ENTERPRISE BARGAINING: WHAT HAS IT GOT TO DO WITH WORKPLACE PARTNERSHIPS?

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1 Introduction

This brief paper sets out a short argument on the issue of 'partnerships at work', or the development of 'co-operative workplace relations'. For many employers, and perhaps also for many unions, the process of enterprise bargaining is principally seen as a trade-off of various employment rights in exchange for others, and not really concerned with broader issues about the quality of working relationships. For example, most of the substance of the exchange with which enterprise bargaining is concerned deals with higher rates of pay, and some improved conditions for employees, in return for concessions on more flexible working hours, the elimination of various extraordinary rates of pay, the reduction of various forms of leave, and the cashing-out of accumulated benefits, and also for functional flexibility (which essentially translates to greater job control for the employer). These aspects are common to all forms of enterprise agreements in the Australian federal jurisdiction, to which the argument in this paper is confined. These agreements include s.170LJ and s.170LK agreements and Australian Workplace Agreements (AWAs). In the case of s.170LJ agreements (agreements between employers and unions), there is also a strong element of union-status clauses through which unions are restoring much of the union security provisions which they have lost in the award simplification process.

It might be said, therefore, in a crude caricature of the bargaining system, that what is going on in enterprise bargaining is merely a decentralised version of what was previously the case in industrial relations. In this process employers and unions, or sometimes employers and employees, are trading, from whatever the strength of their relative positions might be, over essentially 'monetary' rather than quality issues. Many would simply assert that employers are not interested in 'partnerships at work' or 'co-operative workplaces'. They simply want control, and with it the opportunity to reduce costs.

I'm sure this is an accurate reflection of the views of many, but it is a different question as to whether it is necessarily what was expected of the enterprise bargaining process by policy makers, and whether it is necessarily in keeping with the general philosophical trend in employment relations and employment law.

2 A New Workplace Culture Based on Co-Operation / Partnership?

Much of the lead-up to the adoption of the enterprise bargaining system in the early-to-mid 1990s was concerned with overcoming the problems of 'adversarialism' at work, and with the benefits that might flow through in terms of productivity and efficiency, and hence competitiveness, if workplaces could be made more harmonious. Part of the argument for new forms of enterprise agreements, particularly AWAs, but also the collective forms of agreements, rested upon the assumption that such agreements would produce a 'new era' of creative and dynamic arrangements, and would assist in the development of 'innovative' new agreements. And it was expected that that would especially be the case where agreements did not involve the intervention of trade unions.

What might these 'creative and dynamic' or 'innovative' agreements look like? In the first place, they would have to be 'flexible' (i.e. permit the degree of pay, working time and functional flexibility required in the internationalised competitive environment). However, much of the literature in this area also supposes that workplaces function most effectively and efficiently where employees are involved in the decision making processes within the business organisation. These are often referred to as 'high performance workplace systems', 'high commitment workplaces', and 'high involvement workplaces'.[1]

This issue is of paramount concern in many industrial relations systems. For example, in Europe the 'works council' system is well known and respected for developing 'co-operative' style workplace relations, and recently aspects of European style 'consultative mechanisms' have been extended into Britain by virtue of Britain's European membership.[2]

But is the issue of employee involvement in decision making on the policy agenda in Australia? The answer to that question is undoubtedly in the affirmative. Catchphrases and slogans such as 'greater co-operation', 'partnership' and 'harmonious' workplaces can be found in an endless stream of government media releases and parliamentary debates on

matters such as enterprise bargaining and employee share ownership schemes. The Australian Labor Party's website speaks of 'reformed workplaces in a climate of co-operation and consultation', points also emphasised by the leader of the opposition Mark Latham at the Labor Party's national conference in Sydney in 2004.

3 What is Labour Law Doing to Assist This Development?

Political rhetoric is one thing, but to what extent is public policy being taken further through the development of legal or administrative devices supporting these more co-operative 'partnership style' workplace relations?

I've already mentioned the extension of some European concepts into Britain. I draw attention also to the 'Partnerships at Work' programme in Britain where the *Employment Relations Act 1999* contains specific provisions for the spending of money to promote co-operative work practices. We should also note the similar programme introduced here in Victoria by the Bracks' government (Partners at Work).

Importantly the language of 'co-operation' is now also finding its way into the common law contract of employment.[3] Here a series of implied obligations which exist in all contracts between employer and employee have generalised into a proposition that an employer shall not conduct itself in such a way as to destroy the mutual trust and confidence between the parties. This has been held to mean that an employer may not utilise in an unreasonable manner express discretions given to it under the contract of employment. It has also been said to be a 'positive' statement of the duty of 'co-operation', and elsewhere it has been said that 'there are indications of a movement towards a "unitary" view of industrial relations in which common interest and partnership (and not conflict and subordination) are emphasised as features of the employment relationship'.

There are some interesting examples of how these kinds of obligations are playing out in the common law courts. For example, in one case an employee, a junior hospital doctor, was engaged under a contract which on its face permitted the employer to require him to work for more than 80 hours per week at its discretion. Nevertheless, in seeking damages after suffering a nervous breakdown, it was held by a British court that the terms of the contract were not such as to permit the employer to disregard the employee's health. In another case, a

British industrial tribunal has held that it is an implied obligation in a contract that there should be some appropriate mechanism for voicing grievances available to the employee in a workplace.

So far, there is every indication that the Australian courts are likely to follow the general trend of these decisions. The important question is how far the duties will be taken towards the construction of a 'good faith' 'partnership' style relationship in all forms of employment agreements. There are, however, several potential difficulties which stand in the way of the flow of these developments into employment practices. I mention just a couple of them. First, there is a question of just how far the courts will push general common law developments in the context of specialist regulation covering the same area.[4] Secondly, the common law does not necessarily 'regulate' for good practice in employment relations except perhaps in areas where there is a large volume of cases so as to establish a norm, or a high profile case which substantially changes the law and impacts accordingly upon corporate practice. But generally, at this stage, we would not expect to see the values of the trust and confidence duty necessarily to seep through into the construction of enterprise agreements.

Consequently, we would ordinarily expect legislation to lead the way in developing public policy ideas and extending them down into workplace practice. One problem here, particularly with the present federal government, is the fact that even if, in principle, it would prefer to see the development of 'partnership' style workplace relations, or 'co-operative' workplaces, it also is very strongly committed to the principle of reducing externally imposed regulation of workplaces to a minimum.

What this means, of course, is that the provisions of the *Workplace Relations Act 1996* (Cth) contain very little support, if any, for the idea of co-operative workplace partnerships. The primary object of the *Workplace Relations Act 1996*, set out in s.3, is for the development of 'cooperative workplace relations'. Another object is that primary responsibility for employment relations is to rest with the 'employer and employees at the workplace or enterprise level'.

However, aside from these very general indications, at the end of the day, there is very little in the terms of the *Workplace Relations Act 1996* which assists in the development of more 'cooperative' workplace relationships or partnerships at work. There is nothing in the bargaining provisions which requires bargaining over particular issues such as consultative

mechanisms, joint consultative committees, team-based work structures, and so forth, and since much of this type of provision has been stripped from awards under the award simplification process, unless it reappears in agreements it may not be present at all in the regulation of particular workplaces.

There is some capacity in the Office of the Employment Advocate to help develop such workplace ideas because of its brief under s.83BB of the *Workplace Relations Act 1996* 'to promote better work and management practices through Australian workplace agreements'. There is some recent indication that the Employment Advocate is taking this agenda under active consideration. At the same time, the federal government has done little to advance this issue beyond the terms of the *Workplace Relations Act 1996*. It has consistently stated its opposition to any form of legally mandated system of formal employee representation in workplace decision making, although, on the other hand, it has supported strongly the development of employee share ownership schemes – a policy which at least on its face is consistent with a new vision of employment relations based on a culture of common purpose.

4 What are the Outcomes of the Enterprise Bargaining Process telling us about the Development of Partnerships at Work?

In the absence, then, of regulatory support, what contribution are the terms of enterprise agreements making to the idea of a changing workplace culture?

The first point to note here, of course, is the fact that the *Workplace Relations Act 1996* envisages three principal different types of agreements which can be made at enterprise level. I have mentioned these earlier: s.170LJ agreements (between employers and unions), s.170LK agreements (between employers and groups of employees), and AWAs (between employers and individual employees). Because of the differing power dynamics involved in these various forms of bargaining structures, it is to be expected that there will be differing outcomes between the three types.

If we return to one of the points that I made at the outset, there are two fundamental aspects to modern workplaces which are characterised in the human resource management literature as constituting the new culture: flexibility and worker empowerment.

In the Centre for Employment and Labour Relations Law, at The University of Melbourne, a group of researchers and research associates have been engaged in a series of projects which have examined various aspects of the enterprise bargaining process and its outcomes, including an examination of the extent to which various types of agreements deal with issues of flexibility and employee empowerment.[5] The following text is compiled from some of the reports and papers completed or in preparation as part of this broad project. Details of these are attached at the end of this paper.

We can begin by looking at the extent of flexibility contained in the three different types of agreements.

4.1 Pay flexibility

Table 1: Pay Flexibility

	LJ%	LK%	AWA%
Agreements without a pay clause	15	1	8.5
Agreements providing for remuneration to be calculated:			
• On an hourly basis	n/a	n/a	31
• On a daily basis	n/a	n/a	1.5
• On a weekly basis	n/a	n/a	13.5
• On an annual basis	33	26	34
Agreements providing for performance-related pay generally	17	40	18.5
• Agreements providing that individual worker performance is at least one factor in salary reviews	9	34	20
• Pay related to the performance of the team	3	6	n/a
• Pay related to the performance of the organisation	5	7	n/a
Agreements which provide no extra pay for overtime worked	0	23	25
Agreements which allow the employer to reduce pay	0	0	2.5
Agreements containing a clause relating to employee share ownership	2	0	n/a
Agreements containing a clause relating to profit related pay	6	n/a	n/a

Several matters can be briefly noted about this table, and it is unnecessary to dwell on the details. The point to note is that there is a considerable move to pay flexibility (i.e. away from the rigid award structures of weekly earnings, coupled with overtime and penalty rates for work carried out outside ordinary hours, or at weekends), and on the whole, and perhaps counter-intuitively, this appears not to be markedly different between the different forms of agreements, although the sample sets in the cases of s.170LJ agreements and s.170LK agreements were relatively small (100 in each).[6] In all cases, there is a shift to annualised

salaries of substantial proportions, and in all cases, there is a shift to performance-related pay. Major differences, are, however, observed in the fact that *individual* worker performance in calculating pay is much lower in union-based s.170LJ agreements, and that none of these agreements provided for no extra pay for overtime worked compared with quite high proportions of s.170LK agreements and AWAs which permitted this.

The conclusion to draw here is that neither AWAs nor s.170LK agreements offer much more flexibility in relation to performance based pay than do union-based agreements (s.170LJ's), but the union-collectivised workplace is more vigilant in protecting against excesses of remunerative flexibility.

4.2 Temporal flexibility

Table 2: Temporal Flexibility

	LJ%	LK%	AWA%
Agreements without an hours clause	27	11	11.5
Agreements providing no set ordinary working hours	25	85	26
Agreements in which variation of hours are determined			
• Unilaterally by the employer	12	6	14
• Through consultation	33	9	n/a
• No variation	22		n/a
Agreement providing for ordinary hours to be worked within an unlimited spread of hours	5	47	13
Agreements in which variation of the spread of hours are determined			
• Unilaterally by the employer	14	23	14.5
• Through consultation	33	31	n/a
• No variation	22		n/a
Agreements giving the employer the right to require additional hours to be worked	39	43	36

Here again, we see fairly high levels of flexibility across all three forms of agreement, with s.170LK agreements showing extensive flexibility in some respects. The differences between s.170LJ agreements (union-based) and AWAs is, in many respects, surprisingly not remarkable. However, the flexibility acquired under the agreements made with unions are more tightly constrained than AWAs and s.170LK agreements. Under the s.170LJ agreements, alteration to the hours of work, and the spread of hours, are subject to consultation with the union in a relatively high proportion of cases.

4.3 Functional flexibility

Table 3: Functional Flexibility

	LJ%	LK%	AWA%
Agreements without a detailed duties clause	60	67	27
Agreements giving the employer the right to add new duties, including agreements which restrict this power to duties which are	23	49	50
• Reasonable	2	2	10
• Within the limits of the employee's skill, training and competence	20	18	10
• Incidental to the job	3	3	6
• Safe	7	5	1.5
Agreements giving the employer the right to vary duties, including agreements which restrict this power to changes which are	23	49	24
• Reasonable	2	2	0.5
• Within the limits of the employee's skill, training and competence	20	21	5
• Formally recorded on a position description	2	1	2
Agreements giving the employer the right to transfer the employee to another site	16	16	19
Agreements containing a provision for involvement of employees in determining their functions	6	0	n/a
Agreements containing a provision for involvement of unions in determining their functions	0	0	n/a

All forms of agreements provide for flexibility in duties and location which extend the employer's job control. These are, in terms of work organisation, far more flexible workplaces. However, the unrestrained management discretion to vary duties or to add new duties is far greater in the case of AWAs and s.170LK agreements than is the case with s.170LJ (union-based) agreements. There is little variation between the agreements, however, in the capacity of the employer to transfer employees to a different work location.

The general conclusion that we are able to draw from this is that in terms of various major forms of flexibility, enterprise-based agreements are producing (not perhaps in a revolutionary sense, but to a considerable degree at least) a quite different workplace, and quite different working patterns and arrangements than had been the case under centralised awards.

But is this indicative of the kind of workplace 'partnerships' or 'co-operative workplaces' which both the human resources literature and the political rhetoric seem to suggest is desirable?

One view of this process is that these developments have not ushered in new workplaces designed to promote higher productivity and efficiency by eliminating adversarialism and promoting co-operation. Rather, the critics see these developments as principally ushering in a new era of extended managerial discretion, job control and cost cutting. Information about the extent to which enterprise bargaining has involved cost reductions to employers, particularly in the area of wages and conditions, is highly contentious and difficult to calculate.

However, it *is* possible to obtain an impression of the degree to which enterprise bargaining is engaging with the high performance workplace system, by testing for the other dimension of the 'partnerships' style approach – employee involvement in workplace decision making.

4.4 Employee Empowerment

Table 4: Employee empowerment

	LJ%	LK%	AWA%
Agreements containing no consultation clause	30	74	81.5
Agreements containing a requirement that the company			
• Advises employees of workplace change	14	14	3.5
• Engages in informal consultation with employees before introducing workplace change	28	12	11.5
• Engages in formal consultation with employees before introducing workplace changes	12		3.5
• Does not consult at all	2	n/a	n/a
Agreements containing a requirement that the company:			
• Advises unions of workplace change	13	2	n/a
• Engages in informal consultation with unions before introducing workplace change	29	4	n/a
• Engages in formal consultation with unions before introducing workplace change	11		n/a
• Does not consult at all	3	20	n/a
Agreements providing for joint consultative committee(s)	38	30	n/a
• Consultative committees that involve union representatives	24	9	n/a
• Committees with terms of reference limited to the operation of the certified agreements	8	n/a	n/a

What does Table 4 tell us about the degree of employee empowerment being developed through the enterprise bargaining process?

The most important point to note is that 30% of s.170LJ agreements (i.e. agreements by employers with unions) contain no provisions for any consultation between the employer and other parties at the workplace. That figure rises to a staggering 74% in the case of s.170LK agreements and 81.5% in the case of AWAs. What that means is that, at least on the face of these agreements, there are no requirements for any form of 'co-operative' or 'partnership-style' arrangements at the workplace level. In some instances, there are specific provisions which expressly invest employers with the discretion to introduce workplace changes *without* notifying a union (3% in s.170LJ agreements and 20% of s.170LK agreements).

Furthermore, where an obligation to consult is contained in the agreement it is frequently expressed only as an obligation to 'advise' of workplace change rather than an obligation to engage in deliberative discussions with either employees or trade unions.

When it comes to formalised committee structures for dealing with workplace issues, only about one-third of certified agreements (38% of s.170LJ agreements, and 30% of s.170LK agreements) contained such provisions. Although there are no figures in Table 4 for AWAs on this point, we know from previous research that the figure for consultative committees in AWAs is about 3.5%. Again, even though this information is not fully disclosed in the Table, not all joint consultative committees are necessarily indicative of 'partnership-style' relations at work. The powers of, and the scope of matters considered by, joint committees vary enormously from agreement to agreement. As the Table indicates, at least with respect to s.170LJ agreements, a substantial proportion of formal joint consultative committee structures exist only for dealing with matters which are the subject of the enterprise agreement, rather than any broader issues of workplace regulation.

There are other dimensions of worker empowerment which are not dealt with in Table 4, but about which we have some information. One of these is the extent to which work systems within enterprises adopt a 'teamwork' approach with a fair degree of autonomy being passed to workers in such teams to regulate work performance and associated matters. Here again, the results are not encouraging if we are to take 'teamwork' as some sort of an indicator of a more 'co-operative' style workplace. Very few s.170LK agreements contain such provisions, and of a s.170LJ agreement sample set examined by us in previous work, only 11% of

agreements provided for teamwork, as compared with slightly more than 20% of the AWAs we examined. Even in these cases, however, mostly the references were classed as 'weak' rather than 'strong' (i.e. 3% of s.170LJ agreements were deemed to contain 'strong' references to teamwork; 8.5% of AWAs were deemed to contain 'strong' references to teamwork).

5. Enterprise Bargaining Agreements and Workplace Partnerships: Where Are We At?

Broadly speaking, what this summary of evidence tells us is that there is little movement towards the idea of co-operative workplace relations in the terms of certified agreements. Nor, despite the rhetoric of politicians, and the peripheral activities of the common law courts, is there much indication at the moment that the law is able to stimulate a trend to workplace partnerships as a norm of industrial regulation. Without clearer guidance to the industrial authorities, this is unlikely to change.

This doesn't mean to say, however, that there are no reasons at all to be optimistic about the capacity for workplaces to undergo substantial culture change in the Australian regulatory climate. As we have noted in some of our earlier work on AWAs,[7] it is possible to identify the emergence of small numbers of agreements which are well-rounded, and characterised by temporal and pay flexibility, variable duties, performance-based pay, consultation mechanisms, performance management and reviews, and very often team-based work structures.[8] How these might work in practice is another issue, but at least we can say that in the terms of such agreements there is a vision of the 'High Involvement Workplace' or 'High Performance Workplace' which reflects the expectations of politicians and other proponents of serious workplace change.

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[1] R. Mitchell and J. Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.

[2] B. Bercusson, 'The European Social Model Comes to Britain' (2002) 31 *Industrial Law Journal* 209; P. Lorber, 'National Works Council: Opening the Door on a New Whole Era in United Kingdom Employment Relations?' (2003) 19 *International Journal of Comparative Labour Law and Industrial Relations* 297.

[3] D. Brodie, 'Beyond Exchange: The New Contract of Employment' (1998) 27 *Industrial Law Journal* 79; D. Brodie, 'Mutual Trust and the Values of the Employment Contract' (2001) 30 *Industrial Law Journal* 84.

[4] *Intico (Vic) Pty Ltd & Ors v Walmsley* VSCA 90 (21 May 2004), *Johnson v Unisys Ltd* [2001] 2 All ER 801, *Eastwood v Magnox Electric Proprietary Ltd PLC* [2004] UKHL 35, *Aldersea v Public Transport Corporation*

[2001] VSC 169; for discussion see R. Johnstone and R. Mitchell, 'Regulating Work' in C. Parker et. al. (eds.) *Regulating Law*, Oxford University Press, 2004, Chapter 5.

[5] This group includes the present author, Peter Gahan of Deakin University, Joel Fetter, Rebecca Campbell, Kate Creighton, Tanya Josev, Emma Bicknell, Andrew Barnes, and Samantha Korman.

[6] The sample for the AWA set was 200 agreements.

[7] R. Mitchell and J. Fetter, *The Individualisation of Employment Relationships and the Adoption of High-Performance Work Practices: Final Report,* Workplace Innovation Unit, Industrial Relations Victoria, 2003.

[8] It is also cause for optimism that the OEA is now seriously exploring the desirability of High Performance Workplace Systems concepts.

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