

**A Failed Experiment?:
Enterprise Bargaining under the
New South Wales
Industrial Relations Act 1991**

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WORKING PAPER 41

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ACIRRT Working Paper No. 41

JULY 1996

ISBN No. 1 86451 229 6

Style: Michelle Schumacher

Formatting: Davina Park

6/8/1996

WORKING
41
PAPER



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ABSTRACT

This paper examines enterprise bargaining under the *Industrial Relations Act, 1991*. The 1991 Act sought to constrain the effectiveness of the award system and the role of the NSW Industrial Relations Commission, weaken the power of trade unions and enhance the flexibility available to employers to negotiate at a workplace level. However, the paper argues that industrial relations processes do not change solely in response to legislative change. Rather, the responses of the industrial parties remains uncertain and may involve choices which contradict a government's preferred outcomes. Through a combination of qualitative and quantitative evidence the paper demonstrates that the NSW award system and the NSW Industrial Relations Commission remained dominant, that the union movement successfully either resisted enterprise agreements or used the enterprise agreements system to achieve their industrial objectives and that employers, particularly small employers, were reluctant to remove themselves from the established industrial relations system to negotiate enterprise agreements. Enterprise agreements in NSW were also found to have had a detrimental impact on equity and the position of women workers in the NSW labour market.

1. INTRODUCTION

It has been the aim of policy makers to make enterprise bargaining, involving direct negotiations between employers, unions and/or employees with minimal third party involvement, the dominant form of industrial relations practice in Australia. Throughout the 1990s the major political parties have all embraced moves towards an increasingly decentralised industrial relations system. This has seen wide scale and widespread legislative reform at both the state and federal levels as governments seek to make enterprise bargaining the dominant industrial relations practice in Australia.

This paper argues that, at least in the case of NSW, despite government efforts, industrial relations practice has not changed in the manner envisaged by policy makers. This paper questions the ability of governments to fundamentally remake industrial relations practice when employers, trade unions, employees and tribunals have reservations or are resistant to the desired changes.

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- The authors would like to thank Suzanne Hammond, Michelle Dawson and Paul Ronfeldt for helpful comments on earlier drafts of this paper and Shannon O'Keefe for research assistance.

As well, the NSW industrial relations jurisdiction is important in and of itself. According to the 1990 Australian Bureau of Statistics award coverage data, nearly one million workers are employed under NSW awards (ABS Cat. no. 6315.0, 1990: 17). This makes it the second largest jurisdiction in Australia in terms of coverage. Also, areas of coverage under NSW awards are in expanding areas of the economy such as retail.

Among the earliest and, for their time, controversial industrial relations reforms were those introduced by the Greiner Coalition government in New South Wales in the early 1990s. After a series of aborted attempts to reform industrial relations legislation in its first term, the Coalition government finally passed the *Industrial Relations Act*, 1991. The Act represented the first wave of modern industrial relations reform in New South Wales.¹ Its demise provides a timely opportunity to evaluate the NSW experience under a decentralised bargaining system. The Act introduced a hybrid system which maintained centralised wage fixing while providing an opportunity for enterprise bargaining; a similar hybrid model was promoted by the Business Council of Australia (BCA, 1989). This approach stands in contrast to the wide scale labour market deregulation approach pursued in Victoria and New Zealand (Teicher and Fox, 1994; Harbridge and Hince, 1993). The NSW Act was a precursor to the changes introduced under the former Labor government's *Industrial Relations Reform Act*, 1993, which similarly embraced the hybrid system.

The paper examines the legacy of the enterprise bargaining provisions of the *Industrial Relations Act*, 1991. The Coalition government's agenda for industrial relations in NSW was underpinned by assumptions that the NSW award system was bureaucratic and inflexible, that employers desired greater self-determination over industrial matters, that trade unions should be organised around specific enterprises with membership of unions preferably voluntary, and that enterprise agreements could be introduced whilst simultaneously protecting equity.

The paper argues that these assumptions may conflict with the desired industrial relations practices of employers and trade unions within NSW. They may also fail to undermine either the award system or the role of the NSW Industrial Relations Commission. In particular, the paper argues

¹ The Carr Labor government, elected in March 1995, committed itself to repealing the NSW Act and replacing it with a new piece of legislation, more closely modelled on the Commonwealth *Industrial Relations Reform Act 1993*. A draft version of the *Industrial Relations Act 1995* was released in October 1995 and when passed will repeal or modify elements of the *Industrial Relations Act 1991* (NSW Department of Industrial Relations 1995).

that industrial relations processes do not change solely in response to legislative change. The responses of the industrial parties remain indeterminate, and may involve making choices which may contradict a government's preferred outcomes. To test the validity of this argument the paper critically examines the degree to which the parties accepted, rejected or modified the 1991 Act in support of their own specific industrial agendas.

The argument is developed through both qualitative and quantitative analysis of industrial relations in NSW under the 1991 Act between 1992 and 1995. This includes case studies of employer responses, such as the negotiation of a model enterprise agreement at Bathers Pavilion Restaurant (Hammond, forthcoming). But, this model failed to flow throughout the rest of the NSW restaurant industry suggesting that small employers were reluctant to negotiate enterprise agreements in NSW. Also, an analysis of data prepared by the NSW government questions whether enterprise agreements produced measurable productivity improvements and suggests that many employers adopted a cost-cutting approach.

The methodology adopted also explores the responses of two trade unions to enterprise agreements under the 1991 Act. The first case study involves the NSW Independent Education Union (NSW IEU), who were actively involved in enterprise agreement negotiations. The study explores why the union initially preferred enterprise agreements over the arbitral system, what was achieved, the problems encountered under enterprise bargaining and why the union ultimately returned to the award system. The second case study examines the ability of the NSW Public Service Association's (NSW PSA) delegate committee to successfully resist management's desire to negotiate an enterprise agreement within the former NSW Department of Industrial Relations, Employment, Training and Further Education (DIRETFE). It highlights the delegate committee's ability to maintain workplace solidarity by actively recruiting new members and in the process expanding the delegate committee structure.

The paper also relies on quantitative data from the NSW government and the Australian Centre for Industrial Relations Research and Training (ACIRRT) to access the equity outcomes for women workers resulting from enterprise agreements in NSW. The quantitative data suggests that the position of women workers within the NSW labour market has worsened under enterprise agreements with agreements in female dominated industries found to be inferior to those in male dominated industries.

The quantitative data further suggests that enterprise agreements in NSW failed to undermine the award system with only a tiny percentage of workers having their wages and conditions of employment determined solely by enterprise agreements. Non-union enterprise agreements also failed to account for many employees in NSW. Case study evidence suggests that the NSW Industrial Relations Commission continued to retain an important role, particularly in the resolution of industrial disputes.

The paper is divided into six sections. The first section examines the NSW Coalition government's industrial relations reform agenda, in particular its desire to promote an 'enterprise focus'. The second section examines whether employers sought greater self-determination over wage bargaining. The third explores trade union responses to enterprise bargaining under the 1991 NSW Act. The fourth section reviews the equity and bargaining outcomes. The fifth explores the impact of the *Industrial Relations Act, 1991* on the NSW arbitral system. Lastly, the conclusion synthesises the main points and evaluates the relative success or failure of the 1991 Act.

2. NSW COALITION GOVERNMENT'S INDUSTRIAL RELATIONS REFORM AGENDA

In March 1988, New South Wales elected the Coalition government of Nick Greiner, a government committed to reform along economic rationalist lines. Among its first policy initiatives, the Coalition government commissioned Professor John Niland of the University of New South Wales to produce a wide ranging report reviewing industrial relations policy in the state and to recommend change (*Sydney Morning Herald*, 16 June 1988, p. 7). The first volume of *Transforming Industrial Relations in New South Wales* (commonly referred to as the Niland Green Paper) was delivered to the government on 20 February 1989. A key theme within the report was to decentralise industrial relations and foster an enterprise focus. A second volume of the Niland Green Paper was released in 1990 and made recommendations regarding equity, health and safety, training, productivity and the public sector (Niland 1990).

In November 1989, the government responded to the Niland Green Paper with its own White Paper, *The NSW Government's Programme for Modernising Industrial Relations*. The government made several attempts to enact the recommendations through 1989 and 1990.² The

² Industrial Arbitration (Enterprise Bargaining) Amendment Bill 1989 (NSW). Industrial Relations Bill 1990, Industrial Court Bill 1990, Industrial Legislation

May 1991 state election saw the return of a minority Coalition government. The aborted first term industrial relations reform package was reintroduced as the *Industrial Relations Act, 1991* in August of that year.

The Labor opposition, the Labor Council of New South Wales and numerous community groups expressed outrage over the legislation. The Labor Council of New South Wales launched an advertising campaign against 'Greiner's industrial coup' and organised the first state-wide general strike since 1917 for 23 October 1991. Estimates at the time placed the number of strikers at 600,000, about one-quarter of the state's workforce (*Sydney Morning Herald*, 24 October 1991, p. 1). Despite this resistance, the legislation passed on 30 October 1991, coming into effect on 31 March 1992.

At the time of its introduction, the 1991 Act represented a radical redrawing of industrial regulation, with enterprise bargaining to become the main vehicle for setting wages and working conditions in NSW. One of the main changes involved the creation of a separate stream for processing enterprise agreements, which effectively lay outside of the supervision of the Commission. Instead, enterprise agreements were to be lodged with the Industrial Registrar, but were not open to scrutiny by the Commission. Enterprise agreements were required to meet certain substantive and procedural requirements which were set down in legislation. The only third party scrutiny came from the new Commissioner for Enterprise Agreements, whose role it was to meet with the parties and ensure the requirements of the Act were met (Section 127). Unlike the public scrutiny of enterprise agreements in the federal jurisdiction by the Australian Industrial Relations Commission, that undertaken by the NSW Commissioner for Enterprise Agreements was essentially private and closed.

Another change brought about by the 1991 NSW Act was the ability for the negotiation and registration of 'non-union' enterprise agreements. As such, employers could negotiate agreements with individual employees or else with a properly constituted 'works committee' of employees. No union involvement was required for an agreement to be registered. The legislation set down certain procedural requirements including 65% of

(Repeals, Amendments and Savings) Bill 1990. As well, the so-called bite-size bills; Industrial Arbitration (Voluntary Unionism) Amendment Bill, Industrial Arbitration (Enterprise Agreements) Amendment Act 1990, Industrial Arbitration (Unfair Dismissal) Amendment Act 1990, Industrial Arbitration (Unions) Amendment Bill 1990 were introduced.

employees to vote in favour of a "non-union" agreement before it would be registered (Section 119).

Lastly, the legislation set down certain substantive requirements for enterprise agreements. As such, NSW enterprise agreements were not compared in total with existing award conditions which is the case in the federal jurisdiction. NSW enterprise agreements under the 1991 Act were required to meet a set of minimum standards which included 5 days, ordinary hours of work to be no more than a maximum of 40 hours a week averaged over a 52 week period and a minimum wage rate not less than that in the relevant award (Section 122 (1)). As well, employees were guaranteed annual leave, long service leave and parental leave (Section 122 (3)).

The following section examines the responses of employers to the introduction of enterprise bargaining in NSW.

3. EMPLOYERS' DESIRE FOR GREATER SELF-DETERMINATION IN NSW

The Niland Green Paper and the *Industrial Relations Act, 1991* both advocated the decentralisation of industrial relations away from the arbitral system through the development of a greater enterprise focus. This approach to industrial relations was meant to encourage the parties to take greater responsibility for negotiating wages and conditions at an enterprise level and was also expected to result in increased efficiency, productivity and international competitiveness (Niland, 1989a, pp. 17-34; DIRETFE, n.d., p.1). In short, Niland and the subsequent 1991 Act emphasised the desire for the industrial parties for greater self-determination and advocated a reduced role for the state (Guille 1990, p.162).

But most employers did not take advantage of the enterprise bargaining provisions provided under the 1991 Act. Buultjens (1995, pp. 225-6) found that only 34% of small employers surveyed in Lismore considered it 'very important' that they had the ability to change wage levels in response to economic circumstances. In contrast to the views of the NSW Coalition government, the majority of small employers surveyed felt that despite being covered by awards they retained considerable flexibility to hire and fire (64%), alter working hours (54%), have workers perform a range of tasks (77%) and enter into direct negotiations with workers (40%) (Buultjens 1995, p. 227). Buultjens (1995, p.229) also found that 38% of small businesses surveyed had no knowledge of the 1991 Act and concluded that the flexibility that Lismore's small businesses enjoy under

the centralised award system has resulted in a reluctance to undertake enterprise agreement negotiations. Research by Barrett (1995, p.357) on federal non-union Enterprise Flexibility Agreements similarly supports the notion that small business is reluctant to engage in enterprise bargaining.

By the end of the legislation's life, prior to the March 1995 NSW state election, the Employer's Federation of NSW expressed considerable reservations of the Coalitions' government enterprise bargaining system, in particular the lengthy and often costly bureaucratic process involved in having an agreement registered. They encouraged employers to negotiate a consent award, under the jurisdiction of the NSW Commission instead (*Workforce* No. 17, February, 1995, p.1).

But, despite the reticence of most employers, particularly small business, to engage in enterprise agreements, some embraced the new system. For example, the first agreement in the restaurant industry in New South Wales was negotiated by Bathers Pavilion Restaurant, an up market restaurant at Balmoral Beach in Sydney with under 100 employees. The agreement was negotiated via a works committee and without trade union involvement. The agreement saw the abolition of both penalty rates and holiday leave loading, the introduction of a flat hourly rate of \$12.50 and provided a possible model for other restaurants to follow. Functional flexibility was enhanced with workers in the kitchen area permitted to serve customers and waiting staff able to work in the kitchens. Rosters were changed to forty hours per week averaged over a fifty-two week year with workers guaranteed a minimum of twenty-five hours per week (Hammond, forthcoming).

While the workforce reported being under no coercive pressure from the employer to negotiate an enterprise agreement, Hammond suggests that the works committee may have been subject to employer influence in terms of the outcomes achieved. The workforce was concerned at the beginning of the bargaining process with pay rates, the abolition of penalty rates and leave entitlements. By the end of the negotiations the spokesperson for the works committee highlighted instead the benefits that permanency and multi-skilling provided to workers and 'to a certain extent, these objectives are aligned with management objectives to create greater commitment from the workforce and to 'professionalise' the industry' (Hammond forthcoming).

The employer association for the industry, the Restaurant and Caterers Association (RCA) strongly pushed for non-union bargaining (including the ground breaking Bathers Pavilion agreement) within the industry. But the RCA's attempts at non-union 'pattern bargaining', which sought to

reduce penalties and overtime rates, proved less than successful with fewer than a dozen agreements registered (Short and Buchanan, 1995, p. 130). With the legal costs involved in negotiating an enterprise agreement likely to prove prohibitive for many small businesses, most saw little to gain from entering negotiations with their staff.

Moreover, little quantitative evidence is available that enterprise agreements in NSW have resulted in measurable increases in productivity. The Hunter Valley Research Foundation (1993) conducted a survey on behalf of DIRETFE involving responses from seventy-seven employers who had negotiated 88 enterprise agreements prior to June 1993. Of those employers surveyed 55% claimed to have benefited from increases in productivity as a result of negotiating enterprise agreements (1993, p.27). Three factors are accredited with causing this increase in productivity: more flexible work practices (45%); more flexible working hours and wage rates which reduced labour costs and the number of workers required (36%); and an increase in communications between employers and employees (13%) (1993, p.28). Besides the unrepresentative nature of the sample (only seventy-seven employers), no data is provided as to how these productivity improvements were measured with much of the supposed productivity improvements resulting from cost cutting.

A similar picture is evident from an examination of DIRETFE's *Enterprise Focus* magazine which provides regular updates on NSW enterprise agreements. The Summer 1995 edition detailed five case studies of the winners of the 'Enterprise Focus Awards 1994'. The awards are meant to reward organisations introducing 'innovative working arrangements'. But, the award appears to have been provided to companies financing wage rises through cost cutting (Monaro Electricity), or for claiming that a new workplace culture was evident in the aftermath of the enterprise agreement (Fosroc Chemicals and Property Services Group). Trade unions were involved in only one of the enterprise agreements (June Correctional Centre), the remainder conducted by works committees (*Enterprise Focus*, Summer 1995). Moreover, none of the case studies provide measurable productivity indicators instead relying on the unproven assumption that productivity improvements will result from an increased mutuality of interests between management and labour (*Enterprise Focus*, Summer 1995).

Even where the link between enterprise agreements, productivity indicators and wage rises in NSW was made explicit the outcomes have not been clear cut. Prospect Electricity negotiated an enterprise agreement with trade unions in March 1993. The agreement attempted to

link wage rises to productivity improvements via a productivity matrix involving: operating costs per customer; return on assets; reliability index; customer satisfaction index; accident severity; and sick leave (Doyle, 1995). On the one hand, Doyle points to potential benefits in the form of establishing 'benchmarks' for performance and 'practical' ways to improve productivity. On the other, Doyle concedes that such productivity models are 'open to manipulation to suit required outcomes which may be more closely related to perceived industry standards or "going rates" for productivity payments' (Doyle, 1995, p.195). This suggests that linking productivity indicators to wage negotiations does not result in a unitarist panacea, providing instead another focus for conflict and struggle between the industrial parties.

The following section examines the impact of the 1991 Act on trade union density in NSW and provides case studies of the responses of two trade unions to the legislation.

4. TRADE UNIONS AND THEIR RESPONSES TO THE 1991 ACT

Niland argued that trade unions be preferably organised around the enterprise rather than an industry or occupation (1990b, p.203; 1989b, p.15). Niland also opposed the monopoly granted by the state to trade unions (Niland 1989b, p.5). The Coalition broadly supported these recommendations and the *Industrial Relations Act, 1991* set out to make the closed shop 'unlawful' and encourage 'voluntary unionism' by ending monopoly held by trade unions as bodies representing workers in industrial matters (DIRETFE, n.d.b). The legislation cancelled existing preference clauses and prohibited the insertion of new ones into awards or agreements (section 480). It also sought to prevent victimisation on the grounds of trade union membership or non membership. Workers were permitted to sue an industrial organisation up to \$10,000 if it put pressure on an employer to sack someone for non membership or for refusal to take industrial action (Section 481).

Critics argued that the Act represented an ideological offensive whose purpose was to undermine the power of trade unions in NSW (Shaw, 1990, p.49; Fisher, 1990, p.113). O'Brien (1990, p.548) raised concerns that the enterprise focus might result in workplaces and industries that at best contained weak company unions. The Labor Council of NSW expressed similar concerns over the legislation's encouragement of non-union enterprise bargaining. In particular the Labor Council was concerned that workers may not be fully aware of their award entitlements

and may enter negotiations 'without their interests being truly and freely represented' (Labor Council, 1993).

Trade union membership declined dramatically during the period the legislation was in effect. Between June 1990 and June 1994, New South Wales experienced the most dramatic decline in union density of any state except for Western Australia. According to the Australian Bureau of Statistics, union density in NSW declined from 57% in 1990 to 46% in 1994. More dramatic has been the decline in trade union numbers which have plummeted from 1,263,000 to 1,033,000 over the same four year period.

Table 1

Union density and membership, NSW and Australia, 1990 to 1994

Year (June Figure)	NSW Membership (000's)	NSW Union Density (%)	Australia Membership (000's)	Australia Union Density (%)
1990	1,263	57	3,422	52
1991	1,217	55	3,382	53
1992	1,112	51	3,135	49
1993	1,037	48	3,000	47
1994	1,033	46	2,890	44

Source: Australian Bureau of Statistics, 1995, *Trade Union Statistics*, Cat. No. 6323.0

Some predicted that the legislation would bring about union decline in areas such as the retail industry and the white collar private sector, where unions had traditionally relied upon closed shop arrangements to maintain membership (Larriera, 1991). Recent research however has found employers ambivalent about the Act's abolition of the closed shop, continuing to collect union dues and recognising compulsory unionism, often in line with established practice (McGraw and Palmer, 1994, pp. 512-6). As such, more research is required to understand the reasons behind this dramatic decline in union membership in NSW.

But, that is not the purpose of this paper. Instead we focus on the responses of two unions to enterprise agreements in NSW; the NSW Independent Education Union and the delegate committee of the NSW Public Service Association within DIRETFE. The former actively engaged in enterprise agreement negotiations with non-government school employers while the latter successfully resisted management attempts to negotiate an enterprise agreement for different sections of DIRETFE's workforce.

The NSW Independent Education Union (IEU) (previously the NSW Independent Teachers Association) represents teachers, school secretaries and school assistants in the non-government education sector. The union covers some 860 schools of which approximately 550 are Catholic systemic schools. The NSW IEU has 15,000 financial members. Union density among teachers varies from approximately 85% for Catholic schools to between 50 and 60% for non-Catholic independent schools. Density among clerical staff is lower at between 30 and 40%, higher in Catholic as compared to non-Catholic schools. In 1994, 138 of 524 NSW enterprise agreements (26%) had been registered in the non-government education sector, almost all with the NSW Independent Education Union (IEU) (*Enterprise Focus*, Summer, 1995).

During 1993, the IEU entered negotiations over enterprise agreements with employers in independent and catholic schools. The union entered into enterprise agreement negotiations to avoid having to justify wage rises outside of wage case guidelines on productivity grounds. The IEU argues that measuring the productivity of a school teacher is difficult and tends to represent an exercise in cost-cutting. As a result, productivity bargaining was anathema to the union who decided instead to enter into enterprise agreement negotiations with employers.

The negotiation of enterprise agreements between the Association of Independent Schools and the IEU resembled pattern bargaining, with the union seeking to have a model agreement become the standard for the industry. In 1993, the IEU negotiated a model agreement with the Association of Independent Schools (AIS), the employer association which covers nearly all non-Catholic independent schools (*Newsmonth*, February, 1994, p.7). An initial two year enterprise agreement was negotiated between the IEU and the AIS to run from May 1993 until 30 April 1995. Once agreement was reached both parties sought to have this agreement cover all AIS schools. But, the NSW Industrial Registry refused to register the agreement, requiring a separate agreement for each school. This resulted in the AIS being granted power of attorney by its affiliate schools to negotiate and register separate (but essentially identical) agreements for each school in conformance with the 'AIS model'. This 'AIS' model was used to 'pattern bargain' similar agreements for staff throughout the independent non-government school sector.

The 'AIS model' was also relied upon to form the basis for subsequent enterprise agreement negotiations with catholic employers. Enterprise agreements were negotiated by the IEU with various Catholic employers (primarily through the Catholic Industrial Office) by late December 1993. The employers had to choose between a new award similar to that

negotiated with the AIS or an enterprise agreement using the 'AIS model', mentioned above (*Newsmonth*, February 1994 p. 7: *Newsmonth*, December 1994). The IEU eventually reached agreements with independent and systemic Catholic schools, although these differed from the AIS model. The AIS model provided a 4.9% wage increase in two instalments, while the Catholic schools followed the State schools by offering only 1.3%. However, the cost to Catholic employers was equivalent to the 'AIS model' with the union gaining improvements to long service leave and new conditions, most notably paid maternity leave, to compensate for the lower level of wage increases (ITA, 1994).

Yet the IEU did encounter certain difficulties in the course of bargaining with Catholic dioceses. For instance, the conservative diocese of Wagga proved particularly recalcitrant. The bishop of Wagga initially attempted to use the provisions of the 1991 Act to exclude the union from enterprise agreement negotiations. The diocese sent petitions to teachers, asking them to vote on whether they wanted union representation. Approximately 98% of respondents replied in favour of the union. Such recalcitrance, the union noted, would not have been evident under the centralised system where such pockets of resistance would have had to conform to the dominant employer position (IEU Industrial Officer, October 1995). Moreover, centralised wage increases negotiated with the AIS or the Catholic Industrial Office would have placed less of a strain on union resources than negotiating and enforcing the payment of enterprise agreements. The union had to get consent from every school before enterprise agreements could cover all schools in the sector, even those schools in breach of the award and where there were no trade union members. The union also had to persuade these schools to sign the enterprise agreement and to pay the wage rates contained within it.

The NSW IEU argues that enterprise bargaining enabled the union to gain improvements in conditions that it believed would not have been forthcoming under the centralised system. The union was able to gain paid maternity leave in place of a partial wage increase from Catholic schools. Paid maternity leave had historically posed problems in negotiations between the union and employers within the non-government school sector. Throughout the negotiation of enterprise agreements the NSW IEU also negotiated improved long service pay. Why the union had to resort to enterprise bargaining to gain concessions from employers in the area of maternity leave when other unions have successfully negotiated such conditions under the arbitral system remains unclear. Did the resort to enterprise bargaining make the union organise more effectively and listen to the concerns of its members more intently?

The IEU vacated the NSW enterprise agreements stream in 1995, primarily because of the excessive paperwork required to register an enterprise agreement. Also, by 1995 the NSW Industrial Relations Commission appeared more willing to grant applications for wage increases based on consent, rather than requiring specific productivity justifications. On 1 May 1995 the IEU returned to the centralised system with the signing of the *Teachers (Independent Schools) (State) Award*. The new award provided teachers in independent schools with a pay rise of 4% with a further 4% coming into effect from 1 July 1996. The new award is a mirror of its predecessor with the addition of the improved conditions negotiated through the 'AIS model' enterprise agreement such as increased long service leave accrual from 1.5 weeks to 2 weeks for each year of service, the introduction of paid maternity leave (4 weeks from 1 May 1995; 5 weeks from 1 January 1996; 6 weeks from 1 January 1997) and up to five days family leave (*Newsmonth*, May 1995). The IEU was also able to negotiate a 9% rise for Clerks and School Assistants under a new Catholic schools award (*Newsmonth*, May 1995, p.3).

Therefore, the IEU adopted a strategy of 'pattern bargaining' enterprise agreements in line with the 'AIS model'. The union later sought to have these improvements flow into its awards for employees in the non-government education sector. Yet the drain on union resources in negotiating, registering and enforcing the agreements was greater than would have been the case under a common rule award. Enterprise bargaining was also strongly pushed by the Coalition government in the NSW public sector. The next section explores the response of the NSW PSA delegate committee within the department responsible for promoting enterprise agreements in NSW, DIRETFE.

Senior management within DIRETFE sought to negotiate an enterprise agreement in line with the coalition government's policy of encouraging agreements in the NSW public sector (DIRETFE, 1993). But, the PSA delegate committee within DIRETFE refused to sign an enterprise agreement, instead negotiating a 'Memorandum of Understanding' on 28 July 1994 between DIRETFE, the PSA and the Professional Officers Association (POA).

The memorandum aimed to improve working conditions, involve the workforce in managerial decision-making and improve the department's productivity and efficiency (DIRETFE PSA Memorandum, 1994). The memorandum also established a department-wide joint consultative committee. The memorandum had no term and either side could repudiate it at any time. The memorandum complied with NSW Commission requirements regarding dispute resolution procedures. It

also sought to limit management from reducing staffing levels and required management to provide the unions with adequate and timely information regarding plans that impacted on the employment of staff (DIRETFE PSA Memorandum, 1994). The memorandum also included the views of management and the unions regarding enterprise agreements. Management sought to negotiate an agreement for all departmental employees (with the exception of the Senior Executive Service) and the Adult Migrant Education Service. The unions rejected this position arguing that it was the substance of the negotiated outcomes that was important rather than the instruments that gave those outcomes effect (DIRETFE PSA Memorandum, 1994). They requested that management inform them of the issues for negotiation. Management failed to provide these details, merely maintaining that an enterprise agreement had to be negotiated in line with government policy (Secretary and Chair of the DIRETFE PSA Delegate Committee, 1995).

The union also sought to strengthen its department wide delegate committee structure, enhancing its ability to resist managerial attempts to fragment the workforce. Upon signing the memorandum, management initiated direct negotiations with employees. Management embarked on a series of workplace visits to sell the benefits of enterprise agreements to the DIRETFE workforce. The PSA made presentations to staff within the areas of the department visited by management selling the benefits of union membership. The union claims that this exercise boosted union membership and increased the profile of the union. The union reports an increase in membership of approximately 9% throughout the department - at a time when the department's workforce declined by a similar amount (Secretary and Chair of the DIRETFE PSA Delegate Committee, 1995).

One branch of DIRETFE, Public Employer Services (PES), did seek to negotiate its own separate enterprise agreement. This section of the organisation was responsible for promoting enterprise agreements throughout the public and private sectors. One option pursued by workers within PES was to establish a works committee although they were unable to achieve the support of 65% of employees in a secret ballot as required by the 1991 Act, with only 55% of the PES workforce supporting the works committee. The PES delegates then approached the PSA to negotiate an enterprise agreement on their behalf. The union responded by including the PES delegates in the Department's joint consultative committee and delegate structure. As a result, the PES delegates were willing to accept the decision of the department-wide delegate structure to resist negotiating an enterprise agreement (Secretary and Chair of the DIRETFE PSA Delegate Committee, 1995).

The experience of this delegate committee demonstrates the potential for unions to mobilise and resist enterprise bargaining through a strategy of recruitment of new members and of delegates. This provided PSA delegates within DIRETFE with the necessary countervailing power to force concessions in the form of a Memorandum of Understanding from management. It also enabled them to maintain a considerable degree of workplace solidarity in the face of managerial attempts to fragment the workforce through enterprise agreements. Such workplace organisation is often not evident in the private services sector, however, where many women workers are concentrated (Burgmann, 1994). The equity implications and bargaining outcomes for women workers from the coalition government's enterprise bargaining system will be explored in the next section.

5. EQUITY AND BARGAINING OUTCOMES

Niland and the Coalition government articulated a belief that an enterprise focus, while improving efficiency, would not worsen the position of marginal groups in the labour market. Niland (1990a, pp. 36) observed that it was incumbent upon civilised societies to provide an adequate safety net. This awareness of the need for equity is what distinguished Niland's recommendations from those of the ideologies of the New Right - although his perspective on equity remains centred on the rights of individuals rather than those of collectives (O'Brien 1990, pp. 551-4). The *Industrial Relations Act*, 1991 contained certain safeguards to protect workers from unscrupulous employers. The Industrial Court had the ability to declare an enterprise agreement invalid under certain circumstances. To be registered an agreement had to conform to minimum entitlements in relation to wages, hours of work and leave and certain procedural requirements before its registration, such as compulsory conferences with the Commissioner for Enterprise Agreements (O'Donnell, 1995, p.25).

Critics of Niland's proposals noted that the move to decentralised enterprise bargaining would worsen the wages and conditions of marginal groups within the labour market such as women, the young, unskilled workers and newly arrived migrants (Easson, 1990, pp. 172-3; Shaw, 1990, p.40). Burgmann (1994, pp. 21-2) observes that women workers are segregated within the clerical, retail and personal services sectors. These workers are concentrated in occupations with limited strategic importance and in small, geographically dispersed workplaces. Moreover, women workers in these areas often have little if any experience of bargaining collectively with their employer (Gardner, 1994, p.3). Hall and Fruin's (1994, p.115) analysis of 20 federal agreements found that

agreements in male-dominated industries resulted in greater job security and pay increases in comparison with agreements in female-dominated industries where the employer's ability to use casual and part-time work had substantially expanded.

Further, workplace bargaining in the female-dominated service sector often involves cost-cutting because of difficulties in defining productivity in this sector. The weak bargaining position of these workers means they experience greater problems than male dominated industries in linking productivity improvements to pay rises (McDermott, 1993, pp. 549-551).

The Coalition government attempted to meet concerns regarding equity through an evaluation of the impact of the legislation on women workers. In their review of 345 enterprise agreements entitled *Women and Enterprise Bargaining*, DIRETFE gave less than a glowing report of how women had fared under the NSW system of enterprise bargaining. The report notes some NSW agreements contained beneficial conditions, such as greater flexibility in hours and scheduling, additional leave, new classification structures and the inclusion of commitments to Equal Employment Opportunity and the provision of child care. As well, the report noted that some agreements eliminated previously discriminatory award provisions and that, in the move to enterprise wide arrangements, some occupations (such as clerk) had seen their conditions improved as they were brought in line with those of other staff (DIRETFE, 1993).

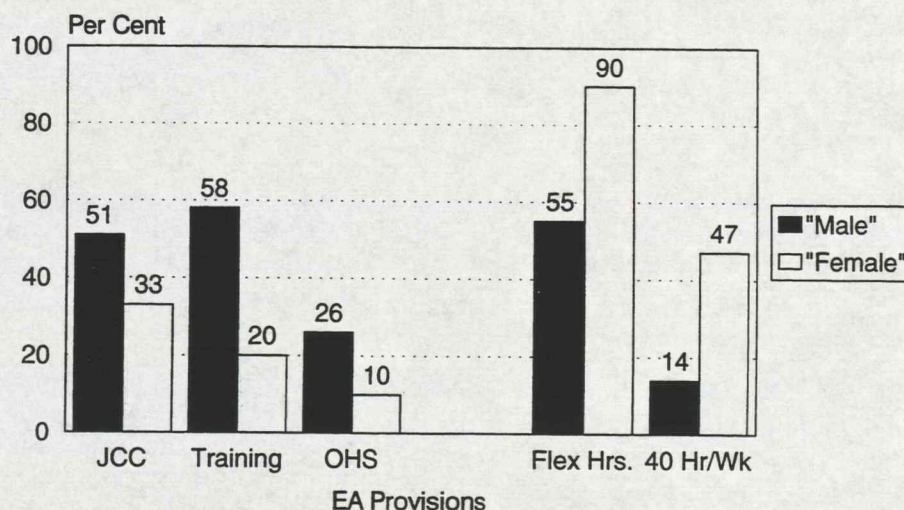
But, the report notes that agreements in female-dominated industries were generally inferior to those in male-dominated agreements. Male-dominated agreements generally had higher wage increases, more benefits and greater access to performance-based pay, training and career paths. The report also stated that increased flexibility might actually prove detrimental to female workers, especially given the inequitable distribution of household and family responsibilities (DIRETFE, 1993).

A more recent content analysis further confirms the observation of inequitable outcomes between New South Wales agreements which cover men and women. Using the Agreements Database and Monitor (ADAM) located at the University of Sydney, 334 NSW agreements were analysed.³ These agreements represent a stratified sample of NSW agreements registered between 1992 and 1995 and still in force as of 1

³ More information on ADAM can be found in *The ADAM Report*, Australian Centre for Industrial Relations Research and Training (ACIRRT), University of Sydney. Another discussion regarding the advantages and limitations of using content analysis databases to study enterprise agreement developments can be found in Rimmer and Watts (1995).

August 1995. The agreements were divided between those in male-dominated, female-dominated and mixed industries, based on the proportion of female employment data from AWIRS (Callus et al. 1991, p.234). The analysis confirms the trends found in the DIRETFE report. Agreements in male-dominated industries were more likely to have productivity enhancement provisions than those agreements in female-dominated industries. 51% of agreements in male-dominated industries provided for workplace consultation while only 33% did so in female-dominated industries. In regards to training, 58% of the agreements in male-dominated industries contained such a provision, while only 20% in female-dominated industries provided training. Lastly, 26% of male-dominated industry agreements made reference to occupational health and safety, while a mere 10% of female-dominated industry agreements did likewise.

Percentage of Selected Provision in NSW EAs from Male and Female Dominated industries



Source: ADAM database, ACIRRT, Sydney University, August 1995; n=334

On the other hand, agreements in female-dominated industries were far more likely to have provisions which made flexible or expanded hours of work. Indeed, the evidence from ADAM would point to flexible work time arrangements coming to the fore of the bargaining agenda in female-dominated industries (ACIRRT 1995). While 55% of agreements in male-dominated industries included provision for flexible start and finish times, an overwhelming 90% of agreements in female-dominated

industries also did. Similarly, only 14% of agreements in male-dominated industries include provision for a 40 hour week, while 47% of agreements in female-dominated industries include such a provision. Lastly, despite the claims of the Coalition's Minister for Industrial Relations between 1993 and 1995, Kerry Chikarovski, that women could have their issues dealt with through enterprise bargaining, the evidence would appear to prove otherwise (Chikarovski, 1995, p.5). Of the 334 NSW agreements analysed only four made provisions for Equal Employment Opportunity, three considered the provision of child care and only two contained a sexual harassment clause (ADAM, unpublished data).

The evidence clearly highlights that enterprise bargaining in NSW had a detrimental impact on equity and the position of women workers in the NSW labour market. The arbitral system has been found to better ensure equitable outcomes when compared to decentralised systems of industrial relations (Hammond, 1994; Whitehouse, 1994). The next section examines the impact of enterprise agreements in NSW on the NSW award system and the role of the NSW Industrial Relations Commission.

6. IMPACT OF THE 1991 ACT ON THE NSW ARBITRAL SYSTEM

The NSW Industrial Relations Commission retained an important and vibrant role despite the intentions of the 1991 Act. The Niland recommendations and the subsequent legislation are based on liberal pluralist assumptions that individuals should be free to negotiate industrial conditions with minimal interference from external organisations and the state. This approach is in stark contrast to Australia's labour history of institutionalised industrial relations (O'Brien, 1990, p. 551). Critics of the Niland prescription have argued that the rationale for decentralised industrial relations remains largely unproven with the demise of the centralised system threatening to shift the balance of industrial power in favour of employers (O'Brien, 1990, p.548). Guille (1990, p.171) suggested that no evidence of the deficiencies of the centralised system nor specific Australian evidence of the advantages of a decentralised enterprise focus for industrial relations is provided by Niland in the Green Papers. Easson (1990, p.68) argued that the changes introduced in the late 1980s greatly increased the flexibility of the centralised wage fixing system, with the 1989 National Wage Case guidelines in particular facilitating the pursuit of increased productivity. Moreover, a focus on the enterprise alone will undermine multi-employer co-ordination, for instance in training, which is facilitated by the award system's industry focus. Hammond and Harbridge (1995) question whether industrial relations systems are universally moving towards a lower centre of gravity

and suggest instead that a considerable degree of centralist regulation remains evident in all West European countries with the exception of Britain.

The data suggests that the award system remained dominant in NSW and that few workers opted out despite the intent of the 1991 Act. Between 1992 and 1995, no more than 18.6% of those workers covered by the NSW award system had their wages and conditions regulated by enterprise agreements. Of that 18.6%, three-quarters of enterprise agreements provided only partial regulation with a majority of the NSW enterprise agreements continuing to rely upon the award.⁴ For those agreements registered in 1994, for instance, 392 out of 524 (75%) of the agreements provided for partial regulation of employment conditions (DIRETFE, *Enterprise Focus*, 1995, p.16). Therefore, at best only 4.65%⁵ of workers covered by the NSW award system had their conditions of employment solely regulated by the Coalition's enterprise agreements system. This signifies that the arbitral system remained the predominant form of industrial regulation for workers in NSW.

But critics expressed concern that the legislation, in a number of areas, would weaken unions. One area of concern was non-union enterprise bargaining. Non-union bargaining, however, rarely took off. Data from 31 July 1995 shows that of the 1,075 agreements registered, two-thirds

⁴ It should be noted that some of the agreements which provided for partial regulation of employment conditions were only concerned about a single issue. For instance, an enterprise agreement between Stegbar-Federated Clerks Union only provided for lowering the minimum call-in time from 4 to 2 hours. As well, some non-union enterprise agreements only change a single condition of employment. For instance, the Georges River Child Care non-union enterprise agreement only changed the manner in which continuity of employment was calculated over the Christmas shut-down period.

⁵ While the Coalition government claimed that nearly one-quarter of NSW award covered employees were also covered by NSW enterprise agreements, this figure may be somewhat inflated. There were 931,836 NSW award covered employees in 1990 (ABS Cat. No. 6315.0, 1990: 5) out of 2,652,000 total employed in NSW in July 1990 (ABS Cat. No. 6203, 1990). By July 1995 the number of total employed in NSW had grown to 2,755,000 (ABS Cat. No. 6203, 1995), an increase of 3.8 %. Extrapolating the 1990 NSW award covered employees figure by this percentage suggests that there were approximately 967,245 award covered employees in NSW at July 1995. There were 180,537 employees covered by NSW enterprise agreements as of 31 July (Enterprise Agreements Advisory Service, DIRETFE, 4 August 1995), or 18.6 % of the approximate NSW award covered workforce at July 1995. With only one-quarter of agreements providing total regulation (assuming equitable distribution of employees between agreements) (DIRETFE *Enterprise Focus* 1995, p.16), a mere 4.65 % of employees had their conditions of employment fully regulated by NSW enterprise agreements at 31 July 1995.

(672) were union negotiated while 319 were non-union employee agreements and a mere 84 were negotiated by non-union works committees.

Table 2

Number of union and non-union registered enterprise agreements, New South Wales, 1992 to 1994

Year	Total No. of Enterprise Agreements Registered	No. of Union Agreements	No. of Non-Union Agreements
1992	58	35	23
1993	394	286	108
1994	524	324	200

Source: *Enterprise Focus*, Enterprise Agreements Unit, DIRETFE, 3(1), Summer 1995, p.16.

The number of employees covered further highlights the disparity between union and non-union bargaining. DIRETFE data from 31 July 1995 shows that of the 180,537 employees under NSW enterprise agreement, 171,755 (95%) of those were covered by union negotiated agreements. In comparison, a mere 3,822 (2%) were covered by agreements negotiated by non-union works committees, while 4,960 (3%) were under non-union employee negotiated agreements (Enterprise Agreements Advisory Service, DIRETFE, 4 August, 1995). Despite the existence of a non-union bargaining stream, trade unions in NSW clearly remained the dominant representative of employees covered by enterprise agreements.

In addition to enterprise bargaining, other legislative changes sought to restrict the role of the NSW Industrial Relations Commission through the introduction of a distinction between 'interest' and 'rights' disputes. Borrowed from North American and European labour law, interest disputes are those concerning the establishment of industrial conditions for a fixed term, while rights disputes are those concerned with the interpretation of those conditions (Schregle, 1981). Broadly speaking, this approach views industrial action over interest disputes as legitimate, while rights disputes are to be resolved through binding grievance procedures.

This distinction, in particular the notion of fixed term settlements, was put into effect in NSW by requiring awards and agreements to have a 'nominal term' of no less than 12 months and no more than 3 years (Section 110(1), 124). During this nominal term, no arbitrated variations could be made to the award or agreements. The Commission could only arbitrate outside of

the nominal term or on 'new matters' (Section 107 (3); 111, 112). As well, restrictions were placed on industrial action related to 'settled matters', namely industrial conditions set down in awards or agreements that were within their nominal term (Section 193-197), and enterprise agreements were required to have a dispute settlement mechanism (Section 121).

Despite the attempts to restrict the role of the NSW Industrial Relations Commission through the introduction of the 'interest/rights' distinction, nominal terms for awards and agreements, and restrictions on the ability of the Commission to arbitrate during the nominal term, the Commission retained an active role in industrial matters in NSW. The Commission, comprising of eleven Judges and twenty-three Commissioners, maintained the award system through such innovations as splinter awards and the use of consent awards. Splinter awards were a means by which the Commission was able to overcome the restrictions outlined above. To arbitrate, the Commission would declare that a dispute was concerned with a new matter, even if similar conditions were within an existing award. Rather than vary the existing award, something the Commission was severely restricted in doing, a new 'splinter' award was issued which covered the matter in dispute, effectively varying the condition within an industry or occupation. As such the Commission maintained a responsive and dynamic award system, despite the 1991 legislation's attempts to curtail the Commission's ability to do so.

The NSW Industrial Relations Commission also retained a strong role in the determination of the wages and conditions for public service workers in NSW. For instance, the December 1993 NSW public service productivity case saw the Commission actively arbitrate a wage rise on past productivity improvements in the NSW public service (NSW Industrial Relations Commission, 1995).

The resilience of the Commission is further demonstrated by its approach to industrial disputation. Reference of industrial disputes to the Commission under the *Industrial Relations Act, 1991* were outlined under the notification of industrial dispute (Sections 188 to 192). Despite the prescriptive and detailed approach to dispute resolution as envisaged in these sections of the legislation, the Commission adopted a 'service model' which sought to have disputes heard quickly in response to the demands of employers and trade unions. The Commission was aware that for many employers a one day stoppage might equate to the loss of one month's profit. The Commission's objective therefore was to 'stop the blood flowing' by getting the case heard quickly if an industrial dispute was in progress. Often the case would be heard that day and settled later the

same evening. The system also operated to the benefit of trade unions. If, for example, an unscrupulous employer dismissed their workforce without notice, the union also had the benefit of immediate recourse to the Commission (NSW Industrial Relations Commission, 1995).

The Commission's ability to respond was facilitated by a combination of centralised administration and flexibility. The NSW Commission is different to the Australian Industrial Relations Commission in that it is able to centralise its administration, with each dispute going before the President prior to being allocated to the relevant Commissioner. Alternately, an employer or union can provide a clerk with a short write up of the dispute - with a formal submission to be lodged within 24 hours. This swift response resulted in no backlog of cases (NSW Industrial Relations Commission, 1995). Therefore, the 1991 Act's provisions regarding industrial disputes, which sought to keep industrial disputes away from the Commission, was arguably driven more by ideology than by the practical concerns of the parties.

Within this context, it is interesting to note that no major employer group in NSW came out in protest against the Labor Party's industrial relations policy prior to the March 1995 election which sought to enlarge the discretion of the NSW Industrial Relations Commission. This response was believed to have had a significant effect on the newly elected Labor government. Labor's proposed industrial relations Act therefore seeks to exploit the tacit agreement of the parties regarding the role of the Commission (NSW Industrial Relations Commission, 1995). The proposed Act provides for enterprise agreements to be approved by the Commission rather than the Registrar using a 'no net disadvantage test' similar to that contained in the federal *Industrial Relations Reform Act 1993*.⁶ Further, the Commission's role as settler of industrial disputes is recognised within the proposed legislation.

7. CONCLUSION

The NSW industrial relations reforms of the late 1980s and early 1990s first proposed by John Niland and then introduced by the Coalition government of Premier Greiner were founded upon a series of assumptions about industrial relations practice. They assumed that the parties, especially employers and small business, wanted to throw off the

⁶ The NSW Labor government's *Industrial Relations Bill* (1995) provides for the NSW Industrial Relations Commission to administer a 'no net disadvantage test' prior to approving an enterprise agreement. While this appears to be similar to the 'no disadvantage' test applied in the federal jurisdiction, the NSW Industrial Relations Commission is permitted to develop its own principles.

burden of industrial tribunals and the award system and embrace an enterprise focus; that trade unions would accept this shift and reorganise around individual enterprises; and that equity would not be compromised by a focus on productivity improvement at an enterprise level. These assumptions proved to be misplaced. The paper demonstrates that industrial relations processes do not change solely in response to legislative change. Rather, the responses of employers and trade unions remains uncertain and may involve choices which contradict a government's preferred outcomes. Moreover, the legislative changes failed to constrain the effectiveness of the award system and the active role played by the NSW Industrial Relations Commission.

First of all, employers did not actively seek the demise of the existing arbitral system. Many employers, in particular small employers, were reluctant to negotiate enterprise agreements, given the time and costs allocated to negotiate and register an enterprise agreement. Most were content to remain within the established system of industrial relations.

Secondly, trade unions did not conform to the assumptions of the legislation either. Many unions successfully avoided or resisted attempts by employers to foster enterprise bargaining. Many successfully chose other industrial mechanisms, often seeking consent award arrangements or variations. As some unions realised that enterprise bargaining could be managed and harnessed to advance certain industrial objectives, they often entered into bargaining with employers to achieve their industrial objectives. It would appear that the NSW experience notes that trade union response remains critical to the relative success or failure of industrial relations reform. Without active trade union involvement in NSW enterprise bargaining, the system lacked both participants and legitimacy.

Thirdly, the quantitative evidence clearly illustrates that men have achieved better outcomes than women under enterprise bargaining in the NSW system. Enterprise agreements in male-dominated industries were generally union agreements often concerned with productivity enhancing issues such as training, team work and consultation. On the other hand, agreements in female-dominated sectors (especially in the private services sector) were primarily concerned with cost minimisation issues, such as reductions in penalties and overtime, often combined with expanded working hours. This provides further evidence of the negative impact enterprise bargaining is having on equity outcomes within the Australian labour market.

Fourthly, the Act failed to undermine the important role played by the NSW Industrial Relations Commission and awards in the regulation of industrial matters in NSW. The limited coverage of enterprise agreements, especially non-union agreements, attests to the resiliency of the award system, with only a very small percentage (4.65%) of NSW award employees having their wages and working conditions solely determined by NSW enterprise agreements. The parties remained loyal to the Commission as it often provided a superior forum for the resolution of industrial disputes than the enterprise bargaining stream. As such, the NSW experience casts serious doubts on the validity of policy prescriptions which argue for a dramatic downgrading of the role of the Industrial Relations Commission. In NSW, the parties clearly choose the arbitral system over the enterprise bargaining stream.

Finally, although rejected by most employers and trade unions in NSW, one legacy of the *Industrial Relations Act, 1991* was that it succeeded in adding to the legitimacy of enterprise bargaining, in particular the adoption of non-union bargaining, among industrial relations policy-makers in the early 1990's, even though this initiative failed to take off in NSW. The experience under the *Industrial Relations Act, 1991* was that despite the ideologically driven reform agenda of the Coalition government, the parties actively involved in industrial relations sought to maintain existing practices and crafted their own solutions to the reality of ongoing industrial conflict.

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