XIX International Congress of Labour and Social Security Law Sydney, 1-4 September 2009

Theme 2: Workers’ representation and social dialogue at the workplace level.

AUSTRALIA

Rapporteur: Sean Cooney

QUESTIONS

1. LEGAL SOURCES

1.1. Are workers’ representation and social dialogue institutions or machinery addressed in your country by statutory regulation, or have they been addressed by collective bargaining?

There are three main sources of norms governing representative institutions:

(1) Occupational Health and Safety Legislation. This provides the most powerful form of employee consultation. Each State, as well as the federal government, has its own OHS legislation and there is some degree of variation between jurisdictions.¹ Historically, State regulation is more important than federal regulation, although it is likely that there will be national harmonization shortly.² Generally, the legislation requires employers to consult with employees over a range of health and safety issues; enables employees to elect a health and safety representative with broad statutory powers (including directing work to cease in certain circumstances); and mandates, under certain conditions, the creation of joint OHS committees with employer and employee representatives, which can set workplace safety policies and monitor compliance.

(2) Industrial Relations Legislation. This legislation also varies around the country, but it is clear that federal regulation is more important than State law, and indeed is designed to largely displace it. One State (Victoria) has referred its industrial relations powers to the federal government³ and some other States (e.g. Tasmania) may shortly do the same.

³ For the new Victorian referral see Fair Work (Commonwealth Powers) Bill 2009 (Vic).
Traditionally, Australian industrial relations legislation provided strong support for employee representation through unions. After the Workplace Relations Act (WRA) was enacted in 1996, following the election of a conservative government, the legislative basis for mandating representative machinery significantly contracted. Further contraction occurred in 2006 with the ‘Work Choices’ amendments to the WRA. However, after the victory of the Australian Labor Party in the federal election in 2007, new legislation replacing the WRA was passed. The legislation, titled the Fair Work Act (FWA), is scheduled to commence operation in part from July 2009, with provisions pertaining to the setting of national and industry-wide labour standards entering into force in January 2010.

An important feature of Australian labour law is that many norms, including those pertaining to representation and consultation, are found not primarily in legislative provisions but in industrial ‘awards’. Awards are made by the Fair Work Australia (formerly the Australian Industrial Relations Commission). This is an independent statutory tribunal. Historically, awards have been made on the application of unions or employer groups, although now, as the constitutional basis for their making has changed, their participation may be less crucial. Awards bind employers and unions in particular industries.

The award provisions that relate to consultation and representation are discussed below. Neither awards, nor national labour standards, mandate the establishment of an ongoing consultation or representation structure in the workplace. However, awards mandate change management and dispute resolution processes.

(3) Collective agreements. These cover approximately 40% of the Australian workforce and are usually but not necessarily concluded between unions and individual employers. Many collective agreements set up ongoing consultation committees – the nature of these varies from agreement to agreement and it is not possible to generalize, except to say that these consultation committees generally do not have decision-making powers. Owing to difficulties recognizing the enforceability of collective agreements in Australia common law, most such agreements in Australia are made in accordance with a statutory procedure and derive their validity, at least in the first instance, from statute.

1.2. Are these rights protected (or promoted) by a constitutional guarantee?
No

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5 It is possible to have a collective agreement between an employer and a non-unionised group of employees.
6 For detailed analysis, see: Anthony Forsyth, Samantha Korman and Shelley Marshall, Joint Consultative Committees in Australia: An Empirical Update, Research Report, Corporate Governance and Workplace Partnerships Project, University of Melbourne, January 2007. See also section 3.3 below.
1.3. Have these machineries or institutions been established under the influence of international or supranational norms by which your country is bound? Not in any direct way; the fundamental architecture of the system was in place prior to the establishment of the International Labour Organization, or the UN Declaration on Human Rights.
2. ORGANIZATION AND FEATURES OF WORKERS’ REPRESENTATION AND SOCIAL DIALOGUE INSTITUTIONS AND MACHINERIES

2.1. Legal requirements in view of the establishment of a workers’ representation at the workplace level.

2.1.1. Is there a staff threshold required for a staff representation body or a machinery being set up at the workplace level? In case it is, please indicate the number of workers employed at the workplace for the threshold to be met. Are apprentices, workers on probation and part-timers taken into consideration for the determination of that threshold?

There is at present no threshold in national labour legislation, since it does not mandate the establishment of committees, other than in the case of occupational health and safety. Neither legislated standards nor awards stipulate a threshold.

The threshold for occupational health and safety committees varies from jurisdiction to jurisdiction. In some States, there is no minimum threshold, as a committee can be initiated by employee request.

2.1.2. Is the establishment of a workers’ representation body or machinery at the workplace level mandatory on the employer or it is voluntary (i.e. it calls for the latter’s agreement)?

(1) Occupational health and safety
Worker representation machinery is mandatory in occupational health and safety legislation.

(2) Technological change management and dispute resolution
The Fair Work Act provides that awards (from 2010 reworked as ‘modern awards’) can include clauses pertaining to ‘procedures for consultation, representation and dispute settlement.’ Draft modern awards have already been prepared by the Australian Industrial Relations Commission/Fair Work Australia, and, while they vary from industry to industry, a typical consultation clause will apply to all workplaces regardless of size. Such a clause is included as an appendix to this report. The typical clause does not require general or ongoing consultation and representation but does enable representation in two specific situations:

(a) The first concerns technological change. The national standard here was established by the Australian Industrial Relations Commission in the Termination, Change and Redundancy case (‘TCR case’) in 1984. The standard in so far as it forms part of modern awards has changed since it was originally drafted. The clause still requires employers to consult in relation to major changes affecting the enterprise,

7 (1984) 8 IR 34.
8 See Clause 8 in the appendix.
and in particular employment. However, whereas the 1984 clause referred to consultation with and through unions, the current clause require consultation directly with the employees affected and with their representatives. This will ordinarily be a union but need not be. In contrast to North American systems, in particular, an individual employee may be represented by their union regardless of whether the enterprise as a whole is unionised. And even if the majority of employees in the enterprise are unionised, an employee is usually free to choose someone other than a union official to represent them (other than in relation to collective bargaining). It follows that there is no legal requirement for a standing union or other representative committee at the enterprise.

(b) The second situation concerns dispute resolution. Modern awards enable employees who have a dispute with their employer about compliance with labour standards (whether the national standards or modern award entitlements) to be represented by another person or organisation during dispute resolution processes within a firm or before Fair Work Australia. Again, the representative can be, but need not be, a union official.

The position is different under some collective agreements, as they mandate an ongoing consultation committee. However, many collective agreement clauses pertaining to change management and dispute resolution are similar to those in awards.

(3) Collective bargaining
Notoriously, the Workplace Relations Act contained no mechanism that would require employers to meaningfully recognize employees or unions for the purposes of collective bargaining. The Act did enable an employee to choose a union (or any other representative) as a bargaining agent, but there was no obligation on the part of the employer to negotiate in good faith with that agent.

The Fair Work Act does now require good faith bargaining and Fair Work Australia can make orders (and, in certain circumstances, compulsorily arbitrate) where an employer refuses to negotiate with employee representatives. One of the circumstances in which Fair Work Australia will intervene is where an employer refuses to negotiate despite the fact that a majority of employees in a bargaining unit want a collective agreement. However, the representative need not be a union; it may be a representative chosen by non-union members.

2.2. Agents of representation and dialogue

2.2.1. Can workers individually express and defend their viewpoints and interests, or such rights are recognized only to staff representative bodies?

Yes, generally speaking, as explained in 2.1.1, workers can express and defend their viewpoints themselves. Indeed, under the Regulations made under the Workplace Relations Act, it has been impermissible to include a term in a collective agreement

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9 Clause 9 in the appendix.
10 See Part 2-4, Division 8 of the Act.
requiring an employee to be represented by a union in a dispute resolution procedure, unless the employee so chose.

The Fair Work Act does not require an employee to be represented by a union for the purposes of change management negotiation, dispute resolution or collective bargaining.

Occupational health and safety legislation varies as to the role of unions. However, generally it is not necessary for employees to be represented by unions.

2.2.2. If the above rights can be invoked only by staff representative bodies, is such representation entrusted to one or several trade union organizations (union track) or it is entrusted to (not necessarily unionized) staff representatives elected by the workers (staff representatives track)?

The rights can be exercised by individual employees, or by their representatives which do not need to be unions.

2.2.3. In case of representation by trade unions (union track) is such representation carried out by a single trade union or it can be carried out jointly or separately by several trade unions? What requirements must be met for a trade union to represent the workers (e.g. to be a « majority union » or a « representative union »)?

Representation can be carried out by a union of the employee’s choice. If there are multiple employees, they may choose multiple representatives in the case of change management and dispute resolution. However, in the context of collective bargaining, if the number of bargaining agents is unwieldy and is impeding bargaining, Fair Work Australia may make an order requiring the representatives to agree on a lead representative.

2.2.4. In the case of a « staff representatives track »
   a. How are staff representatives appointed? Do unions have a role in their election?
   b. Do the staff representatives individually or collectively carry out their functions and responsibilities?
   c. Do you have a single staff representative body, or you have different bodies, with different competences (e.g. staff delegates + enterprise committee + safety, health and conditions of work committees in the case of French Law)?
   d. How are the staff representatives elected? What’s the duration of their mandate?

Generally, individual employees can nominate their own representatives. However, in the case of occupational health and safety representatives and committees, there is generally an election procedure. In the federal jurisdiction and in at least some States, there is no formal union role in their selection; they are chosen by an election in which all employees in the relevant area are entitled to vote.

A health and safety representative carries out her or his responsibilities individually, whereas a health and safety committee acts collectively.
The term of a health and safety representative and of a committee varies according to jurisdiction.

2.3. Content and field of the workers or the workers’ representatives’ prerogatives

2.3.1. What kind of prerogatives are recognized to the worker or their representatives, e.g. the following:

a. expression rights (e.g. the right for the workers or their representatives to express a view on the organization of work or of the working time)?

Expression rights are recognised, but in relation only to change management, dispute resolution, collective bargaining and occupational health and safety (unless more extensive rights are provided by collective agreement).

b. information rights, i.e. the obligation for the employer or the employer’s representative at the workplace level to disclose certain information? (What kind of information must the employer communicate to the staff representatives?)

Information rights are recognised, but in relation only to change management, dispute resolution, collective bargaining and occupational health and safety (unless otherwise provided by collective agreement).

c. consultation rights, i.e. the obligation for the employer or the employer’s representative at the workplace level to request an opinion from the workers’ or their representatives before certain decisions are taken? Is the employer bound by such opinion? Have the workers or the staff representatives veto rights on certain decisions?

Consultation rights are recognised, but in relation only to change management, dispute resolution, collective bargaining and occupational health and safety (unless otherwise provided by collective agreement). The employer is bound by the opinion only in relation to occupational health and safety committees.

d. negotiation rights, i.e. an obligation on the management to open negotiations with a view to reaching agreement, even if there is not a formal obligation to actually conclude an agreement? Is there room, in your law and practice, for the use of referendum or of any other form of vote by the workers at the workplace level?

Negotiation rights are recognised in relation to some aspects of occupational health and safety regulation and collective bargaining. An employer must negotiate on a collective agreement in good faith with employees if a majority seek to do so.
2.3.2. Do these prerogatives relate to all the conditions of work and employment, and to any question relating to the workers’ interest at the workplace (including the enterprise management and management policies) or they are limited to certain issues (e.g. safety and health, working time, work organization, internal regulations, discipline, pay questions, employment)? Does the nature of these prerogatives vary depending upon each field of competence?

They are limited: see above.

2.4. What’s the legal situation of the employees of other enterprises who perform work at the same workplace (e.g. dispatched temporary workers, workers of contractors, workers of service providers)? Is their number taken into consideration for the calculation of the above-mentioned threshold? Can they vote in the election of staff representatives? Can they be elected? Do they have the same rights that are granted to in-plant workers? Can they avail of specific rights?

In many jurisdictions, occupational health and safety legislation extends the obligation on employers to consult to dispatched workers and independent contractors who work at the same workplace. These workers may be eligible to participate in elections for health and safety representatives and committees. Otherwise, such workers do not enjoy the same rights as direct employees.
3. SOCIO-HISTORIC PERSPECTIVE

3.1. Law and political history

3.1.1. Could you, please, briefly describe the historical evolution of the staff representation bodies and machineries in your country: when have they been established, how have they evolved, how have their competences evolved?

Occupational health and safety arrangements have been in place since the late 1970s. The Australian systems were influenced significantly by those adopted in the United Kingdom in 1974 following the Robens Report.

Union participation in standard setting has occurred since the nineteenth century. However, as outlined above, the following forms of representation developed at different times:

- Union involvement in dispute resolution: from nineteenth century;
- Union involvement in change management: generalized from 1984;
- Collective bargaining at the enterprise level: from late 1980s, generalized in 1993.

In all these areas, there has been a shift away from default union representation to representation at the selection of the employee.

3.1.2. The evolution in your country is heading towards greater sophistication and enhanced competences of the staff representative bodies or it points towards greater simplification and weakening (including through the introduction of simplification measures through collective bargaining)?

After a period of ‘deregulation’ between 1996 and 2007, bodies are becoming more sophisticated.

3.1.3. Is it possible to see a cause and effect relationship between this evolution and the overall political evolution?

Yes. The representation system tends to expand with Labor governments and contract with conservative governments. However, both governments accept the principle of representation in areas such as occupational health and safety and both accept the validity of non-union representation.

3.2. The Law and the union movement

3.2.1. Can a relationship be established between the above-referred evolution and the trade union’s or the union movement’s doctrines?

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Sorry, I don’t really understand this question – do you mean union policies? Not really, except that Labor governments are more sympathetic to unions.

3.2.2. Do your country’s employers and business organizations have a doctrine concerning the above-referred bodies and machinery and the evolution they would like to welcome?

Employers tend to accept staff involvement in occupational health and safety, but tend to resist other forms of staff representation, other than the ones they themselves determine.

3.2.2. Are the above-referred bodies and machineries, and their evolution, likely to have any influence on the trade union movement and its forms of organization and action?

The structure of representation in Australia, and in particular, the lack of default rights to unions, means that unions have to organize effectively in the workplace. Thus, the Australian union movement has been devoting very considerable resources to organizing in recent years.

3.3. From legal rules to actual practice

3.3.1. Do you have information on the actual use of the above-referred bodies and machineries, i.e. on the effectiveness of the legal rules that provide for these? What lessons can be drawn there from (having regard notably to the voluntary or the mandatory nature of these bodies and machineries)?

The Fair Work Act mechanisms are new, so there is no information on how the legislation has changed practice. In relation to occupational health and safety, there does not appear to be information on the prevalence of occupational health and safety committees and representatives but there seems to be strong evidence that where these forms of employee participation are in place, they are likely to reduce employee injury. Anecdotal evidence would suggest that these mechanisms are widespread in larger enterprises.

3.3.2. On the contrary, is it possible to observe the actual practice of staff representation at the workplace level beyond any legal or conventional norm relating to this topic, and more especially in the absence of any obligation to set up a workers’ representation body or machinery?

Yes. Until the election of the conservative government in 1996, information on industrial relations practices was collected systematically. That information indicated a rise in informal joint consultation committees from the late 1980s. Similar large scale data does not exist for the last 15 years. However, one recent study of collective

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agreements, by Forsyth, Korman and Marshall, has suggested that joint consultation committees established under enterprise-level collective agreements (not as a result of any law or award) have expanded over the last twenty years and exist in just under half of enterprises covered by collective agreements. Most of the joint consultation committees are elected by employees, and most entail union involvement in the committees. The authors of the study conclude that most of the committees had very limited decision-making powers:

The data examined in this paper suggests that JCCs are a durable, indeed perhaps even a growing, institution of employee voice in Australian labour relations. However, it does not appear that JCCs are acting as a significant mechanism for the extension of employee power.


15 At page 29.
4. REMARKS ON THE QUESTIONNAIRE

Please, explain the difficulties you have met, if any, while replying to this questionnaire.

I think this questionnaire is quite well designed and useful; thank you for your work in preparing it. I have these comments to make:

1. You need to be aware that many countries are federal systems, and therefore there may be multiple jurisdictions with different rules. This is the case, for example, in Australia, the United States, Canada and India. Some countries which are unitary in form have different local rules, for example, China.

2. I wasn’t quite clear how much information you wanted on occupational health and safety as opposed to collective bargaining and dispute resolution. I hope I answered this correctly.

3. It is clear that you were working from a European model; Australia does not use the same concepts in many respects. There is no one staff representation or union model, so the questions were a little difficult to answer.

4. Since this survey was focused on the enterprise level, I did not refer to national level arrangements. These are important in Australia. Unions and employer organizations have rights of representation before the Fair Work Australia (and its predecessor the Australian Industrial Relations Commission) in relation to matters including the setting of awards (and modern awards).
APPENDIX: STANDARD CONSULTATION PROVISION IN MODERN AWARDS

Part 2—Consultation and Dispute Resolution

8. Consultation regarding major workplace change

8.1 Employer to notify

(a) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.

(b) Significant effects include termination of employment; major changes in composition, operation or size of the employer’s workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.

8.2 Employer to discuss change

(a) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 8.1, the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.

(b) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1.

(c) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer’s interests.

General Retail Industry Award 2010 (MA000004) 8 This award will not come into force until 1 January 2010
9. Dispute resolution

9.1 In the event of a dispute about a matter under this award, or a dispute in relation to the NES, in the first instance the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employees concerned and more senior levels of management as appropriate.

9.2 If a dispute about a matter arising under this award or a dispute in relation to the NES is unable to be resolved at the workplace, and all appropriate steps under clause 9.1 have been taken, a party to the dispute may refer the dispute to the Commission.

9.3 The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration.

9.4 Where the matter in dispute remains unresolved, the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.

9.5 An employer or employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of this clause.

9.6 While the dispute resolution procedure is being conducted, work must continue in accordance with this award and the Act. Subject to applicable occupational health and safety legislation, an employee must not unreasonably fail to comply with a direction by the employer to perform work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.