

‘LIGHT TOUCH’ LABOUR REGULATION BY STATE GOVERNMENTS IN AUSTRALIA

JOHN HOWE* AND INGRID LANDAU†

[The federal government’s Work Choices legislation has taken over much of the jurisdiction of state governments to regulate labour practices in the conventional manner. There are already indications that the states are considering more creative forms of labour regulation, including ‘soft’ or ‘light touch’ regulation, as a response to Work Choices. This article presents findings from a study of light touch labour regulation in New South Wales, Queensland and Victoria. The article also makes some preliminary observations on the use of this regulatory technique by the three states, drawing upon a normative model of ‘responsive regulation’. This preliminary assessment of light touch labour regulation suggests that there is considerable scope for improvement, as many of the approaches discussed are relatively weak informational strategies. The article identifies a number of possible regulatory improvements.]

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* BA, LLB (Monash), LLM (Temple), PhD (Melb); Senior Lecturer, Faculty of Law, The University of Melbourne; Academic Staff Member, Centre for Employment and Labour Relations Law, The University of Melbourne; Secretary, Australian Labour Law Association; Reports Editor, *Australian Journal of Labour Law*.

† BA (Hons), LLB (Hons) (ANU); Research Fellow, Centre for Employment and Labour Relations Law; Centre for Corporate Law and Securities Regulation, The University of Melbourne. An earlier version of this article was presented at the Third Biennial Conference of the Australian Labour Law Association, Brisbane, 22–23 September 2006. The research presented in this article was funded by a grant from The University of Melbourne.

I INTRODUCTION

Analysis of the role of the state in shaping industrial relations and employment practices has traditionally focused on labour law. Certainly, a key role of government has been to set labour standards through legislation, or by establishing legal systems of industrial relations whereby conflicts between employers and unions are resolved and there is a mechanism for the determination of appropriate rights and standards for employers and employees. Recently, however, a number of developments — including criticisms of labour law's capacity to accommodate flexibility in employment practices at the level of the firm (often referred to as a need for labour market 'deregulation'), questions about the effectiveness of legally prescriptive and hierarchical models of regulation, and a growth in corporate power — have converged to shift attention to other ways in which the state may influence labour standards and practices.¹ Increasing attention (particularly in Europe and the United States) has been paid to the use by states of 'soft' or 'light touch' approaches to regulating labour standards. Such regulatory approaches are yet to receive extensive consideration as forms of state labour regulation in Australian labour law scholarship.

In Australia, the Commonwealth government's *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices*'), which amended the *Workplace Relations Act 1996* (Cth) ('*WRA*'), brings into further relief the actual and potential use of light touch labour regulation by Australian states. *Work Choices* will reduce the impact of awards — historically the most influential and comprehensive form of legal regulation of employment conditions in Australia. Moreover, under *Work Choices*, the Commonwealth government has created a national system of labour law by 'covering the field' of industrial law, severely restricting the jurisdiction of state governments to use law to regulate corporate labour practices within their jurisdictions. Nevertheless, the federal takeover has the potential to bring a 'cauldron of innovation'² to the boil by causing state governments (and perhaps local governments) in Australia to consider creative approaches to labour regulation, including light touch approaches. While it is too early to evaluate innovative responses to *Work Choices*, it is certainly possible to identify existing light touch labour regulation by state governments, and to discuss recent and impending developments.

This article presents preliminary findings from a study of light touch labour regulation by state governments in New South Wales, Queensland and Victoria. It seeks to contribute to an understanding of how the states aim to effect normative changes in employment practices and industrial relations in Australia other

¹ Cynthia Estlund, 'Rebuilding the Law of the Workplace in an Era of Self-Regulation' (2005) 105 *Columbia Law Review* 319, 321–3. For a discussion of other reasons why the analysis of formal rules has been reduced in importance: see Peter Gahan and Peter Brosnan, 'The Repertoires of Labour Market Regulation' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 127.

² Estlund, 'Rebuilding the Law of the Workplace', above n 1, 350. Cynthia Estlund has discussed state innovation as a possible response to the 'ossification' of federal labour law in the US: see Cynthia Estlund, 'The Ossification of American Labor Law' (2002) 102 *Columbia Law Review* 1527.

than through legislation. Part II of the article identifies the theoretical approaches that have informed this research. Part III outlines how the three Australian state governments under review are currently using light touch regulatory techniques to improve labour standards. We focus in turn on the states' use of public procurement; financial subsidies, tax concessions or loans; codes of practice; and best practice case studies or guidelines. This discussion demonstrates that NSW, Queensland and Victoria already use a range of regulatory techniques to promote desired labour practices. Furthermore, there are indications that the prevalence of light touch approaches by the states is likely to increase in response to *Work Choices*. Part IV provides a very preliminary evaluation of light touch labour regulation in Australia. It assesses the use of light touch regulation by the Australian states against a normative model of responsive regulation. It identifies a number of weaknesses with the current approaches and offers some suggestions for improvement. Suggestions for further research are also considered.

II REGULATORY THEORY AND 'NEW GOVERNANCE'

Informing this research are perspectives drawn from regulatory theory and the 'new governance' movement in Europe and the US.³ We adopt a broad understanding of regulation

as any process or set of processes by which norms are established, the behaviour of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime (whether by enforcement action or by some other mechanism).⁴

Secondly, we recognise that, in seeking to influence behaviour, the state has available to it a number of regulatory techniques beyond the conventional 'command and control' style of regulation, in which formal rules are created, monitored and enforced by the state through orders and sanctions.⁵ Of these

³ These perspectives are increasingly being used to evaluate labour regulation: see, eg, Hugh Collins, 'Is There a Third Way in Labour Law?' in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2002) 449; David Weil, 'Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage' (2005) 58 *Industrial and Labour Relations Review* 238; Ralf Rogowski and Ton Wilthagen (eds), *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (1994). In relation to Australia: see generally Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006). Of particular relevance to this article are the following: John Howe, "'Money and Favours": Government Deployment of Public Wealth as an Instrument of Labour Regulation' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 167; Sean Cooney, 'Exclusionary Self-Regulation: A Critical Evaluation of the AMMA's Proposal in the Mining Industry' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 187; Gahan and Brosnan, above n 1.

⁴ Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *Public Law* 329, 331.

⁵ See Anthony Ogus, 'New Techniques for Social Regulation: Decentralisation and Diversity' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (2001) 82; Terence Daintith, 'The Techniques of Government' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (3rd ed, 1994) 209; Robert Baldwin, 'Regulation: After

alternative techniques, soft or light touch approaches to regulation are distinguished from ‘hard’ legal or centred command and control regulation on the basis that the former are less reliant on the imposition by the state of generally applicable mandatory legal standards as a means of regulating behaviour. These light touch approaches may have advantages (or disadvantages) over command and control style regulatory approaches in that they have the potential to be more ‘responsive’ to complex regulatory environments and the interests of non-state actors. Thirdly, we recognise that regulation is ‘multifaceted, differentiated and increasingly “shared” by a range of public and private actors.’⁶

A number of scholars have suggested that the state is increasingly adopting many of these ‘lighter’ forms of regulation.⁷ For John Braithwaite, the current era of regulation is best understood as one in which the role of the state has shifted from a provider of services and direct regulator, towards a role which is more facilitative of markets and private ordering as both mechanisms of resource provision and distribution, and of regulation.⁸ Describing this era as one of ‘regulatory capitalism’,⁹ Braithwaite observes that there is not less regulation but rather that the *form* of regulation has shifted.¹⁰ Increasingly, attention is paid to regulation of corporations by corporations themselves: to ‘corporate governance’, ‘private ordering’ and ‘self-regulation’.¹¹ Moreover, it is now commonly argued that self-regulation can replace, supplement or interact with state law and public provision as mechanisms of social regulation, such as where governments require or facilitate self-regulation by firms or industries.¹²

“Command and Control” in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (1997) 65. In the US and European Union, scholars tend to use the term ‘new governance’ when considering alternative forms of state regulation: see Lester M Salamon (ed), *The Tools of Government: A Guide to the New Governance* (2002); Gráinne de Búrca and Joanna Scott (eds), *Law and New Governance in the EU and the US* (2006).

⁶ Miguel Martinez Lucio and Robert Mackenzie, “‘Unstable Boundaries?’ Evaluating the “New Regulation” within Employment Relations’ (2004) 33 *Economy and Society* 77, 79. The collaborative nature of regulation is also emphasised by the new governance theorists: see, eg, Lester M Salamon, ‘The New Governance and the Tools of Public Action: An Introduction’ in Lester M Salamon (ed), *The Tools of Government: A Guide to the New Governance* (2002) 1, 8.

⁷ See, eg, Ogus, ‘New Techniques for Social Regulation’, above n 5; Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (1998) 42–7; Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (1990) ch 3; Baldwin, above n 5; Terence Daintith, ‘Regulation’ in *International Encyclopaedia of Comparative Law* (1997) vol 17, ch 10; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002) 14–15.

⁸ John Braithwaite, ‘Neoliberalism or Regulatory Capitalism?’ (Occasional Paper No 5, Regulatory Institutions Network, Research School of Social Sciences, Australian National University, 2005) 1–2, referring to David Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism’ (2005) 598 *Annals of the American Academy of Political and Social Science* 12.

⁹ Braithwaite, above n 8, 2.

¹⁰ *Ibid* 8–12.

¹¹ Although the term ‘self-regulation’ is frequently used to describe a wide range of regulatory practices, including government facilitation of self-regulation, in this article the term refers to situations where an individual firm, industry or market sets its own standards and enforces them. It also applies to the voluntary adoption of socially responsible practices by corporations, sometimes in conjunction with, or under pressure from, non-state regulators such as trade unions or other non-government organisations: see Anthony Ogus, ‘Self-Regulation’ in Boudewijn Bouckhaert and Gerriot de Geest (eds), *Encyclopaedia of Law and Economics* (1997) vol 5, 588.

¹² Gunningham, Grabosky and Sinclair, above n 7; Ayres and Braithwaite, above n 7.

In the realm of labour law specifically, the traditional focus on 'hard' law — legislation, awards and enterprise agreements, and case law — has indeed provided an incomplete picture of the role of the state (and of non-state actors) in regulating work.¹³ The state effects normative changes in employment practices and industrial relations through a range of regulatory techniques. The wide range of techniques available to, and used by, governments to regulate labour standards is well-illustrated through the concept of a 'spectrum' of labour regulation.¹⁴ Between the regulatory extremes of command and control legal regulation and voluntary self-regulation (where there is no direct role for the state) are a number of regulatory approaches which can be classified according to the extent of government involvement and the coerciveness of that involvement.¹⁵ Across this spectrum, approaches vary from:

- initiatives relying on government deployment of wealth to secure behavioural change by attaching conditions to government contracts, or through the offering of financial incentives or rewards;¹⁶ and
- facilitation of 'co-regulation' or corporatist arrangements and/or 'self-regulation' by requiring or encouraging firms and stakeholders either to develop codes of practice, or standards of behaviour, which are better than state sanctioned minimums;¹⁷

through to the use of informational strategies.¹⁸ Informational strategies encompass the imposition of public disclosure requirements on firms, as well as governmental use of information as a regulatory instrument, including dissemination of voluntary codes of practice, 'best practice guidelines' or 'case studies'. The latter approach seeks to promote or encourage private sector take-up of decent work practices by presenting these practices in a way which suggests consistency with ideals of good corporate (self) governance.¹⁹ We should note, however, that the different 'forms and legalities'²⁰ across this spectrum frequently interact with each other within a given regulatory space, and are therefore not necessarily mutually exclusive.²¹

In this article, we set out some examples of Australian state governments employing light touch approaches to regulate labour practices, to assess whether

¹³ Gahan and Brosnan, above n 1; Keith Ewing, 'The State and Industrial Relations: "Collective Laissez-Faire" Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1; John Godard, 'Institutional Environments, Employer Practices, and States in Liberal Market Economies' (2002) 41 *Industrial Relations* 249.

¹⁴ Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97, 100.

¹⁵ *Ibid.*; Salamon, above n 5.

¹⁶ Howe, "Money and Favours", above n 3.

¹⁷ This is sometimes referred to as 'proceduralisation' of regulation: see, eg, Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597; Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21 *Oxford Journal of Legal Studies* 33.

¹⁸ Janet A Weiss, 'Public Information' in Lester M Salamon (ed), *The Tools of Government: A Guide to the New Governance* (2002) 217.

¹⁹ Ogus, 'Rethinking Self-Regulation', above n 14, 100.

²⁰ Chris Arup, 'Labour Law as Regulation: Promises and Pitfalls' (2001) 14 *Australian Journal of Labour Law* 229, 235.

²¹ For a discussion of the concept of 'regulatory space': see Scott, 'Analysing Regulatory Space', above n 4.

these approaches are adequate alternatives or supplements to more traditional labour law. In outlining and assessing the various regulatory techniques adopted by the state governments, we distinguish between the character of the regulatory objective and the nature of the regulatory process adopted for the achievement of this objective. In relation to the former, we examine the different forms of labour regulation with an interest in the extent to which they address the *quality* of jobs created and maintained in the labour market.²² While we are interested in minimum standards, we do not presume that standards of decent work are confined to current legal minimums.²³ We distinguish between approaches that endeavour to secure or improve compliance with existing standards set by legislation or by (collective) industrial instruments such as awards, and those that go beyond this to identify appropriate working conditions or forms of work organisation above the floor of minimum standards.²⁴ For example, we are interested in the use of light touch regulation to influence employer labour management practices in relation to ‘work–life’ balance or cooperative, ‘high performance’ work practices.

In terms of the character of regulatory processes adopted, we enquire into the nature and extent of standard-setting, monitoring and evaluation, and enforcement associated with these approaches, including the degree to which regulation is shared with non-government actors. We do not confine ourselves to legal processes. A government may, for example, require other actors to disclose information regarding compliance with particular standards as a way of enhancing monitoring and evaluation of the effectiveness of a regulatory regime. Similarly, information may be used for enforcement purposes, for example, where a firm is ‘named and shamed’ as a sanction for noncompliance.²⁵

III LIGHT TOUCH LABOUR REGULATION BY STATE GOVERNMENTS IN AUSTRALIA

Before outlining our findings, we must acknowledge some limitations on the scope of our research. Our survey of state government labour regulation is limited to three states —NSW, Queensland and Victoria — and excludes some relevant regulatory schemes which have already been subjected to scholarly analysis regarding their light touch characteristics. These schemes may be found

²² Sean Cooney, John Howe and Jill Murray, ‘Time and Money under *Work Choices*: Understanding the New *Workplace Relations Act* as a Scheme of Regulation’ (2006) 29 *University of New South Wales Law Journal* 215, 217–19.

²³ *Ibid.*

²⁴ *Ibid.* A similar classification is adopted in: Howe, “‘Money and Favours’”, above n 3; Christopher McCrudden, ‘Social Policy Issues in Public Procurement: A Legal Overview’ in Sue Arrowsmith and Arwel Davies (eds), *Public Procurement: Global Revolution* (1998) 219.

²⁵ Daintith, ‘Regulation’, above n 7. This regulatory technique is used by some Australian states in combination with more command and control-type regulation. For example, the Queensland government produces *Prosecution News*, which is accessible via its Department of Employment and Industrial Relations website. The available links generally provide the public with the identity of companies that have breached industrial relations legislation, and details of the nature of the breach and the sanction imposed: see Department of Employment and Industrial Relations, Queensland Government, *Queensland Workplace Prosecutions* (2007) Department of Employment and Industrial Relations <<http://www.deir.qld.gov.au/publications/workplaceprosecutions/2005/index.htm>>.

in areas such as occupational health and safety,²⁶ anti-discrimination legislation,²⁷ and the textile, clothing and footwear industry.²⁸ Exhibiting features of light touch responsive regulation, these models may be useful for comparative purposes in assessing the responsiveness of the regulatory initiatives that are the subject of this article. Furthermore, it must be acknowledged that there are also some forms of 'corporate social responsibility' regulation which address employment systems and practices which are mostly outside the scope of our study.²⁹

A Attaching Labour Conditions to Government Procurement Contracts

One of the light touch regulatory techniques used widely by governments is that of attaching 'secondary' or 'social policy' criteria to government procurement contracts.³⁰ There is an extensive history of governments using their market power as a major purchaser of goods and services from the private sector to promote desired labour practices, particularly those standards relating to equal opportunity employment and the payment of fair wages.³¹ By attaching labour standards to contracts — through which the government purchases the goods and services it needs to carry out its functions from the private sector — governments provide businesses with an economic incentive to comply with specific labour practices.³² All the states and the Commonwealth government rely

²⁶ See, eg, Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (1999); Richard Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials* (2nd ed, 2004); Richard Johnstone, 'Regulating Occupational Health and Safety in a Changing Labour Market' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays in the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 617.

²⁷ See, eg, Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can It Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays in the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 105; Christine Parker, 'How to Win Hearts and Minds: Corporate Compliance Policies for Sexual Harassment' (1999) 21 *Law and Policy* 21, 29–31.

²⁸ See, eg, Shelley Marshall, 'An Exploration of Control in the Context of Vertical Disintegration, and Regulatory Responses' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays in the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 542; Michael Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 542; Shelley Marshall, 'Legal Protection of Workers' Human Rights: Regulatory Changes and Challenges' (Paper presented at the International Institute for the Sociology of Law, Oñati, Spain, May 2006); Igor Nossar, Richard Johnstone and Michael Quinlan, 'Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia' (2004) 17 *Australian Journal of Labour Law* 137.

²⁹ For consideration of the concept of 'corporate social responsibility' with respect to labour management issues: see Meredith Jones, Shelley Marshall and Richard Mitchell, 'Corporate Social Responsibility and the Management of Labour in Two Australian Mining Industry Companies' (2007) 15 *Corporate Governance: An International Review* 57.

³⁰ Sue Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?' in Sue Arrowsmith and Arwel Davies (eds), *Public Procurement: Global Revolution* (1998) 3.

³¹ McCrudden, 'Social Policy Issues in Public Procurement', above n 24.

³² Robert Howse describes public procurement as a form of economic incentive-based regulation: see Robert Howse, 'Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State' (1993) 31 *Alberta Law Review* 455. It is also often described as a

extensively on public procurement as a means of promoting compliance with desired labour practices.³³

Before proceeding to outline how the three states are using public procurement as a means of promoting labour standards, it is important to note the actual and potential limitations on their power to do so. The Australian states are limited in their capacity to use public procurement and other forms of regulation to promote social policy objectives by the nature of Australian federalism. There are two legal restrictions of principal relevance. The first set of restrictions relates to the application of the federal *WRA*. The changes effected by *Work Choices* mean that the *WRA* ‘covers the field’ and thus renders as void any state ‘industrial law’ that seeks to regulate constitutional corporations in a manner which is inconsistent with the federal legislation.³⁴ The *WRA*, through its freedom of association provisions, also limits the capacity of state governments to encourage collective forms of workplace arrangement.³⁵

The second set of restrictions upon state governments arises from the promotion of competition and free trade. The *Trade Practices Act 1974* (Cth) (*TPA*) has been identified as a potential restriction on the capacity of a state government to use procurement to impose social obligations on businesses supplying goods or services to the government.³⁶ A number of commentators, however, have suggested that the *TPA* does not apply to public procurement.³⁷ Nevertheless, doubts about the extent of the *TPA*’s application may be a reason for state government hesitation to strengthen labour conditions attached to public procurement policies.

form of ‘consensual constraint’ on enterprise behaviour, as it involves the control of activity through contractual or other agreements with government: Christopher Hood, *The Tools of Government* (1983) 42.

³³ There is, however, a dearth of academic literature within Australia on the use of public procurement as a regulatory mechanism. An exception is Howe, “‘Money and Favours’”, above n 3. Comparatively more attention has been paid to the subject in Europe and North America: see, eg, Gillian Morris, ‘The Future of the Public/Private Labour Law Divide’ in Catharine Barnard, Simon Deakin and Gillian Morris (eds), *The Future of Labour Law* (2004) 159; Christopher Bovis, ‘A Social Policy Agenda in European Public Procurement Law and Policy’ (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 137, 140–8; Michael Orton and Peter Ratcliffe, “‘Race’”, *Employment and Contract Compliance: A Way Forward for Local Authorities?* (2004) 19 *Local Economy* 150; Andrew Erridge and Ruth Fee, ‘Towards a Global Regime on Contract Compliance’ (1999) 27 *Policy and Politics* 199; Andrew Erridge and Ruth Fee, ‘The Impact of Contract Compliance Policies in Canada — Perspectives from Ontario’ (2001) 1 *Journal of Public Procurement* 51; Christopher McCruden, ‘Using Public Procurement to Achieve Social Outcomes’ (2004) 28 *Natural Resources Forum* 257.

³⁴ *WRA* s 16; *New South Wales v Commonwealth* (2006) 231 ALR 1.

³⁵ This is a limitation which deserves further exploration. For example, could Australian states manage these limitations by having two public procurement programmes: one applicable to employers under state jurisdiction and one applicable to employers under federal jurisdiction? The Canadian federal government has two programmes based on a similar distinction: see Erridge and Fee, ‘The Impact of Contract Compliance Policies in Canada’, above n 33.

³⁶ See, eg, Department of Public Works, Queensland Government, *State Purchasing Policy Review: Policy Paper — November 2006* (2006) 8.4.

³⁷ The courts have generally taken a narrow view of what constitutes ‘carrying on a business’, with the result that many government activities, including procurement, are immune from the effects of the *TPA*: see, eg, *J S McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 227. This includes *TPA* s 45E, which prohibits ‘contracts, arrangements or understandings affecting the supply or acquisition of goods and services’. See generally Nicholas Seddon, *Government Contracts: Federal, State and Local* (3rd ed, 2004) ch 6.

State governments are also restricted in their ability to use light touch labour regulation to influence labour practices in the building and construction industry. Any such regulation must take account of the Commonwealth government's *National Code of Practice for the Construction Industry*³⁸ and *Implementation Guidelines for the National Code of Practice for the Construction Industry*.³⁹ The Australian Building and Construction Commission has extensive powers under the *Building and Construction Industry Improvement Act 2005* (Cth) to investigate alleged breaches of the industrial relations provisions of the Code,⁴⁰ not to mention substantial resources. The Commonwealth government has made it clear that any building project with Commonwealth funding must be 'Code compliant'.⁴¹ The Code is designed to reduce union influence in the building and construction industry, so many of its requirements conflict with state governments' efforts to promote decent labour practices and facilitate trade union activity.

In NSW, Queensland and Victoria, the public procurement process is governed by a complex web of policies, frameworks, codes and guidelines. Each state has a broad procurement policy or framework that sets out general principles applying to government procurement contracts.⁴² Prior to *Work Choices*, all three states included some labour conditions in their procurement criteria. In the case of Victoria, one of the broad policies requires all businesses that tender for government contracts to adhere to an 'ethical employment standard'.⁴³ Queensland and Victoria also have codes of best practice that set out specific labour standards and industrial relations practices with which all businesses in particular industries that tender for government contracts must comply. Queensland has codes of practice for the building and construction industry, call centres and the clothing industry.⁴⁴ Victoria has codes of practice for the building and construc-

³⁸ Australian Procurement and Construction Council, *National Code of Practice for the Construction Industry* (1997).

³⁹ Department of Employment and Workplace Relations, Australian Government, *Implementation Guidelines for the National Code of Practice for the Construction Industry* (2006).

⁴⁰ See *Building and Construction Industry Improvement Act 2005* (Cth) ch 7 pt 2.

⁴¹ A recent example of the tension between the federal and state approaches is the warning issued by the federal government to Multiplex that if it signs a state-based project award in NSW (in compliance with the NSW government's public procurement guidelines for the construction industry), it will no longer be eligible for federal government contracts: see M Skulley, 'Canberra Adamant on Building Code', *The Australian Financial Review* (Melbourne), 6 April 2006, 8.

⁴² New South Wales Treasury, *Procurement Policy: Policy and Guidelines Paper* (2004); Queensland Government, *State Purchasing Policy* (2nd ed, 2004); Victorian Government Purchasing Board, *VGBP Policies* (2002) Victorian Government Purchasing Board <<http://www.vgpb.vic.gov.au>>. Although all three states maintain different procurement practices, in general terms procurement is normally divided between central and departmental procurement. That is, some goods and services are procured 'centrally' through a relatively transparent tender process, while many other goods and services will be procured by departments on an 'as required' basis, so long as the purchases are within the area of their responsibility, with less information available about how this purchasing operates.

⁴³ Victorian Government, *Ethical Purchasing Policy — Mandatory Safety Net for Nominated Sectors* (2007) BusinessVictoria <http://www.business.vic.gov.au/BUSVIC.5111956/STANDARDD/PC_61975.html>.

⁴⁴ Department of Employment, Training and Industrial Relations, Queensland Government, *Queensland Code of Practice for the Building and Construction Industry* (2000); Department of Employment and Industrial Relations, Queensland Government, *Queensland Government Code*

tion industry and for call centres.⁴⁵ In NSW, since 2005, there has been a single code of practice governing all types of government procurement, which sets out standards of behaviour expected of government agencies, tenderers, service providers, employer and industry associations and unions.⁴⁶ While all three states use public procurement as a means of promoting labour standards, their policies differ according to the type of contract or firm to which the policy applies, the precise standards promoted, the sanctions imposed for breach, and the use of monitoring mechanisms.⁴⁷ The divergent approaches of the three Australian states are contrasted below. Some recent developments which have occurred post-*Work Choices* are then discussed.

1 *Applicability*

The extent to which compliance with labour standards is a relevant criterion varies according to the nature, type and value of the contract.⁴⁸ For example, as noted above, provision of goods and services to the government in particular industries, such as building and construction, is governed by its own set of industrial relations principles. In Victoria, only contracts for the purchase of goods and services by the government above a certain threshold value are governed by the *Ethical Purchasing Policy*: contracts in excess of \$100 000 generally, and contracts for the purchase of goods and services under \$100 000 for 'high risk industries', such as textile, clothing and footwear, and cleaning and security services.⁴⁹

2 *Standard-Setting*

Governments differ as to the point in the procurement process at which they impose the labour standards and the nature of the standards. There are three stages in the procurement process at which governments can impose such standards: qualification, or eligibility to tender for a government contract; the tender assessment process; and the contractual requirements imposed on the successful tenderer.

A government may impose standards as 'qualification' criteria, thus restricting the tendering process to those companies that already comply with the social objectives. Building and construction industry contractors that wish to enter into contracts with the Queensland government, for example, must demonstrate compliance with the *Queensland Code of Practice for the Building and Con-*

of Practice for Call Centres (2001); Department of Employment, Training and Industrial Relations, Queensland Government, *Queensland Government Code of Practice on Employment and Outwork Obligations: Textile, Clothing and Footwear Suppliers* (2000).

⁴⁵ Victorian Government, *Building and Construction Code* (1999) BusinessVictoria <https://www.business.vic.gov.au/BUSVIC/STANDARD/1001/PC_50510.html>; Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, *Victorian Government Call Centre Code* (2007).

⁴⁶ NSW Government, *NSW Government Code of Practice for Procurement* (2005).

⁴⁷ For a more detailed conceptual framework: see McCrudden, 'Social Policy Issues in Public Procurement', above n 24.

⁴⁸ *Ibid.*

⁴⁹ Victorian Government Purchasing Board, *Procurement and Ethical Employment (Standard)* (2004) Victorian Government Purchasing Board <<http://www.vgpb.vic.gov.au/CA256C450016850B/0/8F95B4FEC7321C99CA256E0D001BC8F2?OpenDocument>>.

struction Industry as a prerequisite for submitting a tender.⁵⁰ Often, failure to comply with stipulated social criteria in previous dealings with the government may result in the supplier being deprived of the right to bid for contracts in the future.⁵¹ According to the Victorian government's *Ethical Purchasing Policy*, for example, tenderers must supply the purchaser with an 'Ethical Employment Statement' detailing compliance with relevant labour legislation and industrial instruments, including any breaches of the relevant laws in the previous 24 months.⁵²

While there are a range of ways in which governments can integrate labour standard considerations into the tender assessment process, NSW, Queensland and Victoria all adopt a similar approach. A programme could identify a quota of contracts which are 'set aside' for contractors of a particular type, or there may be a 'price preference' for certain types of contractor whereby the bid which bidder A submits, for example, although higher than that of bidder B, is regarded as equal to that of B, if A undertakes to implement a particular social policy. The past practice or the willingness of a past bidder to implement the social objectives may be taken into account as a 'tie-breaker' where otherwise equal tenderers are in competition. Alternatively, the social criteria may be either just one consideration to take into account, or determinative where tenders are otherwise equal. Another approach may be to 'offer back' to preferred tenderers, to allow them to match the lowest bid of the non-preferred tenderer. The approach of the Australian states, however, is to include labour standards as one of a number of different criteria, including value for money, upon which tenders will be assessed. Such an approach leaves considerable space for labour-related considerations to be subsumed within, or overlooked by, government administrators under pressure to secure best value for money.

Two types of labour standard may be linked to public procurement programmes.⁵³ First, procurement may be used as a method of enforcing *existing* legal obligations: that is, as a supplement to existing mechanisms for enforcement of minimum standards set by legislation and/or industrial instruments such as awards and applicable enterprise bargaining agreements.⁵⁴ Secondly, procurement may be used to advance desired modes of labour relations *above and beyond* those required by law.⁵⁵

NSW, Queensland and Victoria all require those who supply goods and services to government departments and offices to comply with all applicable legislative obligations, including relevant employment-related legislation,

⁵⁰ Department of Employment and Industrial Relations, *Queensland Code of Practice for the Building and Construction Industry*, above n 44.

⁵¹ This can also be characterised as a *sanction* imposed on suppliers that fail to comply with the social criteria through deprivation of the opportunity to bid for contracts in the future.

⁵² Victorian Government, *The Victorian Government's Ethical Purchasing Policy: Supporting Fair and Safe Workplaces: Process Guidelines for Government Buyers* (2003) 9–11.

⁵³ Howe, "Money and Favours", above n 3, 173; McCrudden, 'Using Public Procurement to Achieve Social Outcomes', above n 33, 259.

⁵⁴ Howe, "Money and Favours", above n 3, 173.

⁵⁵ *Ibid.*

awards and agreements.⁵⁶ This requirement is generally a precondition to tendering and may also be integrated into the contract.⁵⁷ In this way, their efforts supplement existing mechanisms for the enforcement of minimum standards.

Beyond this, the three states have also sought to promote desired labour practices that are above minimum standards. This is done through the use of codes of practice which are limited to particular industries or activities. These codes are intended to encourage best practice in the particular industries: while they require compliance with relevant legislation and industrial instruments, they also promote cooperative and consultative industrial relations and encourage parties to reach collective agreements and foster collective arrangements. Victoria's *Code of Practice for the Building and Construction Industry — Victoria Industrial Relations Principles*, for example, purports to apply a 'best practice approach' to industrial relations.⁵⁸ The Code encourages employer and industry associations, unions, contractors, subcontractors, consultants and suppliers to adopt and promote a cooperative approach to industrial relations, to communicate openly and honestly with other industry participants, and to have a commitment to a 'best practice' working environment.⁵⁹ It also promotes participation by employees and employers in industry associations.⁶⁰ The *Queensland Government Code of Practice for Call Centres* seeks to encourage 'continuous improvement and best practice' in the three areas of business relationships and practices, organisational systems and standards, and cooperative workforce management policies and practices.⁶¹

A further example in which a state government has sought to use its purchasing power to promote labour standards above the minimum stipulated by law is the Victorian government's School Contract Cleaning programme.⁶² Introduced in 2005, this programme requires all cleaning contractors wishing to obtain contracts with Victorian government schools to apply to the Department of Education and Training for appointment to a panel of approved cleaning contractors.⁶³ Appointment to the panel is based on demonstrated compliance with a

⁵⁶ See Queensland Government, *State Purchasing Policy*, above n 42; NSW Government, *NSW Government Code of Practice for Procurement*, above n 46, pt 5 app A; Victorian Government Purchasing Board, *State Purchase Contracts Policy* (2007) Victorian Government Purchasing Board <<http://www.vgpb.vic.gov.au/CA256C450016850B/0/686DA5B53FD13348CA256FC0001B05CC?OpenDocument>>.

⁵⁷ See, eg, Environmental Protection Agency, Queensland Government, *Standard Conditions of Contract for Goods and Services (Including Consultancy Services and Standing Offers to Supply)* (2004) <<http://www.epa.qld.gov.au/publications?id=1171>>.

⁵⁸ Industrial Relations Victoria, *Code of Practice for the Building and Construction Industry — Victoria Industrial Relations Principles* (2002) [1.1].

⁵⁹ *Ibid.*

⁶⁰ *Ibid* [2.1].

⁶¹ Department of Employment and Industrial Relations, *Queensland Government Code of Practice for Call Centres*, above n 44, art 3.

⁶² John Howe and Ingrid Landau, *Using Public Procurement to Promote Better Labour Standards: A Case Study of the Victorian Government Schools Contract Cleaning Program* (2007) Australian Policy Online <http://www.apo.org.au/linkboard/results.html?filename_num=143933>.

⁶³ Department of Education and Early Childhood Development, Victorian Government, *School Contract Cleaning — Panel Status* (2007) Department of Education and Early Childhood Development, Victorian Government <<http://www.education.vic.gov.au/management/schooloperations/schoolcleaning/panelstatus.htm>>.

range of criteria relating to employment and industrial relations practices, including 'sound practices to promote occupational health and safety', 'sound practices in human resource management', and 'compliance with relevant industrial awards/instruments'.⁶⁴ Applications for admission to the panel are assessed by the Contract Cleaners Assessment Committee,⁶⁵ comprised of representatives of the government, trade unions, contractors and schools.⁶⁶ The Committee makes recommendations to the Department.⁶⁷

Finally, the NSW Government has implemented the *NSW Government Code of Practice for Procurement* which covers all types of government procurement in NSW after July 2004.⁶⁸ The Code directs government agencies to consider, as evaluation criteria in addition to price, the tenderer's occupational health and safety management practices, and workplace and other industrial relations management practices and performance.⁶⁹ In relation to workplace practices, the Code recognises enterprise agreements as 'important elements in achieving continuous improvement and best practice'.⁷⁰ It identifies 'ideal' aspects of enterprise agreements, including cooperative, flexible workplace arrangements, relationships and practices. What this actually requires an agency to consider, however, is somewhat unclear.⁷¹ The NSW government recently revised the industrial relations requirements in its procurement policy as part of its response to *Work Choices*. These new requirements are discussed below.

The limited extent to which state governments use public procurement programmes to promote desired workplace practices becomes apparent when we compare the Australian approach with some international examples. The Canadian government's Federal Contractors Program, designed to promote employment equity, requires contractors to implement an organisational change strategy that includes: identifying and removing artificial barriers to the selection, hiring, promotion, and training of designated groups, and taking steps to

⁶⁴ Ibid.

⁶⁵ Department of Education and Early Childhood Development, Victorian Government, *School Contract Cleaning — Application for Panel Status* (2007) Department of Education and Early Childhood Development, Victorian Government, <<http://www.education.vic.gov.au/management/schooloperations/schoolcleaning/faq.htm>>.

⁶⁶ Howe and Landau, above n 62, 13.

⁶⁷ Department of Education and Early Childhood Development, *School Contract Cleaning — Application for Panel Status*, above n 65.

⁶⁸ While the focus of this article is on state governments, it should be noted that a number of local councils in NSW have signed memoranda of understanding with the NSW Labor Council on procurement issues. These include Holroyd City Council, Leichardt Municipal Council and Cessnock City Council.

⁶⁹ NSW Government, *NSW Government Code of Practice for Procurement*, above n 46, 14–16, 21–5.

⁷⁰ Ibid 22.

⁷¹ In a memorandum of understanding between the NSW Department for Public Works and Services and the Labor Council of NSW in 2002, the government agreed to pursue a number of objectives that included, but went beyond, simply requiring contractors to conform to their existing legal obligations. The memorandum of understanding noted that 'membership and active participation in unions through proper and lawful means is encouraged'. This commitment does not seem to be formally incorporated into the NSW Government's public procurement framework. See Memorandum of Understanding between the Minister for Public Works and Services and the Labor Council of New South Wales for Goods and Services Procurement (April 2002).

improve the employment status of these groups through particular measures.⁷² In 2002, both the Swedish and German governments proposed to make it illegal to give public contracts to companies that had not paid their employees collectively-agreed pay rates.⁷³ The International Labour Organization promotes the inclusion of labour considerations within public procurement contracts. *The Labour Clauses (Public Contracts) Convention* provides that all public procurement contracts awarded by central public authorities shall include clauses ensuring wages, hours of work and other conditions of labour which are no less favourable than those established for work of the same character in the trade or industry concerned, in the district where the work is carried on.⁷⁴

3 Monitoring Compliance

Monitoring and review of the public procurement programmes in NSW, Queensland and Victoria differ, both within and between the states. In Queensland, the three codes that apply to specific industries provide for varying degrees of monitoring. The *Queensland Government Code of Practice for Call Centres* does not provide for any monitoring or review. The *Queensland Code of Practice for the Building and Construction Industry* establishes a tripartite consultative committee responsible for monitoring, encouraging compliance with, and reviewing processes in the Code.⁷⁵ The *Queensland Government Code of Practice on Employment and Outwork Obligations: Textile, Clothing and Footwear Suppliers* provides for a formal consultative mechanism involving 'key industry participants' to 'discuss issues arising from the implementation of this Code'.⁷⁶ The Code also provides for the consultation of industry participants during any review of the Code.⁷⁷

In Victoria, primary responsibility for compliance with the *Victorian Government Call Centre Code* is assigned to the workplaces themselves. However

⁷² Erridge and Fee, 'The Impact of Contract Compliance Policies in Canada', above n 33. Interestingly, the Canadian programme combines requirements for contractors to comply with Equal Employment Opportunity policies with a rewards programme, which recognises those companies who have achieved 'outstanding' equity programmes that exceed the contract compliance requirements.

⁷³ See Thorsten Schulten, *Bundesrat Rejects Law on Collectively Agreed Pay in Public Procurement* (2002) European Industrial Relations Observatory On-Line <<http://www.eiro.eurofound.ie/about/2002/08/inbrief/de0208201n.html>>. The German government's efforts to pass this legislation, however, were stymied in the *Bundesrat* (Germany's second chamber of Parliament).

⁷⁴ *The Labour Clauses (Public Contracts) Convention 1949*, opened for signature 29 June 1949, ILO C94, art 2(1) (entered into force 20 September 1952). Article 2(2) notes that:

Where the conditions of labour referred to in the preceding paragraph are not regulated in a manner referred to therein in the district where the work is carried on, the clauses to be included in contracts shall ensure to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than (a) those established by collective agreement or other recognised machinery of negotiation, by arbitration, or by national laws or regulations, for work of the same character in the trade or industry concerned in the nearest appropriate district; or (b) the general level observed in the trade or industry in which the contractor is engaged by employers whose general circumstances are similar.

⁷⁵ Department of Employment and Industrial Relations, *Queensland Code of Practice for the Building and Construction Industry*, above n 44, [1.5].

⁷⁶ Department of Employment and Industrial Relations, *Queensland Government Code of Practice on Employment and Outwork Obligations: Textile, Clothing and Footwear Suppliers*, above n 44, s 4.3.

⁷⁷ *Ibid.*

where compliance issues arise in organisations that are contracted to the government, they may be referred to the relevant departmental contract manager and then, if necessary, to the relevant departmental secretary.⁷⁸ All proven breaches of the Code will be reported to the relevant Minister for consideration.⁷⁹ Under the Victorian government's School Contract Cleaning programme, the Department of Education and Training is responsible for conducting audits of compliance.⁸⁰

4 Enforcement

Standards set through public procurement programmes are generally backed up by the threat of sanctions for noncompliance, which range from warnings to preclusion from tendering opportunities for a certain period of time. In NSW, for example, sanctions for breach of public procurement contracts by a non-government party may include, in addition to any contractual or other legal remedies pursued: formal warnings that continued noncompliance will result in more severe sanctions; partial exclusion from tendering; and preclusion from tendering for any work in the supply chain for a specified period.⁸¹ For lesser breaches, the sanctions will be applied by the single government agency. In more severe cases, 'government-wide' sanctions are available.⁸²

In Victoria, a tenderer who does not satisfy the requirements of the government's *Ethical Purchasing Policy* is disqualified from further participation in the tender process.⁸³ In addition, their name will be recorded on the Ethical Employment Reference Register, which is accessible to all government buyers.⁸⁴ The government takes care to emphasise, however, that this Register is not a 'black list', as the disqualified tenderer can apply for other government contracts and will be assessed anew.⁸⁵ For contractors who have been awarded a contract, failure to comply with the *Ethical Purchasing Policy* allows the government to terminate the contract.⁸⁶ Failure to comply with the *Code of Practice for the Building and Construction Industry — Victoria Industrial Relations Principles* may result in warnings, reduction in tendering opportunities, reporting of the breach to the appropriate statutory body, and/or publication of the breach.⁸⁷

⁷⁸ Industrial Relations Victoria, *Victorian Government Call Centre Code*, above n 45, 13–15.

⁷⁹ *Ibid.* 14.

⁸⁰ Department of Education and Early Childhood Development, Victorian Government, *Department Cleaning Panel Agreement 2005* (2005) cl 9.1.

⁸¹ NSW Government, *NSW Government Code of Practice for Procurement*, above n 46, cl 6.2.

⁸² See NSW Treasury, *Procurement Policy: Policy and Guidelines Paper*, above n 42, 17–18.

⁸³ Victorian Government, *Ethical Purchasing Policy*, above n 43. For further detail: see Victorian Government Purchasing Board, *The Victorian Government's Ethical Purchasing Policy: Supporting Fair and Supportive Workplaces: Process Guidelines for Government Buyers* (2003).

⁸⁴ *Ibid.*

⁸⁵ Victorian Government Purchasing Board, *The Victorian Government's Ethical Purchasing Policy*, above n 83.

⁸⁶ *Ibid.*

⁸⁷ Industrial Relations Victoria, *Code of Practice for the Building and Construction Industry — Victoria Industrial Relations Principles*, above n 58, [7.3].

5 Post-Work Choices

State governments have indicated that reform of public procurement policies will form part of their response to *Work Choices*. In June 2006, the South Australian government introduced a policy requiring that a new standard clause be included in all contracts for the procurement of goods, services and construction. The clause seeks to ensure that all employees of private contractors continue to enjoy, as a minimum, terms and conditions no less favourable than those in place prior to *Work Choices* coming into force.⁸⁸ In NSW, the 2006 NSW Australian Labor Party State Conference passed a resolution in June demanding that the NSW government and local councils refuse to award contracts to businesses which placed workers on Australian Workplace Agreements ('AWAs').⁸⁹ The NSW government initially expressed reservations about the legality of such a move.⁹⁰ However, in November 2006 the government released a four-page policy statement setting out new industrial relations requirements for NSW government contracts.⁹¹ Contractors will be required to demonstrate that workers received remuneration that, on balance, results in 'no net detriment' as defined in the *Industrial Relations Act 1996* (NSW) with respect to relevant state awards and contract determinations.⁹² These requirements will be piloted in the contract for provision of courier and other delivery services, with the intention that, following a review of the pilot, the requirement will be implemented across government (with the exception of construction contracts).⁹³

In September 2006, the Victorian government announced the development of its *Ethical Purchasing Policy — Mandatory Safety Net for Nominated Sectors*.⁹⁴ This policy, produced in response to *Work Choices*, states that suppliers of goods and services to any Victorian government entity in nominated vulnerable sectors must comply with a minimum safety net of fair employment standards. To comply with this new policy, tenders and suppliers must provide their on-shore employees engaged in supplying the goods or services with terms and conditions of employment that 'are not less favourable overall' than those provided under the relevant award(s) as existed prior to *Work Choices* and as adjusted by the Australian Fair Pay Commission and Australian Industrial Relations Commission. Contractors must also comply with nominated state legislation.⁹⁵ While the government is yet to release the operational details of this policy, it has nomi-

⁸⁸ South Australian Government, *SA Government Contracting Policy* (2006) cl 1.

⁸⁹ See Peter Jean, 'NSW: Will Make Contractors' [sic] Look after Workers: Della Bosca', *Australian Associated Press*, 11 June 2006. An AWA is an individual statutory agreement which operates to the exclusion of collective instruments such as awards and certified agreements.

⁹⁰ On the reservations expressed by the NSW Government: see Anne Davies and Phillip Coorey, 'Call for Workplace Ban Falters', *The Sydney Morning Herald* (Sydney), 14 June 2006.

⁹¹ The new requirements are set out in NSW Government, *New South Wales Government Procurement Policy — Industrial Relations Requirement* (2006) NSW Office of Industrial Relations <<http://www.industrialrelations.nsw.gov.au/action/project/index.html>>.

⁹² *Industrial Relations Act 1996* (NSW) s 35(1)(b).

⁹³ NSW Government, *New South Wales Government Procurement Policy*, above n 91.

⁹⁴ Victorian Minister for Industrial Relations and Victorian Minister for Finance, 'Bracks Government Puts the Brakes on *Workchoices*' (Press Release, 20 September 2006).

⁹⁵ Victorian Government, *Ethical Purchasing Policy*, above n 43.

nated the following sectors as 'vulnerable' and thus subject to the safety net provided by the policy: security services, catering, cleaning services, and the textile, clothing and footwear industries.⁹⁶ The Victorian government has also noted that the Victorian Workplace Rights Advocate ('VWRA')⁹⁷ and Industrial Relations Victoria would assist government procurement officials to comply with the policy requirements.⁹⁸ Queensland is expected to release a new procurement policy in early 2008.⁹⁹

B *Financial Subsidies*

Financial subsidies or incentives are another instrument used by governments seeking to modify the behaviour of companies and other non-government actors.¹⁰⁰ Through attaching labour requirements to the disbursement of subsidies, governments have the potential to deploy their wealth resources to promote job quality, whilst stimulating local and regional industry investment. There are two types of financial incentive that may be used to regulate labour practices of firms: industry assistance grants and special purpose grants or prizes.

Industry assistance grants include the range of financial grants or subsidies provided by governments to corporations in order to facilitate economic development and job growth. Governments around the world seek to promote economic development and job creation by offering investment incentives, or financial and non-financial subsidies in order to attract or stimulate new private sector investment in a country or region.¹⁰¹ Such incentives are just one of a number of forms of public assistance to industry offered by the Commonwealth and state governments in Australia.¹⁰² These instruments often have secondary labour-related objectives in the claim that the subsidies create jobs. The extent to which governments attach labour standard conditions to industry subsidies is unclear. It is remarkably difficult to obtain information about the criteria imposed on recipients. We do know, however, that state governments have come under repeated criticism from trade unions for providing financial subsidies to companies which then either leave the jurisdiction, or adopt labour practices that are inimical to government policy. In Victoria, for example, the German supermarket chain Aldi, which received a state government subsidy and was officially

⁹⁶ Ibid; Victorian Minister for Industrial Relations and Victorian Minister for Finance, above n 94.

⁹⁷ See below Part III(C)(2).

⁹⁸ Victorian Minister for Industrial Relations and Victorian Minister for Finance, above n 94.

⁹⁹ Department of Public Works, *State Purchasing Policy Review*, above n 36; Department of Public Works, Queensland Government, *Purchasing Update — Volume 68 June 2007* (2007) 5.

¹⁰⁰ For discussions of financial incentives as a form of regulatory technique: see, eg, Howe, above n 32; Howe, "Money and Favours", above n 3; Anthony Ogus, 'Nudging and Rectifying: The Use of Fiscal Instruments for Regulatory Purposes' (1999) 19 *Legal Studies* 245.

¹⁰¹ See also Ches Baragwanath and John Howe, 'Corporate Welfare: Public Accountability and Industry Assistance' (Discussion Paper No 34, The Australia Institute, Canberra, 2000).

¹⁰² For recent consideration: see Michael Keating, *Who Rules? How Government Retains Control of a Privatised Economy* (2004) 51–4. The Productivity Commission has estimated that Commonwealth industry assistance and tax concessions alone amounted to over \$4 billion in 2003–04: Productivity Commission, Commonwealth Government, *Trade and Assistance Review 2003–2004* (2004).

opened in Victoria by then Premier Steve Bracks, has attracted criticism from trade unions for placing its Victorian employees on AWAs.¹⁰³

While publicly available information on the extent to which Australian state governments attach labour standards to industry assistance grants remains scarce, the issue has received sustained attention in the US.¹⁰⁴ A large number of industry subsidy programmes administered by American states now involve job quality standards.¹⁰⁵ Moreover, legislation in numerous US states imposes sanctions on companies that fail to comply with conditions attached to industry assistance funds.¹⁰⁶ The scope of such legislative provisions varies significantly — while some states apply them broadly to all subsidy programmes, others take a more limited approach. The laws also differ in the ‘triggers’ for sanctions, the nature of penalties and the length of time for which they hold companies accountable. If a recipient fails to comply with the conditions attached to the industry assistance, or (in some cases) where the recipient relocates outside the state within a specified period of time, the government may impose sanctions including cessation of financial assistance and the ‘clawing back’ of funds by requiring the recipient to reimburse the state.¹⁰⁷ ‘Clawback’ provisions are justified as a means through which the government can ensure public funds return real public benefits.¹⁰⁸ In Australia, however, the dearth of information about the actual use of industry assistance as a technique of labour regulation has led us to focus on the second major type of financial subsidy — the use of special purpose grants or prizes.

Both Queensland and Victoria have, in recent years, used special purpose grants or prizes to recognise and reward businesses with progressive industrial relations and work organisation practices. The NSW government does not appear to have any programmes to reward businesses that adopt desired workplace practices.

The Queensland Department of Employment and Industrial Relations administers a Pay Equity Grants Program which is designed to assist registered industrial organisations involved in pay equity applications, aimed at advancing pay equity in a ‘female’ industry or occupation. The Program was established with a fund of \$50 000 over three years and offers partial subsidies, on a dollar for dollar basis, to successful industrial organisations.¹⁰⁹ In addition, Queensland’s Office for Women, within the Department of Local Government, Planning, Sport and

¹⁰³ Workplace Express, *Aldi AWAs Set New Retail Industry Pay Standard* (1 February 2001) Workplace Express <<http://www.workplaceexpress.com.au/>>. See also ABC Television, ‘Industrial Relations Tipped to Be Significant Election Issue’, *The 7.30 Report*, 8 June 2004.

¹⁰⁴ See, eg, Good Jobs First <<http://www.goodjobsfirst.org/>>; Good Jobs First New York <<http://www.goodjobsny.org/index.html>>; Centre for Policy Alternatives <<http://www.cfpa.org/issues/issue.cfm/issue/CorporateAccountability.xml>>.

¹⁰⁵ See, eg, Anna Purinton et al, *The Policy Shift to Good Jobs: Cities, States and Counties Attaching Job Quality Standards to Development Subsidies* (2003).

¹⁰⁶ These states include Illinois, Washington, South Dakota, Maine and Minnesota.

¹⁰⁷ See, eg, Good Jobs First, *Examples of Clawback Provisions in State Subsidy Programs* (2005).

¹⁰⁸ See Good Jobs First, *Reform #2: Clawbacks, or Money-Back Guarantees* (2007) Good Jobs First <http://www.goodjobsfirst.org/accountable_development/reform2.cfm>.

¹⁰⁹ Department of Employment and Industrial Relations, Queensland Government, *Pay Equity Grants Program* (2006) Department of Employment and Industrial Relations <<http://www.deir.qld.gov.au/industrial/grants/payequity/>>.

Recreation, established a Partnership Grant programme in August 2004, to assist eligible organisations with projects that further the government's goals for women in Queensland, including better balancing of work and family commitments. The \$500 000 grants programme offers up to \$8000 for eligible projects.¹¹⁰

The Victorian government has several grants programmes designed to promote progressive workplace relations. In the financial year 2004–05, Industrial Relations Victoria spent a total of \$3.4 million on workplace grants.¹¹¹ The Partners at Work programme, established in 2002, is intended to encourage Victorian workplaces to develop partnerships with employees, unions and other stakeholders. The programme offers funding of up to 50 per cent of total project costs (to a maximum of \$50 000).¹¹² By late 2005, over 60 workplaces had participated in the Partners at Work Grants programme, although it is unclear whether the Victorian government will continue to fund the programme.¹¹³

The Victorian government has also established a Better Work and Family Balance Grants Program, which assists organisations to adopt innovative practices that improve the work and family balance of their employees. This Grants Program forms part of the Victorian Labor government's wider initiative on work and family balance — Victoria's Action Agenda for Work and Family Balance — launched in November 2003. The Better Work and Family Balance Grants Program is open to Victorian businesses and local government organisations with fewer than 200 employees. The maximum grant offered is \$50 000.¹¹⁴

Finally, in 2002 the Victorian government established the Premier's Awards for Workplace Excellence to promote cooperative approaches to industrial relations.¹¹⁵ The identity and projects of successful recipients for all three award programmes are published as case studies for the wider business community.¹¹⁶

1 *Monitoring, Evaluation and Enforcement*

We have not been able to ascertain how and when grants programmes are monitored and evaluated. If there is evaluation, it appears to be largely internal departmental evaluation relating to budgetary processes. Although publicising the existence of the award, and the winner's practices, may be used as an

¹¹⁰ See Desley Boyle, Minister for Environment, Local Government, Planning and Women, 'Groups Urged to Apply for Grants before December 31 Cut-Off' (Press Release, 10 December 2004).

¹¹¹ Department of Innovation, Industry and Regional Development, Victorian Government, *2004/05 Annual Report* (2005) 160. A list of grant recipients during 2004–05 is available: at 160–1.

¹¹² BusinessVictoria, Victorian Government, *Partners at Work Grants* (2006) BusinessVictoria <http://www.business.vic.gov.au/BUSVIC/STANDARD/1001/PC_60915.html>.

¹¹³ In the financial year 2004–05, grants totalling over \$630 000 were spent through the Partners at Work programme: Department of Innovation, Industry and Regional Development, above n 111, 160–1. For a more detailed discussion of this programme: see Schneider Australia Consulting, *Evaluation of Partners at Work and Better Work and Family Balance Programs* (2006); John Howe, 'The Role of Light Touch Labour Regulation in Advancing Employee Participation in Corporate Governance' (Paper presented at the Corporate Governance and the Management of Labour: Australian Perspectives Workshop, Faculty of Law, The University of Melbourne, 7–8 December 2006).

¹¹⁴ BusinessVictoria, *Partners at Work Grants*, above n 112.

¹¹⁵ BusinessVictoria, Victorian Government, *Workplace Excellence Awards* (2006) BusinessVictoria <http://www.business.vic.gov.au/BUSVIC/STANDARD/1001/PC_60877.html>.

¹¹⁶ *Ibid.*

informational or educational strategy to achieve behavioural change, there is little evidence of attempts to achieve such change beyond the dissemination of information about prizes through publicity material and departmental websites. While there are, in theory, several advantages and disadvantages of rewards as a regulatory technique, it is difficult to apply these considerations to the Australian states, or to evaluate the effectiveness of this regulatory technique, given the paucity of information available.¹¹⁷

C Codes of Practice

Codes of practice are difficult to classify as one type of regulatory technique, as they vary both in their degree of autonomy from government and their legal force. As this article is concerned with the role of state governments, it does not consider codes developed and adopted by companies or industries, without government involvement. We focus on codes that are developed in consultation between government, industry and other affected actors and are enforced by government and/or have a statutory basis. Such codes are often described as forms of 'co-regulation'; 'quasi-regulation' or 'hybrid regulation'.¹¹⁸ The most striking aspect of the use of codes of practice by the Australian states is the uniformity of approach. The three state governments discussed have tended to produce codes of practice for the same industries and, within these, to articulate very similar labour standards, often with almost identical wording.

Codes can be a mechanism by which governments seek to enhance firms' commitment to self-regulate in a socially responsible manner,¹¹⁹ by requiring them to develop a code, perhaps in conjunction with other stakeholders. In other words, the state can play a role in setting process-based standards. By going through the process of developing a code or plan, or auditing firm practices against a state-developed code of practice, it is envisaged that the firm will be able to identify, put into effect, and even to improve upon state-sanctioned behavioural norms.¹²⁰ This is described as 'procedural' or 'constitutive' regulation.¹²¹

NSW, Queensland and Victoria use codes of practice in three main ways. The first is to specify standards of behaviour required of all government agencies. The second use of codes of practice is to specify standards of behaviour with which all companies that supply goods and services to government agencies are

¹¹⁷ For a discussion of the main advantages and disadvantages of this regulatory technique: see, eg, David Beam and Timothy J Conlan, 'Grants' in Lester M Salamon (ed), *The Tools of Government: A Guide to the New Governance* (2002) 340; Gunningham, Grabosky and Sinclair, above n 7; United Kingdom Better Regulation Commission, *Imaginative Thinking for Better Regulation* (2003) <<http://www.brc.gov.uk/publications/imaginativeregulation.aspx>>.

¹¹⁸ Luis Abugattas Majluf, *Domestic Regulation and the GATS: Challenges for Developing Countries* (2005) 15–16.

¹¹⁹ Parker, *The Open Corporation*, above n 7, 2–3.

¹²⁰ Smith, above n 27.

¹²¹ Johnstone, 'Regulating Occupational Health and Safety in a Changing Labour Market', above n 26.

required to comply. Finally, codes are used to articulate 'best practice' guidelines for all firms operating in specific industries.¹²²

We have already discussed the use of codes of practice to specify standards of behaviour required by companies which provide goods and services to state government agencies. In this context, the code of practice operates as a set of rules or principles setting particular labour standards with which the goods or service provider must comply. Thus, the code is used to set criteria through the tender award process, but may also be incorporated into the procurement contract.

The third use of codes is to specify labour standards with which private sector organisations are encouraged to comply. The *Victorian Government Call Centre Code*, for example, does not bind private sector organisations generally but the Victorian government 'encourages all industry participants in Victoria to adopt and adhere to the provisions and principles of the Code as operating standards'.¹²³ Similarly, the Victorian government's website states generally that *all* employers and industry associations, unions, contractors, subcontractors, consultants and suppliers are 'expected' to comply with the standards of practice set out in the *Building and Construction Industry Code — Victoria Industrial Relations Principles* on a voluntary basis.¹²⁴

The Queensland government encourages non-government industry participants to become signatories to the *Queensland Government Code of Practice for Call Centres*. Article 1.3 of the Code states that '[i]ndustry participants are encouraged to comply with the principles and relevant provisions of the code as a benchmark for minimum acceptable standards in the industry'.¹²⁵ Similarly, all relevant firms in Queensland are encouraged to comply with the standards within the *Queensland Government Code of Practice on Employment and Outwork Obligations: Textile, Clothing and Footwear Suppliers*¹²⁶ and *Queensland Code of Practice for the Building and Construction Industry*.¹²⁷

1 Codes of Practice for the Victorian Transport and Forestry Industries

These codes are dealt with separately because they are governed by special legislation and the drafting of the codes is yet to be finalised. At this early stage, the precise labour standards, and their legal effect, are unclear.

¹²² See, eg, Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, *Victorian Government Call Centre Code*, above n 45, 5, which is mandatory (a command and control-type instrument) for all government agencies; operates as an economic incentive-based instrument for parties wishing to contract with government agencies; and operates as a promotional instrument for private sector agencies generally, which are encouraged to voluntarily abide by its provisions. We focus on the second and third types of code usage.

¹²³ Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, *Victorian Government Call Centre Code*, above n 45, 4.

¹²⁴ BusinessVictoria, *Building and Construction Code*, above n 45.

¹²⁵ Department of Employment and Industrial Relations, *Queensland Government Code of Practice for Call Centres*, above n 44.

¹²⁶ Department of Employment and Industrial Relations, *Queensland Government Code of Practice on Employment and Outwork Obligations: Textile, Clothing and Footwear Suppliers*, above n 44, Foreword, [1], [7.4].

¹²⁷ Department of Employment and Industrial Relations, *Queensland Code of Practice for the Building and Construction Industry*, above n 44, [1.1], [1.4].

The *Owner Drivers and Forestry Contractors Act 2005* (Vic) was promulgated by the Victorian Labor government in response to the *Report of Inquiry: Owner Drivers and Forestry Contractors* conducted by Industrial Relations Victoria.¹²⁸ In considering the potential for a code of practice for the Victorian transport industry, the report emphasised that preference should be given to self-regulation (that is, voluntary rather than mandatory codes) where the desired change can be achieved without government intervention.¹²⁹ However, the report proceeded to note that voluntary regulation of a range of practices for owner drivers and forestry contractors had failed, including a proposed national voluntary code of commercial practices in the trucking industry.¹³⁰ Moreover, the strongly competitive nature of the industry and the fact that it lacks 'elements of strong self-regulatory institutions and frameworks and the kind of consumer and community support and acknowledgment that are essential for a voluntary code to be successful in altering behaviour',¹³¹ suggests that there are strong reasons to formulate a mandatory code. The report concluded that an industry code of practice should contain guidelines on acceptable contracting and work practices, and that aspects of the code may be mandatory in nature and attract a penalty for breach.¹³²

Part 3 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic) provides for the Minister for Industrial Relations to prescribe industry codes of practice through regulations.¹³³ The Act also establishes two industry councils, the Transport Industry Council and the Forestry Industry Council, which are responsible, among other things, for providing advice to the government on the development of codes of practice.¹³⁴ These codes may provide for further mandatory regulations, or guidelines on unconscionable business conduct or on industry practice.¹³⁵ The industry councils involve various actors affected by the regulation in the development of standards, and also in monitoring and evaluation.¹³⁶ Both councils comprise government, industry, union and worker representatives.¹³⁷ The councils have jointly developed a code of practice and proposed that the Minister for Industrial Relations use his powers under the Act

¹²⁸ Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, *Report of Inquiry: Owner Drivers and Forestry Contractors: Report and Recommendations* (2005) vol 1.

¹²⁹ *Ibid* 117.

¹³⁰ The report noted that the voluntary nature of the Code (requiring parties to sign up to the Code and agree to comply without enforcement by the state) inhibited its effectiveness: *ibid* 19–20. In particular: there was limited take-up; the Code failed to attract support from key industry associations; and the highly competitive nature of the industry would deter companies from signing up to any regulations that would potentially make the operator less competitive than others.

¹³¹ *Ibid* 117–18.

¹³² *Ibid* 118.

¹³³ *Owner Drivers and Forestry Contractors Act 2005* (Vic) s 27.

¹³⁴ *Owner Drivers and Forestry Contractors Act 2005* (Vic) ss 55(1), 58(1).

¹³⁵ *Owner Drivers and Forestry Contractors Act 2005* (Vic) ss 55(3), 58(3).

¹³⁶ The *Owner Drivers and Forestry Contractors Act 2005* (Vic) is exempted from the *Independent Contractors Act 2006* (Cth): see *Independent Contractors Act 2006* (Cth) s 7(2)(b)(ii).

¹³⁷ *Owner Drivers and Forestry Contractors Act 2005* (Vic) ss 56, 59.

to regulate for the *Owner Drivers and Forestry Contractors Code of Practice 2006*.¹³⁸

2 Monitoring, Evaluation and Enforcement

It is difficult to assess the extent of monitoring of, and compliance with, codes of practice. No doubt voluntary codes can assist trade unions and other worker advocates in raising public awareness regarding employers who fail to comply with the labour standards set by these codes. However, most voluntary codes do not provide for any form of consistent monitoring.

The importance of having adequate institutional arrangements in place to monitor compliance with codes is highlighted by two recent innovations in Victoria. First, the VWRA, a new institution designed to bolster monitoring and evaluation of the fairness of Victorian work arrangements after *Work Choices*, has been established.¹³⁹ While the functions of the VWRA include advising workers on employer compliance with labour legislation and industrial instruments, the VWRA is also empowered to take steps to encourage and promote fair workplaces and practices.¹⁴⁰ The VWRA is thus permitted to define fair labour practices beyond legal minimums, and monitor and evaluate business observance of those practices. Under the relevant Act, the Governor-in-Council may make regulations empowering the VWRA to develop codes of practice, whether voluntary or mandatory, on a range of workplace-related issues, including agreement-making and standard-setting.¹⁴¹ The first VRWA, Tony Lawrence, has indicated that he will consider developing such codes to define fair workplace practices.¹⁴²

The second regulatory innovation in Victoria, discussed above, is the *Owner Drivers and Forestry Contractors Act 2005 (Vic)*.¹⁴³ The Act empowers the two industry councils to advise the Minister on any other matters relevant to 'owner driver contracts' and 'the commercial practices generally engaged in by owner drivers and hirers in relation to each other', even if the Minister has not requested them to do so.¹⁴⁴ It is unclear, however, whether the councils have been

¹³⁸ Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, *Owner Drivers and Forestry Contractors Code of Practice* (2006).

¹³⁹ *Workplace Rights Advocate Act 2005 (Vic)*. While there is now also a Workplace Rights Advocate in the Northern Territory, a key difference between the two is that the VWRA is an institution created by statute, whereas the Northern Territory Workplace Advocate is created by an administrative act. In NSW, following a parliamentary inquiry into the impact of *Work Choices*, the Standing Committee on Social Issues has recommended that the NSW government follow the Victorian example and establish a NSW Office of Workplace Rights, as an independent statutory body: see Standing Committee on Social Issues, Parliament of New South Wales, *Impact of the Workchoices Legislation* (2006) 54–5. The Western Australian government has recently announced its intention to appoint a 'Fair Employment Advocate': see Alan Carpenter, Premier of Western Australia and John Bowler, Western Australian Minister for Employment Protection, 'A Fair Employment Advocate for Western Australians' (Press Release, 30 November 2006).

¹⁴⁰ For the powers and functions of the VWRA: see *Workplace Rights Advocate Act 2005 (Vic)* s 5.

¹⁴¹ *Workplace Rights Advocate Act 2005 (Vic)* s 13.

¹⁴² Workplace Express, *Victoria's New Workplace Advocate Flags New Employment Codes of Practice* (29 May 2006) Workplace Express <<http://www.workplaceexpress.com.au/>>.

¹⁴³ *Owner Drivers and Forestry Contractors Act 2005 (Vic)* s 55.

¹⁴⁴ *Owner Drivers and Forestry Contractors Act 2005 (Vic)* s 55.

provided with resources to carry out monitoring functions, or whether they are likely to function only in response to complaints by contractors or other bodies with an interest in the operation of the industry.

The extent to which it can be said that a code of practice is 'enforced' depends on the type of code of practice. For example, where a code of practice is used in conjunction with procurement or in the manner described under the Victorian *Owner Drivers and Forestry Contractors Act 2005* (Vic), it is being used to set standards where some level of compliance is expected, and where the standards may be legally enforceable. Where codes of practice operate in a more voluntary manner, as a form of best practice guideline, then it appears less likely that there will be anything which can be characterised as enforcement of the code.

D Best Practice Case Studies or Guidelines

The final regulatory technique outlined in this article is the provision of information through best practice case studies or guidelines. NSW, Queensland and Victoria all rely heavily upon the provision of information about 'good' labour practices to promote desired labour practices. As major employers, all three states attempt to use their own employment practices as 'best practice' models for the private sector.¹⁴⁵ States also identify private sector employers that have adopted best practice guidelines as a way of demonstrating to other employers that such practices are not incompatible with conducting a successful and competitive business. The state governments are particularly reliant upon the provision of information and best practice guidelines for the promotion of family-friendly work practices. Despite the pervasiveness of this regulatory approach, there is little evidence to suggest that it achieves substantive outcomes.

The information provided by state governments to employers and employees can be broadly divided into two categories: information pertaining to existing legal rights and obligations, and information promoting desired labour practices. All three states provide information on the former category.¹⁴⁶ This article focuses on the latter.

All three states provide extensive material relating to work and family balance, which will be considered separately. Only Victoria has been particularly creative in attempting to shape employer attitudes to industrial relations and work organisation more generally. It has done so through its promotion of 'High Performance Work Practices'.¹⁴⁷ This goes beyond legal minimum standards, and draws on human resource management theory to emphasise work practices

¹⁴⁵ See, eg, Sandra Fredman and Gillian S Morris, *The State as Employer: Labour Law in the Public Services* (1989); Bob Carter and Peter Fairbrother, 'The Transformation of British Public-Sector Industrial Relations: From "Model Employer" to Marketized Relations' (1999) 7 *Historical Studies in Industrial Relations* 119.

¹⁴⁶ See Office of Industrial Relations, NSW Department of Commerce <<http://www.industrialrelations.nsw.gov.au/>>; Department of Employment and Industrial Relations, Queensland Government <<http://www.deir.qld.gov.au/industrial/index.htm>>; BusinessVictoria <<http://www.business.vic.gov.au/>>.

¹⁴⁷ See BusinessVictoria, Victorian Government, *High-Performance Workplaces* (2006) Business-Victoria <http://www.business.vic.gov.au/BUSVIC/STANDARD/PC_60932.html>.

built upon increasing communication and consultation between management and workers, cooperative workplace relations, improved training and skills, and job security. Through its website, Business Victoria makes available a 'High Performance Toolkit' (which includes a number of guidelines and case studies on enterprise bargaining agreements, workplace change, workplace consultation, workplace flexibility, and organisational diversity).¹⁴⁸ Under the heading of 'Innovative Organisations' are best practice case studies on high-performance organisations that have adopted innovative industrial relations practices.¹⁴⁹ Victoria also provides information on the recipients of the government's Partners at Work Grants,¹⁵⁰ Workplace Excellence Awards,¹⁵¹ and Better Work and Family Balance Grants.¹⁵²

1 Promotion of Family Friendly Work Practices

Family friendly work practices is an area in which all three state governments have relied extensively on light touch regulation, particularly through information and education campaigns. The Victorian government's *Action Agenda for Work and Family Balance*, for example, identifies four key areas in which the Victorian government will take action to promote family friendly work practices. These include leading the way in work and family balance; 'supporting industry' to adopt practices that enhance work and family balance; working in partnership with the community on work and family issues, and demonstrating good practice in achieving work and family balance in Victorian public employment.¹⁵³ In promoting work and family policies to employers, the state governments emphasise that the adoption of such practices is in the employers' self-interest as they reduce absenteeism, improve retention of employees and contribute to better morale and higher productivity.¹⁵⁴ One example of the Victorian government's initiatives in the pursuit of this agenda is the *Quality Part-Time Work Guidelines*, which provide guidance to employers on how they might improve the quality of the part-time work they provide to workers with family responsibilities.¹⁵⁵

¹⁴⁸ BusinessVictoria, Victorian Government, *Managing a High Performance Workplace* (2006) BusinessVictoria <http://www.business.vic.gov.au/BUSVIC/STANDARD/PC_60870.html>.

¹⁴⁹ Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, *The High Performance Toolkit: Workplace Flexibility: Helping Supervisors 'Think Outside the Square'* (2003).

¹⁵⁰ BusinessVictoria, *Grant Recipients* (2006) BusinessVictoria <http://www.business.vic.gov.au/BUSVIC/STANDARD/PC_60934.html>.

¹⁵¹ BusinessVictoria, *Award Winners* (2004) BusinessVictoria <http://www.business.vic.gov.au/BUSVIC/STANDARD/PC_60936.html>.

¹⁵² BusinessVictoria, *Grant Recipients* (23 November 2006) BusinessVictoria <http://www.business.vic.gov.au/BUSVIC/STANDARD/1001/PC_50644.html>; BusinessVictoria, *Workplace Excellence Awards* (23 November 2006) BusinessVictoria <http://www.business.vic.gov.au/scripts/nc.dll?BUSVIC:STANDARD:1001:pc=PC_60877.html>.

¹⁵³ Victorian Government, *Action Agenda for Work and Family Balance* (November 2003) 7.

¹⁵⁴ See *ibid.*

¹⁵⁵ See BusinessVictoria, *Quality Part-Time Work Guidelines* (2006) BusinessVictoria <http://www.business.vic.gov.au/BUSVIC.1376492/STANDARD/PC_60956.html>.

The Queensland Department of Employment and Industrial Relations provides extensive information on 'Work, Family and Lifestyle' through its website.¹⁵⁶ The range of promotional materials available is the product of the Work and Family Unit, which was established within the Industrial Relations Department in July 2001 to provide information and education on work and family issues to both the public and private sectors, and to undertake research and policy development.¹⁵⁷ The Unit conducts its own research with the University of Queensland into work-life balance policies and practices in Queensland workplaces and organisational factors that might facilitate or impede the use of such policies. Additionally, it is involved in other research projects as an industry partner. The NSW Department of Industrial Relations provides information through its website on 'flexible working practices', including the *Work and Family Guidebook — Family Friendly Ideas for Small Business*; *Employment Essentials — Introducing Workplace Flexibility*; information on, and samples of, part-time work agreements; and *Guidelines for Flexible Work Life Balance in Residential Aged Care*.¹⁵⁸

2 Monitoring, Evaluation and Enforcement

To a certain extent, the information strategies discussed in this Part of the article are intended to supplement labour law by providing parties to enterprise bargaining with information which may enhance the inclusion of family friendly, flexible working practices in enterprise agreements. Once again, it has been difficult to ascertain whether or not government departments endeavour to monitor and evaluate the success of these strategies in driving more family friendly employment practices. Existing studies in Australia suggest that the 'combination of relatively limited regulatory provisions with encouragement for exemplary performance' has resulted in a high level of variation in access to family friendly work practices among employees, both between those employed in different workplaces and within the same workplace.¹⁵⁹

3 Post-Work Choices

NSW, Queensland and Victoria have increased their use of information and persuasion techniques in the wake of *Work Choices*.¹⁶⁰ First, the states have established advisory services for employees seeking to understand their rights

¹⁵⁶ Department of Employment and Industrial Relations, Queensland Government, *Work, Family and Lifestyle* (2007) Department of Employment and Industrial Relations <<http://www.deir.qld.gov.au/industrial/family/index.htm>>.

¹⁵⁷ Department of Employment and Industrial Relations, Queensland Government, *Government Initiatives on Work, Family and Lifestyle* (2007) Department of Employment and Industrial Relations <<http://www.deir.qld.gov.au/industrial/family/overview/govtinitiatives/>>.

¹⁵⁸ Office of Industrial Relations, NSW Department of Commerce, *Introducing Workplace Flexibility* (2005).

¹⁵⁹ Gillian Whitehouse and Di Zeitlin, 'Family Friendly Policies: Distribution and Implementation in Australian Workplaces' (1999) 10 *Economic and Labour Relations Review* 221, 224.

¹⁶⁰ See Andrew Dungan, 'Work Choices — The Challenge for State Governments' (Paper presented at the Third Biennial Conference of the Australian Labour Law Association, Brisbane, 22–23 September 2006).

and entitlements under *Work Choices*.¹⁶¹ Secondly, Queensland has introduced a Smart Workplaces initiative, which will involve the development of best practice guidelines and case studies promoting safer and more cooperative workplaces.¹⁶²

IV EVALUATION OF LIGHT TOUCH REGULATION IN AUSTRALIA

While this research acknowledges the importance of broadening the study of labour law to encompass existing diversity in labour regulation, we are aware that these alternative mechanisms are not necessarily an adequate replacement for conventional labour law. How then, do we assess the extent to which alternative approaches to labour regulation can effectively operate in combination with, or as substitutes for, conventional labour law? Is the adoption of light touch approaches a recognition by government of the limits of law, especially the hierarchical model of punitive legal regulation? Is it an innovative attempt to 'capture the fine grain and reflexive fluidity needed for best local practice'¹⁶³ as a way of more effectively fostering corporate compliance with public policy norms? Can particular approaches appear light touch, but still have some bite? Or are states seizing on the rhetorical advantages of light touch regulation to satisfy core constituencies such as trade unions, thereby quelling agitation for stronger action,¹⁶⁴ while in effect allowing corporations to organise their labour practices without significant government influence?

In this article, we make some preliminary observations regarding the use of light touch regulation by the Australian states using a normative model of 'responsive regulation'.¹⁶⁵ We consider that to be effective and accountable, regulation must take account of the complexity of relationships within its 'regulatory space', acknowledging the interaction between different actors, social and economic forces, and between public and private modes of regulation.¹⁶⁶ Corresponding with the recognition that the state does not have a monopoly on power and resources, it has been argued that regulatory models which assume a hierarchical relationship between state regulator and those regulated will not always be effective. Instead, rule formation, monitoring, evaluation and enforcement should involve both state regulators and non-state actors affected by regulation. Our analysis must therefore be aware of the various

¹⁶¹ 'Fair Go' advisory services are now operating in most Australian states: see, eg, Office of Industrial Relations, NSW Department of Commerce, *Fair Go Advisory Service* (29 November 2006) Office of Industrial Relations, NSW Department of Commerce <<http://www.industrialrelations.nsw.gov.au/workplace/fair+go+advisory+service.html>>; BusinessVictoria, Victorian Government, *Workplace Rights Information Line* (2007) BusinessVictoria <http://www.business.vic.gov.au/BUSVIC.2097390/STANDARD//PC_61274.html>.

¹⁶² The 2006–07 budget allocated \$500 000 to the Smart Workplaces initiative: Department of Employment and Industrial Relations, Queensland Government, *Budget Highlights 2006–07* (2006) Department of Employment and Industrial Relations <<http://www.dir.qld.gov.au/corporate/publications/reports/budget0607/index.htm>>. See also Dungan, above n 160, 15.

¹⁶³ Arup, 'Labour Law as Regulation', above n 20, 231. See also Parker, *The Open Corporation*, above n 7, 14.

¹⁶⁴ Smith, above n 27.

¹⁶⁵ This conception of regulation was developed by Ayres and Braithwaite, above n 7, 4. For a recent application of the concept of responsive regulation to Australian labour law: see Cooney, Howe and Murray, above n 22.

¹⁶⁶ Cooney, Howe and Murray, above n 22, 223.

state institutions which may be involved in labour regulation, including tribunals and government labour agencies, as well as non-state institutions such as trade unions, employers and employer-industry associations, and any other body which seeks to influence the terms and conditions under which workers are employed.¹⁶⁷

Further, as Sean Cooney, John Howe and Jill Murray observe, 'once it is acknowledged that parliament is not the sole source of rules, important questions about accountability and transparency are raised'.¹⁶⁸ We therefore need to enquire as to whether light touch labour regulation forms part of a regulatory system which maintains the right balance between regulatory actors to ensure that each is able to hold the other to account for the performance or recognition of labour standards.

Finally, notwithstanding the increased attention given to lighter forms of regulation, the literature on responsive regulation emphasises the importance for regulatory effectiveness of having a 'hybrid' or multi-layered system of regulation or governance that combines legally enforceable standards with light touch and self-regulation.¹⁶⁹ On this view, light touch regulation will rarely work as a stand-alone strategy. Advocates of responsive regulation have emphasised the importance of retaining institutional structures which regulate substantive ends and sanctions for enforcing those ends as the apex of an 'enforcement pyramid' necessary to ensure that other softer techniques are effective.¹⁷⁰ Regulation is likely to be more effective in bringing about behavioural change where state agencies adopt a combination of strategies to encourage organisations to go beyond compliance in that they become committed to regulatory goals and develop their own system of self-regulation to ensure these goals are fulfilled.¹⁷¹

Our first general observation is that there is a dearth of research on the impact of light touch regulation, which makes a full evaluation of the effectiveness of these initiatives very challenging. In the context of public procurement programmes, for example, it is difficult to find any data on the extent of compliance by contractors with any social policy criteria and the success with which such programmes attain their regulatory objectives. Overseas studies of the effectiveness of procurement as a form of labour regulation have produced mixed results.¹⁷² There is also very little discussion or analysis in the academic or

¹⁶⁷ Gahan and Brosnan, above n 1.

¹⁶⁸ Cooney, Howe and Murray, above n 22, 224. See also Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38.

¹⁶⁹ See, eg, Ayres and Braithwaite, above n 7; Gunningham, Grabosky and Sinclair, above n 7.

¹⁷⁰ The notion of an 'enforcement pyramid' was developed by Ayres and Braithwaite, above n 7, 4.

¹⁷¹ Parker, *The Open Corporation*, above n 7. For consideration in the context of labour law: see Margaret Lee, 'Regulating Bargaining and Contracting Systems in Australia' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 67.

¹⁷² Canadian scholars have observed that the evidence on the impact of contract compliance is 'inconclusive': Erridge and Fee, 'Towards a Global Regime on Contract Compliance', above n 33. In another publication, the authors concluded that the employment equity scheme in Canada, while it 'looked good on paper', was underfunded and therefore incapable of meeting its objectives: Erridge and Fee, 'The Impact of Contract Compliance Policies in Canada', above n 33. A limited attempt to evaluate the effectiveness of public procurement policies in the West Midlands of the UK concluded that whilst the programme had a positive impact on the employ-

non-academic literature on the impact or effectiveness of special purpose grants or prizes, despite the pervasive use of this technique.¹⁷³ In 2003, the UK Department of Trade and Industry funded a comprehensive evaluation of the Partners at Work fund. This evaluation makes a number of observations on the operation of the fund, which may be relevant to evaluating the effectiveness of similar projects in other jurisdictions. Although the evaluation found some evidence of a positive impact on employee relations on funded projects, the report concluded that the dissemination activities of the fund reached a limited audience:

our results suggest that, although enormous amounts of material have been disseminated, conferences and workshops held, and web pages created, they tend to be read, attended and visited by actors already in some ways involved in or committed to the process. Rarely, or such is the impression, do the more general dissemination activities impinge upon people — especially perhaps employers — who are ignorant of, or sceptical about, the approach.¹⁷⁴

We are not aware of any studies of Australian approaches along these lines.

While we have been able to establish that state governments do seek to shape labour practices through light touch regulation, it is very difficult to assess the effectiveness of the various approaches at generating widespread change outside of government. The following comments are therefore an evaluation of the design of light touch labour regulation against the normative model set out above.

Our second overall observation is that the labour criteria adopted in many of the regulatory approaches are frequently cast in very general terms, and most do not engender any specific approach to labour practices. State governments' use of public procurement to regulate labour standards in Australia, for example, has tended to focus on ensuring contractors demonstrate compliance with existing employment-related obligations, including legislation, awards and applicable agreements. While this is an important means of ensuring that governments are not rewarding companies that are avoiding their obligations and that the benefits gained through competitive tendering are not accrued on the basis of erosion of employment conditions,¹⁷⁵ there remains considerable scope for the state governments to go beyond this by requiring contractors to adopt labour standards or practices that are *above* the minimums specified by law. Moreover, the uncertain future of state labour law and of both state and federal awards under *Work Choices* makes these an unreliable 'anchor' for compliance purposes. A far

ment practices of contractors, there was considerable scope for improvement of the programme: Orton and Ratcliffe, above n 33.

¹⁷³ A recent exception is an evaluation of the Victorian Partners at Work, and Better Work and Family Grants programmes commissioned by Industrial Relations Victoria and carried out by a private consulting firm: Schneider Australia Consulting, *Evaluation of Partners at Work*, above n 113. However, the evaluation is of limited value in assessing the true impact of these programmes: Howe, 'The Role of Light Touch Labour Regulation', above n 113.

¹⁷⁴ Mike Terry and Jill Smith, 'Evaluation of the Partnership at Work Fund' (Employment Relations Research Series No 17, UK Department of Trade and Industry, 2003) 85.

¹⁷⁵ There is evidence to suggest that this is often the case: see, eg, Janet Walsh and Janine O'Flynn, 'Managing through Contracts: The Employment Effects of Compulsory Competitive Tendering in Australian Local Government' (2000) 31 *Industrial Relations Journal* 454.

better approach would be to articulate the specific standards or practices which a contractor must comply with to be eligible for a government contract.

There are much more clearly articulated standards in some of the best practice guidelines and some codes of practice.¹⁷⁶ Moreover, special purpose grants or prize programmes and best practice guidelines are more likely to articulate 'above the floor' labour standards, including the setting out of particular approaches to work organisation such as in relation to work and family balance and high performance workplaces. However, these documents are generally used as promotional instruments and not to impose criteria on recipients of government contracts or subsidies. To the extent that they are intended to inform employers and employees about forms of decent work organisation which can be included in enterprise bargaining agreements, it could be said that they operate in conjunction with direct legal regulation as a mechanism for bolstering government impact on work practices.¹⁷⁷ Such documents are likely to have a weaker impact on behaviour, however, than instruments through which government deploys its wealth as an incentive for firms to agree to and comply with any standards set.

The light touch regulatory approaches examined exhibit varying degrees of responsiveness in their involvement of non-state actors. There are some programmes where standard-setting has involved industry associations and trade unions. Examples include the Victorian School Contract Cleaning programme, *Quality Part-Time Work Guidelines*, and the *Owner Drivers and Forestry Contractors Code of Practice 2006*. Outside of these examples, it has been difficult to ascertain exactly how the content of procurement standards, prize or reward programmes, codes of practice or best practice guidelines are set. Even in the limited number of cases in which consultation is provided for, much of the decision-making still appears to take place 'behind closed doors'.¹⁷⁸ This raises the related issues of accountability and transparency. These concerns are frequently raised in the governance literature in relation to several of the regulatory techniques examined here, and we have found little evidence to dispel such concerns.¹⁷⁹ It appears that, in general, standards are developed by state governments in consultation with, or as a result of pressure or lobbying by,

¹⁷⁶ See, eg, Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, *Victorian Government Call Centre Code*, above n 45; Industrial Relations Victoria: Department of Innovation, Industry and Regional Development, *Owner Drivers and Forestry Contractors Code of Practice*, above n 138; BusinessVictoria, *Quality Part-Time Work Guidelines*, above n 155.

¹⁷⁷ This observation is made by Belinda Smith in the context of anti-discrimination legislation: Smith, above n 27.

¹⁷⁸ This observation is made in an appraisal of 'Third Way' ideology and labour law in the UK and European Union: see Sandra Fredman, 'The Ideology of New Labour Law' in Catharine Barnard, Simon Deakin and Gillian S Morris (eds), *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004) 9, 18.

¹⁷⁹ See generally Seddon, above n 37; Administrative Review Council, *The Contracting Out of Government Services: Report to the Attorney-General* (1998); Kernaghan Webb, 'Thumbs, Fingers and Pushing on String: Legal Accountability in the Use of Federal Financial Incentives' (1993) 31 *Alberta Law Review* 501; Terence Daintith, 'Regulation by Contract: The New Prerogative' (1979) 41 *Current Legal Problems* 41; Scott, 'Accountability in the Regulatory State', above n 168; Kenneth Woodside, 'Comments on: Thumbs, Fingers and Pushing String: Legal Accountability in the Use of Financial Incentives' (1993) 31 *Alberta Law Review* 536.

industry bodies and trade unions.¹⁸⁰ The extent of this consultation with or involvement by relevant regulatory actors in the standard-setting process, however, remains unclear.

Insofar as there is monitoring and evaluation of compliance with labour standards under, for example, procurement policy, it appears that it is largely carried out by the relevant state government departments. The extent to which departmental resources are devoted to monitoring compliance with light touch regulation is unclear, although there is some evidence to suggest that monitoring and evaluation of light touch regulation is relatively under-resourced compared with monitoring of formal legal regulatory regimes.¹⁸¹ With one or two exceptions, there seems little provision for formal involvement of other actors in monitoring and evaluation. Having said this, a lack of formal involvement would not necessarily prevent a non-state actor from monitoring a firm's compliance with stated labour criteria attached to a procurement process. Aside from concerns about the implications for accountability of under-resourced government monitoring and evaluation, regulatory scholarship suggests that bureaucratic regulation on its own is unlikely to maximise effectiveness of the particular regulatory regime.¹⁸² A more responsive and accountable regulatory model would formally involve non-state actors in the process of monitoring firm performance against standards. In establishing the VWRA, for example, the Victorian government has at least set up a relatively independent agency to carry out monitoring and evaluation, and perhaps develop new standards. The Queensland government has followed Victoria's lead by setting up a similar office.¹⁸³

Effective monitoring and evaluation by non-state actors is dependent upon these actors having adequate access to information. During our research, we found a lack of disclosure regarding assessment of procurement tenders, the content of procurement contracts, and industry subsidies. One possibility for state government action is legislation requiring disclosure by firms of their compliance with codes of practice and so on. Increasing disclosure requirements would at least facilitate more effective monitoring and evaluation by non-state actors, without necessarily empowering them as monitors or enforcers of the standards.

¹⁸⁰ See, eg, Memorandum of Understanding between the Minister for Public Works and Services and the Labor Council of New South Wales for Goods and Services Procurement, above n 71; *Owner Drivers and Forestry Contractors Act 2005* (Vic) ss 55(1), 58(1).

¹⁸¹ For example, implementation of Victoria's *Quality Part-Time Work Guidelines* is largely the responsibility of a single departmental officer.

¹⁸² Ayres and Braithwaite, above n 8. For an overview of the literature: see Parker, above n 8, 8–12.

¹⁸³ The Queensland Workplace Rights Ombudsman was appointed in June 2007: see Queensland Workplace Rights Ombudsman <www.workplacerights.qld.gov.au>. In NSW, the Parliamentary Inquiry into *Work Choices* recommended that the NSW government establish an Office of the Workplace Rights Advocate similar to that in Victoria: Standing Committee on Social Issues, Legislative Council, NSW Parliament, *Inquiry into the Impact of the Commonwealth's Work-Choices Legislation* (2006) recommendation 3. This recommendation, however, was rejected by the NSW government on the basis that it believed that many of the tasks that would be undertaken by such an office were already being adequately performed by the Office of Industrial Relations: NSW Government, *NSW Government Response to the Final Report from the Standing Committee on Social Issues: Inquiry into the Impact of the Work Choices Legislation* (2007) 2.

We found little evidence of monitoring and evaluation strategies designed to foster internal compliance by corporations with the desired norms of labour practices. We are unable to conclude that there is any ongoing process involving the state following up to ensure that such practices are actually being taken up as a result of these initiatives, or otherwise.

Last but not least is the issue of enforcement. It is in this context that the level of hybridity or interaction between light touch regulation and more formal public regulation becomes particularly important. Where compliance with labour standards is not linked to minimum standards with legislative force, and penalties for noncompliance, how can these standards be enforced in any meaningful way? Even where legislative sanctions do exist, a failure by administrative agencies to enforce sanctions, and an overemphasis on educational strategies, has the potential to render the law ineffective.¹⁸⁴ While use of information as a sanction, such as 'naming and shaming' corporations which do not comply with labour criteria, is better than no sanction at all, it is unlikely to be effective in securing compliance with desired labour practices on its own. In contrast, a firm which is about to be named and shamed is more likely to avoid noncompliance if the consequence is that it will no longer be eligible for government contracts. The most hybrid of the various approaches we have researched appears to be the procurement model. Where procurement is combined with a code of practice, there is at least an effective sanction for noncompliance with the code: exclusion from tendering. It is for this reason that trade unions and others have been pressuring state governments to make more effective use of procurement as a form of labour regulation as a response to *Work Choices*.¹⁸⁵

V CONCLUSION

State governments have an important role to play in advancing a decent work approach to labour regulation. They will no doubt find this task more difficult under *Work Choices*. Light touch labour regulation constitutes one avenue through which governments can promote better employment and industrial relations practices by employers. Our research has demonstrated that state governments in Australia make extensive use of light touch regulation to promote decent work practices. It seems likely that state governments will expand light touch labour regulation in the post-*Work Choices* environment.

The question of whether light touch labour regulation is capable of bringing about positive change in the labour practices of employers remains to be discussed. Our preliminary assessment suggests that there is considerable scope

¹⁸⁴ Michael Quinlan, 'Contextual Factors Shaping the Purpose of Labour Law: A Comparative Historical Perspective' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 21, 27–8, referring to Mark Goodwin, *The Great Wage Robbery: Enforcement of Minimum Standards in Australia* (PhD Thesis, University of New South Wales, 2004), a study of the federal industrial relations inspectorate.

¹⁸⁵ See, eg, Davies and Coorey, above n 90; Peter Jean, *State to Avoid AWA Contractors* (11 June 2006) couriermail.com <<http://www.news.com.au/couriermail/story/0,23739,19437802-5003402,00.html>>; Jean, 'NSW: Will Make Contractors Look after Workers', above n 89; Department of Public Works, *State Purchasing Policy Review*, above n 36, 44–5.

for improvement in current light touch labour regulation, as many of the approaches discussed are relatively weak, informational strategies. We have identified a number of possible regulatory improvements. First, the state governments could be more ambitious in the labour standards they seek to promote, particularly in relation to public procurement and financial subsidies. Even in light of the serious legal limitations on their capacity to require companies to engage in collective bargaining, for example, state governments should consider divorcing labour standards from industrial instruments. Secondly, the design of the initiatives could be improved. By improvement, we mean enhancing the effectiveness and democratic accountability of these approaches as mechanisms for enhancing labour standards and rights in Australia. In many cases, standard-setting itself needs to be a more transparent process involving both trade unions and other worker representatives as well as industry. Effectiveness could be improved through providing more access to information so that industry, trade unions and other members of the public can assist in monitoring and evaluation. There also remains scope for more innovative use of sanctions for noncompliance with the goals of light touch labour regulation. Sanctions could include, for example, withdrawal of financial benefits and denial of government contracts and subsidies; publicity sanctions that can be used to threaten the reputation of businesses and other organisations; as well as more traditional 'command and control' sanctions such as the imposition of financial and other penalties.¹⁸⁶

While this article has mapped current light touch approaches to labour standards in three of the Australian states, there remains much research to be conducted in this area. This research could include closer examination of some of the regulatory initiatives discussed in this article to identify strengths and weaknesses. Critical questions remain concerning the impact of the various techniques, including the role of state departments in monitoring and evaluating the effectiveness of many of the strategies discussed. It also appears that there is scope for drawing upon regulatory literature and developments overseas to explore ways in which at least some of these approaches could be more effectively utilised as techniques of labour regulation. Finally, of course, it will be important to follow any further developments in the use of light touch labour regulation as state governments look for ways to respond to *Work Choices*.

¹⁸⁶ Smith, above n 27.