Industrial Aspects of the Sex Industry

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The Australian Senate, in 1991, conducted an exhibition and a series of lectures to commemorate the centenary of the National Australasian Convention of 1891. At this Convention the first draft of the Australian Constitution was prepared. This Convention was at a time of industrial strikes in the shearing and maritime industries that concluded in defeat of the unions involved. These affairs stimulated H.B. Higgins to successfully move, albeit by the narrowest of margins, for the adoption of labour power in the 1898 sittings of the Constitutional Convention.

How things change! In April 1991, there were media statements that scientists had discovered a hormone treatment for sheep that allowed the fleece to be removed in one piece with a few gentle tugs. So the stimulus for Australia's unique industrial system, the shearers, may soon be by-passed by technological change. And with social change who might be entering the industrial arena? Workers in the sex industry. This could well be beyond the imagination of the founders of our Constitution!

This paper will look at some of the industrial aspects of people working in the sex industry with attention being focussed on those who provide personal services. Past debate that has brought about a liberalising of laws connected with brothels, soliciting and related matters has given some attention to conditions experienced by workers in the industry, but seldom presented specific suggestions on how conditions may be stabilised and possibly improved. It is from the perspective of a labour lawyer that the general framework shall be described.

Occupational Health and Safety (OHS) is a major concern for persons working in the sex industry. It is also of concern to consumers and the community at large. It is this concern that has led to laws being modified and prompted conferences such as this. We need to ask what approaches to OHS issues should be adopted?

There are no impediments arising from Australia's Federal system to state and territory legislatures enacting provisions that are directed to the control of communicable diseases. Physical injuries to workers in the industry may also be covered by state legislation, and compensation claims can be covered in this way also.

The communicable diseases issue is one that this paper shall not be pursuing in depth. There are provisions already in place of a general community nature and the provisions
directed specifically to the sex industry will probably become standard. Such provisions can
be characterised as being directed against workers in the sex industry and this probably
aptly describes what motivated legislators. However, provisions of this type can be
beneficial to the targets if handled appropriately.

Injuries to the workers themselves, however incurred, might be handled by what might
be classified as legislation of a 'shops and factories' type, that is, the traditional style of
legislation that is directed mainly to guarding employees against equipment that cuts, crushes
and burns. Such legislation generally covers other matters relating to OHS such as ventilation
and safe methods of exit that can have relevance to the industry.

Related to the shops and factories style of legislation are regulations controlled by fire
bodies as well as general building control and planning bodies. In unsatisfactory working
environments, such controlling mechanisms—together with their multiplicity of agencies—all
have some potential impact. However, they all have a common factor. They depend very
much on the vigilance of inspectorate services. Short of a calamity, however, vigilance will
generally be lacking given the underfunding of most inspectorate services.

The 'new style' OHS legislative packages that are now in place in all Australian
jurisdictions are designed to compliment (and to an extent displace) the traditional shops and
factories style of legislation. Every jurisdiction has its own variation on 'Robens-type'
legislation which was recommended by a United Kingdom Inquiry into Occupational Health
and Safety chaired by Lord Robens in 1972. There is a common element in such legislation.
A general duty of care is placed on employers to maintain a safe working environment.
Some element of participation of employees on matters of OHS is also to be found in all
packages. Where the size of the workplace is sufficient, safety committees may be (or must
be) formed (depending on jurisdiction). Safety representatives may also be required,
depending on the jurisdiction.

This brief indication of the nature of 'new style' OHS legislation indicates what
approach might be adopted in the sex industry. Under the current industry structure, the
number of people in one workplace would be insufficient to place an obligation on
employers to set up a safety committee (twenty is normally required). In any event, to make
this style of legislation work against a reluctant employer, employees need to be fairly strong
in purpose and demonstrate a good deal of unity. Accordingly, an arena where some
coercion is required will now be discussed.

Workers can further their cause by grouping as an association, collective or union. It is
through the grouping that negotiation strength can be gained because of the express or
implied group modification of usual working procedures unless concessions are gained. The
Australian Federal industrial system was designed to lessen the disruption brought about by
strikes and lockouts (Higgins 1968). It is following registration of employee (and employer)
Bodies that awards can be gained that have the force of law.

This may seem far too formal an exercise for this stage of development of the industry.
Until a few years ago it is quite likely that Federal registration of workers in the sex industry
would not have been accepted. This is because, prior to the Social Welfare Union case
(1983) 153 CLR 297; (1983) 47ALR 225, the High Court of Australia used to take a
narrow Constitutional view as to who could engage in an 'industrial dispute'. Following that
case there is no impediment to registration.

There is a recently released report from the Commonwealth Department of Industrial
Relations that suggests a framework for understanding workplace industrial relations
(Commonwealth Department of Industrial Relations 1991). The comment is made that
industrial relations often varied considerably between workplaces within the same industry.
No doubt this applies to the sex industry, with industrial relations varying from proprietor to
proprietor and there being distinctions between workers in brothels and those working for
escort agencies. If one looks at other characteristics outlined in this report, the likelihood of
a union being formed and it being active industrially does not seem all that great. That is, it falls within the 'recreation, personal and other services' classification, and the unstructured characteristics of the job—together with the independent attitudes of many of the workers—would seem to put this low on the scale.

Alternatively, one does not know what impact decriminalisation will bring. There could be an increase in the number of available workers, especially in the current economic environment. This can weaken attempts to unionise. On the other hand, falls in incomes that might occur can strengthen resolve. Possibly, if most employers adopt a benign stance and keep conditions good as supposedly occurs with some employers in the computer industry, then this will lessen demand for union activity. It seems, however, that benign employers are not universal in the industry. In the recently released *Prostitution in the ACT: Interim Report* (Australian Capital Territory 1991) there are two brief statements on working conditions and potential unions:

11.32 Currently workers are not entitled to paid holiday leave, are not entitled to sick leave provisions, there is limited access to workers compensation, there are no set hours of work, no established rates of pay or remuneration, no established working conditions and no access to industrial representation; and

12.24 It is also the opinion of the committee that the interests of workers can be protected through membership of an appropriate union, and the involvement of a union will add significantly to the monitoring of the operations of brothels and escort agencies.

The Australian Capital Territory *Interim Report* has recommendations that will tend to strengthen any moves to unionism. The introduction of a 'Prostitution Regulation Act' is recommended with such an act having a multiplicity of provisions directed to licensing of brothels and escort agents and keeping them on 'the straight and narrow'. This tends to follow the Victorian lead and similar approaches in other jurisdictions seem imminent. Thus a more regulated industry is to be expected.

As much of the regulation is directed at curtailing activities, union activity to improve the lot of workers is likely. This is compounded by a further recommendation of the *Interim Report* which is to make it an offence for a person to engage in commercial sexual activity other than in accordance with a licence to own and operate a brothel or an escort agency. Thus, workers in the industry will be compelled to adopt an employee status which is a clear encouragement to union activity.

This speculation aside, there is a most important aspect of Federal industrial regulation that needs to be considered. The system abhors a vacuum. It is open to any registered union to seek coverage of workers that it claims to be equipped to cover. Thus when new technology leads to a new class of worker there are often contests between unions as to who should have coverage. Here we have an analogous situation with societal change. Should one of the established workers collectives or alliances manage to rally the requisite minimum membership and seek Federal registration it is quite likely that opposition will come from one or two registered unions who will claim competency to cover. If there is no initiative from the industry itself then a colonising exercise from an established union is likely in any event. This leads to the suggestion that early activity may be sound policy in order to get some say in choice of union and some say in the nature of the relationship. This is desirable at the preliminary stage of coverage and essential at the next stage at the establishment of an award.

There is no novelty in this 'race to the Commission' scenario that has just been suggested. Following the Social Welfare Union case (supra), various groups of workers gained eligibility for Federal industrial coverage for the first time. Teachers in tertiary
institutions were amongst them. Discussion amongst such people on the desirability—even respectability(!)—of academics seeking Federal coverage ended quickly when a small conservative teaching union made preliminary moves to cover everyone. Similar things can happen in the sex industry, with the possibility of union coverage being gained by a group that is not to the liking of those in the industry. It is true that opposition to coverage by an unwanted body can be expressed to the Industrial Registrar but, in contests of this type, a fair degree of organisation and industrial capability needs to be demonstrated.

Supposing nothing is done with respect to industrial registration by currently established collectives or alliances within the industry and an established union makes an unwelcome takeover. Suppose also that this is followed by the establishment of an award that is regarded as less than satisfactory by the workers in the industry. What could be done? A campaign within the union to change office bearers might have some appeal. Democratic control is an essential characteristic of unions registered under the *Australian Industrial Relations Act 1988*. But what percentage of our hypothetical union membership might be made up by sex workers and how many issues other than the Sex Workers Award may be in the minds of voters? Let us assume, however, that reorientation of our hypothetical union can be achieved and application is made for an award with provisions superior to the established award. Such an application is sure to be resisted by employers who will be able to argue that the new claim is outside national guidelines. A bad start in such matters is hard to rectify!

The people who take on the drafting of the first award application will have an interesting time. Awards differ in their level of specificity, but even the most specifically worded award relies on the customs of the industry. As we are concerned here with what is said to be the oldest profession there should be no lack of custom. There are sure to be arguments on classifications of workers and on characterising activities. And what relevance should be attached to the experience of the worker? It is a common pattern for awards to set down different pay rates according to whether a person is a junior, apprentice, journeyman, leading hand and so on. It is doubted whether this form of classification will find favour with any employees in the industry. Maybe the only distinction that could be adopted would be between an ‘escort worker’ and an ‘in-house worker’. But even with a line being drawn this way, the hourly rate due to the ‘escort worker’ might need to be adjusted downwards if winning and dining should take up a fair amount of time on duty. This prematurely touches on questions of work value, established rates, impact of market forces, and so on, but it is bound up on determining how classifications might be made in any award.

If attempts to classify workers are unsuccessful then one could fall back to just one rate. This would be consistent with most Federal awards where the specified rate establishes only the minimum. Above award payments are then open to negotiation on an industry or enterprise basis. Enterprise bargaining could become widespread given its current political popularity and its ready applicability to an industry of this type.

But when ‘rate’ is referred to, what is to be covered? An hourly rate or a rate related to output? Or perhaps both, as in industries where the overall rate has a piece rate and hourly rate running together. This is where experts in the industry will have to advise because it seems that this industry contrasts with the manufacturing industry where the very fastest worker may be the most prized. With regards to rates, if the time factor is not the only consideration then some averaging exercise with the time and performance payments will be needed. Without calculations along these lines there can be no way of determining the appropriate rates for other elements that should become part of an award. These are elements such as recreational leave, sick leave and public holidays (or payment in lieu). There are also potential issues such as shift work and penalty rates.

At first glance these might seem non-issues if only casuals are employed. But this approach will not help in calculating the appropriate rate for a casual which under most
awards is 20 per cent greater than ordinary workers. This still leaves the problem of what an ordinary worker is to be paid.

There appears to be nothing to prevent an entire working group being paid on 'casual' type conditions although it is probably inappropriate to label in this way when there are no 'ordinary' or standard workers. If this approach was to be taken, however, one should really follow traditions established elsewhere and top-up any notional 'ordinary' rate by 20 per cent to make up for lack of paid time off.

The problem does not stop here, however. Long service leave entitlements are bestowed on employees by legislation in all states and territories. Such entitlements tend to be supplemented by award provisions. In the ordinary course, casuals are excluded from such entitlements. What happens when everyone is supposedly a casual is a moot point.

This suggests that if problems in determining pay rates and consequent problems in determining other benefits leads to workers being handled universally as 'casuals' it should be casual in a very limited way. That is workers would be 'ordinary' with no holidays and such like, but there would be built in monetary compensation for this.

Universal casualisation is unlikely to be a feature of any Federal award. This is further confirmed when one considers the new parcels of provisions that have begun to appear in awards since 1984. When the High Court of Australia decided the Social Welfare Union case (supra) it permitted a reconsideration of what could properly be regarded as an 'industrial matter'. This, in turn, allowed Federal awards to cover matters previously outside their Constitutional scope. Amongst these matters are superannuation and disputes relating to unfair dismissal. Provisions in awards covering these sorts of matters give employees a degree of permanency not previously enjoyed. Any proposed award for workers in the sex industry would seek provisions along these lines, thus striking at the notion of all work being on a casual basis.

Provisions to be found in these new parcels are of great significance themselves. Superannuation was once confined to government employees and the professional and administrative personnel in non-government employment. It is now universal. People in the building industry—where jobs are traditionally short-term—have award provisions that commit employers to making superannuation contributions. The Industrial Relations Commission now has superannuation as part of national wage cases. Clearly it is due to the sex industry also.

Unfair dismissal provisions in awards do more than affect the occasional dismissed employee. Once 'unfair' becomes the subject of debate all manner of things relating to the employment relationship attract scrutiny. This can have an impact on the general conditions of employment and the way employers relate to employees.

Thus, we come back to a consideration of OHS matters. Previously, the 'new style' of OHS legislation that is directed to developing safe working practices through interaction between employers and employees was mentioned. Legislation of this type includes criminal sanctions against controllers of employment places who fail to maintain an appropriate level of care. The way in which such provisions are enforced is subject to much debate. It is clear that prosecutions are rarely commenced unless there is a 'body on the floor'. This is through scolding more effective in maintaining standards than prosecuting. When scolding is ineffective, prosecutions are expensive exercises with complicated evidentiary issues that seldom result in penalties of any magnitude.

This is not a result that pleases unions. Until recent times, however, few unions have taken a high profile on OHS matters. 'Danger money' for sundry hazardous activities was the typical approach rather than seeking an outlawing of them. In part this was because union involvement in such matters was seen as invading 'managerial prerogatives'. In part it was the result of the way in which 'Shops and Factories' style legislation had very specific targets. In
any event, until recent times unions tended to give lip-service to prevention of occupational injuries and diseases and focus principally on seeking compensation for members suffering from work-based inflictions. Bit by bit a different approach is becoming apparent. Whether it be through legislation or through peak union campaigns it matters little because of the interaction between them.

On current understanding of matters, the alliances and the collectives in the sex industry have been active on OHS issues. State and territory legislatures are in the throes of introducing provisions that impact on OHS and, in due course, they may have an impact. But a multiplicity of provisions will do little good for anyone unless there are effective measures for enforcement. In the absence of clearly discernible hazards—such as machines with exposed blades—inspectores can do little until there is the equivalent of the 'body on the floor' situation found elsewhere. The answer, to the extent that there can be an answer, is in keeping lines open to the 'whistleblower'—the person working in the industry who is unhappy about the way things are being done.

The 'whistleblower' has been about for some time. Whether a person gains this categorisation (or the less favourable one of 'dobber') depends on how one feels about the activity being reported. However described, the releaser of information unfavourable to the employer is likely to have a career set-back if the employer discovers the source of the adverse publicity. This means that Control Boards (however described) are likely to have limited impact due to problems in gaining information, let alone hard subject-to-cross-examination evidence on what is going on in the areas that are purportedly under their control.

Here is where a well-functioning union is likely to be more effective. Assume the worker has coverage by a registered union. Activity as a union member cannot be grounds for discriminatory practices. There may be practical problems in enforcing this unless there is some solidarity from the union. A provision in the award against 'unfair dismissal' places all sorts of pressures on the employer to justify dismissal. It is unlikely that objection to matters linked to OHS will be seen as grounds for dismissal. With the burden placed on an employer to justify dismissal, it may be possible for a concerned worker to avoid the distressing 'whistleblowing' stage because, in effect, the whistle will only be blown if the employer actuates it.

Whether it be through their potential as protected de facto whistleblowers or through their insistence on compliance with other award provisions, it is likely that some employers will be resistant to employing union members. What impact might a Federal award have in this regard? There are two key matters to be considered.

First, any union that gains award coverage is sure to ensure that the award covers workers that do not hold union membership. Such coverage tends to distress people who are paying union subscriptions, but it is a generally adopted device to avoid undercutting by non-union members. A worker who is not a member of the union has no enforceable right to award rates (save in the territories). The potential sting for the employer is that any short-fall in award rates must be made up if the Arbitration Inspectorate uncovers the underpayment. (There may be a prosecution as well). More likely than a discovery by an overworked, underfunded Arbitration Inspectorate is that the worker takes out union membership. Any short-fall on union rates over a period as long as six years can then be claimed. In times past, claims of this sort tended to be actuated by dismissal or would lead to dismissal. Should there be award provisions against unfair dismissal there may be less disinclination for workers to seek the award conditions.

The second consideration relating to union membership is that there may well be a provision in the award declaring preference for unionists. Under a Federal award, a 'closed shop' is not permissible, but the permissible alternative of 'preference for unionists' can lead to virtually the same thing if the stock of potential workers exceeds employment placement.
The current adverse employment situation combined with actual and potential legitimisation of the industry could bring about this oversupply.

My focus on the industrial aspects of the sex industry has been principally on the prospect of Federal registration and possible elements of a Federal award. Many of the things I have referred to could be covered by state awards. Assuming, however, that a Federal route is taken, there is one last comment that needs to be noted with respect to the characteristic of a Federal award: Section 109 of the Constitution, aided by Section 152 of the Industrial Relations Act 1988 (Cwth) gives priority to provisions of a Federal award over any state laws inconsistent with them.

There have been a multitude of cases before the High Court on what is involved in 'inconsistency' in this area. It is doubted that a law of a state that prohibits specific activities will be invalidated by a Federal award provision that regulates such activities. If one has the situation, however, that an activity is permitted in a state and the industrial aspects of it are laid down in a way inconsistent with the Federal award, then the Federal award will prevail. This is favourable to those supporting the award provisions. Where matters need close attention by those negotiating for a Federal award are those circumstances where favourable state provisions may be inadvertently eclipsed by provisions of the Federal award. This possibility needs to be closely monitored in circumstances such as these where values are changing rapidly.

References

