

# WORKING AROUND WORK CHOICES: COLLECTIVE BARGAINING AND THE COMMON LAW

ANDREW STEWART\* AND JOELLEN RILEY†

*[Since the early 1990s, the parties to collective workplace agreements have been encouraged to give their bargains statutory effect by registering them under industrial legislation. Yet in the wake of the High Court's Electrolux Home Products Pty Ltd v Australian Workers Union ruling in 2004, and the introduction of 'prohibited content' rules as part of the Work Choices reforms, there has been a resurgence in the use of unregistered agreements that depend on the common law for legal effect. This article examines the use of such agreements and various barriers to their enforceability. It also looks at options for resolving disputes outside the courts — in particular whether parties can ask members of Australia's publicly funded industrial tribunals to provide private dispute resolution services.]*

## CONTENTS

I	Introduction.....	903
II	The Use of Unregistered Agreements.....	906
III	'Matters Pertaining' and 'Prohibited Content' .....	907
IV	Current Strategies .....	911
V	Does the WRA Present an Insuperable Obstacle? .....	913
VI	Protected Action and Unregistered Agreements .....	916
VII	The General Law of Contract: Some Limitations.....	920
VIII	Overcoming the Privity Problem .....	923
IX	Enforcing Unregistered Agreements.....	926
X	Alternative Dispute Resolution .....	927
	A Private Arbitration and the AIRC .....	928
	B Private Arbitration in the State Tribunals under 'Referral Agreements' ....	931
	C The Commercial Arbitration Acts .....	934
XI	Looking Ahead.....	936

## I INTRODUCTION

The Howard government's 'Work Choices' reforms<sup>1</sup> have generated a great deal of academic comment,<sup>2</sup> not to mention public debate. They also played a

\* BA, BCL (Oxon); John Bray Professor of Law, The University of Adelaide; Consultant to Piper Alderman.

† MA, LLB, PhD (Syd); BCL (Oxon); Professor of Law, Faculty of Law, The University of New South Wales; Consultant to Harmers Workplace Lawyers.

<sup>1</sup> The reforms were introduced by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), the bulk of which took effect on 27 March 2006. Two further sets of amendments were subsequently made: *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth); *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth). The latter of these represented a significant backdown by the government, in reinstating some measure of protection against workers being asked (or forced) to bargain away certain award entitlements.

<sup>2</sup> For a general overview of the reforms: see, eg, David Peetz, 'Coming Soon to a Workplace Near You — The New Industrial Relations Revolution' (2005) 31 *Australian Bulletin of Labour* 90; Chris Briggs, Australian Centre for Industrial Relations Research and Training, 'Federal IR Reform: The Shape of Things to Come' (Report commissioned by Unions NSW, 2005); Joellen

significant part in the government's defeat at the 2007 election. The changes, paradoxically made in the name of deregulation of the labour market, have significantly increased both the quantity and complexity of the federal legislation that governs employment conditions and industrial relations.<sup>3</sup> In so doing, they have confirmed that labour law is now primarily a field grounded in statutory regulation.

Nonetheless, an interesting by-product of the reform process has been to focus attention on the potential of the common law to provide an alternative to the statutory scheme embodied in the *Workplace Relations Act 1996* (Cth) ('WRA') and the *Workplace Relations Regulations 2006* (Cth) ('WR Regulations').<sup>4</sup> Given the continuing role of the common law in both defining and regulating individual employment relationships,<sup>5</sup> it is unsurprising that much of the initial commentary has concentrated on that area. With so many of the Work Choices reforms enhancing managerial power at the expense of workers, it has become important to consider how that power might be moderated or constrained by recourse to established principles of equity or the evolving concept of fair dealing in contractual relations.<sup>6</sup> The removal of statutory unfair dismissal rights, in particular, has prompted writers to consider whether dismissed employees might be able to look to the courts for relief from 'bad faith' terminations.<sup>7</sup>

A further area for debate has emerged from the plan of the newly elected Australian Labor Party ('ALP') government to abolish individual Australian Workplace Agreements ('AWAs'). The ALP has repeatedly suggested that common law contracts — that is, terms expressly accepted as part of a worker's

Riley and Kathryn Peterson, *Work Choices: A Guide to the 2005 Changes* (2006); Andrew Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?' (2006) 16(2) *Economic and Labour Relations Review* 25; 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(1) *University of New South Wales Law Journal* 215; Jill Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35 *Industrial Law Journal* 343.

<sup>3</sup> See Andrew Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210.

<sup>4</sup> The constitutional validity of this legislation was upheld by the High Court in *New South Wales v Commonwealth* (2006) 229 CLR 1. The scheme applies to all trading, financial and foreign corporations, all Commonwealth agencies and all other employers operating in Victoria or the territories. These are collectively referred to in this article as 'federal system employers'.

<sup>5</sup> See generally Breen Creighton and Richard Mitchell, 'The Contract of Employment in Australian Labour Law' in Lammy Betten (ed), *The Employment Contract in Transforming Labour Relations* (1995) 129; Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235, 235–7; Richard Johnstone and Richard Mitchell, 'Regulating Work' in Christine Parker et al (eds), *Regulating Law* (2004) 101; Rosemary Owens and Joellen Riley, *The Law of Work* (2007) ch 5. The 'definitional' role of the common law has been enhanced by the *Independent Contractors Act 2006* (Cth) s 7, which seeks to prevent the states and territories in certain contexts from deeming or treating workers as 'employees' when they are not so regarded at common law: see Joellen Riley, 'A Fair Deal for the Entrepreneurial Worker? Self-Employment and Independent Contracting Post Work Choices' (2006) 19 *Australian Journal of Labour Law* 246; Andrew Stewart, Piper Alderman, *Understanding Independent Contractors* (2007) ch 4.

<sup>6</sup> See Joellen Riley, *Employee Protection at Common Law* (2005) chs 3–5.

<sup>7</sup> See Carolyn Sutherland, 'Regulating Dismissals: The Impact of Unfair Dismissal Legislation on the Common Law Contract of Employment' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 242; Andrew Stewart, 'Good Faith and Fair Dealing at Work' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 579, 587–9.

employment contract — are capable of delivering flexible and efficient outcomes for businesses, without impairing the integrity of the safety net set by legislation, awards and/or collective agreements.<sup>8</sup> This claim has been challenged by employer groups, notably in the mining industry.<sup>9</sup> But the ALP has nonetheless promised that all awards will contain ‘flexibility clauses’ that give employers and individual employees the freedom to vary the effect of the award in certain ways, provided always that the employees are not disadvantaged. Furthermore, awards will have no application to employees with guaranteed annual earnings of at least \$100 000.<sup>10</sup>

In this article, however, our focus is on collective rather than individual relations. The Work Choices reforms have imposed stringent and intrusive controls on collective bargaining<sup>11</sup> — at least where employment conditions are involved.<sup>12</sup> Employers and trade unions in the federal system, who would prefer to operate on a pre-reform ‘business as usual’ basis, have been using common law agreements to sidestep the Work Choices constraints and maintain mutual commitments to former practices. The Rudd government has undertaken to remove most of the current restrictions on the content of workplace agreements.<sup>13</sup> But they remain in force at the time of writing, and full details of the proposed changes are yet to emerge. Furthermore, without a majority in the Senate the new government is not assured of having its proposals accepted by

<sup>8</sup> See, eg, ABC Television, ‘Julia Gillard Talks to the ABC about Industrial Relations’, *The 7:30 Report*, 17 May 2007 <<http://www.abc.net.au/7.30/content/2007/s1926254.htm>>.

<sup>9</sup> See, eg, Workplace Policy Division, Australian Mines and Metals Association, ‘Australian Workplace Agreements — A Major Matter for Miners’ (Paper released at the AMMA National Conference, Perth, 22 March 2007) 19–22.

<sup>10</sup> Kevin Rudd and Julia Gillard, ‘Forward with Fairness: Policy Implementation Plan’ (Policy Statement, 28 August 2007) 9–12.

<sup>11</sup> See generally Anthony Forsyth and Carolyn Sutherland, ‘Collective Labour Relations under Siege: The *Work Choices* Legislation and Collective Bargaining’ (2006) 19 *Australian Journal of Labour Law* 183; Sean Cooney, ‘Command and Control in the Workplace: Agreement-Making under *Work Choices*’ (2006) 16(2) *Economic and Labour Relations Review* 147; Iain Ross, John Trew and Tim Sharard, *Bargaining under Work Choices* (2006). It should be noted that we are concerned in this article with collective bargaining, a process that almost invariably involves one or more trade unions. This can be contrasted with the process of making ‘employee collective agreements’ which (as with AWAs) generally involves little real bargaining, but rather a unilateral formulation by management of terms to which a group of workers are prepared to assent: see Chris Briggs and Rae Cooper, ‘Between Individualism and Collectivism? Why Employers Choose Non-Union Collective Agreements’ (2006) 17(2) *Labour and Industry* 1. As to ‘employer greenfields agreements’ under s 330 of the *WRA*, which are made by employers without the formal involvement of any other party, it is a testament to the newspeak that now pervades the *WRA* that they can even be termed ‘collective agreements’. For discussion of the take-up of employer greenfields agreements under Work Choices: see David Peetz, ‘Assessing the Impact of “WorkChoices” — One Year On’ (Report to the Department of Innovation, Industry and Regional Development, Victoria, 2007) 25–6; Peter Gahan, ‘Employer Greenfield Agreements in Victoria’ (Research report prepared for the Victorian Office of the Workplace Rights Advocate, 2007).

<sup>12</sup> By contrast, the *Trade Practices Act 1974* (Cth) has been amended to make it easier for non-employed contractors to engage in collective bargaining: see Shae McCrystal, ‘Regulating Collective Rights in Bargaining: Employees, Self-Employed Persons and Small Businesses’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 597; Shae McCrystal, ‘Collective Bargaining by Independent Contractors: Challenges from Labour Law’ (2007) 20 *Australian Journal of Labour Law* 1; Shae McCrystal, ‘Collective Bargaining and the *Trade Practices Act*: The *Trade Practices Legislation Amendment Act [No 1] 2006* (Cth)’ (2007) 20 *Australian Journal of Labour Law* 207.

<sup>13</sup> See below n 180 and accompanying text.

Parliament. Accordingly, we will examine the use of unregistered agreements and potential obstacles to making enforceable collective agreements between management and labour, by reference to the law as it stands at the beginning of 2008.

Even if the existing restrictions are ultimately removed, it is still worth considering the shape that a system of collective bargaining might take if truly based on the concept of freedom of contract and regulated by principles of general commercial law. Whether the common law might be marshalled to support an entire system of such bargaining, rather than merely as a device to escape the inconveniences currently associated with registering a workplace agreement, is an issue to which we hope to return in the future.

## II THE USE OF UNREGISTERED AGREEMENTS

There is nothing new about the practice of employers and unions negotiating terms that have legal effect through the common law of contract. For the greater part of the 20<sup>th</sup> century, it was common to find parties making agreements that were neither registered under an industrial statute nor presented to a tribunal for adoption as a consent award. These agreements most often dealt with matters that were specific to a particular workplace, involved over-award commitments, or set a framework for industry or sector-wide conditions.<sup>14</sup> Their legality was rarely, if ever, tested. If a dispute arose over their effect, it was usually resolved either 'on the ground' or with the (often informal) assistance of an industrial tribunal.

From the early 1990s onwards, however, legislative changes in all jurisdictions not only promoted enterprise-level bargaining as the primary method of determining wages and employment conditions, but sought to encourage parties to formalise and register their agreements.<sup>15</sup> Within a few years, around 40 per cent of employees were covered by registered collective agreements.<sup>16</sup> These instruments did not necessarily supplant other forms of regulation: for instance, many of them operated alongside or even incorporated award provisions, rather than supplanting them. The same was often true of unregistered agreements or understandings previously made between the parties. It was common to find clauses in registered agreements that acknowledged the existence of informal commitments, or indeed preserved their effect.<sup>17</sup> Nonetheless, for at least a

<sup>14</sup> See Breen Creighton and Andrew Stewart, *Labour Law* (4<sup>th</sup> ed, 2005) 191–4.

<sup>15</sup> For general accounts of these changes: see, eg, Australian Centre for Industrial Relations Research and Training, *Australia at Work: Just Managing?* (1999) ch 3; Duncan MacDonald, Iain Campbell and John Burgess, 'Ten Years of Enterprise Bargaining in Australia: An Introduction' (2001) 12(1) *Labour and Industry* 1; Andrew Stewart, 'The AIRC's Evolving Role in Policing Bargaining' (2004) 17 *Australian Journal of Labour Law* 245.

<sup>16</sup> The most recent statistics from the Australian Bureau of Statistics ('ABS') show 38.1 per cent of employees as having their pay set by a registered collective agreement: ABS, *Employee Earnings and Hours, Australia: May 2006*, ABS Catalogue No 6306.0 (2007) 6. Since it is possible to be covered by an agreement but receive higher pay by way of some individual arrangement, this may slightly underestimate the coverage of such instruments.

<sup>17</sup> As to this kind of 'layering' of regulatory instruments: see Joel Fetter and Richard Mitchell, 'The Legal Complexity of Workplace Regulation and Its Impact upon Functional Flexibility in Australian Workplaces' (2004) 17 *Australian Journal of Labour Law* 276; Mark Bray and Peter

decade it became the norm for employers and unions to think in terms of expressing their bargains in a registered instrument.<sup>18</sup>

The interest in unregistered agreements was effectively revived by a technicality that emerged in the federal system of agreement making under what was then Part VIB of the *WRA*. Even before the Work Choices reforms sought to emasculate collective bargaining under the *WRA*, unions and their legal advisers were investigating ways of making effective agreements under the common law to secure commitments to workplace management practices that might not concern ‘matters pertaining’<sup>19</sup> to the employment relationships in question.

### III ‘MATTERS PERTAINING’ AND ‘PROHIBITED CONTENT’

The ‘matters pertaining’ requirement has a long and unhappy history in Australian labour law. It was originally part of the definition of the term ‘industrial matters’ in s 4 of the *Conciliation and Arbitration Act 1904* (Cth). The Commonwealth Court of Conciliation and Arbitration (and later the Commonwealth/Australian Conciliation and Arbitration Commission) could only deal with a dispute — and hence make an award — regarding such matters. This led to frequent litigation as to whether the Court/Commission was empowered to regulate a given matter, on the basis that it might or might not have the necessary connection to the employment relationships covered by the dispute. The result was a series of High Court decisions that sought to distinguish between matters that ‘directly’ pertained to employment, and those that lacked a sufficient connection. It did not help that many of these decisions could not be readily reconciled with one another, that form often seemed to matter more than substance, and that some of the reasoning bordered on the arcane.<sup>20</sup>

For a time, after the shift to formalised bargaining in the 1990s, parties seemed to forget about the requirement that agreements must deal with matters pertaining to the employment relationship. However, it was still there in the legislation, a point highlighted in the litigation that culminated in the High Court’s 2004 decision in *Electrolux Home Products Pty Ltd v Australian Workers Union* (‘Electrolux’).<sup>21</sup> Here the Court interpreted the *WRA* to mean that every substantive provision in a certified agreement must directly pertain to employment for the agreement to be registrable.<sup>22</sup> Furthermore, industrial action could not be ‘protected’ (that is, lawful) under what was then s 170ML of the *WRA* if taken in support of a proposed agreement that contained a single ‘non-pertaining’ clause — in that case, a provision for a bargaining agent’s fee to be paid by employees, whether union members or not.<sup>23</sup>

Waring, ‘“Complexity” and “Congruence” in Australian Labour Regulation’ (2005) 47 *Journal of Industrial Relations* 1, 3–6; Stewart, ‘A Simple Plan for Reform?’, above n 3, 212–16.

<sup>18</sup> See Mark Wooden, *The Transformation of Australian Industrial Relations* (2000) 59–65.

<sup>19</sup> See *WRA* ss 170LI, 170LO–LP (repealed).

<sup>20</sup> See generally Creighton and Stewart, above n 14, 97–104.

<sup>21</sup> (2004) 221 CLR 309.

<sup>22</sup> Ibid 327–8 (Gleeson CJ), 351–6 (McHugh J), 369–71 (Gummow, Hayne and Heydon JJ).

<sup>23</sup> The Court held that such a clause did not pertain to employment relations, analogising with earlier decisions to the effect that a claim for the deduction of union dues from wages cannot found an industrial dispute: see *R v Portus; Ex parte Australia & New Zealand Banking Group*

Given the number of agreements with potentially suspect clauses, the *Electrolux* ruling caused consternation for parties. The prospect of an apparently settled certified agreement being dislodged by the discovery of an impermissible term was a particular concern to employers who did not want to face a premature round of bargaining, with its attendant capacity for protected industrial action. These worries were partly allayed when legislation was passed preventing agreements registered before the date of the *Electrolux* decision being rendered wholly invalid.<sup>24</sup> However, confusion quickly emerged as to the ability to register new agreements. With the Australian Industrial Relations Commission ('AIRC') now required to test proposed agreements by reference to principles derived from a complex and confused line of High Court authorities, it is scarcely surprising that different members of the AIRC disagreed as to which clauses pertained and which did not.<sup>25</sup>

The status of a number of contested clauses was effectively resolved by a decision of a Full Bench of the AIRC in a test case in March 2005.<sup>26</sup> While the Full Bench took a fairly liberal view of what could be regarded as a matter pertaining to employment relations, it held that a number of provisions commonly included in union negotiated agreements must be omitted. These included clauses relating to the automatic deduction of union dues from wages, prohibitions on the engagement of independent contractors or labour hire workers to do work hitherto performed by employees, and provisions conferring a broad right on union officials to enter workplaces.

With the inclusion of non-pertaining clauses now threatening the validity of agreements, a practice quickly developed where unions sought to negotiate two separate instruments: the formal agreement that would be put to the AIRC for certification, and a separate or 'side' agreement that would contain all the provisions that either could not or might not be capable of satisfying the matters pertaining test. These latter provisions would often have been standard inclusions in agreements certified over the previous decade. The side agreement might be described as a contract, formalised as a deed or simply set out in a letter of understanding signed by the employer.

*Ltd* (1972) 127 CLR 353; *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 ('*Re Alcan*'). The Court's reasoning has been that 'although the subject matter [deduction of union dues] pertains to a relationship between employers and employees, it is a relationship involving employees as union members and not at all as employees': *Re Alcan* (1994) 181 CLR 86, 107 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>24</sup> See *WRA* pt VIB div 10A (repealed), introduced by the *Workplace Relations Amendment (Agreement Validation) Act 2004* (Cth) sch 1(1). The operation of these provisions in relation to pre-reform agreements has been preserved by the amended *WRA* sch 7 cl 2(1)(p). However, any certified agreements (or indeed AWAs) registered between 2 September 2004 and 27 March 2006 are not covered by the pre-reform *WRA* provisions. Hence these agreements can be invalidated if found to contain a non-pertaining clause.

<sup>25</sup> For analysis of the post-*Electrolux* case law: see Jason Harris, 'Federal Collective Bargaining after *Electrolux*' (2006) 34 *Federal Law Review* 45.

<sup>26</sup> *Re Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) — Enterprise Agreement 2004* (2005) 142 IR 289. For further AIRC full bench decisions on the 'matters pertaining' issue: see, eg, *National Union of Workers; Re Agreement with Exel (Australia) Logistics Pty Ltd* (2005) 146 IR 334; *Heinemann Electric Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2006) 157 IR 1.

In March 2006, the practice of seeking an unregistered agreement became almost compulsory for many unions, with the enactment of the ‘prohibited content’ rules.<sup>27</sup> These rules perfectly illustrate the ‘command and control’ mentality pervading the Work Choices reforms,<sup>28</sup> and make a mockery of any commitment to promoting ‘freedom’ and ‘choice’ in workplace bargaining.<sup>29</sup> As Jill Murray notes:

Work Choices is based on a fundamental mistrust of employers, the favoured regulators under the system. The government seems [to] be afraid that they will collude in the reversion to the collective, civilising, fair standards and procedures of the traditional system.<sup>30</sup>

Section 357 of the amended *WRA* currently provides that an employer must not lodge a workplace agreement that contains prohibited content. A reckless breach of this provision may expose the employer to a penalty of up to \$33 000.<sup>31</sup> Indeed, *any* person who recklessly proposes the inclusion of prohibited content in an agreement, or misrepresents an agreement as not containing prohibited content, risks a similar penalty under ss 365 and 366 of the *WRA*. Section 358 also provides that a term of an agreement will be void to the extent that it contains prohibited content, though the wording of the provision makes it clear that it is only that term that is affected, not the entire agreement.

Under the original version of s 356 of the *WRA*, it was left entirely to regulations to define prohibited content.<sup>32</sup> When reg 8.5–8.7 of chapter 2 of the *WR Regulations* were promulgated, they set out a lengthy list of such matters. Besides specifying that matters not pertaining to the employment relationship would remain prohibited,<sup>33</sup> the regulations also outlined a far more extensive list of forbidden content — including a number of matters that had previously been ruled by the AIRC to satisfy the matters pertaining test.<sup>34</sup>

Much of what is prohibited is specifically targeted at excluding union involvement in statutory workplace bargaining. For example, payroll deduction for union dues, union training leave and guaranteed union involvement in dispute

<sup>27</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) sch 1 div 7B.

<sup>28</sup> See Cooney, above n 11; John Howe, “‘Deregulation’ of Labour Relations in Australia: Towards a More ‘Centred’ Command and Control Model” in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 147.

<sup>29</sup> Stewart, ‘*Work Choices* in Overview’, above n 2, 35.

<sup>30</sup> Murray, above n 2, 365. See also *ibid* 35, 52.

<sup>31</sup> *WRA* s 407(2)(k).

<sup>32</sup> Section 356 was amended by the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) sch 4. It now defines ‘prohibited content’ to include a few specified matters, together with any further matters prescribed by regulation. The matters listed in *WRA* s 356 are taken from the definition of an ‘objectionable provision’ in s 810. The inclusion of such a provision was already treated as prohibited content by *WR Regulations* ch 2 reg 8.5(7). Even after the amendment, the bulk of what is defined as prohibited content is still to be found in the *WR Regulations*.

<sup>33</sup> See *WR Regulations* ch 2 reg 8.7. In line with the post-*Electrolux* case law, the regulation specifies that matters of an ‘incidental’, ‘ancillary’ or ‘machinery’ nature may still be included in an agreement, even if they do not satisfy the matters pertaining requirement.

<sup>34</sup> For example, the imposition of conditions on the use of contract labour is now prohibited by *WR Regulations* ch 2 reg 8.5(1)(h), but was previously found to be a matter capable of pertaining to employment: see, eg, *National Union of Workers; Re Agreement with Exel (Australia) Logistics Pty Ltd* (2005) 146 IR 334.

resolution procedures are specifically proscribed.<sup>35</sup> A number of other provisions which more subtly support the continued influence of unions in workplaces are also prohibited, including clauses dealing with engagement of independent contractors and labour hire workers, limitations on offering AWAs, and even the process for renegotiating an agreement.<sup>36</sup>

Besides the restrictions that these rules seek to place on unions, they have also caused considerable difficulty for employers due to the uncertainty of what is prohibited. This is partly because some of the rules are capable of variable interpretations, not least the matters pertaining requirement. It is also a reflection of the fact that under the Work Choices system there is no chance of getting a formal ruling on contentious clauses, unless someone is actually prosecuted for proposing prohibited content, or the Workplace Authority (formerly the Office of the Employment Advocate) chooses to take action under s 363 of the *WRA* to vary an agreement to remove such content,<sup>37</sup> or the issue arises in the context of a union seeking to take protected industrial action.<sup>38</sup>

Under the previous system, issues could be raised with or by the AIRC during the certification process and then made the subject of a formal decision, which could in turn be appealed to a full bench.<sup>39</sup> The publication of these judgments ensured both that the AIRC and parties generally became aware of what was and was not permissible, despite the fact that it might take time to resolve differences between individual members of the AIRC. This process no longer occurs now that agreements are simply lodged with the Workplace Authority and can take effect without formal scrutiny.<sup>40</sup>

It is true that employers may seek a pre-lodgement assessment of an agreement by the Workplace Authority to determine whether it contains prohibited content. If the draft agreement is cleared, the employer may rely on that assessment to defend any prosecution for recklessly lodging an agreement with prohibited content.<sup>41</sup> However, as many employers have found out, this can be a frustrating process. Aside from the delays that waiting for advice can cause in finalising an agreement,<sup>42</sup> officials reviewing agreements frequently (and perhaps wisely)

<sup>35</sup> *WR Regulations* ch 2 reg 8.5(1)(a)–(f).

<sup>36</sup> *WR Regulations* ch 2 regs 8.5(1)(e), (h), (i), (8).

<sup>37</sup> In such a case the variation itself, though not the reasons for making it, is gazetted: see, eg, the notices that appear in the *Commonwealth of Australia Gazette*, No GN23, 13 June 2007, 1592–4.

<sup>38</sup> Action is not protected if taken in support of the inclusion of prohibited content in an agreement: *WRA* s 436. See also *Heinemann Electric Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2006) 157 IR 1. The issue may also arise in connection with an application for a protected action ballot order: see below nn 68–81 and accompanying text.

<sup>39</sup> Pre-reform *WRA* s 45(1)(e).

<sup>40</sup> Under the ‘fairness test’ introduced by the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth), most agreements require review to determine whether ‘fair compensation’ has been provided for the exclusion or modification of ‘protected award conditions’, and may be rescinded if they do not: see *WRA* pt 8 div 5A. There is no such requirement in relation to prohibited content.

<sup>41</sup> *WRA* s 357(2). Note though that this protects only the employer, not anyone else (including individual managers, union officials and even lawyers or consultants) who may have been involved in drafting the agreement.

<sup>42</sup> See, eg, Workplace Express, *Employer Fears on Prohibited Content Slowing down Bargaining, Unions Claim* (21 September 2006) Workplace Express <<http://www.workplaceexpress.com.au/>>.

'hedge their bets', indicating that they cannot say for certain that a particular clause might not qualify as prohibited content. Worse still, it is not uncommon for the same clause to be cleared by one official and then questioned by another.<sup>43</sup> All of this is exacerbated by the fact that none of these rulings are made public and that there are no formal procedures for external or internal review.<sup>44</sup>

#### IV CURRENT STRATEGIES

In light of the limitations and uncertainties that the prohibited content rules have created, it is not surprising that unions have turned attention to the potential for using common law agreements to secure the commitment of union-friendly employers to continue with former practices.

The most common strategy seems to be the one already mentioned: simultaneously pursuing a registered instrument that will deal with wage increases and a range of other matters, and a side agreement to cover any content that might be prohibited.

An interesting alternative, however, has been to seek *only* an unregistered agreement, while leaving any pre-Work Choices agreement on foot. The transitional provisions in sch 7 of the *WRA* allow certified agreements in force as of 27 March 2006 to remain in force indefinitely, at least where made by a federal system employer.<sup>45</sup> Importantly, pre-reform certified agreements are not required to comply with the prohibited content provisions, except in one respect: any clauses precluding the employer from making AWAs are prohibited in all kinds of agreements, pre-reform and post-reform.<sup>46</sup> Of course, the agreement must deal only with matters pertaining to employment, but that is a function of the pre-reform legislation (as interpreted in *Electrolux*), rather than the new rules on prohibited content. That aside, pre-reform certified agreements can be left in place without the need to vet them for compliance with the restrictions introduced by Work Choices. The same is true of a 'preserved state agreement' that has effect under Part 2 of sch 8 of the *WRA*.

A further advantage, especially for employers, is that a pre-reform agreement does not have to comply with the Australian Fair Pay and Conditions Standard in Part 7 of the *WRA*, at least to the extent that the agreement deals with a 'matter' also covered by the Standard.<sup>47</sup> This avoids the need to apply the highly complex

<sup>43</sup> See, eg, Submission to Senate Employment, Workplace Relations and Education Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*, 2007, Submission No 8, 14 (Cath Bowtell, Australian Council of Trade Unions).

<sup>44</sup> See Senate Standing Committee on Employment, Workplace Relations and Education, Parliament of Australia, *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* (2007) [2.59]–[2.60], [2.83]–[2.89], [3.37]–[3.39], [4.25]–[4.27], [5.16], [6.17]–[6.18], noting similar concerns about the potential for inconsistent and unaccountable decision-making by the Workplace Authority under the new 'fairness test'.

<sup>45</sup> Cf pre-reform agreements involving excluded (non-federal system) employers which have a maximum duration of five years: *WRA* sch 7 pt 2 div 2.

<sup>46</sup> See *WRA* sch 7 cl 8.

<sup>47</sup> *WRA* sch 7 cl 30, sch 8 cl 15E. As originally drafted, these provisions ensured that the entitlements in the Australian Fair Pay and Conditions Standard would not apply at all to workers who remained covered by a pre-reform federal agreement or a preserved state agreement. In December 2006, however, they were amended with retrospective effect by the *Workplace Relations*

rules that determine whether a particular provision in a post-Work Choices agreement does or does not provide a more ‘favourable’ outcome than the Standard in some ‘particular respect’<sup>48</sup> — a question which can prove quite difficult in respect of some kinds of benefits, especially leave entitlements.

Of course, pre-reform agreements cannot be varied — hence the utility of an unregistered agreement. The parties can make a common law agreement to deal with matters of pay and any other improvements in benefits, while leaving the pre-reform agreement in place. If an employer is satisfied with the existing agreement, this may well be regarded as a less troublesome option than dealing with the new system for making workplace agreements.

Anecdotal evidence suggests that unregistered agreements have once again become quite common,<sup>49</sup> although many of the organisations using these arrangements are reluctant to publicise their agreements, lest they attract unwanted political attention — or, in the specific case of the building and construction industry, threaten their eligibility to be involved in certain projects.<sup>50</sup> There is sometimes also a concern about the enforceability of unregistered agreements.

The extent of this last concern should not be overstated. In practical terms, unions that are able to secure a written undertaking on matters of prohibited content will usually be satisfied that the commitment will be observed, whatever the strict legalities.<sup>51</sup> In the world of industrial relations, managers do not lightly go back on explicit promises. But there are always exceptions, and disputes may in any event arise as to the meaning or scope of a provision in an unregistered agreement. The question of how such a dispute can be resolved may well depend on the precise legal status of the arrangement.

In general, the legal effectiveness of an unregistered side agreement depends on two sets of issues. One set of problems arises from the *WRA* itself, while a

*Legislation Amendment (Independent Contractors) Act 2006* (Cth) sch 6(41), (45). As they now stand, their precise effect is difficult to gauge, as it is unclear just how extensively an agreement must deal with a ‘matter’ before the Standard is excluded.

<sup>48</sup> See *WRA* s 172; *WR Regulations* ch 2 reg 7.1.

<sup>49</sup> See also ABS, above n 16, 6 which reveals that in May 2006, 3.1 per cent of employees were paid in accordance with an unregistered collective agreement. This measure would tend to underestimate the prevalence of such arrangements, since it would not include a side agreement operating in conjunction with a registered agreement that dealt with wage rates.

<sup>50</sup> Under the Australian Procurement and Construction Council, *National Code of Practice for the Construction Industry* (1997), companies are ineligible to work on Commonwealth-funded projects unless they comply with the Code and its attendant Guidelines in relation to *all* of their construction work, whether Commonwealth-funded or not. In November 2006, the Guidelines were revised to provide that a company will not be Code-compliant if it enters into an unregistered agreement that deals with matters that would be prohibited content if included in workplace agreement: see Department of Employment and Workplace Relations, Australian Government, *Implementation Guidelines for the National Code of Practice for the Construction Industry* (2006) s 8.1.2. The revision was made without prior warning and caused consternation for parties who had already negotiated such agreements: see Workplace Express, *Bargaining Chaos, as Government Shifts Construction Code Goal Posts — Again* (9 November 2006) Workplace Express <<http://www.workplaceexpress.com.au/>>. See also Anthony Forsyth et al, *Workplace Relations in the Building and Construction Industry* (2007) ch 3.

<sup>51</sup> See, eg, *Construction, Forestry, Mining and Energy Union v Thiess Pty Ltd* (Unreported, Australian Industrial Relations Commission, Lawler V-P, 19 October 2006) [23]–[24], where the union was recorded as seeking ‘a “gentleman’s agreement” — a matter of honour — rather than a legally enforceable agreement.’

second set involves the general principles of law governing the enforceability of common law agreements. We shall address each in turn and also look at the options that parties may have for resolving disputes under these agreements outside the ordinary courts, notably in the industrial tribunals.

#### V DOES THE WRA PRESENT AN INSUPERABLE OBSTACLE?

One question to address, in contemplating a common law collective agreement dealing with subject matter prohibited by the *WRA*, is whether such an agreement can in fact achieve what the legislation expressly prohibits in a statutory bargain.

Under the pre-reform *WRA*, it was clear from provisions such as ss 170LH and 170LN that a ‘certified agreement’ was an agreement that the parties had applied to have certified by the AIRC. In the *Electrolux* decision, it was made plain that employers and unions were also at liberty to make ordinary common law agreements, and that these agreements would not be constrained by the statute’s requirements about ‘matters pertaining to employment’.<sup>52</sup> The enforceability of any common law agreement would depend on compliance with the general law. These statements echo an earlier observation by the High Court in *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (‘*Private Arbitration Case*’).<sup>53</sup> It was noted there that a collective agreement which exceeded what was allowable under the *WRA* (in this instance, in relation to a dispute resolution clause) could nevertheless be enforceable at common law: ‘the underlying agreement remains, and the validity of that agreement depends on the general law, not the legislative provisions’.<sup>54</sup>

Unfortunately, the Work Choices provisions on workplace agreements are ambiguous in this respect. Following the Work Choices amendments, a ‘workplace agreement’ is simply an agreement ‘approved’ by the parties at the workplace, and then lodged with the Workplace Authority.<sup>55</sup> It has effect upon lodgement.<sup>56</sup> The question arises whether such a broad description of a workplace agreement is apt to capture all agreements made between employers and employees. If so, does this mean that the former law allowing for the existence of common law agreements between employers and unions has been impliedly overruled?

The definitions of each type of workplace agreement offer little assistance with this question. Under the amended *WRA* definitions in s 4(1), a ‘workplace agreement’ means ‘(a) an AWA; or (b) a collective agreement’. A note to this definition refers to s 324, which states that a reference to a workplace agreement includes a reference to a ‘proposed workplace agreement’. A ‘collective agreement’ is defined, also in s 4(1), to mean any one of the five kinds of collective agreements provided for in Part 8 of the *WRA*, including ‘a union collective agreement’. Section 328 provides that an employer ‘may make an agreement (a union collective agreement) in writing with one or more organisations of

<sup>52</sup> (2004) 221 CLR 309, 353 (McHugh J), 368 (Gummow, Hayne and Heydon JJ).

<sup>53</sup> (2001) 203 CLR 645.

<sup>54</sup> *Ibid* 658 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>55</sup> *WRA* ss 340, 342(1).

<sup>56</sup> *WRA* s 347(1).

employees'. By virtue of s 333(c), such an agreement is taken to be 'made' when those parties 'agree to the terms of the agreement'.

On one interpretation of this very general language, the definition of a 'union collective agreement' in s 328 would include *any* written employer–union agreement, regardless of whether the parties intended it to be lodged with the Workplace Authority. But under s 347(1), a workplace agreement only 'comes into operation' on the day it is lodged, and the parties can only be 'bound' by an agreement under s 351 if it is 'in operation'. Section 348(1) also provides that only one workplace agreement can 'have effect' in relation to a given employee. On a literal reading of these provisions, unlodged agreements are to have no effect, even at common law.

There are at least two alternative interpretations, however, which avoid this result. One is that the reference in s 328 of the *WRA* to a 'union collective agreement' should be taken to apply only to an agreement that is *intended* by the parties to have effect under the *WRA*. The second is that the various references to an agreement being 'in operation' or 'in effect', or to parties being 'bound', refer only to agreements having effect *under* the *WRA*. In other words, the fact that an unlodged agreement might not, by virtue of ss 347(1) and 351, be able to create any statutory rights and obligations should not prevent the agreement having effect at common law.

This latter interpretation would be consistent with the High Court's decision in *Byrne v Australian Airlines Ltd*.<sup>57</sup> In that case (which concerned a claim that an award provision should be taken to have effect as a clause in the employees' contracts of employment) it was held that an award creates a different kind of legal obligation to a common law employment contract. An industrial instrument created by statute has whatever legal effect the statute confers upon it, and is enforceable according to the terms of the statute.<sup>58</sup> The underlying common law employment contract between employer and employee may derive some of its terms from a relevant industrial instrument, but the contract is a separate construct and has effect according to the principles of contract law.<sup>59</sup> The reasoning in this case has been subsequently adopted in relation to registered agreements. It appears that the terms of such an agreement are not to be treated as automatically incorporated into any employment contract covered by the agreement.<sup>60</sup>

The idea that a registered agreement is a purely statutory construct is also supported, as we have already seen, by what the High Court said about collective agreements in the *Private Arbitration Case*:

<sup>57</sup> (1995) 185 CLR 410.

<sup>58</sup> *Ibid* 418–20 (Brennan CJ, Dawson and Toohey JJ), 456–7 (McHugh and Gummow JJ).

<sup>59</sup> For a critical analysis of the decision: see Creighton and Stewart, above n 14, 312–15.

<sup>60</sup> See *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 337–8 (Kirby J); *ACTEW Corporation Ltd v Pangallo* (2002) 127 FCR 1, 17–18 (Whitlam and Gyles JJ); *Hogan v Employment National (Administration) Pty Ltd* (2002) 119 IR 59, 116–17 (Haylen J). For a recent illustration of the need to view registered agreements and employment contracts as separate sources of obligations: see *Minister for Employment and Workplace Relations v Community and Public Sector Union* (Unreported, Australian Industrial Relations Commission, Lawler V-P, Hamberger SDP and Tolley C, 12 June 2007).

The parties to an industrial situation are free to agree between themselves as to the terms on which they will conduct their affairs. Their agreement has effect according to the general law. If their agreement is certified, it also has effect as an award. To the extent that an agreement provides in a manner that exceeds what is permitted either by the *Constitution* or by the legislation which gives the agreement effect as an award, it cannot operate with that effect. But the underlying agreement remains and the validity of that agreement depends on the general law, not the legislative provisions which give it effect as an award.<sup>61</sup>

It is also pertinent to consider the recognition given to individual workplace agreements (AWAs) under the *WRA*. If the definition of ‘union collective agreement’ in s 328 of the *WRA* includes *any* written agreement between an employer and a union, the same should logically be true of s 326, which describes an AWA in the same form of words: ‘An employer may make an agreement (an *Australian Workplace Agreement* or *AWA*) in writing with a person whose employment will be subject to the agreement.’ It would be almost unthinkable to construe that definition to include *all* written employment contracts and so hold them unenforceable unless lodged with the Workplace Authority. That an AWA is a statutory agreement that operates by reference to an employment contract, rather than actually *being* (or in some sense superseding) such a contract, was assumed by the majority of the Full Court of the Federal Court in *McLennan v Surveillance Australia Pty Ltd*.<sup>62</sup> If parties can make an individual common law contract, why not a common law contract between a union and an employer?

Further support for the argument that the amended *WRA* should not be interpreted to deny any effect to unlodged agreements, even at common law, can be found in the fact that in other provisions of the *WRA* there are explicit references to common law agreements which contemplate their coexistence with lodged agreements made under the *WRA*. For example, s 173 refers to a ‘term of a workplace agreement *or a contract*’<sup>63</sup> having no effect if it purports to exclude the Australian Fair Pay and Conditions Standard. Section 355(6)(b) likewise restricts workplace agreements from ‘calling up’ content from ‘an agreement, arrangement, deed or memorandum of understanding … that … regulates terms and conditions of employment [and] was created by a process of collective negotiation’.

It is also interesting to consider s 64 of the *Building and Construction Industry Improvement Act 2005* (Cth), which expressly provides that an uncertified ‘project agreement’ is to be unenforceable. There is no corresponding provision of this type in the *WRA*, suggesting that the legislature did not intend that common law agreements be generally prohibited.

Finally, there is s 811(2) of the *WRA*. This states that a ‘provision of an industrial instrument, or an agreement or arrangement (whether written or unwritten)’ is void if it permits contravention of the freedom of association protections in

<sup>61</sup> (2001) 203 CLR 645, 658 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>62</sup> (2005) 142 FCR 105. See also Creighton and Stewart, above n 14, 315–16. Cf Fetter and Mitchell, above n 17, 278, 287.

<sup>63</sup> Emphasis added.

Part 16 of the *WRA*. The definitions to this Part in s 779 provide that an ‘industrial instrument’ means ‘an award or agreement’ that is made under an ‘industrial law’, the *WRA* being included in the subsequent definition of ‘industrial law’. The fact that s 811(2) refers to both industrial instruments (including workplace agreements made under Part 8 of the *WRA*) *and* other written or unwritten agreements implies that an agreement between industrial parties can exist outside of the prescription of *WRA* workplace agreements, and that these will only be void to the extent that they are objectionable within the terms of s 811 (or any other specific provision). It would be unnecessary to declare such an agreement or arrangement void if it were already made unenforceable by Part 8 of the *WRA*.

In *Construction, Forestry, Mining and Energy Union v Ulan Coal Mines Ltd*,<sup>64</sup> Lawler V-P accepted that a common law ‘side agreement’ proposed between an employer and a union was a valid expression of the parties’ freedom to contract:

Freedom of contract is a basic right in our legal system. Such a right is not to be taken as having been removed or cut down by legislation unless it is done so with clear words. There is nothing in the Act which expressly prevents a union and an employer from reaching a common law agreement about matters that would be prohibited content in a workplace agreement made under the Act.<sup>65</sup>

This decision would not be binding on a court subsequently required to adjudicate on the validity of one of these side agreements. On balance, though, the courts seem more likely to interpret the new workplace agreement provisions as being intended only to affect statutory rights and obligations, not rights and obligations that might have effect at common law by virtue of an unlodged agreement — except where, as in s 811(2) of the *WRA*, the contrary intention is made clear.

Nevertheless, the possibility of a court adopting a more literal interpretation cannot be ruled out. Certainly, the possibility of a party interested in such an agreement taking the point in litigation must not be ignored. It should be remembered that it is often a company administrator or liquidator who will challenge the validity of contracts purportedly entered into by a corporation. These individuals are required to act in the interests of the creditors and shareholders of the company, and do not consider themselves bound in honour to an agreement which might not be legally enforceable — notwithstanding any good faith that once existed between the employing corporation and a union.

## VI PROTECTED ACTION AND UNREGISTERED AGREEMENTS

One other aspect of the statutory scheme that merits consideration is the curious position in which unions may find themselves when they endeavour to take protected industrial action in support of their claims.

Under s 435(2) of the *WRA*, employees and unions may only take protected action in connection with a ‘proposed collective agreement’, following the

<sup>64</sup> (Unreported, Australian Industrial Relations Commission, Lawler V-P, 13 October 2006).

<sup>65</sup> Ibid [10]. See also *Re Educang Certified Agreement 2002* (Unreported, Australian Industrial Relations Commission, Richards SDP, 20 September 2006) where it was clearly assumed that an unregistered agreement was not to be regarded as a ‘workplace agreement’ for the purposes of the *WRA*.

formal initiation of a ‘bargaining period’ under Division 2 of Part 9. If the interpretation we have outlined above is correct, that means a *registered* collective agreement. Hence any flexing of industrial muscle in the negotiations for a common law agreement will come at the risk of the usual range of sanctions against unprotected industrial action, including s 496 stop orders (which are now mandatory whenever such action comes to the attention of the AIRC),<sup>66</sup> and potential common law suits for a range of industrial torts.<sup>67</sup>

Whilst so much is reasonably clear, an issue arises when a union is simultaneously seeking to negotiate both a registered and an unregistered agreement. Can the union take protected action purely over the registered instrument, especially if it is a key component of that instrument (such as the size of a wage increase) that has proved the real ‘sticking point’ in negotiations?

The problem here is the requirement that in order for action to be protected, it must have been preceded by ‘genuine’ bargaining. For a union, this issue typically arises when it seeks an order from the AIRC to allow it to conduct a ballot to authorise industrial action.<sup>68</sup> The introduction of this cumbersome new procedure is one of the key reforms made by the Work Choices amendments.<sup>69</sup> It often now happens that an employer will try to head off industrial action by opposing the grant of a ballot order. No order means no ballot, and no ballot means no immunity except where action is taken in response to industrial action by the employer.<sup>70</sup> One of the conditions for the grant of an order is that the applicant is ‘genuinely trying to reach agreement with the employer’, and indeed has previously tried to do so during the bargaining period.<sup>71</sup>

In a number of cases, an employer has successfully argued that the pursuit of prohibited content in negotiations for a new workplace agreement will be evidence that a union is not ‘genuinely’ bargaining. As Acton SDP has explained, ‘[t]he inclusion of what is clearly prohibited content in a union collective agreement is something an employer is unlikely to agree to because of the potential consequences for the employer of doing so.’<sup>72</sup>

<sup>66</sup> As to the differences between *WRA* s 496 and the provision it replaced, s 127 of the pre-reform *WRA*: see Ross, Trew and Sharard, above n 11, ch 7.

<sup>67</sup> As to the torts that are almost invariably committed in the course of industrial action: see Creighton and Stewart, above n 14, 561–72. Section 166A of the pre-reform *WRA*, which in at least some instances required a certificate from the AIRC before the commencement of tort proceedings, was repealed by the Work Choices amendments: *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 71.

<sup>68</sup> An order can be sought under *WRA* s 451.

<sup>69</sup> See Shae McCrystal, ‘Smothering the Right to Strike: *Work Choices* and Industrial Action’ (2006) 19 *Australian Journal of Labour Law* 198, 203–4; Ross, Trew and Sharad, above n 11, ch 6; Graeme Orr and Suppiah Murugesan, ‘Mandatory Secret Ballots before Employee Industrial Action’ (2007) 20 *Australian Journal of Labour Law* 272.

<sup>70</sup> *WRA* s 445.

<sup>71</sup> *WRA* s 461(1)(a), (b).

<sup>72</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Kempe Engineering Services Pty Ltd t/as Kempe Manufacturing & Engineering Services* (Unreported, Australian Industrial Relations Commission, Acton SDP, 8 August 2006) [24]. It may be different, however, where the content is not ‘clearly’ prohibited but merely of doubtful validity: see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Tyco Australia Pty Ltd* (2006) 157 IR 15, 21 (Giudice J, Lawler V-P and Williams C); *Automotive, Food, Metals, Engineering, Printing and Kindred Industries*

Importantly, the same conclusion has been reached where the matters that would be prohibited content are set out in a proposed deed or memorandum of understanding, rather than in the draft of the registered agreement which a union is seeking. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Cadbury Schweppes Australia Ltd*<sup>73</sup> it was found that the unions in question had made their assent to any registered agreement conditional on agreement being reached as to the side agreement. Since the unions were not prepared to seriously consider any offers made by the employer until that happened, it could not be said that they were genuinely bargaining.

In that case, the evidence showed that the unions had inextricably linked the registered and unregistered agreements. In *Construction, Forestry, Mining and Energy Union v Ulan Coal Mines Ltd*,<sup>74</sup> Lawler V-P considered that it would be different where the two instruments were being pursued separately. Having suggested, as we have already seen, that there was nothing in the *WRA* that expressly prevented parties reaching a common law agreement over matters that would be prohibited content in a registered agreement, he went on to opine:

While the mere fact that a union contemporaneously makes claims for a side agreement containing prohibited content and makes other claims for a workplace agreement strongly suggests that the union is not genuinely trying to reach a workplace agreement, a union may advance claims for prohibited content for inclusion in a separate common law agreement while at the same time genuinely trying to reach a workplace agreement under the Act, provided it is clear on the evidence that there is no linkage between the two such that concluding the workplace agreement, or the making of a concession in relation to it, is made conditional upon the acceptance of a union claim for prohibited content in the separate common law agreement.<sup>75</sup>

The question is how ready the AIRC should be to conclude that the two processes are being kept separate. In *United Firefighters' Union of Australia v Country Fire Authority*,<sup>76</sup> Commissioner Foggo had been prepared at first instance to grant a ballot order, despite the fact that the Union had indicated its desire to negotiate a deed containing prohibited content. The Commissioner noted that the demand for a deed had been made before the bargaining period had been initiated, and that the Country Fire Authority had not produced any evidence to show that the demand had subsequently been pressed.<sup>77</sup> On appeal, however, the full bench took a different approach:

In our view, the pursuit of claims which involve prohibited content at the same time as seeking a Workplace Agreement, whether the prohibited content forms

*Union v Skilled Group Ltd* (Unreported, Australian Industrial Relations Commission, Simmonds C, 9 May 2007).

<sup>73</sup> (Unreported, Australian Industrial Relations Commission, Acton SDP, 11 July 2006).

<sup>74</sup> (Unreported, Australian Industrial Relations Commission, Lawler V-P, 13 October 2006).

<sup>75</sup> Ibid [13]. See also *Construction, Forestry, Mining and Energy Union v Thiess Pty Ltd* (Unreported, Australian Industrial Relations Commission, Lawler V-P, 19 October 2006).

<sup>76</sup> (2006) 158 IR 120.

<sup>77</sup> Transcript of Proceedings, *United Firefighters' Union of Australia v Country Fire Authority* (Australian Industrial Relations Commission, Foggo C, 17 August 2006).

part of the proposed agreement or otherwise, strongly suggests that the Union is not genuinely trying to reach a Workplace Agreement which complies with the requirements of the Act. In the circumstances of this case, claims for prohibited content had been made, and at no time prior to, or during the proceedings before the Commissioner, was there any reliable evidence to show that *the claims were no longer being pursued or were otherwise irrelevant to the negotiations for a collective agreement*. In these circumstances, we do not believe that the Commissioner could have been satisfied that the [Union] was genuinely trying to reach an agreement during the bargaining period, or at the time of the application.<sup>78</sup>

In effect, therefore, once a side agreement is ‘on the table’, the onus is on the union to indicate that it is no longer seeking such a deal if it subsequently wishes to take protected action.

The obvious step for a union is to make a formal statement that it is no longer pursuing the unregistered agreement. The AIRC has been prepared to recognise that ‘[t]he dynamics of industrial relations negotiations require a practical approach which acknowledges that both parties may alter their position during the course of negotiations for tactical or other reasons.’<sup>79</sup> It is now accepted that even where a union has at one point in negotiations proposed the inclusion of what might be prohibited content in an agreement, it may formally withdraw the claims in question or indeed simply give a general indication that it will not pursue prohibited content. To shift position in this way does not mean that the union is not genuinely seeking to reach agreement.<sup>80</sup> Similarly, it would seem, a union may make a tactical declaration that it is seeking to negotiate only a registered agreement, or at least that any negotiations over a common law agreement are to be regarded as an entirely separate exercise.<sup>81</sup> With that done, ‘genuine’ bargaining can be established and a ballot order obtained. There is, of course, nothing to stop the union resuming its quest for a side agreement at a later date.

The absurdity of the resulting position is readily apparent, with unions and employers forced to adopt a ‘two track’ approach to negotiating collective agreements. One might well question a regulatory system that makes the legality

<sup>78</sup> *United Firefighters' Union of Australia v Country Fire Authority* (2006) 158 IR 120, 135 (Watson V-P, Lacy SDP and Hingley C) (emphasis added).

<sup>79</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Amcor Packaging (Australia) Pty Ltd* (Unreported, Australian Industrial Relations Commission, Harrison C, 6 December 2006) [34]. See also *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v CSBP Ltd* (Unreported, Australian Industrial Relations Commission, Drake SDP, 20 April 2007) [64]. This is not to say that a party may continually ‘shift the goalposts’ in negotiations: see, eg, *Liquor, Hospitality and Miscellaneous Union — Western Australian Branch v CSBP Ltd* (Unreported, Australian Industrial Relations Commission, McCarthy DP, 15 June 2007).

<sup>80</sup> See, eg, *National Union of Workers v Blue Circle Transport Pty Ltd* (Unreported, Australian Industrial Relations Commission, Watson V-P, 11 August 2006); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Tyco Australia Pty Ltd* (2006) 157 IR 15; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Mayfield Engineering Pty Ltd t/as Metlabs* (Unreported, Australian Industrial Relations Commission, Acton SDP, 21 November 2006).

<sup>81</sup> See, eg, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Amcor Packaging (Australia) Pty Ltd t/as Amcor Cartons Australasia* (Unreported, Australian Industrial Relations Commission, Harrison C, 6 December 2006).

of industrial action turn on the willingness of parties to declare that they are not interested in an agreement that a few days or weeks earlier was firmly on their agenda.

## VII THE GENERAL LAW OF CONTRACT: SOME LIMITATIONS

Assuming that the *WRA*, as currently enacted, does allow the existence of common law collective agreements made between unions and employers, this is by no means the end of the matter. As the High Court has suggested in *Electrolux* and the *Private Arbitration Case*, such agreements may have effect as commercial agreements according to the principles of the general law.<sup>82</sup> These principles can create considerable difficulties for the kinds of agreements that unions and employers often wish to make.

Typically, a union seeks an agreement that will commit the employer to confer a stipulated range of benefits on all, or a given class, of employees engaged by the employer. That includes the union's own members, and also employees who are not members. As *Metal Trades Employers Association v Amalgamated Engineering Union*<sup>83</sup> illustrated, a union generally has no interest in encouraging the employment of cheaper, non-union labour. The union also wants the agreement to cover both existing employees and any new recruits to the business who will be performing work of the same kind. Again, there is no advantage in allowing the employer to engage new staff more cheaply.

In addition, unions typically want the employer to commit to matters benefiting the collective, and not only to matters conferring benefits on individuals. For example, in the past, unions have negotiated for automatic payroll deductions of union dues — a matter consistently held by the High Court *not* to be a matter pertaining to the individual employment relationship, but a matter of concern to the union as a collective.<sup>84</sup> Other examples are a commitment that the union play a role in grievance-handling procedures, and obligations to consult unions on workplace change issues such as planned redundancies, new technologies and training schemes. In the current climate — where these kinds of matters may be prohibited content under the *WRA* and *WR Regulations* — unions may be particularly anxious to include such matters in a common law agreement, to enhance their own chances of survival post-Work Choices.

This list of desirable features of agreements creates some immediate problems under the general law. The requirement that individual benefits be conferred upon non-members or future employees creates privity problems: a common law contract can benefit and burden only those who are party to the contract at the

<sup>82</sup> *Electrolux* (2004) 221 CLR 309, 353 (McHugh J), 368 (Gummow, Hayne and Heydon JJ); *Private Arbitration Case* (2001) 203 CLR 645, 658 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>83</sup> (1935) 54 CLR 387.

<sup>84</sup> See above n 23. As noted in *Construction, Forestry, Mining and Energy Union v Ulan Coal Mines Ltd* (Unreported, Australian Industrial Relations Commission, Lawler V-P, 13 October 2006) [12], there is nothing 'intrinsically evil' about such arrangements.

time it is made.<sup>85</sup> To be a party to a contract, a person must give their informed consent, either directly or through an agent authorised to make the contract on their behalf. By contrast, a statutory collective workplace agreement requires the support of only a simple majority of those who vote on its adoption in order to bind all the employees it covers, including any new recruits engaged while the agreement remains in force.<sup>86</sup> This, of course, is the principal advantage of legislating for the recognition and enforcement of collective workplace agreements. So long as the agreement is made according to the formal requirements of the statute it will be binding, notwithstanding any concerns about whether each and every employee agreed to it. The first obstacle to using common law contracts to do essentially the same work as a statutory workplace agreement is therefore the doctrine of privity. How can such an agreement be made so as to bind the employer in respect of all current and future employees?

The requirement that the agreement confer benefits on the union as a collective creates a different kind of problem. The union, as a corporation able to sue and be sued in its own name,<sup>87</sup> can be a party to such a contract, so privity does not present a problem. However, what consideration can the union provide to support such a contract? Under the general law, a contract is binding only if it is supported by consideration flowing from the promisee to the promisor. Contractual promises must be purchased — not necessarily with money, but with some kind of forbearance.<sup>88</sup>

This problem is in fact the easiest to overcome. Contract law's preoccupation with consideration can be dealt with by making the agreement a properly executed deed. Execution of a deed provides sufficient evidence of the parties' serious intention to be legally bound by the agreement, so that consideration is deemed to be unnecessary,<sup>89</sup> except in one respect. Even an agreement made by deed will need to be supported by consideration if the agreement purports to assign some property right that does not presently exist. This particular rule, which is based on the principle that equity will only support an assignment of future property if it is supported by executed consideration,<sup>90</sup> is unlikely to arise in agreements dealing with the matters described above. It may, however, become an issue if unions were to attempt to use common law collective agreements to bargain for security for employee entitlements by means of sophisticated financial instruments. It is a complication which need not concern us here.

The problems that the doctrines of privity and consideration (where there is no deed) may cause are illustrated in *Ryan v Textile Clothing and Footwear Union*

<sup>85</sup> See *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1956) 95 CLR 43; *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460. See generally J W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (5<sup>th</sup> ed, 2007) ch 16.

<sup>86</sup> WRA ss 340(2), 351(b).

<sup>87</sup> See, eg, WRA sch 1 cl 27.

<sup>88</sup> See Carter, Peden and Tolhurst, above n 85, ch 6.

<sup>89</sup> Ibid 111–12.

<sup>90</sup> See R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) 242–3.

of Australia ('Ryan').<sup>91</sup> Ryan arose because a company, Homfray Carpets, found itself in the hands of receivers. While it was a going concern, the company had entered into a number of agreements with unions, representing the industrial interests of its employees, to pay above-award redundancy payments should any redundancies be necessary. These agreements might have been registered under prevailing Victorian legislation, but — for reasons known only to the parties themselves — they were not.<sup>92</sup> Nevertheless, while the company was solvent it maintained a practice of honouring the agreements.

The trouble arose when the receivers and managers took control and sought to retrench many workers. They made all redundancy payments due under the prevailing award, but sought directions from the Supreme Court of Victoria before making any further payments according to the terms of the unregistered collective agreements. Insolvency practitioners are understandably cautious in ensuring that dispersal of a company's assets occurs in accordance with strict legal obligations — they can be personally liable to repay any funds improperly distributed.<sup>93</sup>

The Court held that the unregistered agreements were unenforceable — as statutory agreements, because the parties had failed to register them, and as contracts, because they failed to satisfy a number of common law requirements. First, to satisfy the doctrine of privity, it was necessary to identify the parties to each agreement. On its face, only the employer and the unions were signatories to the agreements: individual employees were not named as parties, and hence had no standing to enforce the agreements by claiming the promised redundancy payments. The unions' argument that their officers had signed the agreements as an agent for all employees could not stand on the facts.

An agency relationship is a consensual relationship, whereby a principal authorises the agent to act on the principal's behalf. Agency cannot arise where the principal has no knowledge of the agent, or has not authorised the agent to act.<sup>94</sup> The unions could not demonstrate that they had been authorised even by their own members, let alone by non-members. They certainly could not act as agents for any person who was not even an employee at the time the agreements were made. According to the doctrine of privity, only those employees who actually authorised the unions to act as their agent in entering into the agree-

<sup>91</sup> [1996] 2 VR 235.

<sup>92</sup> The agreements, made in 1991, could have been registered under the *Industrial Relations Act 1979* (Vic), which was in force until 1 March 1993.

<sup>93</sup> Liquidators are 'officers' for the purpose of *Corporations Act 2001* (Cth) s 9 and are thereby subject to the duty of care in s 180. Section 180 is a 'civil penalty provision' (s 1317E), and a breach can give rise to an order for compensation to the company under s 1317H. Liquidators may also be removed for misdirecting payments. Sections 473(1) and 503 allow the court to remove a liquidator for 'cause', which includes breach of the duty of care: see Andrew R Keay, *McPherson's Law of Company Liquidation* (4<sup>th</sup> ed, 1999) 313. For a case involving termination payments to employees: see *City & Suburban Pty Ltd v Smith (as liquidator of Conpac (Aust) Pty Ltd (in liq))* (1998) 28 ACSR 328, 334–6 (Merkel J).

<sup>94</sup> In *Markwick v Hardingham* (1880) 15 Ch D 339, 349, James LJ stated: 'the relation of principal and agent requires the consensus of both parties'. See generally G E Dal Pont, *Law of Agency* (2001) 91–3. The principal may be held to have ostensibly authorised an agent by holding the agent out as one authorised: see *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 505 (Diplock LJ). However, the doctrine of ostensible authority still requires the existence of a principal at the time of the agent's act.

ments could be made a party to the agreements.<sup>95</sup> Since the agreements were drafted in very general terms and purported to apply to all employees, each union's claim to be acting as an agent failed on the facts.<sup>96</sup>

Consideration also proved an obstacle in *Ryan*. When the unions sought to enforce the agreements in their own right, as the parties principal, they were faced with the argument that they had given no consideration for the employer's promise. It was the employees who provided the work in return for entitlements. The document referred to no consideration provided by the unions to support the agreements, nor could the unions establish any. The unions' argument that they had given consideration by forbearing from taking industrial action was also rejected.<sup>97</sup> The taking of industrial action is nothing more than the withdrawal of labour by individual employees — the unions could not claim the employees' forbearance as their own.

The last of the reasons for the unenforceability of the agreements in *Ryan* was what the Court took to be a lack of intention to create legal relations. As Brooking JA stated, it appeared that the agreements 'were intended by the unions and the company to have practical industrial, as opposed to legal, consequences.'<sup>98</sup>

Whatever the accuracy of this last view on the particular facts in *Ryan*, it is clear enough that parties to an unregistered agreement may specifically indicate their intention to create a legally enforceable contract.<sup>99</sup> One way to establish such an intent is to record the agreement in a deed. As already noted, the use of a deed may also overcome any problem of consideration. Nevertheless, the expediency of a deed will not remedy the problem of privity; only those who are party to a deed can enforce it. In some jurisdictions, it may be possible to invoke statutory provisions that permit a third party who is an intended beneficiary of a contractual promise to enforce the contract, notwithstanding the common law rule.<sup>100</sup> It is also possible that at some point in the future the common law itself may come to recognise such an exception.<sup>101</sup> For the time being, however, the doctrine of privity will in most cases stand in the way of employees enforcing an unregistered agreement to which they are not party.

## VIII OVERCOMING THE PRIVITY PROBLEM

The privity problem can be managed, and the method for managing it depends on the type of commitments or obligations that the agreement contains. Com-

<sup>95</sup> *Ryan* [1996] 2 VR 235, 239 (Brooking JA).

<sup>96</sup> *Ibid.*

<sup>97</sup> See *Ibid* 270–1 (Hayne JA).

<sup>98</sup> *Ibid* 251.

<sup>99</sup> Assuming that *is* their intention: cf *Construction, Forestry, Mining and Energy Union v Thiess Pty Ltd* (Unreported, Australian Industrial Relations Commission, Lawler V-P, 19 October 2006).

<sup>100</sup> See *Law of Property Act 2000* (NT) s 56; *Property Law Act 1974* (Qld) s 55; *Property Law Act 1969* (WA) s 11. Notwithstanding the statutes in which they are contained, these provisions can each apply to contracts that do not involve an interest in property.

<sup>101</sup> See *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, where the High Court was prepared to create such an exception, but only in relation to insurance contracts. A number of judges appeared to lay the groundwork for the development of a more general exception, but this has not to date eventuated: see Carter, Peden and Tolhurst, above n 85, 332–5.

mitments made by the employer directly to the union create fewer difficulties than commitments made to benefit individual employees.

A number of the matters listed as ‘prohibited’ by the *WRA* and *WR Regulations* are matters which can be framed in an agreement as clauses intended to benefit the collective.<sup>102</sup> For example, a clause which states that the employer would permit the union to run training courses on the employer’s premises, during working hours, is a clause that would confer an entitlement on a union. The union would be privy to that particular obligation. Similarly, a clause which states that the employer would grant the union so many seats at the table in any meetings to discuss workplace change would directly benefit the union, as an organisation in its own right. These matters create no privity problems, and any difficulties with consideration can be overcome by using a deed.

More difficult issues arise when the agreement purports to confer benefits on all employees, including those yet to be hired. Even greater problems arise when the agreement purports to impose a burden on individual employees. An agreement may, for example, require employees to submit to random drug or alcohol testing, or to cooperate with a new system of performance review.<sup>103</sup>

We shall deal first with the simpler issue: that is, proposals to provide benefits to all employees, including new recruits who have not joined the enterprise at the time the agreement is made. The benefits in question might include entitlements to certain remedies for capricious or arbitrary dismissal, another matter prohibited by the *WRA* and *WR Regulations*.<sup>104</sup>

There are at least two ways in which an agreement might effectively confer a benefit on a person who is not yet engaged at the time the agreement is made. One involves the employer binding itself to include agreed clauses in every new employment contract entered into with new recruits. In this way, the deed of agreement made between the employer and the union becomes a ‘head agreement’ which stipulates the terms of a multitude of individual employment contracts. To ensure that the union can establish its own direct interest in this clause, the commitment in the head agreement should be expressed as a promise to the union itself. Words to the following effect might be included:

The employer recognises that the union, as an organisation committed to the representation of its members and potential members, has a legitimate concern that all employees, whenever they commence work, and whether members of the union or not, should enjoy the same benefits.

Another method would be for the union to enter into the deed as a trustee for all employees. Although a person cannot make an agreement as an agent for a principal who does not exist at the time the agreement is made,<sup>105</sup> a trustee can

<sup>102</sup> See *WRA* s 356; *WR Regulations* ch 2 reg 8.5.

<sup>103</sup> Cf the features of the registered collective agreements at the University of Western Australia which Terence Quickenden sought to establish were not binding on him: *Re National Tertiary Education Industry Union; Ex parte Quickenden* (1996) 140 ALR 385; *Quickenden v O'Connor* (2001) 109 FCR 243.

<sup>104</sup> *WR Regulations* ch 2 reg 8.5(5).

<sup>105</sup> See Dal Pont, above n 94, 91–3. Even ratification of the act of an agent is impossible unless the agent purported to act for the principal at the time of the act: see at 113–14. See also *Keighley, Maxsted & Co v Durant* [1901] AC 240.

declare a trust over property for the benefit of a class of beneficiaries, some of whom do not exist at the time of the declaration. So long as the class of beneficiaries is described with sufficient precision that a court can identify who is in and who is outside the class at any time that a determination of beneficial interests needs to be made, the trust will meet the criterion certainty test imposed by English and Australian courts of equity for a valid discretionary trust.<sup>106</sup> The class of beneficiaries could be described as 'any person who is or becomes an employee of the employer during the currency of this deed'. This will remain valid so long as the deed does not exceed any perpetuities period. Perpetuity problems are easily avoided by providing that the deed ceases to operate at a definable point in time, within the perpetuities period. In New South Wales, this is 80 years from the date of making the deed<sup>107</sup> — a considerably longer period than the usual workplace agreement.

Of course, a valid trust also requires property to be the subject of the trust. This presents no obstacle, because contractual rights are an established form of personal property: 'A contracting party may be trustee for a third party of that chose in action which is constituted by the benefit of a contract.'<sup>108</sup>

When the idea of using discretionary trusts in such agreements was raised in a public forum attended by a number of interested union leaders,<sup>109</sup> at least one union advocate expressed some concern. The concern was that a trust would necessarily impose onerous fiduciary obligations on the union. Unions would not want to risk the prospect that their members — or more likely, non-union beneficiaries of such a trust — might sue them for breach of their duties as trustees if the union decided not to pursue an action on behalf of a beneficiary in a particular case.<sup>110</sup> This is one of the peculiarities of trust law. The beneficiaries themselves have no right to enforce the terms of any agreement entered into by the trustee for their benefit. The beneficiaries' only right is against the trustee, to require the trustee to perform the terms of the trust.<sup>111</sup> Commercial trustees (for example, of investment trusts) manage the risk of suit by disgruntled beneficiaries by including extensive indemnities in their trust instruments. The same protections might be used to shelter union trustees from onerous and open-ended fiduciary obligations to employees.

<sup>106</sup> See *McPhail v Doulton* [1971] AC 424. According to J D Heydon and M J Leeming, the criterion certainty test expounded by the House of Lords in this case 'has come to be regularly applied in Australia and New Zealand and should be taken to represent the law': J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (7<sup>th</sup> ed, 2006) 68.

<sup>107</sup> See *Perpetuities Act 1984* (NSW) s 7. For other jurisdictions: see *Perpetuities and Accumulations Act 1985* (ACT) s 8; *Law of Property Act 2000* (NT) s 187; *Property Law Act 1974* (Qld) s 209; *Law of Property Act 1936* (SA) ss 61–2; *Perpetuities and Accumulations Act 1992* (Tas) s 6; *Perpetuities and Accumulations Act 1968* (Vic) s 5; *Property Law Act 1969* (WA) s 101.

<sup>108</sup> Carter, Peden and Tolhurst, above n 85, 325 (citations omitted). See also Heydon and Leeming, above n 106, 22–4.

<sup>109</sup> Discussion following presentation by Joellen Riley, 'Commercial Law Remedies for Workplace Problems' (Speech delivered for Unions NSW, Trades Hall, Sydney, April 2006).

<sup>110</sup> Cf *Ellenbogen v Federated Municipal and Shire Council Employees' Union of Australia, NSW Division* (1986) 14 IR 381, rejecting the argument that a union owes a legal obligation to its members to institute legal action on their behalf. However, no trust was involved in that case.

<sup>111</sup> See Heydon and Leeming, above n 106, 22.

In reality, individual beneficiaries can have a rather difficult time enforcing a trust. Trustees generally do not care much about this weakness in trust law. For them, it is an advantage that it is the trustee and not the individual beneficiary who will bear the initial burden of enforcing an agreement with other parties to secure rights and entitlements for the beneficiary. It would seem — at least on its face — that the trust approach would be one way for a union to maintain supervision of the enforcement of those clauses in the agreement that were intended to benefit individual employees. In the case of a term which purported to provide protection from arbitrary dismissal, this method would restore a role for unions in deciding if and when to enforce these clauses, as was the case before statutory unfair dismissal regimes extended rights to individual employees.<sup>112</sup>

It should also be noted that while a discretionary trust can benefit employees behind their backs and without their knowledge,<sup>113</sup> it cannot burden them.<sup>114</sup> Hence, this technique could not be used to enforce a requirement that employees submit to a form of testing or performance review which their employment contracts would not otherwise allow. If the obligation to be tested or reviewed were to be imposed on existing employees, each employee's personal consent would be required. Otherwise, the effect of enforcing the collective agreement would be to impose a unilateral variation of the non-union employee's contract of employment, and this might trigger a complaint that the original employment contract had been repudiated.

#### IX ENFORCING UNREGISTERED AGREEMENTS

The chief legal concern among those who use common law agreements is the process for enforcing them if trust and cooperation between the parties breaks down, or if another person (perhaps a liquidator) takes control of the employing corporation. Litigation tends to be expensive, and it will not always be a straightforward matter to obtain an order that compels performance of the terms of a deed or contract.

If money is owed to someone who is party to the agreement, then the remedy is straightforward enough. An action for debt or money due may be instituted in the relevant local or magistrates' court or, in some jurisdictions, possibly even in an industrial tribunal.<sup>115</sup> However, if the money is owed to a third party such as

<sup>112</sup> The union's discretion lay in whether to notify a dispute over unfair dismissal to an industrial tribunal. In NSW, this 'gatekeeper' role was so jealously guarded by unions that it took a Liberal government to introduce a right for individual employees to lodge their own unfair dismissal claims: see Andrew Stewart, 'A Quiet Revolution: Unfair Dismissal in New South Wales' (1992) 5 *Australian Journal of Labour Law* 69, 70–1.

<sup>113</sup> Heydon and Leeming, above n 106, 67.

<sup>114</sup> A trust cannot burden a beneficiary, because a burdensome obligation is not property, and therefore cannot be the subject of a trust. 'There can be no trust without property': Heydon and Leeming, *ibid.*

<sup>115</sup> For example, the Industrial Relations Court of SA and the WA Industrial Relations Commission both have jurisdiction over certain contractual claims: see *Fair Work Act 1994* (SA) s 14(a); *Industrial Relations Act 1979* (WA) ss 7(1)(a), 29(1)(b)(ii). There is some doubt, however, as to whether this jurisdiction may now be exercised in relation to federal system employers: see the contrasting views expressed in *Smith v Albany Esplanade Pty Ltd v/s The Esplanade Hotel* [2007] WAIRC 00192 (Unreported, Smith SC, 2 March 2007) and *Armanini v Transfield Ser-*

an individual employee, which is perhaps more likely, a union seeking to enforce the agreement would need to seek an order for specific performance compelling the employer to make the payment. While courts have shown themselves willing to grant such orders in favour of third parties, at least where monetary commitments are involved,<sup>116</sup> the fact that the remedy is equitable in nature may sometimes require proceedings in a higher court.<sup>117</sup>

The real problems occur where the obligation in question is one that does not involve the payment of money — for example, where there is a commitment not to dismiss employees harshly, unjustly or unreasonably, or to consult over certain issues.<sup>118</sup> Courts are generally reluctant to grant any orders (including injunctions) that would have the practical effect of compelling parties to perform non-monetary obligations. This is especially true where the obligations are of a continuing nature and hence would require ongoing supervision by the court, and/or where the parties' relationship involves an element of trust and confidence.<sup>119</sup>

A court is far more likely to prefer to award damages. But that remedy also has its difficulties in this context. For instance, if an employer fails to fulfil a commitment to act fairly in dismissing a worker, what loss does that cause the union that is party to the agreement, as opposed to the dismissed worker?<sup>120</sup> An agreement might purport to impose an obligation on the employer to make some agreed payment in such a case. However, unless that sum represented a genuine attempt to pre-estimate the loss likely to be suffered as a result of the breach, it would be treated by a court as unenforceable by virtue of the rule against penalties.<sup>121</sup>

## X ALTERNATIVE DISPUTE RESOLUTION

One obvious way for parties to avoid such problems is to ensure that any dispute over their agreement will be dealt with by more informal dispute resolution mechanisms, either before, or instead of, going to court. Just as such clauses are standard inclusions in registered workplace agreements,<sup>122</sup> and

*vices (Australia) Pty Ltd* (2007) 162 IR 432. Proposals to amend the WA legislation to address this problem are currently before Parliament: Industrial and Related Legislation Amendment Bill 2007 (WA); Contractual Benefits Bill 2007 (WA).

<sup>116</sup> See, eg, *Beswick v Beswick* [1968] AC 58; *Silver v Dome Resources NL* [2007] NSWSC 455 (Unreported, Hamilton J, 9 May 2007).

<sup>117</sup> See James Crawford and Brian Opeskin, *Australian Courts of Law* (4<sup>th</sup> ed, 2004) 112–13.

<sup>118</sup> This is also a problem with the enforcement of awards or registered collective agreements, though at least there the *WRA* and its state equivalents provide the deterrent of penalties for those who breach non-monetary obligations: see Creighton and Stewart, above n 14, 267–8.

<sup>119</sup> See I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (7<sup>th</sup> ed, 2007) 103–9, 119–25, 598–604.

<sup>120</sup> Though note that where the union has entered into the agreement as a trustee, it may seek to recover damages on behalf of an employee-beneficiary. In such a case, the loss to be assessed is that of the beneficiary. Once recovered, the damages will themselves be held on trust for the beneficiary, and must be paid over on request: see *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460, 501–2 (Windeyer J).

<sup>121</sup> See Carter, Peden and Tolhurst, above n 85, 871–80.

<sup>122</sup> Indeed they are required by s 353 of the *WRA*. As to the impact of the Work Choices reforms on dispute resolution under the *WRA*: see A Forsyth, 'Dispute Resolution under WorkChoices: The First Year' (2007) 18(1) *Labour and Industry* 21.

indeed in commercial agreements (especially in industries such as construction),<sup>123</sup> so it is open to the parties to agree that disputes will be resolved by some process of mediation and/or arbitration.

One issue that arises with these clauses is the choice of mediator or arbitrator. Clearly, the parties are free to select a private provider, but such a person could be expected to charge a fee for their services. Is it possible, though, to appoint a member of one of Australia's publicly funded industrial tribunals and ask (or even expect) them to provide their services without charge?

#### *A Private Arbitration and the AIRC*

As far as the AIRC is concerned, based on its ruling in *Construction, Forestry, Mining and Energy Union v Macmahon Contractors Pty Ltd ('Macmahon')*,<sup>124</sup> the formal answer would appear to be 'no'. In this case the AIRC was asked to help resolve a dispute concerning a company's drug testing procedures, pursuant to a dispute resolution clause in a certified agreement that covered any 'grievance [arising] through the course of employment'.<sup>125</sup> A full bench that included the President, Giudice J, noted that this formula was broader than the jurisdiction conferred by s 170LW of the pre-reform *WRA*. This permitted agreements to empower the AIRC only to 'settle disputes over the application of the agreement'.<sup>126</sup> Since the dispute here did not meet that criterion, the AIRC had no power to deal with the matter. As the full bench emphasised:

the Commission, being a statutory creation, only has the powers which the Act confers upon it. This principle has been articulated by the High Court and the Commission in a number of cases. It follows that the Commission cannot increase its own jurisdiction by an award or decision it makes and *nor can the parties to an agreement*.<sup>127</sup>

Hence, while it is possible for the AIRC to conduct what the High Court described as 'private arbitration' under the terms of a registered agreement,<sup>128</sup> this can only be done within the terms of the statutory grant of power.<sup>129</sup> By clear implication, there can be no authority for the AIRC to arbitrate (or indeed

<sup>123</sup> See Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2<sup>nd</sup> ed, 2002) 96–102.

<sup>124</sup> (2005) 146 IR 466.

<sup>125</sup> Ibid 467 (Giudice J, Lawler V-P and Raffaelli C).

<sup>126</sup> Ibid 468 (Giudice J, Lawler V-P and Raffaelli C).

<sup>127</sup> Ibid 470 (emphasis added), citing *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation* (2003) 128 IR 385, 393 (Giudice J, Harrison SDP and Simmonds C); *Charles Sturt University v National Tertiary Education Union* (2005) 145 IR 319, 324 (Lawler V-P, O'Callaghan SDP and Harrison C).

<sup>128</sup> See *Private Arbitration Case* (2001) 203 CLR 645, 658 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>129</sup> Likewise, in relation to a post-Work Choices agreement the AIRC may conduct a dispute resolution process only to the extent that it is specifically authorised by the agreement, and then only in accordance with the terms of *WRA* pt 13 div 5. It is possible, however, that an agreement may now validly confer on the AIRC a power to resolve disputes over matters that go beyond the application of the agreement; see Ross, Trew and Sharard, above n 11, 54–5, noting the difference in wording between pre-reform *WRA* s 170LW and the current *WRA* s 353(1), though the matter is not perhaps as clear as the authors seem to suggest.

conciliate or offer any other form of dispute resolution) in situations for which the statute does not provide.

Of course, *Macmahon* was a case where one of the parties, the employer, formally objected to the AIRC taking jurisdiction. If neither party objects to the AIRC being given a role for which the *WRA* does not expressly provide, where is the problem?

Throughout the history of the pre-Work Choices arbitration system, AIRC members were prepared to help resolve disputes over which they had no formal jurisdiction, provided the parties did not object. Perhaps the most notable example was the practice that for many years allowed disputes over the reinstatement of dismissed workers to be brought before the AIRC, well before the first federal unfair dismissal laws were enacted in 1993.<sup>130</sup> Employers frequently consented to the AIRC dealing with such claims and agreed to abide by its 'decision', even though the dispute in question rarely had the 'interstate' character required by the statute under which the AIRC was purporting to operate.<sup>131</sup> At the peak of this informal system, hundreds of cases were dealt with by the AIRC each year.<sup>132</sup>

Even in more recent times under the *WRA*, practitioners have become used to certain AIRC members offering to adjourn proceedings to 'go into conference', whether they have the formal power to conciliate or not. The willingness of such members to assist, with or without *WRA* authorisation, in resolving disputes underlying the proceedings before the AIRC is one of the reasons many parties have retained confidence in the AIRC, despite its reduced role.<sup>133</sup>

In spite of the long tradition of 'informal' or 'consent' dispute resolution in the federal tribunal, some awkward questions remain about the use of public resources to support activities that are not formally within its statutory jurisdiction. A rare airing of these issues appeared in the judgment of Heerey J of the Federal Court of Australia in *National Union of Workers v Pacific Dunlop Tyres Pty Ltd*.<sup>134</sup>

In this case, the respondent employer sought to block an application by the union and two of its members to institute proceedings alleging a breach of award by the employer. According to the employer, the parties had made a binding agreement to abide by a previous 'decision' issued by Munro J of the AIRC in resolving an industrial dispute notified by the union. The evidence showed that the parties had consented to Munro J dealing with the matter, despite an apparent absence of any interstate element to the dispute. The employer had in effect

<sup>130</sup> *Industrial Relations Reform Act 1993* (Cth).

<sup>131</sup> Both the *Conciliation and Arbitration Act 1904* (Cth) s 4, and the subsequent *Industrial Relations Act 1988* (Cth) s 4(1), included in the definition of industrial dispute a requirement that it extend 'beyond the limits of any one State'.

<sup>132</sup> See J O'Donovan, 'Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission: Jurisdiction and Practice' (1976) 50 *Australian Law Journal* 636, 639–40.

<sup>133</sup> See Helen Forbes-Mewett, Gerard Griffin and Don McKenzie, 'The Australian Industrial Relations Commission: Adapting or Dying?' (2003) 11 *International Journal of Employment Studies* 1; Forsyth, above n 122.

<sup>134</sup> (1992) 37 FCR 419.

agreed not to ‘pull jurisdiction’ on the AIRC.<sup>135</sup> According to the employer, this made Munro J a ‘private arbitrator’, the parties’ agreement to accept his decision was one that had contractual effect, and the doctrine of estoppel could be raised to prevent the finality of that decision being ignored.<sup>136</sup>

In rejecting this contention, Heerey J discussed the difference between ‘private arbitration’, where the arbitrator’s power is derived solely from the agreement of the parties, and the statutory system of ‘industrial arbitration’.<sup>137</sup> In this case, everything pointed to Munro J having exercised his statutory role as an industrial arbitrator:

he received submissions from the parties (who addressed him as ‘Your Honour’ and not ‘Mr Arbitrator’), conducted conferences, heard evidence and delivered a decision which on its face purports to be not the award of a private arbitrator but a decision of the Commission under his hand as a Deputy President.<sup>138</sup>

Heerey J also rejected any suggestion that the parties had made some form of agreement. There was no ‘bargain contracted by mutual promises’, but rather ‘two parties independently, for reasons which suited each one, taking a similar course’ — that being to leave ‘the jurisdictional point in abeyance, in the hope that the result of a hearing before an experienced Deputy President of the Commission might be acceptable to both sides.’<sup>139</sup>

Significantly, however, Heerey J also noted some of the problems that would have arisen had Munro J been asked, and consented, to act ‘in the unusual role of private arbitrator’:

The [Industrial Relations Act 1988 (Cth)] contains no indication that members of the Commission are required or permitted, as part of their official function, to act as private arbitrators. Therefore if, as the employer alleges, the parties in fact agreed that Munro J was to act as a private arbitrator, his Honour would have had to be aware of that agreement and consent to so act. Presumably he would receive payment for his services and would carry out the work in his spare time. He would thus probably need the consent of the Minister to engage in paid employment outside the duties of his office: see s 25(1) of the Act. Since private arbitration and industrial arbitration under the Act are markedly different functions, in carrying out the former he would doubtless be at pains to make it clear that he was not carrying out the latter, which of course was his usual work.<sup>140</sup>

As this passage suggests, it is one thing for an AIRC Member to purport to exercise a statutory power to deal with a matter that may be beyond their jurisdiction, where the parties make a strategic choice not to raise any objection. It is quite another for that member to purport to act as a private conciliator or arbitrator under the terms of an agreement that can have no statutory effect. It is hard to see the basis on which the time, resources and facilities of a statutory

<sup>135</sup> Ibid 421–2 (Heerey J).

<sup>136</sup> Ibid 428 (Heerey J).

<sup>137</sup> Ibid 424–6.

<sup>138</sup> Ibid 427 (Heerey J).

<sup>139</sup> Ibid 427–8.

<sup>140</sup> Ibid 426.

tribunal can be deployed in such a way, without specific authorisation from Parliament. There is certainly nothing in the *WRA* that expressly permits this to happen.

#### B *Private Arbitration in the State Tribunals under 'Referral Agreements'*

What though of the state tribunals? Four states have recently moved to authorise their industrial relations commissions to resolve disputes under private industrial agreements.<sup>141</sup> Legislation in NSW,<sup>142</sup> Queensland<sup>143</sup> and South Australia<sup>144</sup> permits parties to enter into a 'referral agreement' that confers specified dispute resolution functions on the relevant commission.<sup>145</sup> A similar proposal is before the Western Australia Parliament.<sup>146</sup> In the case of the SA Commission, it may exercise all of its ordinary statutory powers under the *Fair Work Act 1994* (SA), except to the extent that the parties specify otherwise or this would conflict with the referral agreement.<sup>147</sup> Any decision or order it makes in performing its agreed role may also be enforced under this Act.<sup>148</sup> In NSW, by contrast, provision is made that nothing in the relevant section

makes any order, determination or other decision of the Commission in respect of a dispute binding on the parties to the dispute unless the referral agreement operates (apart from this section) to make any such order, determination or decision binding on the parties ...<sup>149</sup>

There is a similar provision in the Queensland Act.<sup>150</sup>

These new provisions are most obviously aimed at employers and unions operating in the federal system. For example, parties in NSW and SA are expressly permitted to agree on a system of private arbitration for unfair dismissal claims.<sup>151</sup> Under the *WRA*, not only are many employees now excluded

<sup>141</sup> Tasmania also permits a form of 'private arbitration' of industrial disputes by its Industrial Commission: see *Industrial Relations Act 1984* (Tas) s 61. However, this provision predates the Work Choices reforms and does not require a formal agreement by the parties, merely a joint request to the President. Section 61 has been amended by *Industrial Relations Amendment Act 2007* (Tas) s 9, allowing private conciliation as an alternative to arbitration.

<sup>142</sup> *Industrial Relations Act 1996* (NSW) s 146A, amended by the *Industrial Relations Amendment Act 2006* (NSW) s 3, sch 1(3).

<sup>143</sup> *Industrial Relations Act 1999* (Qld) s 273A, amended by the *Industrial Relations Act and Other Legislation Amendment Act 2007* (Qld) s 25.

<sup>144</sup> *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA) sch 1. This Act, formerly known as the *Commercial Arbitration Act 1986* (SA), was amended and renamed by the *Statutes Amendment (Public Sector Employment) Act 2006* (SA) pt 8.

<sup>145</sup> See also *Industrial Relations Act 1996* (NSW) s 146B; *Industrial Relations Act 1984* (Tas) s 19A, which authorise the NSW and Tasmanian Commissions respectively to perform dispute resolution processes under either a federal workplace agreement or the 'model dispute resolution process' in *WRA* pt 13 div 2 where selected by the parties concerned.

<sup>146</sup> Employment Dispute Resolution Bill 2007 (WA).

<sup>147</sup> *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA) sch 1 cl 2(6).

<sup>148</sup> *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA) sch 1 cl 2(10).

<sup>149</sup> The parties can provide for a right of appeal to the full bench of the NSW Industrial Relations Commission under *Industrial Relations Act 1996* (NSW) s 146A(9). As to the nature of such an appeal: see *Australian Workers' Union v Bluescope Steel (AIS) Pty Ltd* (2006) 157 IR 93.

<sup>150</sup> *Industrial Relations Act 1999* (Qld) s 273A(5).

<sup>151</sup> *Industrial Relations Act 1996* (NSW) s 146A(4)(b); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA) sch 1 cl 2(1)(c). A referral agreement under s 273A of the

from lodging such a claim with the AIRC under Division 4 of Part 12,<sup>152</sup> but workplace agreements are (as we have seen) specifically prohibited from seeking to provide any right or remedy in relation to a harsh, unjust or unreasonable termination.<sup>153</sup>

While the SA and Queensland provisions had only recently taken effect at the time of writing, the NSW system has been in operation since March 2006. A number of major corporations have already signalled their willingness to use it. For example, BlueScope Steel is recorded as having entered into a ‘protocol’ with a number of unions that imposes an obligation to complete referral agreements whenever ‘the need arises for the Commission to assist in resolving industrial disputes’.<sup>154</sup> As of December 2007, there have been around 20 reported instances of the NSW Industrial Relations Commission arbitrating disputes involving the company under s 146A of the *Industrial Relations Act 1996* (NSW).<sup>155</sup>

The question remains, though, whether state provisions of this kind can *validly* have effect in relation to federal system parties. With certain exceptions, s 16 of the *WRA* automatically excludes state or territory industrial laws from applying to federal system employers. The definition of a ‘State or Territory industrial law’ in s 4(1) of the *WRA* expressly includes the *Industrial Relations Acts* in both NSW and Queensland, and hence their provisions on ‘referral agreements’. The definition also includes any Act that ‘applies to employment generally’ and that has as ‘one or more of its main purposes ... regulating workplace relations (including industrial matters, industrial disputes and industrial action within the ordinary meaning of those expressions)’.<sup>156</sup> This would seem to catch the *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA), which undoubtedly seeks to regulate industrial disputes. Given that the subject matter of sch 1 is reflected in the title of this Act, it is hard to deny that a ‘main purpose’ of the statute is to deal with such issues — especially as it need only be a main purpose, not *the* main purpose.

Section 16(1) of the *WRA* states that the Act is ‘intended to apply to the exclusion of [state or territory industrial laws] so far as they would otherwise apply in relation to an employee or employer’. The NSW Commission has consistently sought to interpret this provision narrowly, so as to preserve the operation of state laws in relation to constitutional corporations and other federal system

*Industrial Relations Act 1999* (Qld) may deal with an ‘industrial dispute’, which is defined in sch 5 to mean a dispute over an ‘industrial matter’. That term is in turn defined broadly enough in s 7 to include a dispute over a dismissal.

<sup>152</sup> See Anna Chapman, ‘Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege’ (2006) 16(2) *Economic and Labour Relations Review* 237; Marilyn J Pittard, ‘Fairness in Dismissal: A Devalued Right’ in Julian Teicher, Rob Lambert and Anne O’Rourke (eds), *WorkChoices: The New Industrial Relations Agenda* (2006) 74.

<sup>153</sup> See *WR Regulations* ch 2 reg 8.5(5).

<sup>154</sup> *Australian Workers Union v BlueScope Steel (AIS) Pty Ltd* [2007] NSWIRComm 1029 (Unreported, Connor C, 5 June 2007) [3].

<sup>155</sup> At the time of writing, the most recent was *Abbott v BlueScope Steel (AIS) Pty Ltd* [2007] NSWIRComm 1097 (Unreported, Connor C, 19 December 2007).

<sup>156</sup> *WRA* s 4(1).

employers.<sup>157</sup> Although the point does not appear to have been argued, the Commission seems to have proceeded on the basis that s 146A of the *Industrial Relations Act 1996* (NSW) is somehow unaffected by the *WRA*.<sup>158</sup>

By contrast, the breadth of the exclusion in s 16(1) of the *WRA* has been emphasised by both the High Court and a Full Court of the Federal Court. In upholding the constitutional validity of the provision, a majority of the High Court stressed that it is open to the Commonwealth to define a ‘field’ of regulation, pass laws that relate to that field, and thereby exclude the states from trespassing on it. This can be done regardless of whether the federal regime actually deals with some of the matters covered by the state laws that will be excluded.<sup>159</sup>

In *Tristar Steering & Suspension Ltd v Industrial Relations Commission of New South Wales*,<sup>160</sup> the Full Court of the Federal Court held that s 16 of the *WRA* precluded the NSW Commission from conducting an inquiry into an industrial dispute involving a federal system employer, irrespective of whether the Commission sought to impose any obligations on that employer. Each of the judges stressed that s 16 was to be interpreted broadly. According to Buchanan J:

By its terms s 16 of the *WRA* declares an intent that the *WRA* occupy, to the exclusion of the [*Industrial Relations Act 1996* (NSW)], (subject only to the exceptions in s 16(2), (3) and (4) — which are not here relevant), the whole field of legislative activity ‘in relation to an employee or employer’ (my emphasis) where the employer is an entity identified by s 6(1) of the *WRA*, including a constitutional corporation. The words ‘in relation to’ are broad. They are not confined to exclude only actual regulation of specific rights and obligations but anything done by or under a State or Territory industrial law. Furthermore, although in many, perhaps most, cases it is the relationship of employer and employee, or the relations of an employer with its employee or employees, which will provide the practical foundation from which s 16 commences that should not be understood to import a limitation upon, or add a further gloss to, the words ‘in relation to an employee or employer’. Matters which concern them individually, or separately, are also within the field covered.<sup>161</sup>

<sup>157</sup> See, eg, *Australian Workers Union v Australian Steel Mill Services Pty Ltd* [2006] NSWIR-Comm 1141 (Unreported, Connor C, 6 October 2006); *Re Inquiry into Matter Relating to Availability of Work at Tristar Steering & Suspension Australia Ltd* (2007) 161 IR 50. The Commission has taken a similarly broad view of the scope of the exclusions in *WRA* s 16(2), (3): see, eg, *Re Transport Industry — Mutual Responsibility for Road Safety (State) Award and Contract Determination [No 2]* (2006) 158 IR 17; cf *Endeavour Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2007] FCAFC 177 (Unreported, Ryan, Moore and Mansfield JJ, 22 November 2007). *WR Regulations* ch 2 reg 1.2(2) has also been interpreted broadly, preserving the operation of state laws relating to pre-Work Choices matters: see, eg, *Skilltech Consulting Services Pty Ltd v Australian Workers' Union (NSW)* (2007) 160 IR 73.

<sup>158</sup> Cf *Australian Workers Union v BlueScope Steel Pty Ltd* [2007] NSWIRComm 1088 (Unreported, Connor C, 3 December 2007), where Commissioner Connor was prepared to accept that while the Commission could take jurisdiction under a referral agreement, it could not exercise that jurisdiction in such a way as to vary a preserved state agreement that had effect as a federal instrument under *WRA* sch 8.

<sup>159</sup> *New South Wales v Commonwealth* (2006) 229 CLR 1, 166 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>160</sup> (2007) 158 FCR 104.

<sup>161</sup> Ibid 114–15. See also the reasoning at 107–8 (Kiefel J), 109–10 (Gyles J).

On this interpretation of s 16 of the *WRA*, there is a strong argument that the new dispute resolution provisions in NSW, Queensland and SA cannot validly apply to federal system employers and employees. If so, then the respective commissions would not be authorised to perform the functions for which a referral agreement might provide, at least where such parties are involved. The only exceptions would be where a dispute concerned one of the ‘non-excluded matters’ listed in s 16(3) of the *WRA*, such as occupational health and safety, child labour or long service leave.

Once again, the question may be posed whether any of this matters if the parties have consented to the state tribunal arbitrating their dispute. The point could obviously arise if a party was unhappy enough with the outcome of ‘private’ arbitration to challenge the power of the tribunal to act. A more intriguing question might be whether a disgruntled party could even sue the arbitrator for something said or done in discharging their duties under the agreement. Members of industrial tribunals generally have the usual judicial immunity from suit in performing their statutory functions.<sup>162</sup> However, as the High Court noted in *Fingleton v The Queen*,<sup>163</sup> there are limits to this immunity. Gleeson CJ quoted Lord Bridge to the effect that it is ‘clear that the holder of any judicial office who acts in bad faith, *doing what he knows he has no power to do*, is liable in damages.’<sup>164</sup> Furthermore, as Kirby J tellingly observed,

[s]imply because an action is performed by a person who is a judicial officer does not, without more, attract the immunity. Nor does the fact that the action was done during work hours, in or from the judicial officer’s chambers, on official notepaper or otherwise with an outward semblance of official conduct, afford the immunity *if the reality posited by the legislation is missing*.<sup>165</sup>

There has not to date been any definitive ruling from the higher courts as to the applicability of the NSW, Queensland or SA ‘referral agreement’ provisions to federal system parties. For the time being, members of the respective tribunals may no doubt continue to enjoy their usual immunity from suit, on the basis that they are exercising a jurisdiction and powers that they presumably believe, in good faith, to exist. But should an adverse finding be made by the courts, and in the absence of a plausible argument that the dispute concerns a ‘non-excluded matter’, it might be a very different story — whatever the willingness of the parties to consent to the tribunal arbitrating.

### C *The Commercial Arbitration Acts*

A further issue with the use of private dispute resolution processes under unregistered agreements is how the outcomes of such a process might be enforced, or indeed challenged. To the extent that an agreement provides for some form of private arbitration, it would seem that the Commercial Arbitration

<sup>162</sup> See, eg, *WRA* s 97; *Industrial Relations Act 1996* (NSW) sch 2 cls 7–8; *Industrial Relations Act 1999* (Qld) s 337; *Fair Work Act 1994* (SA) s 44.

<sup>163</sup> (2005) 227 CLR 166.

<sup>164</sup> *Ibid* 185, quoting *Re McC (A Minor)* [1985] AC 528, 540 (emphasis added).

<sup>165</sup> *Fingleton v The Queen* (2005) 227 CLR 166, 226 (emphasis added) (citations omitted).

Acts in each state and territory would apply.<sup>166</sup> These Acts pertain to any ‘arbitration agreement’, a term uniformly defined to mean ‘an agreement in writing to refer present or future disputes to arbitration’.<sup>167</sup> Despite the title of the legislation, there is no requirement that the agreement in question be ‘commercial’ in nature.<sup>168</sup>

Assuming these Acts did apply, one consequence under s 33 of the each Act would be that any ‘award’ made by the arbitrator would be enforceable in the relevant state or territory supreme court (or in some instances a lower court in that jurisdiction) as if it were a judgment issued by that court. Furthermore, it would be open to either party, unless the agreement provided otherwise, to appeal an arbitrator’s decision to that court on ‘any question of law’ arising out of the award.<sup>169</sup> Other roles that the court might play, subject in some instances to the agreement providing otherwise, would include:

- appointing an arbitrator, where the parties cannot agree and there is no other method of filling the vacancy;<sup>170</sup>
- issuing subpoenas to compel attendance before an arbitrator or the production of a document,<sup>171</sup> or compelling persons to do such things when ordered by an arbitrator;<sup>172</sup>
- setting aside an arbitrator’s award, on the basis that there has been ‘misconduct’ by the arbitrator (including ‘corruption, fraud, partiality, bias, and a breach of the rules of natural justice’),<sup>173</sup> or that the award or the arbitration itself has been ‘improperly procured’;<sup>174</sup> and

<sup>166</sup> See *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA). In the case of the SA Act, the reference here is to the main part of the statute, as opposed to the recently added provisions in sch 1 which have already been discussed. It is possible though that if sch 1 causes the Act to be regarded as a ‘State or Territory industrial law’ for the purpose of the exclusion in *WRA* s 16(1)(a), then the rest of the statute is likewise precluded from applying to arbitration agreements made by federal system employers. The exclusion in *WRA* s 16(1)(a) should not affect the other Commercial Arbitration Acts, since none of them can be said to have a ‘main purpose’ of ‘regulating workplace relations’: see *WRA* s 4(1) definition of ‘State or Territory industrial law’.

<sup>167</sup> *Commercial Arbitration Act 1986* (ACT) s 2; *Commercial Arbitration Act 1984* (NSW) s 4(1); *Commercial Arbitration Act 1985* (NT) s 4(1); *Commercial Arbitration Act 1990* (Qld) s 4; *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA) s 4(1); *Commercial Arbitration Act 1986* (Tas) s 4(1); *Commercial Arbitration Act 1984* (Vic) s 4(1); *Commercial Arbitration Act 1985* (WA) s 4(1).

<sup>168</sup> For a general discussion of the Commercial Arbitration Acts: see Astor and Chinkin, above n 123, 298–311. See also Ross, Trew and Sharard, above n 11, 57–9.

<sup>169</sup> Commercial Arbitration Acts s 38.

<sup>170</sup> Commercial Arbitration Acts s 10.

<sup>171</sup> Commercial Arbitration Acts s 17.

<sup>172</sup> Commercial Arbitration Acts s 18.

<sup>173</sup> ‘Misconduct’ is uniformly defined: see *Commercial Arbitration Act 1986* (ACT) s 2; *Commercial Arbitration Act 1984* (NSW) s 4(1); *Commercial Arbitration Act 1985* (NT) s 4(1); *Commercial Arbitration Act 1990* (Qld) s 4; *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA) s 4(1); *Commercial Arbitration Act 1986* (Tas) s 4(1); *Commercial Arbitration Act 1984* (Vic) s 4(1); *Commercial Arbitration Act 1985* (WA) s 4(1).

<sup>174</sup> Commercial Arbitration Acts s 42.

- removing an arbitrator, on the ground of their misconduct, incompetence or unsuitability, or because they have been subject to undue influence.<sup>175</sup>

It remains to be seen whether parties to industrial agreements seek to take advantage of any of these provisions.

One problem with the application of the Commercial Arbitration Acts to industrial agreements is the possibility of inconsistency with the terms of the industrial statutes in each jurisdiction. This is most obviously the case where the agreement in question has been registered under the *WRA*. Even if the Commercial Arbitration Acts are not automatically excluded by the terms of s 16(1) of the *WRA*,<sup>176</sup> they are plainly inconsistent with the detailed rules for dispute resolution and compliance laid down by Parts 13 and 14 of the *WRA* and as such would be overridden by virtue of s 109 of the *Constitution*.<sup>177</sup> But it is also unclear whether the Commercial Arbitration Acts can or do apply where a ‘referral agreement’ is made in accordance with the state provisions discussed in Part X(B) above. None of the relevant statutes clarify how any inconsistency between the two regimes is to be resolved,<sup>178</sup> though presumably the ‘industrial’ provisions would prevail on the basis of being enacted more recently.

## XI LOOKING AHEAD

The highly restrictive Work Choices model of statutory collective agreement making has generated avoidance strategies — or at least perpetuated those originally spawned by the *Electrolux* decision.<sup>179</sup> The newly elected ALP government has promised a ‘freedom to bargain collectively without excessive government rules and regulations’, with no ‘onerous, complex and legalistic restrictions on agreement content’ and a capacity to reach agreement on ‘whatever matters suit’ the bargaining participants, subject only to the requirement that the terms be ‘lawful’.<sup>180</sup>

The ALP has clarified this policy platform, stating that anything contravening the freedom of association rules, including (much to the annoyance of certain unions) any provision for bargaining services fees, will remain prohibited.<sup>181</sup> That aside, and subject to a greatly strengthened ‘safety net’ to prevent award or statutory entitlements being bargained away, it would seem that freedom of contract is to rule. It will be interesting, though, to see whether the ALP government will be prepared to jettison anything in the nature of a matters pertaining requirement, as the wording of its policy might seem to suggest.

<sup>175</sup> Commercial Arbitration Acts s 44.

<sup>176</sup> See above n 166.

<sup>177</sup> See *WRA* s 18(1), which provides that *WRA* s 16 is ‘not a complete statement of the circumstances’ in which inconsistency may arise between the Act and a state or territory law.

<sup>178</sup> A deficiency especially notable in the case of the *Commercial Arbitration and Industrial Referral Agreements Act 1984* (SA), which says nothing about the relationship of the new sch 1 to the remainder of the Act.

<sup>179</sup> (2004) 221 CLR 309.

<sup>180</sup> Kevin Rudd and Julia Gillard, ‘Forward with Fairness: Labor’s Plan for Fairer and More Productive Australian Workplaces’ (Policy Statement, 28 April 2007) 13–15.

<sup>181</sup> See Julia Gillard, ‘Howard’s IR Policy an Unfair Mess’ (Press Release, 8 May 2007).

In the longer term though, the question is whether we can envisage a sustainable system of collective workplace agreement making based entirely on the common law. As the discussion above has explained, the common law is generally an unwieldy tool for dealing with multi-party agreements, and it is particularly inept in creating obligations which will bind a group of people without individual consent by every member of the group. The doctrine of privity creates that problem, while the discretionary trust provides an ingenious, but perhaps unnecessarily complex, solution.

Enforcing common law agreements can also be an expensive and complex process. The common law often refuses to provide genuinely useful remedies (such as reinstatement of workers, and orders for the specific performance of other obligations, such as consultation rights) on the basis that to do so would yoke together unwilling parties to a personal services contract. The easiest way around these obstacles may still be to legislate for a system of collective bargaining. Whether that system needs to involve *registered* agreements, or whether it would be sufficient to allow agreements to operate on a private basis albeit with some modification to the contractual rules and remedies that would otherwise apply, is a question that merits further consideration.