 1970s and came to fruition in the 1980s. Underpinning these policies was a general fear that union membership and award conditions in the commercial sector were about to be lost as they had in the housing sector.

The preceding discussion has outlined several different strategies developed to combat contract labour. It is clear that, over time, the BWIU and VOBS have been able to improve their strategies to the point that they have enjoyed considerable success in the commercial sector and have regained some ground in the housing sector. It is also apparent that there is no single appropriate strategy, and that these must be adapted to the peculiarities of employer structure and policy, and to union membership characteristics, attitudes and strengths.

Ultimately these union strategies have always depended upon strong collective organisation and action, notwithstanding the different forms which this has taken - the open unionism of the BWIU and the more closed, craft unionism of the VOBS. What is unique about these unions' success is the lack of legal support. Given the competitive and unstable character of the industry, contract labour is best dealt with at the industry level in a way which removes the inducements to towards labour cost cutting. Any voluntary approach is likely to fall short of providing continual and uniform minimum industry standards. However, the legal framework which could stabilise the industry has failed to evolve. For this reason, unions remain reliant upon the kinds of strategies outlined in this chapter.
ENDNOTES

1. Attempts by building industry unions to include piece rates in federal and state awards (with the exception for tile-layers) have been disallowed by the relevant tribunals.
2. A principal contractor may be required to give 'reasonable notice' to a contract worker, however in reality termination occurs without notice and without penalty due to the significant costs of pursuing such a breach of contract.
3. Rise and fall clauses allow the cost of wage increases due to industrial tribunal decisions, during the contract period, to be passed on from the subcontractor to the builder. They do not allow the subcontractor to adjust the tender price if wage costs have been underquoted for other reasons.
4. Covick (1984, 106) details the decline in self-employed income levels relative to award rates, providing a general indication of the difference between income levels of employees in the commercial sector relative to self-employed in the housing sector. The BWIU (ACAC, 1978, 86 and 217) details stagnated housing rates over a two year period when award rates had increased at least through National Wage Cases.
5. Officials of all major building industry unions in Victoria, except the VOBS and BWIU, interviewed by the author in the mid-1980s, indicated the futility of attempting to enrol members in the housing sector.
6. Contract workers have a reputation for being solely concerned with the rate of pay, resulting in most other union services being considered either unimportant or relevant to employees rather than contractors. Further evidence of this approach is available in Building Worker, September 1973, page 2, and Gagg (1969).
7. An impression gained from articles in the Building Worker of the early 1970s and from interviews with BWIU officials.
8. Labour-hire is labour supplied by an agency to a builder or subcontractor. The agency generally employs the worker in accordance with relevant awards (Odeo Case, 1988, 40).
9. Evidenced by a series of articles in the Building Worker during this period.
10. According to Frenkel and Coolican (1980, 63), this was the general attitude of employer associations towards agreements in the construction industry.
11. All-in paid employees are similar to cash-in-hand employees, except tax liability is often met through the Prescribed Payments System and hence involves a lower rate of tax (10 per cent) than that for wage employees.
12. The definition of pyramid contracting in the agreement was 'the practice of a subcontractor, to whom a labour-only contract is originally awarded, of subletting that contract, or part thereof, to another subcontractor'. TA were not awarded a labour-only contract by builders, but entered contracts to introduce workers to builders to perform work.
13. Clause 23 of the Victorian Building Industry Agreement 1989-1992 reads: 'the parties agree to reserve the question of contract labour hire to a supplementary agreement to be determined as soon as practicable'. To date, no further steps have been taken to establish such an agreement.
14. The Building Worker throughout this period is scattered with articles highlighting the problem of under-cutting agreement rates.
15. Industrial Arbitration Act 1940 (NSW), section 88FA.
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INTRODUCTION

Road transport has for many decades provided an arena in which unions have fought against the threat posed by marginal workers. The marginal workers in question are 'owner-drivers'. As the term suggests, owner-drivers are individual self-employed workers who drive a truck delivering goods by road and who own the vehicle they drive. Thus, unlike 'employee-drivers' who are wage labourers selling only their labour power - their ability to drive a vehicle owned by someone else - owner-drivers are generally workers who sell both their labour power and capital services.

While comprising a single category for most purposes, it must be recognised that owner-drivers can differ from each other according to their personal capital holdings, their role as employers and their independence. Some owner-drivers, for example, own their own rigs outright, some have secured small loans from banks, while others have 'purchased' their vehicles with very little capital through either hire-purchase arrangements with financial institutions or sometimes even on loans from the company for which they work. Some owner-drivers who own more than one truck are also employers of employee-drivers, but most will only employ drivers for short periods while they themselves are sick or on holidays. The independence of owner-drivers derives mainly from the range of clients for whom they work. Some (referred to as 'tied' or 'painted' owner-drivers) work exclusively for one company to the extent that they have their trucks painted in that company's colours, some work regularly for a small number of companies, while others (called 'itinerants' or 'independents') gain their loads on an irregular basis from varied sources. These differences can be important in determining the industrial behaviour of owner-drivers and therefore their relations with employee-drivers and trade unions.
Irrespective of the differences between them, almost all owner-drivers can be described as 'marginal' largely because of their legal status. Owner-drivers constitute one of those groups of workers occupying that 'grey area' of the common law between 'employees' and 'independent contractors' (for more detail, see Chapter 3; and Industrial Commission, 1970, Chapter 13). Owner-drivers are also marginal in several other respects. For example, they occupy an ambiguous position in terms of industrial organisation, often falling between trade unions and employer associations. Many owner-drivers are marginal in terms of income, especially during economic recessions when the availability of work falters, rates received decline and bankruptcies become common. Fluctuations in the availability of work and the absence of employment guarantees also make many owner-drivers marginal in terms of job and income security.

This chapter seeks to explore the role of owner-drivers in road transport, the threat they pose to employee-drivers and trade unions, and the response of the unions to this threat. This account must begin with the industry context: road transport product markets, production processes and labour markets. These factors provide a number of constraints and opportunities to the parties to industrial regulation within road transport - they suggest a greater or lesser potential for certain patterns of behaviour and regulation to occur. Attention will then return to the specific strategies pursued by the unions in the period between 1940 and 1988. It is these strategies and the counter-strategies of employers and other groups which ultimately determine whether the potential suggested by the industry context will be realised in reality. In this case, most attention will focus on the Transport Workers' Union in New South Wales. This union has been unusually successful in its efforts to recruit and regulate owner-drivers, and has gained almost unique legislation to assist it in these endeavours.²

CONTEXT

Road transport is a large and important industry, not only because it accounts for a significant proportion of Australia's gross national income and employs considerable numbers of workers, but also because it provides a vital intermediary service for other industries. As road transport operators are so fond of saying, almost all goods in Australia are at some time moved by road. Unfortunately, poor statistics often make it extremely difficult to paint an accurate picture of the road transport industry (Rimmer, 1970, 4; McDonell, 1986, Chapter 4), but the following seeks to identify some of the more important features of the industry.

Product Markets

Road transport product markets in the postwar period were characterised by three main features: fragmentation, growth and competition. Although it is
useful to talk of a coherent 'road transport industry', the industry is in fact highly fragmented, comprising a series of relatively separate sectors. Road transport, for example, is fragmented according to the type of operator involved. In the case of 'ancillary operators' or 'ancillary carriers', road transport is not the main business activity of the operator but is rather an adjunct to its main activity. Manufacturing companies or farmers, for example, may deliver their own goods to customers or pick up their own raw materials. In these circumstances, the vehicles used by the enterprise to carry the goods are owned by that enterprise. On the other hand, road transport is the main activity of enterprises referred to as 'professional carriers', 'hire and reward carriers' or 'road transport contractors'. This second group of carriers transport goods owned by others for a fee or cartage rate (National Road Freight Industry Inquiry, 1984, 16; Australian Bureau of Statistics, 1981; Commission of Enquiry into the NSW Road Freight Industry, 1980, Volume I, 6/10). The distinction between ancillary carriers and professional carriers is important because the two groups face different market pressures: ancillary carriers are mainly concerned with the market for the enterprise's product and therefore tend to see road transport as a cost which should be minimized, while professional carriers are centrally concerned with the market for and profitability of road transport services. These different pressures can lead to different production decisions and, as Commons noted so long ago, to different patterns of industrial relations (Commons, 1905).

Road transport product markets are also fragmented according to the distance goods are carried. The most common distinction identifies three sectors: short distance (or local), long distance intrastate and long distance interstate. Although individual operators can enter any or all of these sectors, they differ in many respects. The different sectors, for example, are governed by different laws, with the interstate falling within the purview of federal industrial, taxation and regulatory laws, while short distance and long distance intrastate are more exclusively covered by state laws. More directly relevant to this section, the different sectors are also subject to different market pressures, they have different production processes and therefore different cost and rate structures. Long distance road transport has grown considerably in the postwar period from a very small base, but it still cannot rival short distance sector in terms of the number of vehicles, the freight carried or employment (Commission of Enquiry into the NSW Road Freight Industry, 1980, Volume I, 6/3 and /10; Australian Bureau of Statistics, 1984).

Road transport markets are also fragmented according to the goods being carried. One traditional distinction is between 'general freight' and a number of 'specialist' sectors. The former caters for a wide range of 'dry' goods, while the latter carry goods which cannot be easily be mixed together, such as gases, liquids and perishables. On the one hand, these different sectors tend to use different technologies: general freight can be carried in all-purpose vehicles (including flat trays or enclosed pantechnicons), while the specialist sectors require specialist vehicles, such as tankers or refrigerated vans/trailers. On the other hand, since the demand for road transport services
is largely derived from the goods being carried, the different sectors are subject to different market pressures. The various specialised sectors, however, are not enormously important compared to general freight in terms of truck numbers, freight moved or employment (Commission of Enquiry into the NSW Road Freight Industry, 1980, Volume I, 5/8).

A second main feature of road transport product markets is the pattern of demand, especially the growth of these markets in the postwar years. Through a combination of technological, economic and political exigencies, road transport had previously been confined to delivering goods over short distances in the cities, while long distance transport was dominated by sea and rail. However, during World War II these factors began to change and the following years saw the rapid growth of long distance road transport (both within the state and interstate) as road took over some of market traditionally dominated by sea and rail (Wotherspoon, 1980; Hirst, 1956; Rimmer, 1970). At the same time, improved roads, new truck technologies and the changing location of industry within the cities encouraged considerable growth in short distance road transport (Spearritt, 1978, Chapters 6 & 7). This pattern of growth - measured by the number of trucks, their carrying capacity and freight market shares - continued throughout the postwar period, with only temporary interruptions resulting from the recessions of the 1970s and the early 1980s (Bray, 1989, Appendices 4.1 and 4.2; Rimmer, 1977, 176; Commission of Enquiry into the NSW Road Freight Industry, 1980, 6/10). Employment figures failed to rise in proportion to this growth after the late 1960s, but the road transport workforce generally continued to grow faster than other transport modes (Bray, 1989, 90-3).

An important, and in many ways peculiarly Australian, part of the growth of road transport in this period was the rise of the freight forwarding companies (Rimmer, 1970 and 1977). These companies differed from road transport companies in that they contracted directly with owners to transport goods from door to door as part of a total package of transport services. Thus, a single service was provided at an all-inclusive rate and with a single invoice, irrespective of whether the transport task was performed by road, sea, air, rail or a combination of modes. A small number of the freight forwarding companies came to dominate long distance transport in Australia and their ability to switch consignments from one mode to another allowed them significantly increase intermodal competition. As well, the rise of these companies led to significant changes in the organisation of the production process in road transport and affected the role of owner-drivers.

The final feature of road transport product markets is competition. Despite the fragmentation of road transport markets, a common feature which runs through almost all sectors is strong price competition. The sources of this competition are elements inherent to the structure of the road transport industry and factors peculiar to the historical development of road transport in New South Wales. The structural elements include the generally simple, homogeneous and inexpensive technology used in road transport, the few
barriers to entry into the industry, the relative lack of large economies of scale and the difficulty in differentiating the services of one company from those of another (Felton, 1978; Kolsen, 1956). One factor peculiar to New South Wales was the failure of institutional mechanisms administered by either the state or road transport companies to regulate price competition (Bray, 1989, 102-3). As well, the rise of the freight forwarding companies also served to increase competition. These companies operated in the transport (rather than road transport) industry, contracting their road transport tasks to smaller professional carrying companies or self-employed owner-drivers who often cut prices in efforts to gain work from the large freight forwarders. These organisational arrangements and the resulting competitive pressures lie at the heart of the owner-driver problem confronting unions in the road transport industry.

Production Processes

The production process in road transport can be divided into a series of relatively separate steps or stages. At its most simple, in the long distance full truckload freight sector or much short distance delivery, there are three main stages: loading, line-haul and unloading. This process is more complicated for professional carriers in the less-than-full truckload sectors, especially long distance, where 'consolidation' and 'deconsolidation' of loads must take place in terminals or warehouses. Here there are at least seven stages: loading, short distance line-haul to the terminal, consolidation of loads, long distance line-haul, deconsolidation of loads, short distance line-haul and unloading of the goods at the final destination.

In both these simplified examples of road transport production processes the various stages of production are readily divisible. That is, each stage can be easily separated from the others and performed by different workers, different vehicles and even different enterprises. In particular, the line-haul tasks are often separated from storage, loading and consolidation/deconsolidation. As a result of this divisibility of the production process enterprise managers have a number of alternative methods by which they can complete their transport tasks. For example, the owner of goods can choose to transport those goods within the company using company-owned vehicles and employee-drivers, thereby becoming an ancillary carrier, or the owner can engage the services of a professional carrier; the latter case is a 'contracting' arrangement. Similarly, the professional carrier can purchase the appropriate means of production (that is, terminal facilities, line-haul vehicles and fuel) and wage labour to complete production internally or another professional carrier can be engaged, thus creating a 'subcontracting' arrangement. In the cases of both contracting and subcontracting, the professional carrier can be a company or an owner-driver.

Thus, the divisible nature of the production process in road transport creates the opportunity for enterprise managers to choose among a number of alternative organisational arrangements by which production can be
completed. The question of why production is organised in a particular way in any given empirical situation is not one which can be answered in this chapter because it has not been the main focus of research, but some general comments can be offered. For example, it has been argued elsewhere that management's choice between becoming an ancillary carrier or instead relying on contracting or subcontracting arrangements is influenced by two inter-related criteria: cost and control (Bray, 1989, 125-9). In other words, the use of contracting arrangements is likely to be attractive to enterprise managements if they are cheaper or if they provide greater control and flexibility than the alternative choices. For example, contractors may develop specialised skills or utilise capital and labour more efficiently, thus reducing the cost of their operations. The use of contractor can also allow companies to more closely equate costs with fluctuations in demand for their product. Finally, and this goes to the heart of the 'owner-driver problem' discussed below, contractors (especially owner-drivers) may be cheaper or more flexible because of their ability to avoid rigidities associated with industrial regulation.

Labour Markets

The labour market occupies an ambiguous position in the present analysis because many aspects of the labour market - such as the 'hiring and firing' of owner-drivers, the price of this form of labour and the conditions under which owner-drivers are engaged - represent the main focus of later sections. Nonetheless, a number of structural features of the labour market can be explored at this stage. The first step is to recognise that the labour power available to road transport enterprises comes in several different forms. Wage labour, or employee-drivers, can be employed by ancillary carriers or by professional carrier companies, while self-employed owner-drivers can supply labour power (along with the services of a vehicle) on either a contract or subcontract basis. In other words, each of the alternative production arrangements has a corresponding form of labour.

At the risk of oversimplification, the factors influencing enterprise management's choice among these various labour forms fall into two categories: those affecting demand and those affecting supply. The demand for all forms of labour is largely determined by the demand for road transport services and the nature of the production process being used. Given the picture of demand in product markets presented above and the generally labour intensive nature of the road transport production process, it can therefore be assumed that demand for labour was generally strong through much of the postwar period. However, the demand for particular forms of labour is largely determined by the outcomes of management's production decisions which are, in turn, affected by the cost and control factors discussed in the previous section.

The supply of all forms of labour is affected by a range of factors from increases in the total population and fluctuations in labour force participation rates to changes in the price of labour and the number of persons holding
relevant licences to drive vehicles of various sizes. The supply of particular forms of labour, however, is influenced by additional factors. For example, since owner-drivers supply the capital services of a truck as well as labour power, then the availability and cost of that capital equipment should affect the supply of owner-drivers. At the same time, the relative financial rewards accruing to owner-drivers versus those accruing to wage labour should also dictate the supply of owner-drivers. Finally, as will be detailed below, many commentators argue that the supply of owner-drivers is affected by 'non-economic' factors, such as the attitudes of owner-drivers and their strong urge to become 'their own boss' irrespective of the financial rewards.

These forces of demand and supply should come together to determine the overall size of the road transport workforce and the internal composition of that workforce, in terms of the mix between employee-drivers and owner-drivers. However, any attempt to follow the actual outcome of these factors in the New South Wales road transport labour market is fraught with difficulties: the available labour force statistics are largely inadequate for the task, being too highly aggregated and rarely reported in any regular or consistent way (Bray, 1989, 144-58). Nonetheless, piecing together the incomplete information which is available, it seems that the following points can be made.

**Table 1:** Total Labour Force in Road Transport and Total Number of Drivers, New South Wales, 1947-1986.

<table>
<thead>
<tr>
<th>Year</th>
<th>Labour Force Road Freight</th>
<th>Drivers All Industries</th>
<th>Drivers Road Freight</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>000s</td>
<td>000s</td>
<td>000s</td>
</tr>
<tr>
<td>1947</td>
<td>13.9</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>1961</td>
<td>24.8</td>
<td>43.5</td>
<td>*</td>
</tr>
<tr>
<td>1966</td>
<td>28.8</td>
<td>49.5</td>
<td>*</td>
</tr>
<tr>
<td>1971</td>
<td>30.3</td>
<td>53.3</td>
<td>18.9</td>
</tr>
<tr>
<td>1976</td>
<td>30.6</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>1981</td>
<td>34.6</td>
<td>53.4</td>
<td>19.3</td>
</tr>
<tr>
<td>1986</td>
<td>32.2</td>
<td>51.8</td>
<td>19.4</td>
</tr>
</tbody>
</table>

* not available

**Notes:**

(1) The labour force statistics are inconsistent in that some are 'total employed population', while others are 'total labour force'. Although it does not significantly affect the numbers involved, the main difference seems to be the exclusion from the former of unemployed.

(2) The figures for drivers are 'truck and van drivers' for all years except 1986.

(3) The 1986 figures are not strictly comparable with earlier data because of changes in the categories used.

**Source:** Australian Bureau of Statistics, *Censuses of Population and Dwellings*. 
First, according to census data presented in Table 1, the total labour force in New South Wales road freight transport grew significantly over the postwar years to around 34,600 in 1981, and then declined slightly in 1986. Turning to occupational data, the total number of 'truck and van drivers' in all industries grew more slowly to around 53,400 in 1981, while the number of these drivers in road freight transport reached 19,300 by 1981. The number of drivers across all industries decreased slightly in 1986, while in road freight transport the number increased slightly.

**Table 2: Self-Employed Drivers by Industry Sector, New South Wales, 1971-1981**

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Self-Employed Drivers</th>
<th>Self-Employed as a Percentage of All Drivers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>All Industries</td>
<td>Transport &amp; Storage</td>
</tr>
<tr>
<td></td>
<td>000s</td>
<td>000s</td>
</tr>
<tr>
<td>1971</td>
<td>12.2</td>
<td>8.5</td>
</tr>
<tr>
<td>1976</td>
<td>14.7</td>
<td>9.9</td>
</tr>
<tr>
<td>1981</td>
<td>15.3</td>
<td>10.8</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>All Industries</td>
<td>Transport &amp; Storage</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>%</td>
</tr>
<tr>
<td>1971</td>
<td>18.2</td>
<td>26.3</td>
</tr>
<tr>
<td>1976</td>
<td>22.0</td>
<td>32.2</td>
</tr>
<tr>
<td>1981</td>
<td>22.6</td>
<td>32.0</td>
</tr>
</tbody>
</table>

**Note:** The figures for drivers are 'drivers (road transport)'.

**Source:** Australian Bureau of Statistics, *Censuses of Population and Dwellings*.

Second, the number of owner-drivers can only be estimated by examining self-employment among drivers and, less directly, by examining self-employment among the road transport labour force. Such an examination reveals that owner-drivers are represented in most industries, but they are far more common in some industries than in others. For example, in 1981 there were approximately 15,300 self-employed 'drivers (road transport)' in the New South Wales. Over 70 per cent of these (that is, around 10,800) worked in the industry division of transport and storage. This industry division also had the highest proportion of owner-drivers, with 32 per cent of all drivers being self-employed (Bray, 1989, Table 6.2). Unfortunately, no New South Wales figures are available, but Australian data suggest that the proportion of owner-drivers is even higher among 'truck and van drivers' in the road freight industry, with the figure standing at 39 per cent (ABS, 1981).
### Table 3: Self-Employment in Road Transport and Road Freight Transport, New South Wales, 1947-1986

<table>
<thead>
<tr>
<th>Year</th>
<th>Self-Employment as a Percentage of Total Labour Force in:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Road Transport</td>
</tr>
<tr>
<td>1947</td>
<td>23%</td>
</tr>
<tr>
<td>1954</td>
<td>22%</td>
</tr>
<tr>
<td>1961</td>
<td>19%</td>
</tr>
<tr>
<td>1966</td>
<td>18%</td>
</tr>
<tr>
<td>1971</td>
<td>18%</td>
</tr>
<tr>
<td>1976</td>
<td>23%</td>
</tr>
<tr>
<td>1981</td>
<td>25%</td>
</tr>
<tr>
<td>1986</td>
<td>28%</td>
</tr>
</tbody>
</table>

* = not available

**Source:** Australian Bureau of Statistics, *Censuses of Population and Dwellings.*

The third main point concerns trends in self-employment over time. Here, as shown in Table 2, there seems no doubt that between the years of 1971 and 1981 the number of owner-drivers grew significantly, in absolute numbers and as a proportion of all drivers. These trends are confirmed by the indirect measure of self-employment among the road transport labour force, which in fact shows a continuation of this trend through to 1986 (see Table 3). However, the data from the earlier period from 1947 to 1966 is less clear. No occupational data are available for these years, so analysis must rest on labour force statistics. These data, presented in Table 3, suggest that self-employment began the period on a high and subsequently fell as a proportion of the labour force until 1971, when it began to rise once more. The difficulty here is that this downward trend in the 1950s and 1960s does not accord with qualitative data obtained from statements by and interviews with road transport operators and commentators. These sources saw the number of owner-drivers increasing over the period (Bray, 1989, 152-6; Bray & Rimmer, 1986, 444-7). This conflict between the quantitative and qualitative data remains largely unresolved, although it must be recognised that in many ways the perceptions of road transport operators are important in motivating their industrial relations activities irrespective of whether those perceptions are well informed or not.

### THE 'OWNER-DRIVER PROBLEM'

The preceding account of the road transport industry context provides a basis for understanding the challenge posed by owner-drivers to employee-drivers,
trade unions and industrial regulation. For example, the divisible nature of the road transport production process is a precondition for the owner-driver contractors or subcontractors becoming alternative methods of completing the transport tasks. It is this type of production process which leads to owner-drivers and employee-drivers being readily substituted for each other and therefore being direct competitors for work.

The competitiveness of road transport product markets also provides an obvious source of motivation for ancillary carriers, freight forwarding and road transport contracting companies alike to consider the use of self-employed owner-drivers. Owner-drivers, for example, have the potential to give enterprises greater control over production and greater flexibility in the allocation of resources. At times of growth, owner-drivers also provide an opportunity to expand the enterprise's activities without much capital investment by the enterprise. At times of decline, owner-drivers represent a potential source of cost-cutting.

However, the cost advantage of owner-drivers and the flexibility they offer to enterprise management are not constant or inevitable qualities. Indeed, they depend a great deal on the state of demand and supply in labour markets and on the nature of institutional structures governing the operation of labour markets. The biggest difficulties for employee-drivers arise when the cost and flexibility of wage labour is effectively standardised and regulated by institutional structures, like trade unions and the arbitration system, but the cost and flexibility of owner-drivers is not so regulated. In this situation, market forces determine the terms and conditions of owner-driver contracts.

As the previous sections showed, structural features of road transport, such as low capital costs and easy entry to the industry, mean that market forces can easily lead to strong price competition. But many commentators argue that this tendency has been exaggerated in New South Wales by several additional features. For example, some suggest that entry to the industry has become excessively easy because of finance companies which too readily granted credit to new owner-drivers (Wise, 1982; *Highway Torque*, May 1988; *Truckin' Life*, October 1988, 17-18). Others claim that an excess supply of owner-drivers develops because of what one commentator calls the 'Bert Reynolds syndrome' (Wise, 1982). That is, new entrants to the industry are more interested in the image of driving trucks and being 'their own boss' than in making rational business decisions about the capacity of the industry to provide them with sufficient financial rewards to cover their labour and capital expenses (see also Staff Writer, 1951; Davis, 1963; Industrial Commission, 1970, para. 18.4; Abeles, 1981, 8). The market dominance of the big freight forwarders is another factor at work. Individual owner-drivers have little bargaining power when confronted with the power of these large companies and many argue that rate-cutting and exploitation is often the result (*Truck & Bus Transportation*, September 1956, 61 and December 1957, 67; *Truckin' Life*, August 1981, 26-30). The result of all these factors is further
price competition, or 'rate-cutting' as it is called in the industry, as owner-drivers desperately seek work at whatever rate they can get in an overcrowded market.

It is bad enough that these circumstances of unfettered market forces can lead to the exploitation of owner-drivers. However, more important for present purposes are the consequences for employee-drivers of enterprise managements choosing the owner-driver alternatives. Companies using employee-drivers become subject to strong competition from owner-drivers or from companies using owner-drivers as contractors or subcontractors and may consequently lose work. As a result, employee-drivers can not only lose their jobs, but the level of wages, other financial benefits and a range of working conditions enjoyed by employee-drivers can be threatened by the availability of a cheaper, more flexible means by which management can complete the transport of goods. Increasing numbers of owner-drivers can also undermine the membership and power of trade unions. The rate-cutting and instability associated with unfettered market forces has also been linked many times over the postwar period with road safety problems, such as excessive speeding, overloading and the use of drugs (for example, Commission of Enquiry into the NSW Road Freight Industry, Volume IV, 6/1). These are all features of the 'owner-driver problem'.

One final point of qualification emerges from the earlier discussion of the road transport context. That is, the fragmentation of road transport product markets spells a warning that generalisations about road transport as a whole can be hazardous. For example, the different market conditions operating in different sectors mean that some operators will be under less pressure to implement cost-cutting measures than others. Similarly, the production process will be organised differently in different sectors, some relying more on owner-drivers than others. It is, therefore, important to remember that the 'owner-driver problem' will vary from sector to sector and that variations in industrial regulation will also emerge in different sectors of the industry.

UNION STRATEGIES TOWARDS OWNER-DRIVERS

A number of industrial organisations have been concerned with or threatened by the plight of owner-drivers. Indeed, throughout the postwar period a number of employer associations and independent owner-driver associations sought to recruit owner-drivers as members and regulate their rates and conditions (Bray, 1989, Chapter 7). However, the activities of these organisations have generally been less important than those of the main trade union in the area, the Transport Workers' Union (TWU), and this chapter is almost exclusively concerned with the TWU's response to the 'owner-driver problem'. The TWU is essentially an occupational union representing truck drivers, although it does recruit other groups of workers both within road
transport and beyond. The union in New South Wales is a branch of the federally-registered Transport Workers' Union of Australia, but for most of its history the NSW Branch has operated almost independently of the federal union. This situation reflects both historical tradition and the dominance of the state, rather than the federal, arbitration system in New South Wales road transport (Bray & Rimmer, 1987, 184-7, 227-34, 245-9).

The TWU in New South Wales has adopted basically the same strategy towards owner-drivers since a change in the leadership of the union in 1942. Since then, the union leadership has not attempted to exclude owner-drivers from membership or to prevent their employment in the industry. On the contrary, the union has generally sought to recruit owner-drivers as members. It has also attempted, at least on an official basis, to avoid any policy which gave preference to the employment of either owner-drivers or employee-drivers. Consequently, union policy has been concerned with regulating the rates and conditions of owner-driver work rather than determining where and when owner-drivers were used.

There were a number of avenues or methods by which the TWU could seek to regulate owner-driver rates and conditions (Bray, 1989, Chapters 3 & 8). On the one hand, it could rely purely on the collective strength of owner-driver organisation either to impose standard rates and conditions unilaterally on the buyers of their services or to negotiate a bilateral agreement with those buyers. The former will be referred to as 'collective unilateralism', while the latter is 'collective bargaining'. On the other hand, the union could seek the assistance of various state agencies to determine and enforce minimum owner-driver standards. This 'state regulation' can take several forms depending on the state agency in question. The account below discusses three: 'economic regulation', where the agency seeks to regulate prices, entry or some other aspect of product market behaviour in the industry; 'traffic and driving regulation', where the police and road traffic authorities administer rules governing behaviour on the road; and 'industrial arbitration', where the agency is an industrial tribunal set up to conciliate and arbitrate industrial disputes. The mixture of these regulatory methods and their relative success varied in New South Wales over the period under review.

The long-term consistency of the TWU's strategy should not be taken to imply unanimity among members and officials in their attitudes towards owner-drivers. In fact, there were periods of considerable tension within the union over the owner-driver issue and the enthusiasm with which the owner-driver cause was pursued often depended, amongst other things, on the balance of factional politics within the union. Rather, the consistent strategy reflects a majority view that owner-drivers could never be eliminated from the industry and that it is in the interests of both employee-drivers and owner-drivers to be organised under the same banner. In line with this view, TWU officials generally sought to promote or justify union policy towards owner-drivers by emphasising either the importance of organisation as the means by which owner-drivers could advance their own interests (for example,
Correspondence, 1945; Voice of the Transport Worker, June 1968, 10 and September-October 1978, 38) or the need to get owner-drivers organised if the interests of employee-drivers were to be protected (for example, Correspondence, 1951; Voice of the Transport Worker, February-March 1980, 29).

1940-1959: Early Failures

The TWU in New South Wales first demonstrated a conscious interest in owner-drivers around 1942, when a new 'progressive' faction, led by A.G. (Barney) Platt, took control of the union from a long-established conservative group. At first Platt, along with his 'progressive' colleagues, was something of a champion of owner-drivers. The union actively recruited owner-driver members, initiated new organisational structures to accommodate them within the union and embarked on a variety of industrial and political actions designed to more effectively regulate owner-driver rates and conditions. However, from the late 1940s, when Platt changed his factional allegiances and his factional opponents began to find support among owner-drivers, Platt's energies were directed towards other goals. Some owner-driver campaigns were still mounted, but the union's resources did not seem to be strongly marshalled behind them. In fact, as the TWU increasingly became a central arena in the battle between the 'Industrial Groupers' and the 'anti-Groupers', most of the union's resources were consumed by faction-fighting rather than industrial activity (Bray & Rimmer, 1987, Chapters 5 & 6).

In terms of owner-drivers membership, the TWU certainly made some gains during the 1940s. As Table 4 shows, the number of owner-driver members grew from around 500 in 1944 to a reported 4,746 by 1950. During the 1950s, the union seemed to retain its owner-driver members, still claiming 4,609 owner-driver members in 1957, but there is room to doubt these figures. The continuing factional battles in the union and Platt's practice of recording 'contributing membership' rather than 'financial membership' makes these figures unreliable at best.

Apart from simply encouraging owner-drivers to join the union, the TWU also followed several avenues in an effort to more effectively regulate owner-driver rates and conditions. For example, along with other groups, the union (unsuccessfully) sought the introduction of economic regulation through the licensing of road transport operators and by way of limitations on the sale of ex-service vehicles, which union officials thought would flood the truck market. The union had more success in bringing certain categories of road cartage rates under the supervision of the Prices Commission up until the early 1950s, but this victory was of little real value because the Commission set only maximum prices instead of the minimum standards sought by the union (Morton, 1961; Bray, 1989, 198-201). Traffic and driving regulations were also favoured by union officials as a means of attacking some of the more anti-social manifestations of unrestrained rate-
cutting. The period, for example, saw the first legal restrictions on driving hours and overloading of commercial vehicles using New South Wales roads. The union, along with some of the road transport employer associations, claimed these initiatives as victories in their political campaigns, but the actual impact of these measures on owner-driver behaviour on the road is difficult to measure (Bray, 1989, 201-5).

Table 4: Total Membership and Estimates of Owner-Driver Membership of the Transport Workers' Union in New South Wales, 1940-1988

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Contributing Membership</th>
<th>Total Financial Membership</th>
<th>Owner-Driver Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>1941</td>
<td>4,299</td>
<td>2,958</td>
<td>na</td>
</tr>
<tr>
<td>1944</td>
<td>7,868</td>
<td>6,604</td>
<td>500</td>
</tr>
<tr>
<td>1945</td>
<td>na</td>
<td>5,500</td>
<td>1,000</td>
</tr>
<tr>
<td>1946</td>
<td>na</td>
<td>6,517</td>
<td>2,000</td>
</tr>
<tr>
<td>1950</td>
<td>23,088</td>
<td>12,194</td>
<td>4,746</td>
</tr>
<tr>
<td>1957</td>
<td>28,745</td>
<td>na</td>
<td>4,609</td>
</tr>
<tr>
<td>1967</td>
<td>na</td>
<td>21,928</td>
<td>4,239</td>
</tr>
<tr>
<td>1975-76</td>
<td>na</td>
<td>35,000</td>
<td>5,000</td>
</tr>
<tr>
<td>1978-79</td>
<td>na</td>
<td>36,000</td>
<td>6,000</td>
</tr>
<tr>
<td>1987</td>
<td>na</td>
<td>38,605</td>
<td>7,916</td>
</tr>
<tr>
<td>1988</td>
<td>na</td>
<td>41,305</td>
<td>8,096</td>
</tr>
</tbody>
</table>

Notes: (1) na = not available
(2) No systematic statistics were kept by the TWU on owner-driver membership. Consequently, these estimates should be accepted with some caution.
(3) 'Contributing membership' included all members on the union's books, while 'financial membership' includes only those members whose dues were fully paid up.

Sources: Bray (1989, 166); Correspondence, Theodore (TWU Computer Consultant) to McLean, 13/12/89.

The union also sought state regulation through the industrial arbitration system. Here, the union had to overcome two hurdles: it had to ensure that the system had the jurisdiction to regulate owner-driver rates and conditions and it then had to secure particular awards containing owner-driver provisions. The former task proved more difficult than expected. As mentioned above, most owner-drivers are classified as 'independent contractors' rather than 'employees' at common law and were therefore excluded from coverage of the arbitration system. In an effort to overcome this, the union was able to extract three legislative changes from the Australian Labor Party (ALP) government which ruled New South Wales
throughout the period. The Industrial Arbitration Act was amended in 1943, 1951 and 1957 with the intention of bringing owner-drivers and taxi-drivers within the scope of the Act. However, the effect of each of these amendments was subsequently voided by court action initiated by employer groups (Industrial Commission, 1970, Chapter 3; Bray, 1989, 208-15).

Given these setbacks to its jurisdictional goals, the union's minor victories in the award arena proved ephemeral. After the first of the legislative amendments in 1943, the union pushed for and eventually gained owner-driver provisions in a number of road transport awards after 1945 (for example, Industrial Commission, 1945). However, despite the claims by union officials of a great victory for owner-drivers, subsequent experience showed that these provisions applied only to a very small number of owner-drivers who were defined at common law as 'employees', while the vast majority of owner-drivers continued to operate beyond the scope of these legally-binding minimum standards (Bray, 1989, 212-15). These failures, along with the growing awareness among the union leadership of the 'owner-driver problem' led the union to push for further legislative change.

Eventually, in 1959, the TWU achieved a fourth set of legislative amendments, most importantly sections 88E and 88F of the Industrial Arbitration Act. Section 88E continued an earlier approach by 'deeming' certain groups of workers (including owner-drivers) not normally regarded as 'employees' at common law to be 'employees' for the purposes of the Industrial Arbitration, Annual Holidays and Long Service Leave Acts. Section 88F empowered the Industrial Commission to declare void certain contracts for the performance of work (including those for the sale of trucks 'in-work') if those contracts were found to be 'unfair, harsh or unconscionable'. Section 88F later came to be widely accepted by all sides of industry as a valuable legal instrument (Industrial Commission, 1970, Appendix 13), but section 88E was perceived as a real challenge to those groups opposing state regulation of owner-drivers and subsequent years saw a fierce battle over union attempts to bring the new law into operation.

With the failure of the various attempts at state regulation, the TWU was forced to rely almost exclusively on collective bargaining for effective collective regulation. This method, however, required either employer support or strong organisation among owner-drivers - a characteristic evident in only isolated sections of the union's membership. For example, from 1950 the union negotiated collective agreements with the Ricegrowers' Association covering owner-drivers carting rice in rural areas and, during the 1950s, the delivery of newspapers by owner-drivers from the printers to retail outlets was regulated by agreements between the union and the newspaper proprietors. These agreements were given legal backing by registration under section 11 of the Industrial Arbitration Act (Bray, 1989, Appendix 8.1). As well, from the 1940s onwards, the union regularly negotiated owner-driver rates with the Department of Main Roads, although the outcomes of these negotiations were then incorporated into rate schedules used by the Department rather than
formal collective agreements. Although these collective agreements brought benefits to the owner-drivers involved, they covered only a small number in total. The collective bargaining method was further flawed by the need to gain employer consent to register agreements, and thereby give them legal effect, and by the capacity of non-signatories to undercut the rates and conditions contained in the agreements.

In summary, the 1940-1959 period saw the TWU seriously take up the owner-driver cause for the first time. The union's activities resulted in increased owner-driver membership of the union and some limited regulatory gains were made by way of collective bargaining in a small number of industry sectors. However, the broader ambitions of the union, especially with respect to state regulation, were frustrated. The main source of optimism at the end of the period was the promise offered by the new sections 88E and 88F of the Industrial Arbitration Act, passed in 1959.

1960-1979: Successes and Employer Backlash

During 1959 the NSW Branch of the TWU experienced a wholesale change in leadership, with Platt and his supporters being replaced by a group led by E.A. Wilmot. This latter group (later led by E.M. McBeatty) continued to dominate the union's leadership throughout the subsequent two decades (Bray & Rimmer, 1987, Chapters 7 & 8). The Wilmot leadership brought a new enthusiasm towards the recruitment and regulation of owner-drivers not simply because of any commitment to owner-drivers, but also because of poor union finances, a need for the new officials to establish stronger power bases among members and concern about the growing numbers of owner-drivers and their impact on the work, wages and conditions of employee-drivers (Bray & Rimmer, 1986, 444-7).

Campaigns launched by the union in the early 1960s netted new owner-driver members, especially in the metropolitan yards of the big freight forwarders and in the ready mixed concrete industry. As Table 4 shows, the union claimed 4,239 owner-drivers as financial members in 1967. Later years saw further membership increases, including a new section among tip truck operators. By the late 1970s, the estimated owner-driver membership totalled 6,000. Despite these membership gains, the union's organisational strength among owner-driver varied considerably across industry sectors: some (like the ready mixed concrete industry) were almost completely organised, while others (like interstate and general cartage) lagged far behind.

Throughout the 1960-1979 period, the TWU continued to advocate state regulation of owner-driver rates and conditions. Traffic and driving regulations did not change significantly during the 1960s, but the 1970s saw increasing concern over the safety implications of rate-cutting, excessive driving hours, overloading and speeding. However, this concern did not result in widespread agreement about regulatory solutions (Commission of Enquiry into the NSW Road Freight Industry, Volume IV). The union also failed in its
efforts, via political lobbying and submissions to government inquiries, to gain any economic regulation of the industry (Bray, 1989, 237-8, 261-3).

It was in the area of industrial arbitration that the union made considerable, albeit much delayed, progress in this period. In the early 1960s, the union embarked upon campaigns to standardise and improve owner-driver rates and conditions in a number of industry sectors (Voice of the Transport Worker, December 1960, 2 and December 1961, 2). At first these campaigns focused on collective bargaining and they encountered different sectoral responses from employers. But when the union began to seek assistance from the arbitration system through section 88E of the Industrial Arbitration Act, employer opposition coalesced. The result was an extraordinary six-year legal battle in which several employer groups fought to prevent the TWU from using section 88E to regulate owner-driver rates and conditions. The details of this battle are recounted elsewhere (Bray & Rimmer, 1986, 449-50; Bray, 1989, 228-37), so suffice it to say that it had two significant outcomes. First, it effectively prevented the TWU from gaining any advantage from section 88E throughout the 1960s. The only exceptions were in the ready mixed concrete industry and, in the 1970s, in the Department of Main Roads. Second, the legal battle led to an extensive review of the operation of section 88E by the Industrial Commission of New South Wales. The Commission's report, released in 1970 (Industrial Commission, 1970), broadly supported the TWU's efforts to operationalize the legislation, criticised employers for their stubborn opposition and recommended to the then Liberal/Country Party Coalition government new legislative provisions which would end the legal stalemate.

The TWU, of course, considered the Industrial Commission's report a great victory, but the victory meant little in the short term. Employer groups successfully lobbied the government and the report's recommendations were not implemented. The TWU had to await a change of government, which came with the election of the Wran ALP government in May 1976. Even then, a variety of factors intervened to delay the passing of legislation until April 1979, when the Industrial Arbitration (Amendment) Act essentially implemented the 1970 recommendations of the Industrial Commission.

The 1979 Act was exactly the type of legislation the TWU had been seeking for over 30 years and it was to become a model for other unions with 'marginal worker' problems and for branches of the TWU in other states. However, the delays which postponed the introduction of the Act until 1979 meant that the union was forced throughout the 1960s and 1970s to pursue regulation of owner-drivers rates and conditions through collective bargaining at an industry sector level. This avenue produced 8 separate collective agreements during the 1960s and 35 agreements during the 1970s, many being regularly renegotiated and each being registered under section 11 of the Industrial Arbitration Act (Bray, 1989, Appendices 9.1 and 10.1). There was also an unknown number of agreements which were not registered. These
agreements covered owner-drivers in industry sectors and in individual companies.

Despite the growing incidence of collective agreements, the collective bargaining method continued to be second best for the TWU. Apart from the flaws of collective bargaining discussed above, another significant problem with collective bargaining emerged during the 1970s; namely, the federal Trade Practices Act passed in 1974. One of the main aims of this legislation was to increase competition in product markets by outlawing contracts, arrangements or understandings which were regarded as restraining competition. In the months immediately following the passing of this legislation, it seemed that it threatened many owner-driver agreements because by their very nature they sought to reduce competition among owner-drivers by standardising the rates and conditions they received. This threat later receded when the Trade Practices Commission gave authorisation for the various organisations to continue negotiating owner-driver agreements, but the Act remained a cause of concern, especially as reinterpretation of the Act by the Commission could easily result in the withdrawal of the authorisations and the outlawing of collective bargaining for owner-drivers.

In summary, the 1960-1979 period saw the TWU continuing to recruit owner-drivers as members and again seeking the regulation of their rates and conditions. The biggest achievement came in 1979, with the passing of legislation which finally brought owner-drivers within the scope of the industrial arbitration system, but the battle leading up to this event was a long and frustrating one. As a result of the long delays in gaining the necessary legislation, the union was forced again to rely on collective bargaining at a sectoral or company level. Continuing advocacy of economic regulation bore no fruit at all, while traffic and driving regulations also failed to deliver effective regulation.

1980-1988: A Precarious Victory

The 1980s were good years for the TWU in its attempts to recruit and regulate owner-drivers and the main cause was the Industrial Arbitration (Amendment) Act of 1979. This Act effectively repealed section 88E and introduced a new Part VIIIA into the Industrial Arbitration Act. The approach in the new legislation differed to the old because it made no attempt to 'deem' owner-drivers to be 'employees'. Instead, it recognised single-truck owner-drivers as self-employed 'contract carriers' and established a comprehensive system of regulation in which contracts between contract carriers and 'principal contractors' could be determined and enforced (CCH, 1980). This system allowed the registration of 'Associations of Contract Carriers' and 'Associations of Principal Contractors' to represent each side of these contracts. More importantly for the TWU, the Act gave the union special status. For a transitional period the union had exclusive rights to represent contract carriers (ie. owner-drivers) in most sectors of road transport and shared rights in all but one of the remaining sectors. Only in brick carrying
was the union excluded (CCH, 1980, 68-9). The TWU registered as an Association of Contract Carriers in June 1980 and the new opportunities offered by the Act enabled it to increase its owner-driver membership over the following years. As Table 4 shows, the union claimed over 8,000 owner-driver members by the end of 1988.

The union's efforts to regulate owner-driver rates and conditions had mixed success during the 1980s. As in previous years, its advocacy of economic regulation fell on deaf ears in both state and federal governments (for example, Truckin' Life, August 1981, 26-30; National Road Freight Industry Inquiry, 1984). Traffic and driving regulations and road safety became matters of some controversy several times during the decade and the union was able to participate in the formulation of government policy on important matters such as tachographs and truck speed limiters. It was, however, the industrial arbitration system which again offered the union its main opportunities.

The 1979 Industrial Arbitration (Amendment) Act established two main methods by which owner-driver rates and conditions could be regulated (CCH, 1980, Chapter 7). First, an Association of Contract Carriers could engage in collective bargaining with either a Principal Contractor or an Association of Principal Contractors to produce a collective agreement, which could then be given legal effect by registration under section 91H. This was similar to the procedure, used in earlier periods, by which Industrial Agreements were registered under section 11. Second, the associations could seek intervention by a 'Contract Carrier Tribunal' (or the Industrial Commission assuming the powers of such a tribunal), which had the power to make 'Contract Determinations'. This latter procedure was similar to the role of Conciliation Committees in the making of awards for employees. The especially important feature of the determinations is that they, like awards for employees, have 'common rule'; that is, they are legally binding on all principal carriers and contract carriers specified by the Tribunal, irrespective of whether they were parties to the proceedings (CCH, 1980, 50).

Initially, the TWU concentrated its resources on the first of the regulatory methods. In fact, over 40 separate collective agreements covering owner-drivers in particular companies and sectors were registered under section 91H in the 1980-1988 period and many of these were regularly renegotiated (Industrial Registrar, 1989). However, this use of collective bargaining was not dissimilar to the union's activities before the 1979 Act - it simply produced more agreements in a wider range of sectors and companies. Furthermore, the old limitations of collective bargaining re-emerged and the union soon turned towards determinations and their 'common rule' provisions as the solution. The need to prevent non-signatories undercutting the provisions of collective agreements was articulated by the TWU Branch Secretary in mid-1981:
The job still requires our officials to get into the owner-driver situation in respect of our registration on behalf of these people. Large companies are prepared to come to the party, however, there are still plenty of mavericks around and they are squeezing the owner-driver. Common rule determinations are the answer... These determinations would be like awards for employees and be minimums.(sic)(Voice of the Transport Worker, June-July 1981, 9)

A TWU Organiser put it another way:

... the employer groups were also saying I will pay the 91H and I will also observe any determination that is legal through the courts. I will also use this document for a rate increase..., the proviso is that my opposition pay the same rates and conditions that I do. (emphasis added) (ibid., December 1982, 70)

By the end of 1988, the TWU had established eight determinations covering owner-drivers in New South Wales; these determinations are listed in Table 5. The relationship between these determinations is similar to the pattern of awards governing employee-drivers in New South Wales road transport. That is, there is a combination of smaller determinations covering owner-drivers in specific industry sectors with a larger general determination (ie. the Transport Industry - General Carriers Determination), which is designed to cover most owner-drivers not included in the smaller determinations or by section 91H agreements.

**Table 5: Contract Determinations Covering Owner-Drivers in New South Wales, 1988**

<table>
<thead>
<tr>
<th>Title</th>
<th>First Determined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transport Industry - Interstate Carriers</td>
<td>12/12/80</td>
</tr>
<tr>
<td>Transport Industry - Concrete Haulage</td>
<td>20/11/81</td>
</tr>
<tr>
<td>Transport Industry - Car Carriers</td>
<td>21/4/82</td>
</tr>
<tr>
<td>Transport Industry - General Carriers</td>
<td>31/5/84</td>
</tr>
<tr>
<td>Transport Industry - Excavated Materials</td>
<td>12/8/85</td>
</tr>
<tr>
<td>Transport Industry - Concrete Haulage - Mini Trucks</td>
<td>3/9/85</td>
</tr>
<tr>
<td>Transport Industry - Quarried Materials</td>
<td>13/3/86</td>
</tr>
<tr>
<td>Transport Industry - Courier &amp; Taxi Truck</td>
<td>13/4/87</td>
</tr>
</tbody>
</table>

**Source:** New South Wales Industrial Gazette.

This combination of determinations (and agreements) meant that legally-binding minimum standards are available to most owner-drivers operating in New South Wales road transport. The union was able to use the
determinations in several ways. It was, for example, far easier to convince contractors to pay and owner-drivers to demand the rates contained in the determinations when the union could say 'these rates must be paid by law'. Ultimately, of course, the union could also enforce these rates and conditions by taking legal action against those breaching determinations. Finally, the determinations provided the union with good propaganda by which it could persuade owner-drivers that the union was 'doing something' for owner-drivers and that, therefore, owner-drivers should 'do something' for themselves by collectively demanding the rates contained in determinations. Thus, the TWU had finally gained the assistance from the state it had been seeking since the early 1940s.

The magnitude of the TWU's victory in New South Wales is emphasised by the fact that it is unique among the Australian states. A number of the union's branches in the other states attempted to get similar legislation during the 1980s but, without exception, these attempts failed. The federal TWU was obstructed by different obstacles, most obviously the Constitution, and its efforts to bring state regulation to the federal system also failed. The New South Wales system of owner-driver regulation is almost unique.

However, as impressive as the TWU's victory in New South Wales was, it is important to recognise that the victory was a precarious one. First, there is the problem of enforcement of the determinations and agreements. While the establishment of these legal instruments gives the union valuable ammunition in their fight to regulate owner-drivers, it does not eliminate the underlying economic forces and attitudes which produced the owner-driver problem in the first place. Entry to the industry is still relatively easy, competition is still strong in road transport product markets, the 'Burt Reynolds syndrome' still operates, owner-drivers are still often in excess supply and have poor bargaining power. As a result of these forces, many owner-drivers are still tempted to or forced to consider rate-cutting and breaching of determinations and agreements, especially in times of recession and weak demand for road transport services. As the union found in the early 1980s, enforcement of minimum standards will always be a difficult struggle in these circumstances (Voice of the Transport Worker, December 1982, April 1983, August 1983).

Second, the TWU's victory was largely achieved by persuading New South Wales governments to introduce the appropriate legislation. In fact, the relatively long periods of ALP government in New South Wales and the union's ready access to ALP Ministers go a long way towards explaining the unusual success of the TWU in this state. The corollary of this is that the legislation, and therefore the backbone of the union's success, can just as easily be removed by a less sympathetic government.
CONCLUSIONS

Like many trade unions, the TWU is confronted with a dilemma emanating from a group of marginal workers. In this chapter, that dilemma has been referred to as the 'owner-driver problem'. The causes of this problem can at least partly be traced to structural features of road transport product markets, production processes and labour markets. These features mean that as long as owner-drivers behave individualistically, excess supply and their weak bargaining position will tend to produce uncontrolled rate-cutting and declining owner-driver conditions. These outcomes not only threaten the livelihood of the owner-drivers themselves, but also undermine the position of both employee-drivers and the TWU.

The TWU's response to this problem has since 1942 focused not on excluding owner-drivers from the union or the industry, but on recruiting them into the union and regulating their rates and conditions. The recruitment strategy has resulted in large numbers of owner-drivers joining the union, although it is difficult to tell what proportion of all owner-drivers have joined and the effectiveness of owner-driver organisation varies considerably across industry sectors. The only certainty is that the TWU has been more successful than any other road transport organisation in recruiting owner-drivers (Bray, 1989, Chapter 7).

The TWU's regulatory strategy employed a number of different methods. Collective bargaining was the most enduring and it was quite successful in some industry sectors. However, collective bargaining also had significant flaws which forced the union to seek assistance from the state. Throughout the 1942-1988 period, the union sought economic regulation (through licensing and limitations on entry into the industry), but it completely failed to convince governments of all political persuasions to implement this option. The union found it easier to advocate traffic and driving regulations because of the need to protect road safety, but these measures only addressed the symptoms rather than the cause of the problem, and enforcement continued to be a difficulty.

By far the most successful method for the TWU in New South Wales involved the industrial arbitration system. By bringing owner-drivers within the scope of the arbitration system, legally-binding minimum rates and conditions could be established. This goal was frustrated for many years, but finally the union achieved it in 1979. This victory, despite its precariousness, is unique within the Australian road transport industry and most unusual compared to the regulation of other types of marginal workers in other industries.

How can the TWU's success with this form of regulation in New South Wales be explained? As the introduction to this chapter suggested, this question can only be answered by combining structural factors with the strategic decisions and actions of the parties to regulation. To perhaps
oversimplify somewhat, the two elements which seem to distinguish the present case from others are the political environment in which the TWU worked and the peculiar strategies pursued by the union throughout the period. Clearly, many structural features of the road transport industry in New South Wales are replicated in other states of Australia, but one external factor which was unique in the present context was the political complexion of New South Wales governments. The long periods of ALP government in this state (that is, from 1942 to 1965 and 1976 to 1988) gave unions in this state the opportunity to gain political concessions over many years. The TWU, whose strategy towards owner-drivers relied so much on gaining assistance from the state, was able to realise this opportunity very effectively. If this analysis is correct, then the union's regulatory success is, as discussed above, rather vulnerable to changes in the political climate.

ENDNOTES

1 This chapter examines only the road freight industry and no attempt is made to extend the analysis to road passenger transport.

2 The overall argument and the empirical account are largely drawn from previous research by the author. For more extensive referencing of the material presented in this chapter, see Bray (1989) and (1990).

3 Child (1985, 123) recognises the importance of divisibility of the production process for contracting arrangements.


5 The federal TWU sought several changes to the federal Conciliation and Arbitration Act during the decade; see Hancock (1985, 355-66); and Truckin' Life, September 1984, 13; August 1985, 40-1; May 1987, 9.

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8 Contracting Out in the Public Sector: the Case of Computer Services

Belinda Probert & Judy Wajcman

INTRODUCTION

By the end of the 1980s federal, state and local governments in Australia were spending millions of dollars every year engaging consultants and contract workers from the private sector to provide goods and services that could be (or previously had been) produced by government employees themselves. The kind of work that is contracted out in this way is extremely varied, and includes the cleaning of public buildings, garbage collection, the provision of training for public servants, and the development of computer programmes to run the taxation system.

The trend towards an increasing reliance on external consultants and contract labour that emerged strongly in the 1980s is not unique to Australia. It has been loudly advocated in most Western industrialised countries, especially the United States, the United Kingdom, the Netherlands, France and Japan (Hirsch, 1989, 536). Support for the contracting out of public sector activities has been a central element in the revival of conservative political ideologies, reflecting a generalised hostility to any further growth of public sector activities, and a celebration of the principles of 'small government'. The Thatcher regime in Britain, for example, has pursued policies of privatisation which range from selling off publicly owned enterprises such as those supplying gas, water and telephone services, to encouraging local councils to replace council run garbage collection with the services of a private contractor. In the United States it is perhaps the privatisation of prisons which has attracted most interest.

The Liberal Party of Australia has clearly been influenced by the Thatcher and Reagan records in this matter, and its leader, John Hewson, argued explicitly for privatisation in his previous role of Shadow Minister of Finance. He announced that 'an essential element of our planned audit of the
Commonwealth Government finances, which will be initiated on our first day in Government, will be to identify the scope for contracting out.' In this 1989 statement he went on to specify the kinds of activities that were obvious candidates for contracting out, and they included repairs and maintenance to public buildings, cleaning and catering, secretarial services, and the planning, design and construction of government buildings (quoted in Australian Council of Trade Unions Public Sector Working Party, nd, 11). While new right politicians have had relatively little electoral success in Australia, their ideas have been influential in management circles, and within the political culture generally. The Labor Party has tried intermittently to raise the possibility of selling off major state-owned enterprises such as Australian Airlines or Qantas and in 1990, amidst considerable controversy, such a policy was accepted at a special meeting of the Party's National Conference. There has been far less public discussion, as yet, of the less dramatic form of privatisation that has been steadily occurring with the increased buying in of labour services to replace public employment.

Alongside politically driven campaigns in favour of privatisation and small government there have been powerful economic pressures working in the same direction in the 1980s. This has been a decade of fiscal crisis, with many Western governments struggling (often reluctantly) to reduce public expenditure, sometimes by cutting back on the services provided, sometimes by imposing staffing freezes. Thus, in some areas, the justification used by public sector managers for their increased reliance on private consultants and contractors has been overwhelmingly financial. In the case of cleaning, for example, cost savings have been the driving force behind the replacement of staff with subcontracted labour. When relatively unskilled tasks such as cleaning and garbage collection are put up for tender it is common for subcontractors to present extremely competitive bids in comparison with the cost of maintaining an 'in-house' workforce. Their lower costs are often a direct reflection of their ability to supply non-union labour at lower rates of pay. Similarly, some employment agencies sell themselves specifically as suppliers of cheaper labour, with blandishments such as:

Imagine a workforce you can hire and de-hire without hassles. A labour force that you can turn on when you need it and off when you don't. A workforce free of payroll tax, workers compensation, annual, sick and long service leave, superannuation and termination costs... Call our labour controllers NOW! (Daly Smith Corporation, 1990, 887)

Critics of contracting out in the public sector have tended to focus on areas where it has led to a deterioration in the wages and conditions of those doing the work, and to a decline in the quality of service provided. There have been several studies from Britain, for example, which suggest that the contracting out of local council services such as cleaning and catering has led to falling standards in the work performed, and to lower wages for the contract labour force compared to council employees. Contractors' profits
have been shown to depend on an intensification of labour, and reduced levels of employment in the industry as a whole. In one well-publicised Australian case, that of the Doncaster-Templestowe Municipality in Melbourne, a garbage removal contractor undercut other tenders by $700,000 through waiving employees' award conditions (Evatt Research Centre, 1990, 7; see also Bernstein, 1986; and Brosnan and Wilkinson, 1989).

While these case studies have contributed greatly to our knowledge about the contracting out of relatively unskilled and labour intensive public services, less attention has been paid to the contracting out of highly skilled professional work, and the widespread use of external consultants within the public sector. Alongside the contract cleaners are to be found growing numbers of contract tax specialists, engineers, publishers, draughtsmen, and computing specialists, as well as management consultants of different kinds. This chapter is concerned with one of these groups - the computer specialists. Unlike the marginal workers of most of the case studies in this volume, computer specialists could be said to benefit from their contract status in a number of ways. However, like the lower-skilled public sector contractors in areas like cleaning and catering, they could be said to be undermining the working conditions of those who remain public sector employees, and to be undermining the public sector itself.

The chapter examines the contracting out of computer work by government agencies in Australia, both in terms of management's motives and interests and the contractors' motives and interests. It goes on to weigh up the conflicting accounts that have been presented about the effects of this increased reliance on contract computer specialists on quality of service, and on the employment conditions of both the contractors and staff. Against this background it is then possible to discuss the attempts by different interested parties to organise and regulate this form of employment. The discussion is necessarily speculative in parts, since the occupation of computer specialist is itself a very new one, with no historical traditions on which to base an analysis, and there has, as yet, been little substantial study of the occupational and workplace culture that is developing around the computer.

CONSULTANTS, CONTRACTORS AND THE AUSTRALIAN PUBLIC SERVICE

Within the public sector (as in the private sector) much of the buying in of high skill labour comes under the title of employing 'consultants' rather than 'contractors'. There is no universally acceptable way of defining these two categories, but an enquiry by the Joint Committee of Public Accounts into the use of consultants by Commonwealth Departments defined consultants as 'specialists engaged to undertake short-term projects which assist the development or refinement of a department's activities. In contrast, external contractors are usually regarded as tradespeople or professionals engaged on a
temporary basis to undertake more routine work, or to help the department carry out its already defined activities' (Joint Committee, 1990, 2). The committee admitted, however, that the line was often hard to draw, and particularly so in the case of computer personnel. Alternatively, consultants are defined as people who come in to examine a particular part of an organisation's operations and who write a report, while contractors come in to do a particular task. More cynically, the Chairman of the Contractor's Association, who works as a contractor in computing, gave the insider's definition of a consultant as someone 'who borrows your watch and tells you what time it is'. Whatever the distinction, one thing everyone agreed on was that consultants were far more expensive than contractors.

The recently completed inquiry by the Joint Committee of Public Accounts was provoked by comments made by the Auditor-General to the effect that millions of dollars were being spent without proper procedures for selecting consultants, or monitoring and evaluating their work. The committee was in fact unable to establish the full extent of consultancy work for Commonwealth departments because the departments were unable, or claimed to be unable, to provide the relevant figures. Despite the fact that all departments are required to publish details of their use of consultants in their annual reports, the committee discovered that most had failed to do so. The committee requested details from 'negligent departments' but 'discovered at this stage that departments which were extensive users of consultants experienced difficulty in providing this information' (Joint Committee, 1990, 16). Subsequent passages concerning the search for information in the committee's report evoke images of Jim Hacker, Minister for Local Administration in the popular television series, trying to get a straight answer from Sir Humphrey Appleby.

Whatever the total figures, consultancies come in very different shapes and sizes. At one extreme there are major long term contracts such as the environmental impact studies carried out for the Department of Defence costing millions of dollars, while at the other there is the Department of Immigration's use of individuals to run one-day training programmes on 'Sexuality and Relationship Counselling', at a modest $350. To take an example in the computing area, the Australian Taxation Office (ATO) spent $3.25 million on computer consultants in 1989/90 and $6.5 million on computer contractors. A wide variety of departments hire temporary computer programmers from Computer Power for $36 dollars an hour. Overall, there is no doubt that spending on external computing services is a significant part of many departments' spending on labour. Within the Department of Immigration as a whole, for example, well over one million dollars was scheduled to be spent in 1988/89 on contracts in the computing area, while the Information Systems area of Telecom spent almost $10 million on computing contractors and consultants in the same year.

If there is one thing on which all parties agree it is that consultants are expensive, and it is widely assumed that contractors also earn more than those
on the permanent payroll. In response to this, government departments point to a variety of factors associated with contracting which lead, it is claimed, to greater efficiency and productivity. One of these is the periodic or short-term nature of the need for certain specialist skills or services. Thus the Department of Defence occasionally needs expert advice on the environmental impact of proposed activities, for which it can hardly justify maintaining permanent qualified staff. In the area of computing, which affects almost all government agencies, similar justifications are commonplace. A great deal of computing work involves relatively short term projects lasting three, six or twelve months. Contractors can be brought in to complete these projects without maintaining skilled computer personnel on permanent staff.

In 1986 Computing Australia conducted a survey into the growth of contract work in computer programming. According to this, the major sources of contract work were Public Utilities/Administration which accounted for 41 per cent of contractors, followed by Manufacturing, Wholesale/Distribution, and Banking/Finance/Insurance (Computing Australia, 1986, 16). The same survey concluded that the main reasons for the use of contractors in all these areas were the short-term nature of the work, the specialised nature of the skills required, difficulties in recruiting suitably qualified staff, the cost advantages of using contractors rather than full-time staff, and their greater productivity (ibid., 3-4). Much the same kinds of motives can still be identified in the continued employment of contractors by public sector organisations. This aspect of the contracting out of work is part of a much more widespread move (in the private sector as much as the public) to externalise certain functions and reduce levels of permanent employment. It has become common, for example, for large scale continuous process and manufacturing firms to rely on contract labour for their periodic maintenance needs (Clutterbuck, 1985). This trend is associated with the growth of large-scale employment agencies - 'people houses' - such as AWA Field Projects, which advertises that it will provide an unparalleled array of multi-skilled personnel, including engineers, technicians and electronics operators. Skilled Engineering, a Melbourne based company, has about 2,500 skilled workers on its books, who are in fact employees of Skilled Engineering, contracted out on specific jobs.

The major attraction of such arrangements is clearly lower labour costs, with firms and government departments able to purchase exactly the amount of labour time they require and no more. In some areas, such as skilled maintenance work, the contract labour force has the added attraction for management of replacing strongly unionised employees. It is also claimed, however, that external contract workers are more productive. Studies of contract cleaning suggest that one important element in this increased productivity is simply the intensification of labour under contracting arrangements. At its most obvious this involves a reduction in the number of hours or number of cleaners allocated to a given task (Brosnan and Wilkinson, 1989, 87). In this context the increased productivity is the result of highly
exploitative practices by the managers of contract cleaning firms. However, increased productivity can also result from contract employment in less directly exploitative ways. A survey of self-employed contract computer programmers who were working from home revealed that most of them thought they were more productive at home. Indeed, about half of them said they had become workaholics since starting to work at home, often working until very late at night and at weekends (Probert and Wajcman, 1988, 444).

An alternative explanation for increased productivity among contract workers stems from the payment systems used. The most common payment system for contract programmers is a combination of hourly (daily) rates and a 'fixed price' for the job. As one consultant put it to me, good managers will draw up contracts which ensure that the required work is completed in the specified time to a specified budget, and this may well ensure high levels of productivity. He went on to contrast this with the situation of public service employees who, he said, had no incentive to produce on time or to finish projects. Their pay is, for the most part, unrelated to their performance.

The suggestion that in-house staff are relatively unproductive, it should be stressed, was not a viewpoint which emerged directly from public sector managers in their submissions to the Joint Committee of Public Accounts. Its interest lies more in its articulation of a commonly held view about the work practices of public servants which may indirectly be important in encouraging a reliance on private sector consultants. During the 1980s, it could be argued, well-established beliefs about the time-serving attitudes and behaviour of all bureaucratic workers were reinforced and reinvigorated by the rise of new right ideas about the importance of competitive, entrepreneurial attitudes. Indeed, this was an issue that the Administrative and Clerical Officers' Association (ACOA), now the Public Sector Union (PSU), raised in their submission to the Joint Committee of Public Accounts inquiry into Commonwealth departments' use of consultants.

ACOA argued that the engagement of private consultants is sometimes the result of simple 'ideological prejudice' in favour of the private sector. In some cases this has taken the form of essentially arbitrary rulings that a certain percentage of some kinds of work should be allocated to the private sector (ACOA, 1988, 6). This concern was also expressed to me by the State Public Services Federation, whose federal industrial officer suggested that public sector managers sometimes appear to be unjustifiably impressed with consultancies as such - as though taken in by the mystique of consultants and their glossy reports. To him this also reflected a lack of trust in their own staff. This issue, the 'Loss of Public Service Confidence', is in fact the last heading in the Joint Committee of Public Account's report. They quote from an eloquent submission on the subject:

It is as though the public service, not just in Australia, but throughout the world, has suffered a crisis of confidence. To an extent this is an inevitable reaction to the excessive faith communities put in their
governments in the post-war years. To a generation brought up on Keynesian economics, low taxes, high growth, low unemployment... our present ills call for a scapegoat, and public servants seem to provide an ideal opportunity...

... it is part of the culture that middle-level public servants are simply not used to selling their own skills, are simply not used to getting up and asserting themselves. Experienced consultants do that every day. (Joint Committee, 1990, 85-6)

Ironically, it was in the private sector that the most clearly stated opposition to the use of computer contractors by management emerged. Major corporations such as Colonial Mutual claim to employ very few contractors. And if they have one or two around, they work side-by-side with a couple of Colonial Mutual employees to ensure their skills are brought into the company. Internal skill shortages are avoided, so it is claimed, not by paying over the odds in salaries but by good management practices which ensure that valued employees with computing skills are listened to. It was even claimed that one contractor working there had been enticed onto the permanent staff. Similarly, Carlton and United Breweries Ltd tries to avoid the use of contractors for the obvious reason that they tend to be more expensive. The services of computer agencies, or what were called somewhat disparagingly 'bodysshops', were avoided wherever possible. The private sector, it seems, is somewhat surprised and baffled by what it sees as the public sector's extravagant use of consultants and contractors.

In explaining their need for contract computing labour, the most common explanation put forward by government departments is probably the claim that computer skills have to be 'bought in' because the skills are simply not available 'in-house'. The shortage of computing expertise within the public service is real enough. It reflects both an absolute shortage of people with computer skills in Australia (Information Industries Education and Training Foundation Ltd, 1989) and also the employment preferences of those who do have the skills. Furthermore, it is often claimed, the public service cannot solve this problem by recruitment and training programmes, since it often does not have the time to recruit and train staff with the specialist skills required for particular tasks. It must, therefore, buy the skills in on contract. This argument, is, however, more questionable. The widespread use of contract labour can actually contribute to the problem it is designed to address - that is, the shortage of internal skills - and in this sense it is a self-fulfilling prophecy. The skills that are bought in replace the need for recruitment and training and will be seen as an alternative to employing new staff unless specific steps are taken to ensure that such skills are also transferred to permanent employees.

There is an alternative reason for questioning whether government departments are in fact likely to support longer term staff recruitment and training policies as a method of overcoming skill shortages in either the
computing area or any other. This reason did not feature in the Joint Committee of Public Accounts report, nor in the submissions made by public sector unions, but it was suggested by several different public sector unionists. It concerned the role of budgeting procedures. Within the public sector generally, severe restrictions on salary spending have been a key element of 1980s expenditure cutting measures. This led to the introduction of staff ceilings but not to workload ceilings. For some enterprising managers the solution to this problem was to arrange for some work to be done 'outside', which enabled them to pay for it out of a different budget. Much of the contract work in computing is not of a short term nature, and departments were effectively taking on new staff even if they did not show up in the salary figures. At the state public service level, unions feel that salary ceilings result in management hating the idea of committing itself to ongoing costs in the form of salaries, even if this might in fact be considerably cheaper than investing annually in large numbers of consultants. Recent changes to budgeting procedures in the public service have given management greater freedom and flexibility in how they spend their budgets, but overall cost cutting pressures still tend to be translated into reductions in full-time staff.

CONTRACTORS AND THE LABOUR MARKET FOR COMPUTER SPECIALISTS

The fact that there are well documented absolute shortages of almost all kinds of computer skills in Australia affects the employment relationships to be found in this area in a number of ways. First and most obvious, the shortages (which are predicted to remain acute for at least several years) exert upward pressure on wage rates. Second, the shortages give individuals with such skills considerable mobility in the labour market. The public sector's reliance on external consultants and contractors stems in part, at least, from the fact that significant numbers of skilled computer programmers prefer the status of independent contractor to that of employee. Both public sector unions and public sector managers agree that they have a problem in retaining computer systems operators (CSOs) once they have gained some experience. There are, however, a number of different reasons that are put forward for this.

The most striking aspect of this problem, though certainly not the most important, is what is widely known as the 'Friday-to-Monday' syndrome, or the 'revolving door' syndrome. These terms refer to situations where public servants leave the public service to join or establish consultancies. Since there is no legislation to prevent it, a public service employee can resign a position (on Friday) and return as a consultant (on Monday) to do precisely the same tasks at a significantly higher fee. Concern about the potential for conflict of interest in this situation has been heightened by publicity about the 'revolving door' activities of defence company executives in the United States. These executives were employed in senior Pentagon posts for several years, and then returned to industry as highly paid consultants on the same kind of
arms contracts that they had overseen whilst at the Pentagon. While not in quite the same league as the Pentagon cases, the Joint Committee of Public Accounts reported a case where 'a public servant, a computer systems officer, had resigned his position in the Parliamentary Information Systems Office (PISO) on 22 April 1988. On the next working day (26 April 1988), however, the officer had returned to his position in PISO as an external computer consultant to perform precisely the same duties for which he was responsible before resigning.' The officer's previous salary as a permanent public servant was $46,000 whereas as a consultant his engagement cost the Parliament $101,270 (Joint Committee, 1990, 26).

It is clear from the way that many people speak of the Friday-to-Monday syndrome that they see employees who become contractors as primarily motivated by financial interests. There is no doubt that labour market shortages in the computing area mean that salaries outside the public service are extremely competitive. The impression of contractors as a group driven by pecuniary self-interest might be reinforced by the knowledge that the Contractors' Association was set up to help contractors fight the ATO rather than to ensure the maintenance of professional standards among those in the contract labour market. If the public service was unable to regulate the Friday-to-Monday syndrome, the ATO did not hesitate. Employees who continue to work for the same employer after becoming contractors, and contractors who work for one employer for long periods of time, are finding it difficult to convince the Commissioner for Taxation that they are not in fact employees for taxation purposes.

It would be an oversimplification, however, to see the decision to become a contractor as motivated primarily by a desire for greater pay. While it is true that computer programmers are unlikely to opt out of secure employment without the prospect of good earnings as contractors, these could be seen as a trade off against the insecurity of self-employment. As a contractor a computer programmer is constantly faced with the problem of finding new jobs, and there is no annual leave loading, superannuation or sick pay to rely on. This is not to suggest that there is any question of financial deprivation here, but rather to raise the question of other motives. Contractors themselves do not put financial interests as the most important factor in contracting, and there is little reason to believe that this is because they feel it is socially unacceptable to confess to pecuniary motives. In a small survey of computing contractors working from their homes, which was carried out in 1987-8, the majority claimed that they had chosen this option because of the flexibility and convenience it represented, and because it allowed them to work for themselves. Asked to define what they meant by flexibility they said it meant choosing your own hours of work, independence, setting your own priorities, and being able to choose jobs and clients (Probert and Wajcman, 1988, 444).

The Chairman of the Contractors' Association also maintained that the reason people became contractors was to have more control over their work,
to be more independent. He also put the question of financial interests in a somewhat different light by suggesting that becoming a contractor was a way of avoiding the 'management' work which usually accompanies salary increases in large organisations. In other words, it was possible to confine yourself to more advanced and better paid technical work as a contractor. Similar sentiments were expressed by many public sector employees and the PSU. They argue that many technically competent computer systems officers (CSOs) have no desire to become managers of other people, only to become ever more technically specialist. However, within the public service there has, until now, been no provision for high level promotion without managerial responsibilities. The situation has been exacerbated by the rapid rise of CSOs through the existing award structure - a reflection of skill shortages in this area - which brings them equally rapidly to grades requiring managerial work. The Information Systems Unit at Telecom which employs very large numbers of CSOs illustrates this problem clearly. There are at present five CSO grades. Grade One has seven increments or rungs, while Grade Two has four, Grade Three has three, and so on. In the 'old days' a computer programmer came in at the bottom rung of the Grade One, and went up one increment a year until they reached the second grade, and so on all the way up through the grades. Today computer programmers come in somewhere near the bottom of Grade One, but within six months to a year they are promoted to CSO 2 in order to prevent them leaving all together. Promotion, in turn, leads invariably to greater responsibility and the requirement to supervise other workers. Very many technical experts do not wish to be involved in this management work, and may indeed be not very good at it. One result of this pattern of accelerated advancement is that high ranking CSOs tend to be far less experienced today than in the past.

CRITIQUES OF CONTRACTING OUT

Concern about the contracting out of computer work by government agencies takes a number of forms. Unlike the contracting out of low skill work, or of services such as catering, the focus of this concern has rarely been the welfare of those doing the contract work. While there must be unsuccessful contractors as well as successful ones, it is the latter who dominate debate.

As in the low pay areas, however, there has been critical comment about the effect that contract work has on the quality of work done and the quality of service provided. There is considerable debate, for example, about whether the engagement of outside consultants guarantees an objective assessment of particular problems or issues - a view that consultants and the managers who employ them are concerned to promote. There have been many well substantiated claims that specific consultants are engaged precisely to guarantee support for a particular management decision or position. In their submission to the Joint Committee of Public Accounts on the use of
consultants by Commonwealth departments, ACOA drew attention to the use of external consultants:

... as a device to assist the officials who hire them to promote a 'cause' or policy option, within the bureaucracy, the political process, or the general community. (ACOA, 1988, 6)

As an example of this they cited the research study jointly funded by the Committee for Economic Development of Australia and the Department of Immigration and Ethnic Affairs, which was used to justify increased levels of immigration because it 'found' that immigration did not affect unemployment levels (ibid.). The finding was in fact built into the assumptions of the study, according to ACOA (and other independent commentators).

Critics of the public sector's increasing reliance on external consultants and contractors find little to reassure them in the final report of the Joint Committee of Public Accounts. It notes that despite the existence of service-wide guidelines on the engagement of consultants, 'scant attention has been paid to them' (Joint Committee, 1990, v). The Committee was seriously concerned about the absence of mechanisms to ensure accountability, and the failure to develop some kind of performance indicators to assess the cost-effectiveness of consultants' services (ibid., vi). In their submission to the inquiry, the Association of Draughting, Supervisory and Technical Employees (ADSTE) went even further, arguing that in the areas of work covered by the Association there was a tendency for consultants and contractors to lack any long term commitment to the projects they were employed on. They were also seen to be unwilling to consult with unions and other interested parties (ADSTE, 1988).

Alongside these kinds of concerns about the quality of work done by consultants and contractors there are a series of questions that have been raised about the effect of their widespread use on the employment conditions and employment prospects of those doing similar kinds of work as public sector employees. These were issues raised by a number of organisations representing staff or employee interests before the Joint Committee of Public Accounts inquiry, including ADSTE, the Association of Professional Engineers, the Institute of Engineers, Construction Services (Department of Administrative Services), and what was then the ACOA.

The strongest theme to emerge from their submissions was that of the danger of deskilling work done by employees, and curtailing the career structure available within the public sector. ADSTE, for example, argued that the side effect of the use of the consultants to perform departmental tasks in draughting and technical areas has been a deskilling of staff. They also argued that in many areas training and staff development had been severely curtailed because of the same cost cutting measures that encouraged reliance on contract work. Similarly, the numbers of engineers recruited by the Public Service has diminished over the years, greatly reducing the number of people
within the Service with enough 'hands-on' experience to brief consultants adequately (Joint Committee, 1990, 81). Engineers employed by Australian Construction Services (to which the former policy of allocating 50 per cent of work to the private sector applied) argued that it was not the 50 per cent rule per se that affected in-house engineers, but the way in which it was applied. Their concern was that it was the most interesting and challenging aspects of the projects that were contracted out to consultants, resulting in the loss of skills from the public sector. The Department of Administrative Services likewise acknowledged that it had reduced the range of skills maintained in-house in specialised areas within architecture and engineering (Joint Committee, 1990, 81). In addition, they had not developed in-house some very specialised computer information and technology skills which were required, leading to reliance on outside consultants.

The majority of public sector employees working in computing are covered by the PSU which, as the then ACOA, made a major submission to the Joint Committee of Public Accounts inquiry. In particular they referred to the effective 'de-skilling' of the public sector wherever Departments made a regular practice of contracting out research and similar tasks, 'leaving only the routine, less challenging and interesting tasks to Public Servants' (ACOA, 1988, 8). ACOA claimed that the ideology of 'smaller government' as it is reflected in policies of contracting out is 'already having a significant negative effect on career opportunities for Public Servants'. This has led to the loss of talented staff and greater difficulty in recruiting replacements. They make the point that these trends are reinforced by the medium to long term reliance of many Commonwealth departments on external consultants 'to do work of the same type as an alternative to permanent Public Servants' (ACOA, 1988, 9-10).

It is in the area of computer programmers and other computing professionals that there has been a particular tendency to engage consultants to do the same work as permanent staff. This is partly as a result of the well documented and chronic shortage of people with these skills in Australia, but it is in itself a practice which contributes to the continued shortage of in-house skills. The public service has adopted the strategy of hiring contract computer professionals on a continuing basis, as a supplement to normal staff recruitment. ACOA argued that this has had 'very disruptive consequences as Public Servants with these skills see in the salaries paid to contractors clear market evidence that they are under-valued by their employer. They therefore leave, to be re-employed as consultants with higher salaries and less supervision or responsibility for outcomes' (ACOA, 1988, 10).

In June 1988 the Australian Public Service found it necessary to respond to this trend by introducing new restrictions which sought to prevent former public servants from being engaged as contract programmers for at least a year after they leave, and requiring those who are re-engaged to have had at least two years of private sector experience in the last five years. However, as ACOA point out, this does nothing to solve the fundamental
problem, and certainly does not hinder the exit of skilled personnel who can find work in the private sector without difficulty (ACOA, 1988, 10). And when the Joint Committee of Public Accounts sought advice from the Attorney General's Department about the legality of 'Friday-to-Monday' activities, it was informed that:

... there is nothing in the Public Services Act, or... other legislation, which prevents public servants from accepting positions as consultants to a Commonwealth Department or authority after they retire or resign from the Public Service. (Joint Committee, 1990, 27)

One of the reasons that these skilled personnel can find contract work in the private sector as well as the public is that their training on and experience with major public sector projects is highly valued by private sector organisations. This is because the public sector provides the opportunity for unique kinds of computer training on some of its massive public service projects. The ATO, for example, with its $850 million modernisation programme provides extraordinary opportunities for computer work, unlike anything the private sector provides. Similarly, in Social Security, unique programming needs require the development of on-the-job training and special skills. Given the shortage of skilled personnel, consultants and contractors are brought in to work on these massive projects. They later leave, together with staff who have become experts in these new systems, eagerly snatched up by private sector firms who then benefit from the valuable, publicly provided training. Before long the same departments have further needs in the computer area and must bring in new consultants who have to be trained all over again. (The same pattern occurs with tax specialists who receive unique training with the Taxation Office and leave to become tax consultants.)

It is impossible to calculate the exact costs involved in the use of external computer consultants as against the provision of in-house expertise, and to accurately evaluate the claim that the public sector is subsidising the training which is subsequently exploited profitably by the private sector. It is true, however, that by international standards the Australian private sector has very little commitment to training. Australia has the highest level of external mobility of any country in the OECD. In other words, when individuals change jobs they tend to change employers. This reflects the very low levels of internal mobility in Australia's labour market, caused in part by the low training effort of Australian employers. Whatever the merits of these arguments it is certainly the case that contracting leads to the loss of skills in the in-house workforce, and the widespread perception that careers in the public service are likely to be curtailed. (It should be noted that contractors themselves tend to see their ongoing training as a matter for which they have to be responsible - either by taking courses at their own expense or finding work in newly developing areas.)
UNION STRATEGIES TO REGULATE CONTRACT WORK

Public sector unions and other unions which cover the kinds of public sector employees who are threatened by contracting out have been actively addressing the issue of contract employment for some time now. But before examining the specific responses of public sector unions to the contracting out of computer work, it is important to consider the peculiar characteristics of this work and those who do it. The occupation of computer specialist is, after all, a very new one about which there has been little research as yet (but see Arthur, 1977; Hebdon, 1975; and Mumford, 1972). There are grounds for looking at a range of potential alternative forms of occupational organisation.

At one extreme there are at least some grounds for suggesting that this occupational grouping is best understood within the framework of the sociology of professions. Terence Johnson provides a useful list of the conditions which are necessary for this kind of occupational organisation. First, he suggests, there must be an effective demand for the particular skills from 'a large and relatively heterogeneous consumer group' - something which reduces the consumer's control and increases the practitioner's autonomy from any individual consumer. Second, professionalism is associated with a homogeneous occupational community, something that comes with a 'relatively low level of specialisation within the occupation and by recruitment from similar social backgrounds.' To be effective the occupational group requires a practitioner association or guild to bestow status and identity and to promote unity - ideally imposing a monopoly on practise and regulating entry to it (1972, 52-54).

Enid Mumford in her early study of the job satisfaction of computer specialists was confident that the occupation was in the process of becoming professionalised. In 1969 the British Computer Society held its first professional examinations. Mumford concluded that 'the data processing career man can now call himself a professional once he has passed the British Computer Society examinations and accepted their code of ethics' (1972, 59). Mumford was perhaps premature in her judgement about developments in Britain, and there had been no such progress in the United States. There, members of the information systems community regularly attempted to get themselves formally recognised as having professional status. However, in 1971 the U.S.Court of Appeals ruled that 'programmers and analysts were better described as "technical" rather than "professional" employees' as their work 'did not require a professional measure of skill, knowledge and independent exercise of judgement' (Orlikowski and Baroudi, 1989, 17).

In Australia the moves to professionalise computer work have been relatively slow. The Executive Director of the Australian Computer Society (ACS) recently claimed that the value of professional membership of the Society was becoming much more widely recognised. Applicants for membership of the Society are required to demonstrate a standard of knowledge in the field which is what determines their appropriate level of
membership, and one way of doing this is to pass the ACS's recently established twice yearly examinations.

In its constant aim to improve professionalism within the information technology arena the Society is promoting its own examinations as a very suitable and effective way for those who want to enter the field, but who do not have the opportunity to obtain a tertiary qualification from a university or college of advanced education. (ACS Victorian Bulletin, September, 1990)

The Executive Director expressed his confidence 'that the examinations conducted by the Society itself would continue to generate growing demand as a mechanism for demonstrating a standard of knowledge for a prerequisite for professional entry into the field' (ibid.). By the end of 1990, the ACS had established a 'Practising Computer Professional' program, and was claiming that 'it should emerge as a prerequisite when hiring contractors and consultants' (Australian, 4 December 1990).

Despite the fact that computer specialists can look to a very wide range of clients for their services, possess skills that are as arcane and impenetrable as those of doctors and lawyers, and have established 'professional' societies, it could nonetheless be argued that they show little sign of becoming a recognisable profession. (It is still possible to be employed as a public service CSO without any formal computing qualifications - even if credentialism is on the increase.) There are a number of possible reasons for this. First, they have had no need to artificially restrict the numbers entering the field in order to maintain income levels, since demand for their services has greatly exceeded supply. Second, it seems unlikely that those entering the occupation share a similar social background which might encourage a sense of exclusivity. And third, there is a vast gulf between the skills and abilities of those at the top of the occupation and those at the bottom, which also militates against any sense of identity, colleague-loyalty and shared values. Finally, information systems workers generally have very little control over their work procedures. As Orlikowski and Baroudi argue:

The typical IS [information systems] worker is employed in a non-IS, heteronomous organisation and is subject to a bureaucratic philosophy and various degrees of IS and non-IS managerial practices... What is done, why it is done, and how it is executed is not ordinarily determined by the IS workers themselves, or by some independent professionally defined 'IS practices and procedures'. (1989, 20)

An alternative framework for considering the occupational organisation of this group would locate computer workers as skilled technical workers, best compared with older skilled groups such as draughtsmen, among whom subcontracting is also common. It has been argued that subcontracting among draughtsmen is a result of fluctuating needs for
draughting in individual firms, with some firms too small to require draughtsmen continuously, and even large companies needing extra labour when big projects are taken on (Thomas and Deaton, 1977, 159). In Britain during the 1960s subcontracting grew rapidly in response to high postwar demand, both in the form of agents supplying self-employed draughtsmen, and in the form of companies with their own drawing office hiring out labour or taking drawing work in. The labour market strength of draughtsmen derives from the fact that (like computer workers) they are not concentrated in any one industry, and do not form a substantial section of the workforce in any industry. There is competition for their services from the buyer's side of the market, and competition between firms for their labour in any locality.

Draughtsmen have a strong sense of belonging to an occupation, a sense of identity which stems in part from the fact that they tend to be employed in groups in the drawing office, cut off from other groups in any particular plant. In Britain the draughtsmen's union strongly opposes the use of self-employed contract labour, but it has negotiated agreements with subcontracting offices which hire out labour. 'Many firms have agreements with TASS [Technical and Supervisory Section of the Amalgamated Union of Engineering Workers] to use only those contract offices which have been approved. Indeed, for offices in the engineering industry, TASS approval is virtually a precondition for survival' (Thomas and Deaton, 1977, 162-3). In the mid-1950s contract drawing offices formed a trade association (aimed partly at improving the image of contract drawing offices), but it has become essentially an employers' association and together with TASS has campaigned to eliminate freelance draughtsmen (ibid.).

The Contractor's Association in Australia bears little resemblance to either a professional association or the British association of contract drawing offices. It represents the self-employed or freelance contractors, and was formed in 1984 with the specific aim of defending self-employed contractors from the Tax Office. From the beginning, the Association had 1200 members, most of whom joined out of concern that the Tax Office would seek to reject their claims to be operating a small business and insist on treating them as employees. This concern stemmed from a major case brought against a 'Friday to Monday' contractor. It was argued that he had not genuinely altered his employment status, and that for taxation purposes he remained effectively an employee of the company. Two further cases were lost by contractors in 1989 (Freelancer, 1989, 33-37). Membership of the Contractor's Association is now only 400, with half of these being computer contractors (the rest being in engineering and draughting) and it is barely viable financially. While in some ways it bears more resemblance to a union than to a professional association, its Chairman addressed the readers of the Freelancer thus:

You are known to have made yourself ineligible for social welfare, you shun unions and rely on your own personal efforts instead of government handouts. (ibid., 33)
This hostility to unions is confirmed by the attitudes of the computer contractors working from home who were interviewed by Probert and Wajcman (1988). While many of them contemplated joining the Australian Computer Society in order to keep up with developments in computing, they were unanimous in their rejection of unionisation.

Those computer workers who go contracting are not, of course, representative of the occupation as a whole. Thousands of computer workers are employees of private and public sector organisations and they do not all harbour dreams of self-employment. They may well, however, feel dissatisfied with their employment conditions both in terms of the return on their skills that the open market seems willing to offer, and the status that they feel advanced computing skills should attract. In principle, it could also be argued that computer workers are strategically well placed to exploit collective strategies for improving their employment situation. Unlike many technologically defined skills which are company specific, computer skills are general skills. In his article about skill and strategic options for unions, Gulowsen notes that workers with general skills 'have a better bargaining position' than those with company specific skills, where the training is 'usually administered by the company training unit and focuses on the problems and procedures of that firm' (1988, 162).

Gulowsen goes on to distinguish between two kinds of general skills: those which are socially, or formally, defined and those which are technologically defined. Socially defined skills - craft skills - are those which workers have succeeded in having formalised, and which they may seek to defend against technological innovation in order to promote job security and expand established rights. Management today is increasingly opposed to formal skills wherever they prevent management taking advantage of scientific and technological progress, and is arguing for flexible, or technologically defined, skills. Rapid technological changes are stimulating the development of new skills, particularly in areas such as data processing, communication and instrumentation. According to Gulowsen:

... these skills differ from the old skills in their lack of tradition and established principles of organisation... As with the old skills, they seem in demand virtually everywhere in modern industry, commerce and administration. (ibid., 167)

In determining the likely use that computer workers might make of their strategic position it must be recognised that the occupation is still dominated by young people, 'most of whom have little or no prior working experience in other fields' (ibid.). As Gulowsen concludes, 'with good opportunities to make individual careers, to start up their own businesses or to operate in a labour market where sellers have the upper hand, few computer personnel have attempted to organise trade unions' (ibid., 168). And there are other reasons which militate against such a collective approach to advancement, such as the very wide range of experience and abilities which
separate those at the forefront of the field from those at the rear - something already noted as working against professionalisation. Furthermore, programming and systems analysis work appear to offer high levels of intrinsic satisfaction which may reinforce an individualistic sense of career. In a study comparing contract computer specialists in Britain and Japan, Andrew Friedman claims that Western computer specialists' jobs are near ideal both because of the intrinsic satisfaction derived from the tasks themselves and because working conditions are particularly good' (1987, 359). For all these reasons, and particularly the individualistic nature of much of the work itself, the occupation of computer specialist tends to involve a 'very individual-centred working culture' (Gulowsen, 1988, 168).

What one can conclude from this approach to identifying computer specialists' strategic bargaining position is that if they were to attempt collective action, they would be likely to be successful (see also Sterling, 1984). There are, however, good reasons to suggest that the occupation as such will be more like a professional association than a union, with members committed to keeping up with each other, sharing information and keeping abreast of constant technological change, rather than to industrial action.

While computer workers may show little signs of organising on the basis of their occupation, many are of course members of a trade union. In the private sector the very low level of unionisation among white collar workers generally means that there has been little response to the issue of subcontracting. Public sector unions, by contrast, have for some time now been actively addressing the issue of contract work generally, and contract computing specifically (ACTU Working Party, nd; Evatt Research Centre, 1990, ACOA, 1988). In its submission to the Joint Committee of Public Accounts inquiry, ACOA urged the Committee to not merely look at ways of regulating the use of consultants, but to consider the threshold question: 'is an external consultant necessary?'. ACOA accepted the notion that consultants may be required to help out during peak-loads, or to provide specialised expertise that is otherwise unavailable, but they were concerned that their use be strictly limited in such circumstances.

Public sector unions have, as a result, pushed for greater control over the management of consultants/contractors. It is PSU policy, for example, that specialist contractors must train existing staff in the section where they are working so that the skills are developed in-house. It is also policy that contractors should not have line management positions, such as project manager. As an example of this kind of strategy, in 1987 Telecom and ACOA came to an agreement about the use of contractors as part of the second tier negotiations in the national wage case. While accepting the need for contract workers to supply skills not available in-house, and to meet unforeseen workload increases, both parties agreed that as a general principle, arrangements should be made 'whenever feasible to facilitate the transfer the
specialist skills possessed by contractors by Telecom Information Systems staff. Consequently, contractors would not be employed for long periods of time.

At the same time as it seeks to regulate the use of contract labour, the PSU recognises that its computer specialist staff are attracted to the contracting sector because of problems with the public service career structure, and it has responded with a number of initiatives. At the general level the PSU supports the development of public sector skills audits and the internal circulation of people with special skills. This would reduce the need to look for skilled personnel outside the service, and also provide more interesting work for highly skilled staff. In 1988 the Public Service Commission launched its own internal consultancy service, despite the fact that only a couple of weeks earlier it had told the Joint Committee of Public Accounts that the creation of a central consultancy agency within the Service would not be supported by the Commission. Such an agency, it had argued, would not be able to get staff with the necessary range of experience, expertise and qualifications nor would it be able to service the wide range of projects currently undertaken by consultants (Joint Committee, 1990, 4-5).

As well as campaigning generally about the adverse effects of privatising a wide range of labour services, there has been considerable activity around the issue of improving the career structure available to CSOs. At the Commonwealth level there are difficulties in both recruiting and retaining CSOs. At the state level, which has better pay rates, there is no problem in recruiting base level CSOs (indeed the public service is the single largest employer of computer graduates), but there are serious retention problems. The PSU has been arguing for a review of the CSO category, and a range of measures to make it more attractive. These include better pay (closer to the rates which prevail on the open market), maintenance of secure employment conditions, and an improved career structure. In particular it has been strongly argued that CSOs should be able to progress up their career structure without having to move sideways into management positions. In other words, the PSU supports the recognition of top level computer specialists as having status equivalent to that of the Senior Executive Service. Within Telecom an agreement has in fact been reached that in the new CSO structure there will be a 'super-programmer' grade, above CSO 5, to be called a 'Technical Specialist'. (The same grade will be used to encompass the top tax specialists in the ATO who also do not want to have to become managers in order to get to the top of the public service career structure.)

Unions trying to improve pay and conditions for certain specific sections of their membership because of pressures from the labour market may find this conflicts with their overall strategies. For example, the government may well be willing to raise the salaries of a narrow band of workers if the market demonstrates such pressures. This will, however, jeopardise the wider union strategy of creating broad bands of generally comparable skills within the public service. Similarly, the issue of
performance based pay has been raised for the higher CSO grades as a way of moving their salaries closer to external market rates. Yet, performance based pay is something that has been explicitly rejected by the PSU for similar grades in other areas. Meanwhile, Telecom and the PSU have agreed to a job evaluation system for CSOs, based on fine grading of the degree of responsibility, training required and so on. Each job will be ranked along all these dimensions as a basis for determining pay. Some unionists are concerned that while this might not be performance based pay, it is the thin edge of the wedge. CSOs in Telecom have not agreed to performance based pay as such, but they have agreed to a performance and development review scheme which will be used to determine whether employees should get their increments or not.

Other measures which the PSU has suggested as means of reducing the public service's reliance on external contractors and of increasing the loyalty of computer staff have focussed on the provision of training. The union has argued that the:

... development of training programmes and other internal mobility measures are real alternatives to a medium-term or long-term policy of engaging external consultants... in large, diverse organisations like the Australian Public Service' (ACOA, 1988, 9).

Compared with private sector employers the APS's provisions for staff training are relatively good, but this is not to say very much. And, according to the PSU, current political beliefs in the virtues of 'smaller government', reflected in policies to reduce the size of public sector activity, are 'already having a significant negative effect on career opportunities for Public Servants' (ibid).

CONCLUSIONS

Trade unions have traditionally opposed the increased use of contract labour in a wide range of industries. From the union point of view increasing numbers of contract workers are generally seen as a threat to the employment conditions and employment prospects of employees generally and union members specifically. The use of contract labour by employers is seen as a cost-cutting measure which is likely to benefit employers rather than employees, and which simultaneously threatens to reduce levels of union membership and union influence.

There are some growing areas of contract employment, however, where this perspective seems inappropriate, in terms of its analysis of the motives of both the employers and the contract workers. In particular, employers may be far more preoccupied with the need for a 'flexible' workforce than with raising the rate of exploitation, while workers may value
flexibility more than their holiday leave loading. This is particularly the case where workers have important skills which are in relatively short supply, such as in the engineering or computing areas. The public sector's increasing reliance on computing contractors and consultants does not appear to be driven by cost-saving motives, but by a combination of concerns including a skilled labour shortage, and an ideologically based belief in the merits of privatising public sector activities.

From the contractors point of view, there are substantial benefits to be gained from self-employment, though these are not simply financial. The nature of computer work itself is clearly an important factor shaping the attitudes of computer specialists and perhaps encouraging an individualistic occupational culture. Whatever the motives of contract workers in areas such as computing or engineering, trade unions are unlikely to reduce the significance of the contract labour force with policies of outright opposition. This is not to say that this kind of employment need be 'unregulated' or impervious to collective control, but rather that this might require substantial changes in the structure of union organisations.

The PSU does not have the option of seeking to expand its membership into the ranks of the computer contractors, being confined to covering employees. It has, however, identified a range of strategies designed to improve the employment conditions of those computer specialists it covers, and to challenge the reasons that government agencies have provided for such large scale reliance on external labour. It is here that their attempts to regulate contract computer work link up with a much broader campaign among public sector unions aimed at restricting the privatisation of public sector services and employment, often of a low-skill, low wage nature.

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9 Conclusions

Mark Bray

INTRODUCTION

The quest for flexibility in production and labour market arrangements has been a consuming passion of the 1980s and 1990s. There are many paths to flexibility, but this volume has concentrated on quantitative or numerical flexibility. Successful implementation of this form of flexibility requires flexible workers - workers whose job tenure, pattern and location of employment, and legal status are distinctly different from the traditional model of the full-time, permanent, on-site employee. In this collection, these workers have been called 'marginal workers' and the groups given special attention include part-time workers, outworkers, self-employed workers and contract workers.

There is a widely held perception that these groups of marginal workers are growing rapidly and that this trend threatens existing patterns of industrial regulation and the membership and power of the trade union movement. This volume sought to subject this perception to critical scrutiny by examining the relationship between marginal workers and unions in Australia. In particular, the case studies presented above sought to examine the organisational and regulatory responses of trade unions to the challenges posed by marginal workers.

The main theme to emerge from the preceding chapters is one of diversity. Not all Australian unions have encountered marginal workers. The challenges posed to unions by marginal workers vary according to the nature of the marginal work in question and according to the factors which contributed to the emergence of that group of marginal workers. The urgency of the problems raised by marginal workers depends on the size and rate of increase in the marginal workforce. Finally, the unions themselves have been highly particularistic in their responses to marginal workers. Thus, there are few universal answers to the questions at hand and perhaps the most important conclusion to be drawn is that an understanding of the impact of marginal workers on particular trade unions and an assessment of the responses of individual unions to marginal workers must be developed through close analysis of the context in which the relevant marginal workforce emerged.
Chapter 9

And yet despite the diversity of experience evident in the preceding chapters, there are also many similarities. The task of the present chapter is to explore these similarities and to offer some generalisations about marginal workers and their relationships with unions. This task is addressed by first examining the broader context of marginal workers; in particular, attention focuses on trends in the growth of the marginal workforce and the causal factors which might lie behind these trends. The subsequent sections endeavour to analyse more systematically the nature of the marginal worker problem and the range of union responses respectively.

MARGINAL WORKERS IN CONTEXT

The first step in analysing the marginal worker problem is to assess the size of the marginal workforce and the rate at which it is increasing. This is not an easy task. The evidence on the incidence of marginal workers presented in this volume comes from both aggregate statistics, as in Chapter 2, and more disaggregated case studies in Chapters 4 - 8. Together, these sources are, unfortunately, far from conclusive. An important reason for this inconclusiveness is undoubtedly the paucity of quantitative data on marginal workers. All too often, the scattered location of marginal workers, the small size of the workplaces in which most work, and the informality and even secretiveness of their activities make them invisible to statisticians. Even where statistics are gathered, they are rarely reliable or illuminating because the statisticians, like the law-makers, are preoccupied with the more standard models of employment. It is the employee rather than the self-employed, the permanent, full-time and on-site worker rather than the casual, part-time or home-based worker who has traditionally constituted the main focus of the statistician's endeavours. Chapter 2 showed that these problems are significant at an aggregated level of analysis, but their impact is compounded rather than reduced when attention turns to more disaggregated industry or regional levels.

Exploiting the admittedly weak data available, the evidence suggests both change and continuity in the incidence of marginal work. For example, some groups of marginal workers are new and the incidence of some older forms of marginal work has increased considerably in recent times. At an aggregate level, Chapter 2 by Burgess and earlier work by Lever-Tracy (1988) leave little doubt that part-time workers constitute a far greater proportion of the work force today than they did even twenty years ago. Similarly, self-employment and casual work seem to be on the increase, albeit at less dramatic rates. Trends in the incidence of homework are more difficult to discern. At an industry level, Probert and Wajcman's account in Chapter 8 focuses on a new occupational group, namely computer workers, which has only emerged in recent years and whose marginal status is often even newer. Chapters by Ellem, Underhill and Bray also demonstrate a widespread perception amongst practitioners that marginal workers in their respective
industries have grown in number since the 1970s, although 'hard' quantitative data proving these perceptions to be accurate are not always available.

This evidence of increasing marginal work, however, must not be exaggerated. It must be remembered that industries examined in this volume are not necessarily representative of all industries and that changes in the incidence of marginal work can (and have) moved in the opposite direction. Stevedoring, for example, has seen considerable decasualization of employment over the postwar period (Deery, 1978). Furthermore, marginal workers have long histories in several of the industries examined above. Outworkers in clothing, owner-drivers in road transport and subcontractors in building have all been part of their respective industries for decades. Trade unions have also been grappling with the problems caused by such workers for almost as long. The TWU's campaign to regulate owner-drivers goes back to the early 1940s, the efforts of the building unions to combat contract work also date back to this period, while CATU was well aware of the threat posed by outworkers in the 19th century. In this way, marginal workers in the 1980s and 1990s can be seen as simply the continuation of long-established practices - a point which is often lost by more sensationalist and ahistorical commentators.

The next step in assessing both the problems facing unions and the adequacy of their responses is to explore the reasons why marginal work has emerged. Again, this task is not a simple one because of the diverse experiences of different industries. At this stage, the most appropriate method of explanation is to simply list the many factors which have been noted in the preceding chapters. These factors can be seen to emanate from both demand and supply sides of the economic equation - from the actions and attitudes of employers and workers respectively.

On the demand side, an important initial point concerns the opportunities provided by certain features of the production process for the use of marginal workers. Sometimes these opportunities are raised by the development of new technologies. The introduction and growing sophistication of computers and communication technologies, for example, have created the opportunity for employers to farm out parcels of work to workers who labour at home (Probert & Wajcman, 1988). It was argued in Chapters 6 and 7 that the nature of technology and the production process were also important in building and road transport in that the production process can be readily divided into separate specialised stages completed by autonomous workers, such as contract workers and subcontractors. Similarly, machining is a stage in the production of clothing which is easily completed outside the manufacturer's factory. In each of these cases, the limited potential for advances in technology to reduce production costs also creates an incentive for employers to focus their attentions on reducing labour costs.

There is also a range of factors which can combine to provide employers with an incentive to seek alternative forms of labour beyond the
conventional model of full-time, permanent employment. The first of these must be competitive pressures in product markets. There can, for example, be little doubt that increases in many forms of marginal work coincide with declines in aggregate demand resulting from international recessions since the 1970s and other factors which encouraged greater competition in product markets. These, in turn, forced employers to seek greater efficiency, increased flexibility and lower cost structures. Ellem's chapter on the clothing industry certainly sees the growth of competition resulting from tariff cuts and international competition as an important force in the exploitation of outworkers by clothing manufacturers. The chapters by Underhill and Bray on building and road transport also see product market competition as an important incentive for the use of marginal workers, although competitive markets and the use of marginal workers in these industries are by no means new to the 1970s and 1980s. In the public sector, the private sector product market pressures have found their counterpart in the fiscal problems of the state. Part-time employment and contracting out, for example, can be used to reduce costs (Hall, 1987), while Probert and Wajcman's chapter identifies the role of staff ceilings and other financial controls on public sector managers as at least a partial cause for their greater use of outside consultants and contractors.

Another feature of product markets affecting employers is not so much competition, but rather rapid fluctuations in product market demand. As Chapter 1 mentioned, it is common to attribute employers' thrust for flexibility in the 1980s to their need to quickly adjust production and output to suit quickly changing consumer demand (Piore & Sabel, 1984). This idea certainly has some support from the preceding case studies of clothing, building and road transport, each of which is an industry subject to rapid fluctuations in product market demand. The use of marginal workers rather than more standard employees in these industries allows employers to adjust their cost structures to more closely parallel demand patterns.

Another factor on the demand side is the nature and consequences of industrial and state regulation. On the one hand, legal protections afforded to most employees (such as minimum wages, workers compensation, redundancy provisions or long service leave) impose costs and procedural rigidities on the use of standard employees, providing employers with an incentive to seek less costly and more flexible alternatives. This argument has been used in the overseas literature to explain a trend in employment away from 'status' towards 'contract' relationships (Streeck, 1987), but it also arises in all of the case studies presented above. On the other hand, as Brooks shows in Chapter 3, the selectivity of the law's protection - by granting protection only to workers who fit within the standard model of employment - also provides employers with the opportunity to realise these cost and flexibility objectives through the use of marginal workers. Outworkers in clothing, contract workers in building, owner-drivers in road transport and computer
contractors/consultants in the public sector all occupy ambiguous legal positions because of the peculiar way in which the statutory and common law systems have operated.

A similar argument surrounds the traditional operations of trade unions. Effective organisation and collective regulation of standard employees by trade unions has raised the cost and reduced the flexibility of such labour forms, thus indirectly encouraging employers to search for non-union labour forms. Furthermore, the state has generally confined union operations to the protection of standard employees and unions themselves have rarely sought to expand their activities to include the protection of workers outside this model. These factors, plus the difficulties inherent in organising workers who are often widely scattered in small workplaces, mean that marginal workers have remained largely unorganised and have therefore come to represent a viable, less costly and more flexible alternative for employers.

Finally, state regulation through taxation regimes can also encourage employers to turn to marginal workers. In the same way that industrial legislation selectively imposes costs on the use of standard employees, so payroll and other taxes tend to encourage employers to engage workers who fall outside the definitions used in the relevant legislation.

Thus, many factors have affected employers' demand for marginal workers. Some of these factors, especially those associated with the avoidance of industrial or legal regulation, confirm the perception held by Australian unions that marginal work is an 'anti-union employment practice' (see Chapter 1). Under these circumstances, it is understandable why Australian unions might see the use of marginal work as an illegitimate practice which should be opposed at all costs. However, it is equally clear that employers' demand for marginal work is not solely motivated by the desire to attack unions and avoid industrial regulation. Consequently, blanket union policies opposing all marginal work practices may be poorly reasoned and ultimately self-defeating.

On the supply side, it must be recognised that workers have also been influenced by a range of factors which have forced or encouraged them to choose, or at least accept, marginal work. Many of these factors reflect the failures of traditional work patterns and industrial regulation to deliver the flexibility and lifestyle opportunities which workers need or desire. Others relate more to workers' ambitions of higher financial rewards. As with the demand side factors discussed above, a failure to acknowledge or accept the salience of these supply side factors can lead unions to adopt unsympathetic policies towards marginal workers and to ignore the positive potential of some marginal work practices for workers.

*Unemployment* is one such factor. As overseas commentators have noted, the rise of many marginal work practices coincides with the onset of
high levels of unemployment (Marshall, 1989). Workers threatened with or experienced in unemployment will often be forced to accept part-time, casual or home-based employment. Certainly, the coincidence of increased marginal work in Australia with the rise of mass unemployment since the 1970s (demonstrated in Chapter 2) suggests some support for this argument, although evidence that significant numbers of part-time workers express a preference for part-time work (reported in Chapters 2 and 4) serves to qualify this support.

Another important supply-side factor is changing family and life-style patterns which have especially, although not exclusively, affected women. Lever-Tracy's chapter, for example, persuasively argues that changing attitudes about work, about gender roles and about the family have created a situation in which workers need more flexible working arrangements during the course of a working day, a working week, a working year or even a working life-time. These new needs help to explain the attraction of part-time work for many workers and the trend among computer workers of working out of home (Probert & Wajcman, 1988). Ellem recognises the role of changing family and life-style patterns, but he also identifies pressures which force women seeking work to bring that work into the home instead of going out to work in a clothing factory. Amongst these additional factors are disadvantages associated with factory work, such as cultural and communication difficulties, lack of child-care facilities and poor public transport.

Another supply-side factor influencing workers is undoubtedly a desire on their behalf for greater control and autonomy in their working lives. This factor is strongly reflected in the common desire among owner-drivers, building workers and computer workers to 'become their own boss'. It is, however, questionable whether this goal is achieved in most instances of marginal work. Despite the illusion of owning one's own business and the individual freedom that this supposedly brings, it is questionable how many marginal workers actually exercise that freedom. Instead, many supposedly independent workers are heavily dependent on one customer for their work and thereby have little choice in the hours they work, the income they earn, and sometimes even the pace at which they work or the clothes they wear on the job.

Often allied to this desire for autonomy is a belief that a move out of traditional wage labour, especially to self-employment, will bring great financial rewards. This belief seems to have some foundation in the case of computer workers and it can be realised by owner-drivers and building workers in good economic times. However, bad economic times bring very different results. Overcrowded labour markets, such as those in clothing and those emerging in building and road transport during economic downturns, demonstrate the lie of financial success for marginal workers. As well, the penalties associated with non-continuous work, loss of holiday and sick pay, loss of overtime and shift allowances are not considered by many marginal
workers when calculating their potential incomes. Under these circumstances, the promise of 'making it' has little substance.

In summary, there are many factors which explain the emergence of marginal work. These factors derive not only from the flexibility strategies of employers, but also from the actions and aspirations of workers. Analysis of the exact constellation of factors relevant to any particular instance of marginal work can contribute to an understanding of the problems confronting unions and to an assessment of union responses.

THE MARGINAL WORKER PROBLEM

The accounts contained in previous chapters suggest that the threat posed by marginal workers to trade unions comes in three main ways. First, marginal workers may be exploited in some way. This is clearly a concern to the marginal workers themselves, but it is also a problem for trade unions which seek to represent the interests of marginal workers. Second, the marginal workers can threaten the wages and working conditions of other trade union members, most often workers who fit the more standard model of employment and who therefore fall more easily within the coverage of awards and protective legislation. Third, marginal workers can undermine the institutional power of the union organisation itself.

Each of these problems has a common source in the lack of collective regulation governing marginal workers. Chapter 3 showed that neither the common law nor statute law effectively protects most marginal workers. This inadequate legal protection arises partly from the nature of the legal system and the ambiguous legal status within it of most marginal workers, and partly from the failure of unions to advance the regulation of marginal workers within the parameters of the existing legal framework (see also Dickens, 1988). The result is that as long as marginal workers are ununionised and effectively excluded from the coverage of industrial legislation, awards or collective agreements, the determination of their work tasks, rewards and working conditions will be left to market forces. This is not always to the disadvantage of the marginal workers, provided they are individuals with substantial market power. For example, the computer workers in Probert and Wajcman's case study possess skills which are in short supply. As a result, they can command attractive contract rates, sufficient to compensate them for their time, the benefits they lost by leaving permanent employment and the insecurity of self-employment. Similarly, owner-drivers and building workers can make good incomes during boom times, as can part-time workers with skills in short supply. However, market conditions which are less favourable often lead to low incomes and considerable insecurity for marginal workers. At worst, as with clothing outworkers, poor market power leads to undeniable exploitation.
Irrespective of the fate of the marginal workers themselves, they almost always create some problems for more standard employees in the same industry or occupation. This largely arises from the substitutability between standard employees and alternative marginal workers. The computer workers who successfully make the jump to well-rewarded consultancies both jeopardise the career prospects of their colleagues who remain permanent public servants and place great pressures on the internal wage relativities within the sector. At the other extreme, and probably more common, clothing outworkers threaten the employment prospects, wages and working conditions of factory workers. There is always the possibility that the managers of clothing factories can choose to dismiss factory workers in favour of outworkers or at least use the threat of such action to justify lower wages or poorer working conditions for factory workers. This is not necessarily the result of perniciousness on the manager’s part. It is rather the natural result of competition: clothing firms reducing their labour costs by exploiting outworkers put considerable market pressure on those firms relying on factory labour. Similar scenarios can be constructed for the building and road transport industries.

Marginal workers also threaten the institutional power of the unions. One avenue by which this occurs is through declining membership figures. If marginal workers are less likely to join trade unions than are standard employees, then an increase in the marginal workforce reduces either existing union membership or future union growth. Did this occur in the case studies? In addressing this question it is important to recognise, firstly, that there was no comprehensive study in the preceding chapters of either union membership trends or worker attitudes. The former requires accurate data on union membership amongst marginal workers, which unions either did not keep or withheld from researchers. Assessment of the latter proposition requires extensive surveys of marginal workers, which were not undertaken. Nonetheless, there was strong anecdotal evidence that anti-union feelings flourished amongst marginal workers. Certainly, union officials in clothing, road transport, building and the federal public service seemed convinced of this state of affairs and feared the consequences for union membership.

If anti-union attitudes do exist amongst marginal workers and if these are a source of concern for trade unions, then what are the causes of these attitudes? On the one hand, such attitudes may be the inevitable result of characteristics inherent in marginal work or marginal workers. The anti-union sentiment amongst self-employed workers, for example, may be caused by their non-employee status and their desire not to be seen as employees. Part-time workers may inevitably be anti-union because of a reduced commitment to work or a strong instrumental approach to work. Or perhaps anti-union attitudes stem from the other features of marginal employment, such as the scattered and small workplaces in which they work. On the other hand, marginal workers may respond badly to unions because of factors associated with the unions themselves. For example, marginal workers may reject unions because they believe that unions cannot or will not promote their
interests. Or perhaps they believe that unions are controlled by standard employees and, consequently, marginal workers have little say in union policies. Similarly, female marginal workers may regard unions as male-dominated.

Unfortunately, many of these questions about union membership remain unanswered. However, they do lead to an important issue for researchers and unions alike: if anti-union attitudes and anti-collectivist actions are caused by the failures of past union organisation or policy, then is it possible that they can be reversed to produce pro-union attitudes and collectivist behaviour? This suggests a potential for positive union action which might reduce the membership threat posed by marginal workers. The relative success of the Victorian Operative Bricklayers' Society (VOBS) in recruiting and regulating bricklayers and of the Transport Workers' Union (TWU) in unionising some groups of owner-drivers suggest that such a potential can be realised. The most appropriate union strategies for achieving these goals will be examined in the next section.

A final avenue by which union power is threatened by marginal workers is by the undermining of collective regulation achieved by unions. If firms engaging marginal workers undercut firms not using them, then even 'good employers' have a strong incentive to oppose union organisation and collective demands. In such situations, use of marginal workers thus undermines existing collective agreements and awards, as well as threatening the capacity of unions to negotiate future agreements and awards. If unions cannot demonstrate to their members a capacity to protect their security of employment and advance their material interests, then they are unlikely to gain the support of those members, which further reduces union power. Even where the marginal workers are not undercutting wages, as with the computer workers in Chapter 8, their existence still impacts on the unions in the industry. Can unions prevent or overcome these threats to their power? What are the most appropriate union strategies? Again, these are questions for the following section.

UNION RESPONSES TO MARGINAL WORKERS

The responses of unions to marginal workers vary enormously according to the industry or occupational circumstances - and therefore according to the nature of the marginal worker problem confronting the union - and according to the character and leadership of the union. Despite these variations, there are some generalisations which can be made. The first point concerns the process by which union responses are formulated. For example, there seems little doubt that, initially, the question of how to respond to marginal workers is addressed in a fairly ad hoc manner where it arises: at the individual workplace. It is, after all, usually the individual firm which makes the decision to use marginal workers, and workplace union representatives and
organisers only look to union committees at branch level to co-ordinate and formalise the response when similar problems emerge across companies. Certainly, most of the accounts in the preceding chapters focus on the activities at the branch level of individual unions because they examine industries in which marginal workers have come to be perceived as a significant problem across companies.

It is only after these lower levels of union operation have tried to meet the challenge, and usually failed, that such issues are referred to inter-union organisations, such as the state labour councils or the Australian Council of Trade Unions (ACTU). The Building Workers Industrial Union (BWIU) in New South Wales eventually sought inter-union action to pressure employers into an industry-wide agreement, and it was also strongly behind jointly sponsored research on anti-union employment practices and the ACTU's resolutions in the mid-1980s (see Chapter 1 and 6). Lever-Tracy also pointed out that it took many years before the ACTU adopted a clear policy on part-time work. Joint union action like this is especially important when the union response requires legislative changes, and therefore political action.

Turning from the processes producing them to the substance of union responses, how have unions sought to address the threat posed by marginal workers, and have these responses been successful? The preceding chapters suggest that analysis of union responses best proceeds by focusing on union approaches to both membership and regulation. With respect to membership, there is a continuum of policies which ranges from, at one extreme, unions excluding marginal workers from joining their organisation to, at the other extreme, unions actively recruiting marginal workers. With respect to regulation, there is again a continuum, from unions ignoring marginal workers and leaving marginal work totally unregulated to unions accepting employers' right to engage marginal workers, but seeking to strictly regulate the conditions under which they are employed. Using membership and regulation policies as dimensions in this way, four main union responses can be identified: ignore; exclude and oppose; limit and regulate; recruit and integrate.

Unions can, of course, simply ignore marginal workers. The consequences are usually that marginal workers are left to their own devices and regulation of their work is left to market forces. Clearly, this approach is confined mainly to workplaces or industries where marginal workers are small in number and negligible in their impact on industrial regulation and union organisation. Since marginal workers are well represented in all the industries examined in the preceding chapters, this union response was rare.

The second response, exclude and oppose, is most common early in the history of a union's encounter with marginal workers. The basis of this response is a refusal by the union to in any way condone marginal work or to accept marginal workers as union members. Lever-Tracy's chapter saw this total opposition as typical of early union responses to part-time work. This
type of work was regarded as illegitimate and union policies were preoccupied with protecting the interests of full-time workers. Similarly, Ellem identified such an approach in CATU's early rejection of outwork; he called it the 'ignore or exclude' approach. CATU was dominated by factory workers and it wanted outwork abolished. Underhill also described the early policies of the building unions towards contract workers in this way: as soon as contract workers were identified on a construction site, the union would insist on the threat of industrial action that they be converted to employee status and paid award rates and conditions.

This exclude and oppose approach can be successful for unions. However, success seems to depend upon marginal work remaining a small proportion of all work in the industry and upon the union being sufficiently well organised to effectively enforce its opposition at the workplace level. When these conditions are not met, the union's policy becomes discredited. The building unions, for example, found the task of identifying contract workers and policing union policy excessively difficult in the geographically-scattered building industry. The anti-part-time work policies of many unions before the mid-1980s either resulted in part-time workers being used in an unregulated way or, alternatively, employers being encouraged to use casual workers who enjoyed even greater insecurity than permanent part-timers. Furthermore, the exclude and oppose approach seems to be based on an assumption which regards marginal work as an anti-union employment practice and which therefore denies any possible advantages marginal work might have for the workers involved. The resulting union opposition to marginal work can thus alienate marginal workers from the union and breed anti-union sentiments which are subsequently difficult to break down.

The third response, limit and regulate, is usually a modification or refinement of the exclude and ignore approach. Here the union accepts the use of marginal workers, but seeks to limit their number and closely regulate the conditions under which they are used. Chapter 5, for example, showed that CATU tried to use early federal awards to impose quotas on the use of outworkers, while bank and retail unions used similar quotas as bargaining tools to negotiate improved wages and working hours for full-time workers (see Chapter 4). Marginal workers are accepted as union members, but rarely is there any enthusiasm in the union's efforts to recruit them. Thus, regulation of marginal workers is still seen as a method of protecting the position of non-marginal groups, who usually dominate union memberships and union decision-making bodies.

The fourth response, recruit and integrate, is usually the result of a recognition by unions that marginal workers are unavoidable in the industry and that unions must seek to advance the interests of marginal workers if they are to protect the union and its traditional membership. Thus, few restrictions are placed on the use of marginal workers, but the union attempts to ensure that marginal workers become union members. The union also seeks regulation of marginal work on a similar basis to that applying to standard
employment and it often formalises the relationship between marginal and more standard employees both at work and within the union. This approach characterises the TWU's response to owner-drivers for much of the period since the 1940s, the building unions' most recent efforts with respect to contract workers, CATU's policies towards outworkers under its new leadership in the 1980s, and the policies of many white collar unions towards part-time work over recent years. Thus, there is a reciprocal relationship in the recruit and integrate approach between union membership and effective regulation. On the one hand, effective regulation of marginal work is designed to encourage marginal workers to join the union because they can see that the union advances their interests. On the other hand, unions are much more likely to succeed in regulating marginal work if marginal workers are union members and are active in the formation and enforcement of union policy towards marginal work.

This fourfold categorisation of union responses is useful in generally distinguishing between alternative approaches, but it raises many additional questions. Perhaps most relevant are two: if unions adopt either the third or fourth approach, what policies are most likely to encourage marginal workers to join unions, and what regulatory strategies will lead to effective regulation of marginal work?

On the membership front, the unions examined in this volume pursued a number of initiatives, all of which recognise that marginal workers are different to standard employees, that they sometimes have different interests to standard employees, and that these special interests must be catered for if marginal workers are to be attracted into the union movement. Such objectives require new methods and new union structures. Ellem argues, for example, that CATU first had to locate outworkers and communicate with them before it could recruit them or improve their conditions of employment. This required close relationships with community and ethnic media groups, and the employment of female organisers from migrant backgrounds and special outwork project officers. Some unions representing public servants set up separate committees for part-time workers in order to give them direct input into union policy, especially policy directly affecting part-time work (see Chapter 4). The VOBS did the same by establishing a separate association to cater for the needs of contract building workers, while the TWU has set up similar intra-union associations for owner-drivers.

Given that many marginal workers are female, unions may also need to adopt new structures, policies and practices which directly appeal to women. For example, a new approach may be required to the form and timing of union meetings if unions are to encourage the participation of female members. Greater representation of women on union committees and in official positions would also help. An increasingly common theme in union reports and strategy documents is the potential contribution of more
progressive policies on child care, anti-discrimination, equal opportunity and recognition of 'female skills' to increasing union membership (Winters, 1987; Berry & Kitchener, 1989, 46).

Such measures can contribute to increased membership amongst marginal workers - indeed, they seem to be vital if unions are to mount credible recruitment campaigns - but there is no guarantee of success. The complaints of owner-drivers mentioned in Chapter 7 suggest that even the TWU, which has had particular success in enrolling owner-drivers as members, has been forced to rely on compulsory unionism mechanisms to recruit at least some owner-drivers. Ultimately, the success of recruitment policies (measured in membership numbers) depends on the extent to which previous neglect or previous union policies have caused the low level of union membership. As mentioned above, marginal workers are characterized by many features apart from their marginal status per se which lead to low unionization rates. The difficulties encountered by CATU in enrolling outworkers or by the BWIU in enrolling contract workers in the housing sector may well be explained more by geographically scattered workplaces in which they work rather than the failures of union structures or policies.

On the regulation front, there is a range of strategies available by which unions can seek to standardise and improve the employment conditions of marginal workers. Bray's chapter referred to three main alternatives: collective unilateralism, collective bargaining and state regulation. Collective unilateralism, which involves workers unilaterally determining rules which are then imposed on employers, was rarely used by the unions covered in this collection, except perhaps the building unions' early - and largely unsuccessful - attempts to ban contract workers from commercial building sites and the VOBS's more effective efforts to regulate bricklayers' rates. To operate at a workplace or company level, this strategy requires strong worker organisation, which is unusual. However, even if it can be effectively implemented at a workplace level, this strategy encounters problems associated with market undercutting when it is enforced in some companies but not in others. Industry-wide regulation is the only way to avoid such problems, but this brings further difficulties. The unusual success of the VOBS in unilaterally regulating subcontractor rates in the commercial building sector, detailed in Chapter 6, is perhaps explained by the special circumstances of that occupational group.

The collective bargaining strategy was more common. This involves a union negotiating with an employer or group of employers to produce a collective agreement covering marginal workers. The BWIU certainly adopted this approach, negotiating an agreement with the Master Builders' Association (MBA) banning pyramid contracting in the commercial sector and further agreements regulating contract work with individual large companies which operated in both the commercial and housing markets. The VOBS negotiated with the MBA over bricklaying rates in the Victorian housing sector. The TWU also negotiated many company-level and industry-
level agreements regulating owner-driver rates and conditions. These collective agreements brought some improvements to the incomes and working conditions of marginal workers, they served to standardise and regulate the marginal work and they eased some union fears aroused by the marginal worker problem. However, despite the many gains which can be achieved through collective agreements, it remains a flawed strategy for most unions. The most significant problem is that of enforcement. Often these agreements have no legal backing, which means the union must enforce them through industrial means. The building unions encountered significant problems in this area. Furthermore, even when an agreement is legally binding, it covers only those employers who are party to the agreement. Again, these companies are frequently subject to undercutting in the product market by companies not bound by the agreement.

There can be no question that the third strategy, state regulation, is the most effective from the union point of view. This strategy means that some state agency, such as an arbitration tribunal, intervenes to impose regulation of some kind on marginal work. In most cases, this provides the union with a legal mechanism by which regulation can be enforced. Perhaps more importantly, it provides an opportunity to overcome the flaws associated with collective unilateralism and collective bargaining. The establishment of an award with common rule, or an equivalent legal instrument, means that all employers are subject to the same rules. Undercutting and similar behaviour is legally forbidden. Brooks' account in Chapter 3 showed that the establishment of state regulation is relatively easy for those marginal workers defined at common law as employees. Certainly, there are few legal obstacles impeding unions seeking to regulate part-time work, as they can readily apply to the arbitration tribunals for awards to cover the appropriate workers. In such cases, the union's most difficult tasks are to decide upon the appropriate award conditions and then to achieve them in the face of employer opposition. Many other marginal workers, who occupy more ambiguous legal positions, present more difficult legal problems. The building unions, for example, were unable to gain award coverage for contract workers, and thereby gained little assistance from the state. Ellem showed that between the late 1960s and the mid-1980s, CATU was also hamstrung by similar problems with outworkers as a result of Cocks' Case. The 1987 award ended this exile from the arbitration system and CATU thereby received valuable assistance from the state. However, the importance of state intervention and the problems involved are best demonstrated in Chapter 7 by the TWU's struggle from the 1940s until 1979 to bring owner-drivers within the NSW arbitration system. Resolution of this struggle in the union's favour only came with the extraordinary Industrial Arbitration (Amendment) Act of 1979 - a piece of legislation which has come to represent a model for many unions with marginal worker problems.

Despite the importance of state regulation and its potential advantages for unions, it is not a complete panacea. Again, the enduring problem is usually that of enforcement. In order to exploit the legal mechanism and
ensure effective regulation, a union must first detect the breach and initiate proceedings against the offender. In competitive and scattered industries - like clothing, road transport and building - such detection is in itself difficult, especially given the anti-union and anti-regulation attitudes of many employers and marginal workers.

CONCLUSION

This collection provides some insights into the circumstances surrounding the growth of the marginal workforce, the problems such a development holds for trade unions and the responses - appropriate and otherwise - unions have mounted in the face of these problems. However, the relatively small number of case studies reported here and the omission of important groups of marginal workers (like temporary workers, casuals and trainees) reduce the authority of the generalisations which can reasonably be made. Perhaps more importantly, the diversity of experience which characterises marginal work practices and union responses to them means that general analysis is inevitably difficult. There is much work yet to be done by researchers, unions, employers and policy-makers alike.

ENDNOTES

1 Both these points suggest potentially fruitful areas for research by unions. It seems absurd that unions mindful of the threat posed by marginal workers do not invest resources in closely monitoring their membership profiles. Similarly, it would seem sensible for unions seeking to maintain or increase union membership to undertake detailed investigation of the attitudes of workers in general towards unions, but especially the attitudes of marginal workers.

2 Completely different questions arise when unions are successful in recruiting marginal workers. That is, what is the effect of increased numbers of marginal worker members on the union organisations themselves? Will increased marginal workers not change the balance of power within the unions or the types of policies pursued by the union or the union's political allegiances? It is not possible that the conflicts of interest which sometimes arise between marginal workers and standard employees will lead to internal conflicts, perhaps instability, within the union? There can be no doubt that such developments are possible; indeed, recent reports of the role of owner-drivers in TWU elections suggest one possible example of this already occurring (see, for example, the allegations contained in Ritsch, 1989). A fear of such an eventuality may well cause incumbent union officials to oppose the recruitment of marginal workers. However, few unions have had to confront such issues, mostly because marginal workers have not joined unions in sufficient numbers to threaten traditional union structures or policies.

3 A special problem with the collective unilateralism strategy (and, indeed, collective bargaining) at industry level is potential breaches of the Trade Practices Act; for a discussion of this problem in road transport, see Bray (1990, 125-8, 133).
REFERENCES

ACIRRT

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