JOINT CONSULTATIVE COMMITTEES IN AUSTRALIA: AN EMPIRICAL UPDATE

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Anthony Forsyth,[*] Samantha Korman[+] and Shelley Marshall[#]

1. Introduction

In contrast to many Western European countries, legislatively mandated systems of works councils or permanent consultative mechanisms with employees have not traditionally featured as components of Australian labour law or labour relations systems. In their absence, voluntarily formed joint employee/employer committees have been one of the primary means for ongoing, direct consultation with Australian employees over matters crucial to their working lives (aside from or as an adjunct to trade unions). Despite a recent resurgence of interest in employee 'voice' mechanisms in industrial relations literature,[1] very little is known about the incidence or purposes of voluntarily formed joint consultative committees (JCCs) in Australia.[2] In particular, little is known about the effect of the legal and policy stances of various Federal and State governments.

Against the trend of many other OECD nations, and apart from a brief period in which JCCs were given legal 'encouragement', successive Australian governments have shied away from legislating for permanent or ongoing employee consultative mechanisms. They have only mandated consultative committees in relation to specific topics, such as occupational, health and safety; while consultation obligations (without the need for a consultative *structure*) have also been imposed under Federal legislation, and in some States, in respect of large-scale redundancies. Have these narrower legislative interventions, together with generally positive policy stances towards industrial democracy, had any wider effect? This paper aims to examine this question and remedy the gap in the literature by drawing together data from various

[*] Senior Lecturer and Director of the Corporate Law and Accountability Research Group, Department of Business Law & Taxation, Monash University; Associate of the Australian Institute of Employment Rights.
[+] Student, Masters of Labour Law, University of Melbourne.
[#] Research Fellow, Corporate Governance and Workplace Partnerships Project and Member of the Centre for Employment and Labour Relations Law, Law School, University of Melbourne.
[1] See, for example, two recent books: Paul Gollan, Ray Markey and Iain Ross (eds), *Works Councils in Australia: Futures, Prospects and Possibilities*, The Federation Press, Leichhardt, NSW, 2002; and Paul Gollan and Glenn Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy: Labor Essays 2003*, Pluto Press/Australian Fabian Society, Melbourne, 2003; and Amanda Pyman, Brian Cooper, Julian Teicher and Peter Holland, 'A Comparison of the Effectiveness of Employee Voice Arrangements in Australia' (2006) 37(5) *Industrial Relations Journal* 543.
[2] R. Markey, 'The State of Representative Participation in Australia: Where to Next?' (2004) 20 *International Journal of Comparative Labour law and Industrial Relations* 533 at 534-537.

sources in order to form what we believe to be a reasonably comprehensive picture of JCCs in Australia.

In this paper JCCs are defined broadly, and could include a variety of practical mechanisms for consultation. Only consultative committees which were ongoing, as opposed to 'one off committees' convened on a single topic or ad hoc basis, are examined in this study.[3] Because JCCs are the products of unilateral management initiative or of union/management agreement, rather than statute, they vary considerably in terms of composition, jurisdiction, powers and organisational level of operation. While consultation involves a two-way flow of information between employers and employees, in terms of their formal powers JCCs may offer workers only the right to information or the right to have their opinions taken into account or heard. There is no *presumption* that the committees are actually decision-making bodies. This is one of the central issues in evaluating the effectiveness of JCCs as a form of worker representation, about which our analysis of the data presented in this paper enables us to form some views.

The data examined in this paper reveals some surprising trends. It demonstrates a steady increase in the number of JCCs provided for in Federal enterprise agreements from 1991 to 1999, and continuing growth in the proportion of JCCs provided for in State collective agreements until 2004. Far from being limited to 'tea, towels and toilets',[4] the established committees appeared to be empowered to discuss matters of strategic importance to the enterprise, at least in so far as they were formally provided for in enterprise agreements. Closer examination of the clauses setting up consultative committees in enterprise agreements suggests that they may have been more concerned with matters aimed at improving productivity and flexibility than with 'employee empowerment' issues, such as work/life balance, professional development, and job satisfaction. This paper speculates that this may be the result of two factors: first, enterprises may view JCCs as a means to create 'high performance workplace systems'; secondly, it may suggest that the 1991 *National Wage Case*, in which the Australian Industrial Relations Commission[5] required award parties to establish mechanisms for consultation and negotiation over efficiency and productivity issues, has had a flow-on effect in enterprise agreements; it may also imply that the Keating Labor Government's support for consultation in the enterprise bargaining process had a lasting legacy, despite having been removed by the Coalition Government in 1996.

The remainder of this paper is divided as follows. The next section (Part 2) considers Federal legislative requirements for consultation in the workplace. Part 3 contains a brief review of previous empirical studies of JCCs. Part 4 discusses broad-picture data gathered from the Australian Centre for Industrial Relations Research and Training (ACIRRT)[6] on the incidence of provisions for formal and ongoing joint consultative

[3] This definition was taken from Mick Marchington, 'Surveying the Practice of Joint Consultation in Australia' (1992) 34 *Journal of Industrial Relations* 530, 533.
[4] P McGraw and I Palmer, 'Beyond Tea, Towels and Toilets: Lessons from a Top 500 Company in Using Joint Consultative Committees for Enterprise Bargaining' (1994) 32 *Asia Pacific Journal of Human Resources* 97.
[5] To be referred to herein as the AIRC, or the Commission.
[6] ACIRRT, now known as the Workplace Research Centre, is based at the University of Sydney. The data was kindly provided by Larissa Bamberry of ACIRRT, free of charge.

committees in enterprise agreements. 48 Federal certified agreements[7] are subsequently examined for closer analysis concerning (among other issues) the subject matters that joint consultative committees are empowered to discuss and the powers of the committees. The final section (Part 5) makes some concluding observations about the data, provides some brief international comparisons, and summarises the prospects for the emergence of formalised workplace consultative mechanisms in the Australian context.

2. Legal Requirements for Consultation

Consultation Obligations under the Federal Labor Government, 1983-1996

Privately owned businesses in Australia have never been compelled to create ongoing consultative *mechanisms* with employees. However, there was a brief period in the 1990s in which Federal industrial relations legislation required businesses entering into enterprise agreements to set up *processes* for consultation, unless the parties to an agreement agreed it was inappropriate to do so. Empirical research conducted elsewhere shows that government policy and legislation has an impact on the incidence and form of consultative schemes.[8] However, the evidence examined in this paper suggests that it is difficult to trace a direct or straight-forward link between government positions and voluntary JCC initiatives in Australia since the early 1990s. While, as this section discusses, the Federal Labor Government provided some obligations to consult, our data shows that the legacy of these obligations appears to have continued after their removal by the Coalition government. This suggests that the link between laws and their effects may be complicated.

The election of a Federal Labor Government in 1983 ushered in a new prominence and policy direction for industrial democracy in Australia, coupled with the establishment of the 'Accord' between the Government and the Australian Council of Trade Unions (ACTU), and tripartite mechanisms for consultation over economic and social policy at a national level.[9] In December 1986, the Hawke Government released a policy discussion paper on industrial democracy and employee participation. The extent to which the Government was willing to push employee participation is summarised by its succinct statement that: 'Co-operation and participation can be encouraged but not compelled.'[10] The discussion paper recommended that the government should play a facilitative role in the development of employee participation practices on a voluntary

[7] That is, agreements made under sections 170LJ and 170LK of the *Workplace Relations Act 1996* (Cth) (*WR Act*), as those provisions operated prior to the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (*Work Choices Act*).

[8] Michelle Brown and Susan Ainsworth, *A Review and Integration of Research on Employee Participation in Australia, 1983-1999*, Working Paper No.18, Centre for Employment and Labour Relations Law, March 2000, 5.

[9] See eg J E Isaac, 'Australia' in Anne Trebilcock (ed), *Towards Social Dialogue: Tripartite Cooperation in National Economic and Social Policy-Making* (1994) 67.

[10] Department of Employment and Industrial Relations (DEIR), *Industrial Democracy and Employee Participation: A Policy Discussion Paper* (1986) 40.

basis, rather than seeking to mandate such practices through legislation or the imposition of uniform models.[11]

However, the Labor Government *did* introduce legislation and other supportive measures for employee participation in the Australian Public Service, including mandatory requirements for the establishment of 'Departmental Councils' and 'industrial democracy plans' in Federal departments and agencies.[12] Steps were also taken to promote 'information sharing' in enterprises, with employers encouraged to provide employees with information regarding company organisation and structure; business prospects and plans for mergers, production levels and relocations or closures; financial performance; personnel issues; and so on.[13] Encouragement was also given to the development of consultative practices under the auspices of the Federal Commission. This began with the landmark decision in the *Termination, Change and Redundancy Case* (*TCR Case*) in 1984,[14] which led to the insertion of provisions in many Federal and State awards requiring information and consultation with employees over proposed redundancies and other workplace changes that might adversely affect them.[15] Then, in the 1991 *National Wage Case* decision, the AIRC required award parties to establish mechanisms for consultation and negotiation over workplace efficiency and productivity issues.[16]

Arguably the most advanced forms of mandatory employee participation thus far in Australia's industrial relations history were implemented via changes to the *Industrial Relations Act 1988* (Cth) (*IR Act*), as part of the introduction of 'enterprise bargaining' into the industrial relations system, operating in conjunction with the long-established arbitration-based framework.[17] Initially, the consultation aspects of these reforms were fairly moderate: the 1992 enterprise bargaining provisions merely required a union whose members would be covered by a certified agreement to consult with those members about the terms of the agreement.[18] These provisions were substantially strengthened by the *Industrial Relations Reform Act 1993*(Cth) (*IR Reform Act*), which required that reasonable steps be taken (it was not specified by whom) to inform and consult with employees during the negotiation of both union-based 'certified agreements' and non-union 'enterprise flexibility agreements', before these could be approved by the Commission.[19] Further, agreements had to establish a 'process for the parties to the agreement to consult each other about matters involving changes to the

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[11] Ibid, 97-100, 102, 104-105, 110-111, 158.
[12] See eg Michael Gurdon, 'The Emergence of Co-Determination in Australian Government Employment' (1985) 124 *International Labour Review* 465.
[13] See National Labour Consultative Council, *Guidelines on Information Sharing* (1984).
[14] (1984) 8 IR 34; see also *Termination, Change and Redundancy Case – Supplementary Decision* (1984) 9 IR 115.
[15] By the late 1990s, most Federal awards contained redundancy provisions modelled on the TCR standards: ACIRRT, *A Review of Prevailing Community Standards concerning Redundancy and Retrenchment across Australia* (2002) 5-6.
[16] *National Wage Case April 1991* (1991) 36 IR 120, 121.
[17] See Richard Mitchell, Richard Naughton and Rolf Sorensen, 'The Law and Employee Participation – Evidence from the Federal Enterprise Agreements Process' (1997) 39(2) *The Journal of Industrial Relations* 196, 202-3.
[18] *IR Act*, s 134E(1)(c) -(d) and (3), as amended by the *Industrial Relations (Legislation Amendment) Act 1992* (Cth); these provisions also required unions to inform the Commission about the steps taken to consult with their members about an agreement, and the outcome of these consultations.
[19] *IR Act*, sections 170MC(1)(e)-(f), 170MG, 170NC(1)(g)-(h) and 170 NG, as amended by the *IR Reform Act*.

organisation or performance of work in the enterprise' under the agreement, unless the parties agreed that this was inappropriate.[20]

These provisions were examined in some detail by Mitchell, Naughton and Sorensen. In their view, the provisions were a 'weak direction' to the parties to enterprise agreements to establish an appropriate formal system of employee involvement. They required the parties to establish only a 'process', rather than a 'mechanism' or 'structure' for consultation. Nevertheless, the provisions provided some scope for the development of an ongoing consultative process because the amended *IR Act* required, in an agreement, evidence of a process for considering change or performance of work, whether or not that particular agreement dealt with those change or performance issues.[21] Mitchell et al also considered that the AIRC set the standard quite low, when certifying agreements, with regard to the degree of participation required. The Commission paid a lack of attention to the legal requirement for a consultation process as part of the agreement itself, focussing instead on whether consultation occurred in the *bargaining* process.[22] The Federal Department of Industrial Relations was likewise critical of the AIRC for failing to closely scrutinise the evidence concerning consultation during bargaining, and paying inadequate attention to the legislative requirements providing for an ongoing process of consultation and provisions relating to consultation with 'relevant employees'.[23] As a consequence of these shortcomings of the formal statutory obligations and their enforcement, it cannot be said that the consultation provisions of the *IR Reform Act* provided an instance of mandated, ongoing, consultative structures. The practical effects of these legislative provisions are discussed later in this paper.

Finally, another measure introduced by the Labor Government in 1993 was the imposition of obligations on employers to notify and hold discussions with unions and employees about redundancies affecting fifteen or more workers.[24] The redundancy consultation provisions were intended to operate as a statutory formulation of the award provisions that had been established by the AIRC in the *TCR Case* in 1984.

The Coalition Government's Changes to Legislative Consultation Requirements from 1996

Soon after coming to power in 1996, the conservative Howard Coalition Government introduced a major statute in order to implement its industrial relations reform agenda: the *WR Act*.[25] In relation to employee consultation and participation, the Coalition's industrial relations policy for the 1996 election stated that:

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[20] *IR Act*, sections 170MC(1)(d) and 170NC(1)(f), as amended. See also the discussion of these provisions in Mitchell et al, above n 17, 203-4.
[21] Mitchell et al, above, n.17, 204.
[22] Ibid, at 206.
[23] Department of Industrial Relations, *Enterprise Bargaining in Australia – 1994 Annual Report*, AGPS, Canberra, 1995, cited by Brown & Ainsworth, above, n.8, 6.
[24] *IR Act*, Part VIA, Division 3, Subdivisions D and E, as amended by the *IR Reform Act*.
[25] The *WR Act* has since been extensively amended by the *Work Choices Act*. The discussion that follows refers to relevant provisions of the *WR Act* as originally enacted. There is a limited discussion of how these provisions have been affected by the *Work Choices Act* in Part 5 of this paper.

> The Coalition strongly supports and will encourage all forms of employee participation – ranging from direct consultation through to financial incentives, profit sharing and employee share ownership.
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> . . .
>
> *It is essential that any initiatives are developed on a voluntary basis. The Coalition opposes enforcement of employee involvement through legislation.*[26]

In lieu of statutory direction the Coalition government articulated support for 'the creation of formal or informal consultation structures'.[27] The *WR Act* referred in its objects clause to the desirability of providing a framework for 'cooperative workplace relations'.[28] However, Gahan et al have contended that the actual provisions of the *WR Act* 'contain[ed] very little support for the idea of co-operative workplace relationships'.[29] This can be seen in the legislation's downgrading of the mechanisms that formerly operated to encourage or require workplace consultation. The *WR Act* removed the requirement for parties to an enterprise agreement to consult each other about matters involving changes to the organisation or performance of work in the enterprise.[30] The 1993 provisions aimed at promoting the growth of consultative practices in the enterprise bargaining process were replaced with very minimal requirements for informing employees about the terms of proposed agreements when they were being negotiated.[31] On the other hand, the *WR Act* did not impose any prohibition on enterprise agreement provisions establishing consultative processes in the enterprise. Further, the statutory requirements for consultation with unions over large-scale redundancies were retained.[32]

While the right to include provisions for consultative committees in enterprise agreements may have remained under the *WR Act*, this was not the case for awards. Under the 1996 legislation, the AIRC was given the task of 'simplifying' Federal awards, by paring them back to twenty 'allowable matters' and reviewing them to remove prescriptive work practices and other perceived impediments to efficiency and productivity.[33] Importantly, the effect of s 89A of the *WR Act* was that workplace consultation became a 'non-allowable award matter'. Therefore, the Commission was required to remove award 'TCR clauses' (including requirements for consultation over technological change and redundancies), along with award provisions for information

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[26] Liberal/National Coalition, *Better Pay for Better Work* (Industrial Relations Policy, 1996), at 11, emphasis added.
[27] Liberal/National Coalition, *More Jobs, Better Pay* (Workplace Relations Policy, September 1998), at 29.
[28] *WR Act*, section 3.
[29] Peter Gahan, Richard Mitchell, Kate Creighton, Tanya Josev, Joel Fetter and Donna Buttigieg, 'Regulating for Performance? Certified Agreements and the Diffusion of High Performance Work Practices' (Paper presented to the Australian Labour Law Association 2nd National Conference, Sydney, 24-25 September 2004), 8.
[30] Breen Creighton and Andrew Stewart, *Labour Law an Introduction* (2000) 46; see also Gahan et al, above n, 29.
[31] *WR Act*, ss170LK(3) and (7); see also s 170LK(4)-(5).
[32] *WR Act*, Part VIA, Division 3, Subdivisions D and E.
[33] *WR Act*, ss 89A(1)-(2) and 143(1B)-(1C); see further Marilyn Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62, 66-72.

sharing and the establishment and operation of consultative committees.[34] Overall, the AIRC's role has been transformed over the last ten years from that of a major driver of initiatives to promote increased levels of employee participation, to performing the largely negative function of ensuring that consultative mechanisms did not transcend the Government's statutory limits on the content of awards. Further, it had no power to *ensure* that consultation provisions were included in enterprise agreements.[35]

It should also be noted that, since 1996, the Coalition Government has 'neutralised or weakened' almost all of the formal mechanisms for management-union consultation on employment matters in the Australian Public Service.[36] Sector-level and department-level structures for consultation have been disbanded, and the statutory requirements for industrial democracy plans repealed. In their place, rhetorical support is provided to agency-level consultative processes under the *Public Service Act 1999* (Cth) and other regulatory instruments.[37]

In place of statutory or policy backing for formalised workplace consultation structures, the Government's main initiative in the area of employee participation has been to promote employee share ownership schemes by making enhanced taxation concessions available for such schemes.[38] An Employee Share Ownership Development Unit has also been established within the Federal workplace relations bureaucracy, to oversee case studies and pilot programs aimed at assisting Australian businesses to set up share ownership schemes.[39]

In summary, the last two decades have witnessed a shift towards, and then retreat from, the imposition of legislative requirements for ongoing consultation processes in Australian workplaces. The next two sections of this paper examine data on the consultative practices that emerged under these various phases of statutory intervention and withdrawal.

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[34] See eg *Re Award Simplification Decision* (1997) 75 IR 272; *Re Universities and Post Compulsory Academic Conditions Award* (1998) 45 AILR 3-972; *Section 109 Reviews Decision* (1999) 90 IR 123.

[35] The AIRC's role in relation to workplace consultation was partially restored by the decision in the *2004 Redundancy Test Case* (AIRC Full Bench, PR032004, 26 March 2004), which established that 'redundancy disputes procedures' (incorporating employer obligations to inform and consult employees about proposed redundancies) could be inserted in Federal awards; however, this outcome was short-lived, as much of the effect of the 2004 decision has been extinguished by the *Work Choices Act* (see Part 5 below).

[36] Phillipa Weeks, 'Reconstituting the Employment Relationship in the Australian Public Service' in Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 69, 81.

[37] See further Anthony Forsyth, 'The Retreat from Government Support for Social Dialogue in the Australian Public Service' (2003) 62 *Australian Journal of Public Administration* 52.

[38] See The Hon Peter Costello MP, Treasurer, *Media Release*, 20 August 1996; *Income Tax Assessment Act 1936* (Cth), Division 13A.

[39] Department of Employment and Workplace Relations, *Budget 2003-04 Fact Sheet: Employee Share Ownership* (2003); see also House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours: Inquiry into Employee Share Ownership in Australian Enterprises* (2000); and <http://www.workplace.gov.au/workplace/Category/SchemesInitiatives/ESO/>.

3. Review of Previous Empirical Studies of JCCs

What do previous studies tell us about the incidence and nature of JCCs in Australia? The only studies of a broad or systematic nature of the operation of JCCs are the Australian Workplace Industrial Relations Surveys (AWIRS) of 1990[40] and 1995;[41] Marchington's more detailed study of the data collected in AWIRS 1990;[42] and Mitchell et al's study of 1,800 Federal enterprise agreements which was conducted in 1995. Each of these studies will now be discussed briefly.

AWIRS 1990 and Marchington's Analysis of the Data

The AWIRS were extensive surveys of the Australian workforce and employers carried out in 1990 and in 1995, which generated data from structured questionnaires.[43] The surveys investigated both the public and private sectors and included inquiries about JCCs in Australia. The AWIRS 1990 data revealed that only 14 per cent of workplaces had JCCs.[44] Of those workplaces that had consultative structures, it was found that more than half of them held meetings on a monthly basis, or more often.[45] 83 per cent of committees met with some regularity, that is, somewhere between twice per year, to once every two weeks.[46] Twenty per cent of committees met monthly, 9 per cent met every two months, and 11 per cent met every 3 months.[47]

In his analysis of the AWIRS 1990 data, Marchington found that there were different models of consultation operating in Australia depending on the degree and strength of unionisation at the workplace. Those industries which traditionally had powerful unions including mining, construction and transport, had a higher number of JCCs with union representation than traditionally less-unionised industries including wholesale and retail trade, and financial and business services.[48] He reported that in the less unionised industries, only 25 per cent of committees included union members.[49] Marchington also found that the main subjects arising for consideration by JCCs were working conditions (36 per cent of JCCs), including health and safety; personnel-related (24 per cent of JCCs), which included staffing issues, training, and communications; performance and quality (24 per cent of JCCs); and award

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[40] R Callus, A Morehead, M Cully, J Buchanan, *Industrial Relations at Work: The Australian Industrial Relations Survey*, AGPS, Canberra, 1991.

[41] A Morehead, M Steele, M Alexander,K Stephen and L Duffin, *Changes at Work: The 1995 Australian Workplace. Industrial Relations Survey,* Addison Wesley Longman Australia, 1997. Morehead et al explain that AWIRS 1990 involved a survey of over 30,000 workplaces, while AWIRS 1995 involved surveys of more than 37,000 workplaces.

[42] Marchington, see above n.3.

[43] Morehead et al, above n 41, 12-13.

[44] Callus et al, above n 22, 125. See also Roy Green, 'Change and Involvement at the Workplace: Evidence from the Australian Industrial Relations Survey', (1991) 2 *The Economic and Labour Relations Review* 72.

[45] Callus et al, above n 40, 126.

[46] Marchington, above n. 3, 539.

[47] Ibid.

[48] Ibid, 541.

[49] Ibid.

restructuring (14 per cent of JCCs).[50] Marchington identified, further, that there were differences between industries in relation to the main subjects discussed by JCCs. In wholesale and retail trade, public administration, and transport and storage, the principal focus of JCC meetings was on working conditions. In contrast, in manufacturing and electricity, gas and water, award restructuring was the main issue considered.[51]

AWIRS 1995

AWIRS 1995 revealed that since 1990, the incidence of JCCs had more than doubled, with the total number of committees in workplaces surveyed reaching 33 per cent.[52] This increase was found to be widespread across sixteen different industries.[53] Three and four fold increases in the incidence of JCCs since 1990 were not uncommon in some industries. Moreover, it was found that businesses with enterprise agreements were more likely (in both 1990 and 1995) to have JCCs: workplaces that had engaged in enterprise bargaining had a 35 per cent higher incidence of committees in 1990 than those that had not, and an 18 per cent higher incidence in 1995.[54]

In addition, AWIRS 1995 again found a strong presence of union representatives on JCCs. In 31 per cent of workplaces with consultative committees, all of the employee representatives on the committee were union members or delegates. In 53 per cent of committees, the employee representatives comprised union and non-union representatives. In 16 per cent, there were no union representatives on the committee at all.[55] AWIRS 1995 also found that most JCCs were meeting on a very regular basis.[56] Ten per cent met at least fortnightly; just over half the committees (51 per cent) met at least monthly; whilst 89 per cent met at least 4 times per year.[57]

Mitchell, Naughton and Sorensen's Study

As noted earlier, Mitchell, Naughton and Sorensen carried out a study of more than 1,800 Federal certified agreements[58] to determine whether the 1993 legislative requirements for consultation in the enterprise bargaining process were being complied with.[59] Their study was thus not as broad in scope as the AWIRS surveys which examined practices in a wide cross-section of businesses, not just those JCCs that were formally provided for in enterprise agreements. Mitchell et al found that JCCs were established for the purposes of meeting the statutory consultation requirements in 62 per cent of certified agreements.[60] However, even where consultative structures were established, Mitchell et al identified inadequate provisions for the appointment,

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[50] Ibid, 542.
[51] Ibid, 543.
[52] Morehead et al, above n.41, 188.
[53] Ibid, 189.
[54] Ibid.
[55] Ibid, 193-4.
[56] Ibid, 194.
[57] Ibid.
[58] Mitchell et al, above n. 17, 208; note that their study also encompassed enterprise flexibility agreements, which will not be discussed for the purposes of this paper as they were relatively insignificant in number and are no longer a feature of Federal workplace relations legislation.
[59] See nn 17-20 above and accompanying text.
[60] Mitchell et al, above n 17, 214.

representativeness, jurisdiction and meetings of these bodies, creating 'grave doubt as to whether the vast majority of JCC structures complied with the spirit or the letter of the requirements'.[61] For instance, they found that in 64 per cent of enterprise agreements there was no indication of how often the JCC would meet.[62] They found that 60 per cent of certified agreements provided no indication of the composition of the committee;[63] 32 per cent provided for equal representation of both employers and employees on the committee; and eight per cent provided for employees to constitute the majority of committee members.[64] 62 per cent of the agreements gave no indication of the manner of appointment to the committee.[65] 33 per cent indicated that appointment of employee representatives would be by employees;[66] while in only 5 per cent of agreements, employee representatives were to be appointed by unions.[67]

Mitchell et al also found that the agreements they examined provided for the discussion of a wide variety of subjects by JCCs. The most prominent issues considered included productivity, efficiency and competitiveness, training issues and performance appraisals (53 per cent of certified agreements made provision for these matters to be discussed).[68] Other subjects discussed by JCCs included absenteeism; technological and other change; working environment/hours; 'reporting back' on committee deliberations; and dispute resolution.[69]

Where does this Previous Research Leave Us?

Forsyth argues that while there is some support for Mitchell et al's findings as to the inadequacy of the 1993 legislative provisions in providing a sustained basis for workplace consultation, the evidence from AWIRS suggests that the broader enterprise bargaining process contributed significantly to the development of joint consultative mechanisms in Australian workplaces in the early 1990s.[70] The purpose of the research reported in this paper is to determine whether this trend has continued. Little or no research has been conducted into the prevalence of JCCs in Australian workplaces since the *WR Act* was passed, bringing with it a downgrading of the statutory support for workplace consultation. Have these changes resulted in an increase or a decrease in consultative practices? If there has been a continued increase, what might have stimulated this unexpected development?

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[61] Ibid, 213.
[62] Ibid, 211 and 213.
[63] Ibid.
[64] Ibid, 211.
[65] Ibid, 212.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Anthony Forsyth, *Transplanting Social Partnership: Can Australia Borrow from European Law to Improve Employee Participation Rights in Business Restructuring?* Unpublished PhD Thesis, University of Melbourne, 2005, 53.

4. Empirical Analysis

In this part of the paper, first, data from ACIRRT's Agreements Database and Monitor (ADAM) are considered in order to sketch a broad picture of JCCs in Australian Federal and State jurisdictions from 1991 to 2004. Secondly, a selection of Federal enterprise agreements is analysed more closely in order to paint a more detailed picture of the operation of JCCs.

ADAM Data

Data from ADAM, a database maintained since 1993, has been used to analyse the incidence of JCCs from 1991 to 2003, variances between industries and jurisdictions, and union representation on committees. Limited data was also available for 2004 concerning the incidence of JCCs in state jurisdictions. As at June 2004, the ADAM database contained data on 11,385 registered enterprise (collective) agreements from the Federal and State jurisdictions over this period. This was broken down as follows: Federal (5514), New South Wales (1912), South Australia (833), Queensland (2030), and Western Australia (1096). ADAM thus provides a useful body of data from which to draw conclusions regarding the incidence of JCCs. However, like the data examined by Mitchell et al, these conclusions are limited to workplaces covered by enterprise agreements, rather than Australian workplaces more broadly. Furthermore, the data does not tell us what is happening in workplaces in practice; that is, whether the arrangements that are formally provided for are being utilised or are providing a meaningful basis for industrial democracy for Australian workers.

Provision for Formal Consultative Committees between 1991 and 2003

Figure 1 shows that 45.2 per cent of all Federal enterprise agreements in the ADAM database included some mention of the use of a formal consultative committee. For these purposes, a consultative committee was defined as follows:

> … the provision of a formal structured committee at a workplace, which typically provides a forum for discussion between representatives of the employees and management. The committee must be in existence, that is, not a commitment to create a committee at some [future] time.[71]

Figure 1: Incidence of formal consultative committees between 1991 and 2003

	Frequency	Percent
Yes	2116	45.2
No	2565	54.8
Total	4681	100

Growth in the Incidence of JCC Clauses in Agreements between 1991 and 2003

[71] Definition provided by Larissa Bamberry of ACIRRT via email to Shelley Marshall, 8 December 2004.

There was a steady rise in the number of consultative committees provided for in Federal agreements registered from 1991 to 1999, reaching a height of close to 58 per cent in 1999 and declining thereafter (as shown in Figure 2). This data shows a jump from 6.6 in 1992 to 40.0 in 1993 in the percentage of agreements that provided for JCCs. There was another increase in the incidence of formal consultative committees in Federal agreements between 1995 (19.9 per cent) and 1996 (54.0 per cent). What was the reason for these increases? We could speculate that the 1996 increase occurred in anticipation of the removal of award TCR provisions, as a result of consultation no longer being an allowable award matter under s 89A of the *WR Act*.[72] Parties may therefore have shifted consultation clauses which were previously in awards into certified agreements in the course of their renegotiation of agreements. However, Forsyth notes that the void created by the removal of award consultation provisions has been only *partially* filled by agreement making.[73] For example, in comparison to the very high incidence of award TCR clauses (including information and consultation requirements),[74] less than one third of enterprise agreements in 2003 made provision for discussions between management and employees/unions about redundancies or other forms of workplace change.[75] Further, by 2003, the incidence of JCCs in Federal agreements had dropped to 33.3 per cent.

The ADAM and AWIRS 1995 data yielded largely similar results. The proportion of agreements shown by ADAM to have made mention of the use of formal consultative committees in 1995 (19.9 per cent) was considerably lower than the incidence of JCCs in all workplaces recorded by AWIRS 1995 (33 per cent). However, in 1994 the proportion of JCCs in enterprise agreements was much higher (46.3 per cent, according to ADAM). When the average from the ADAM data for 1994 and 1995 is taken, the result is not dissimilar to the AWIRS 1995 data. [76] This is an interesting result: one might expect those companies that have enterprise agreements to be more consultative than those that do not, as the presence of an agreement implies willingness by the employer to consult with employees and unions over working conditions. However, the data indicates to the contrary. An explanation for this may be that even in those companies which are unionised or have enterprise agreements, JCCs may not be formally established under enterprise agreements; rather, their rules may be set out in a separate charter or in a human resources manual, for example.[77]

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[72] See n 34 above and accompanying text.
[73] Forsyth, above n**.** 70, at 68.
[74] See n. 14 above and accompanying text.
[75] Further unpublished data from the ADAM database, on file with the authors; specifically, this data shows that 30.2 per cent of Federal enterprise agreements made in 2003 contained provisions obliging employers to discuss redundancies (up from 13.7 per cent in 1996); and that 26.5 per cent of 2003 agreements required notification, and 24.9 per cent consultation, over workplace change generally (up from 14.1 per cent and 9.4 per cent respectively in 1996).
[76] A comparison between the ADAM and AWIRS 1990 data cannot be carried out, as formal enterprise agreements did not exist at the Federal level in 1990.
[77] R. Mitchell and J. Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292

Figure 2: Incidence of JCCs provided for in Federal agreements by year

Year	JCC	No JCC	Total
1991	1	5	6
	16.70%	83.30%	100%
1992	9	127	136
	6.60%	93.40%	100%
1993	70	105	175
	40.00%	60.00%	100%
1994	146	169	315
	46.30%	53.70%	100%
1995	74	298	372
	19.90%	80.10%	100%
1996	288	245	533
	54.00%	46.00%	100.00%
1997	299	365	664
	45.00%	55.00%	100.00%
1998	372	398	770
	48.30%	51.70%	100.00%
1999	238	173	411
	57.90%	42.10%	100.00%
2000	209	170	379
	55.10%	44.90%	100.00%
2001	181	145	326
	55.50%	44.50%	100.00%
2002	163	239	402
	40.50%	59.50%	100.00%
2003	63	126	189
	33.30%	66.70%	100.00%
Total	2113	2565	4678
	45.20%	54.80%	100.00%

Union and Non-union Agreements Compared

Prior to the 2005 Work Choices reforms, the *WR Act* provided for two main types of certified agreements which could be made at the enterprise level:

- section 170LJ agreements – collective agreements between employers and unions;
- section 170LK agreements – collective agreements between employers and groups of employees.

Figure 3 shows that 33 per cent of the non-union (section 170LK) agreements included formal consultative committee clauses (n = 277), and 67 per cent contained no consultation clause. This is consistent with data gathered from a sample of 100 section 170LJ and 170LK agreements certified between September 1999 and July 2003 by Gahan et al.[78] They found that a 'staggering 74 per cent of [section] 170LK [non-union] agreements . . . contained no consultation clause', and 70 per cent of those

[78] Gahan et al, above n.29.

agreements contained no provisions for formalised committee structures.[79] Despite the accuracy of this observation, the figure nevertheless suggests that *some* employers who do not wish to form agreements with unions still believe it is in their interests to consult with employees, and to formalise that consultative arrangement. In contrast to the data for non-union agreements, according to ADAM, almost half (47.8 per cent) of the section 170LJ union agreements made formal provision for JCCs.

Figure 3: Differences between enterprise agreements made with unions or without unions

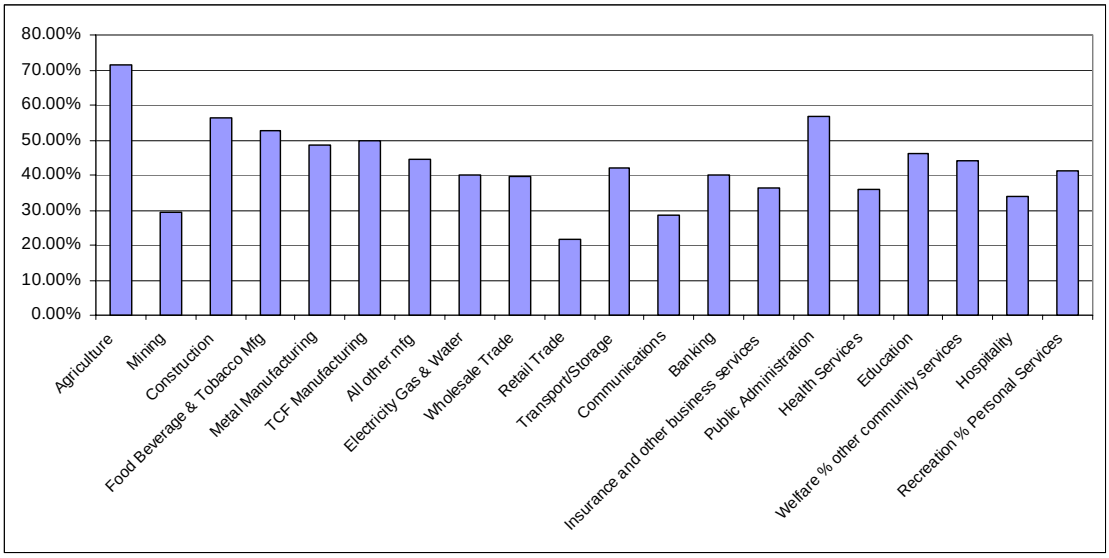
		Formal Consultative Committee used		
		Yes	No	Total
Union party to the agreement	Count	1839	2010	3849
	Percentage	47.80%	52.20%	100.00%
Union not party to the agreement	Count	277	555	832
	Percentage	33.30%	66.70%	100.00%
Total	Count	2116	2565	4681
	Percentage	45.20%	54.80%	100.00%

Variances between Industries

The ADAM data indicates that there were wide variances in the incidence of JCCs between industries (as shown in Figure 4). The data shows a surprisingly high presence of formal consultative committees in agreements in agriculture (71.4 per cent of Federal agreements), although the number of agreements from the agricultural industry (n=25) may not be sufficient to provide a basis for any general conclusions. Construction (56.2 per cent, n=384), food beverage and tobacco manufacturing (52.2 per cent, n=116), textile, clothing and footwear manufacturing (50.0 per cent, n=40) and public administration (56.6 per cent, n=211) also contained high incidences of formal consultative committees under enterprise agreements. In contrast, mining (29.3 per cent, n=53), retail trade (21.5 per cent) and communications (28.6 per cent) showed significantly lower incidences of JCCs in agreements.

[79] In relation to the former category, Gahan et al tested for the inclusion of any consultation clause, rather than a clause which established an ongoing, formal consultative mechanism. Their test is a little less stringent than that used for the ADAM data, which may explain the higher incidence of consultative clauses in Gahan et al's data. The latter category, 'formalised committee structures for dealing with workplace issues' (see Gahan et al, above n 29 at 19) is closer to the ADAM definition: see n 71 above and accompanying text.

Figure 4: Incidence of JCCs – differences between industry groups



State Agreements

There was quite a wide variation in the incidence of JCCs between State jurisdictions, as shown by Figures 5 and 6. Queensland had, between 1991 and 2003, the highest number of formal consultative committees in enterprise agreements, with almost 47 per cent of agreements registered over this period containing a clause pertaining to an ongoing consultative committee. The proportion of agreements that contained reference to ongoing JCCs in Queensland agreements had reached 57.7 per cent by 2004.[80] South Australia also had a relatively high incidence of consultative committee clauses in agreements: almost 45 per cent on average for the period 1991 to 2003. By 2004, 65.6 per cent of South Australian enterprise agreements contained JCC clauses, exceeding the proportion of consultative committees in Federal agreements by 7.6 per cent**.** The presence of JCCs in New South Wales and Western Australian enterprise agreements was somewhat lower over the period 1991-2003: 41.9 per cent of New South Wales agreements made provision for JCCs, as did 49.4 per cent of Western Australian agreements.

There is no clear legal explanation for this variation between the States. There are no provisions in South Australian industrial legislation for the setting-up of permanent consultative committees under awards or enterprise agreements, or mandating consultation over specific matters like redundancies or restructuring.[81] There is, however, a long history of interest in workers' representative mechanisms in South

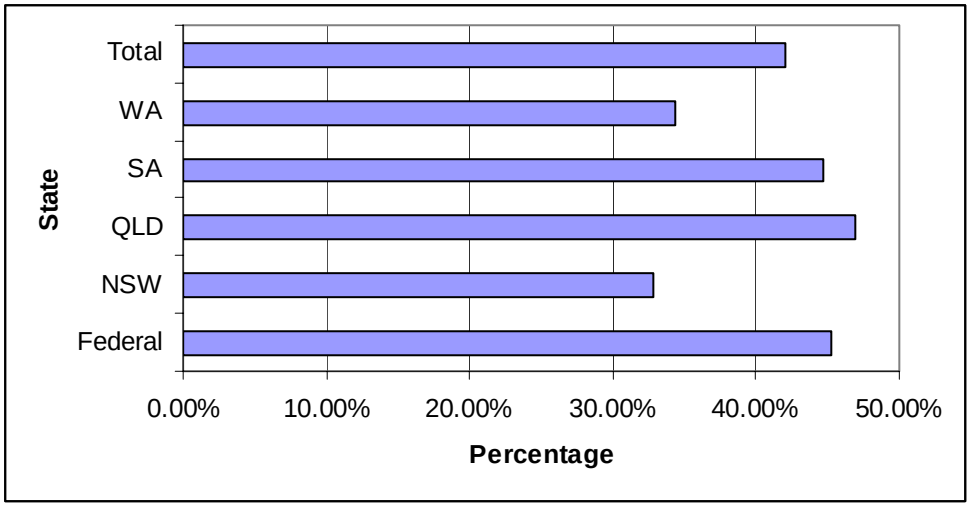
[80] Agreements which were in operation as at the end of October 2004 were also analysed for jurisdictional differences. There were approximately 2,000 agreements operational at that time in the ADAM database. A number of these agreements had only been short coded (meaning that the information only covered industry, occupation, location, wages data and basic profile; and that details about consultative committees had not been captured). Agreements that had been fully coded and included details about consultative committees numbered approximately 1,400.

[81] Section 72B of the *Fair Work Act 1994* (SA) provides for the State industrial tribunal to establish minimum standards of severance pay for redundant workers, but does not extend to information or consultation rights about proposed redundancies.

Australia. In 1973, the State Government initiated a program of industrial democracy with the publication of two reports on 'Worker Participation in Management'. The 1975 Australian Labor Party (ALP) South Australian State Convention adopted a recommendation that: 'The aim of the Labor Party should be to obtain effective democracy in all areas of life, including the work place'.[82] In 1975 a Unit for Industrial Democracy was established within the South Australian Premier's Department. There were experiments with industrial democracy within the public sector in South Australia under the Labor Governments of Premier Don Dunstan (1972-1979).[83] However, these were wound down once the ALP left office. While this period of intense interest did not lead to long-lasting legislative changes, it may have had a lasting influence on the form of union commitment to workers' representative mechanisms and broader acceptance of the principles that lie behind them.

It is likewise difficult to explain the high incidence of consultative committees in Queensland enterprise agreements from a legal standpoint. The Queensland Labor Government has been critical of the lack of 'legislative provisions that promote participative, consultative and cooperative workplaces' in the *WR Act*.[84] Despite this, Queensland industrial legislation does not contain specific provision for the operation of consultative committees under enterprise agreements,[85] although it does impose information and consultation obligations on employers in respect of large-scale redundancies.[86]

Figure 5: Incidence of formal consultative committees based on jurisdiction 1991 - 2003



[82] Letter from Charles Conelly, Project Officer in the Industrial Democracy Unit, to Ken Stone, Secretary, Victorian Trades Hall Council, 26th March 1976

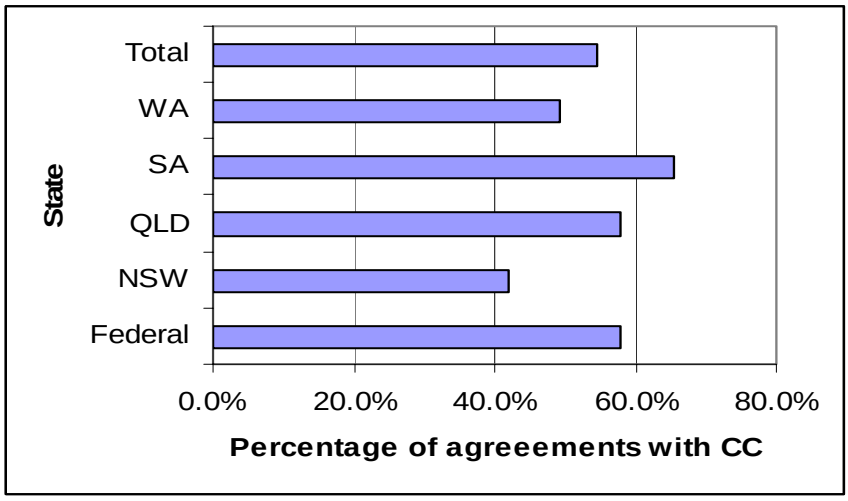
[83] See further eg Geoff Anderson, 'The South Australian Initiative' in Robert Pritchard (ed), *Industrial Democracy in Australia* (1976) 155.

[84] Submission by the Queensland Government, Senate Employment, Workplace Relations, Small Business and Education Committee Inquiry into the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, p 1.

[85] Sections 126 and 127 of the *Industrial Relations Act 1999* (Qld) may provide some scope for the inclusion of JCC clauses in awards; however, no such scope appears to exist regarding enterprise agreements.

[86] *Industrial Relations Act 1999* (Qld), sections 89-90B.

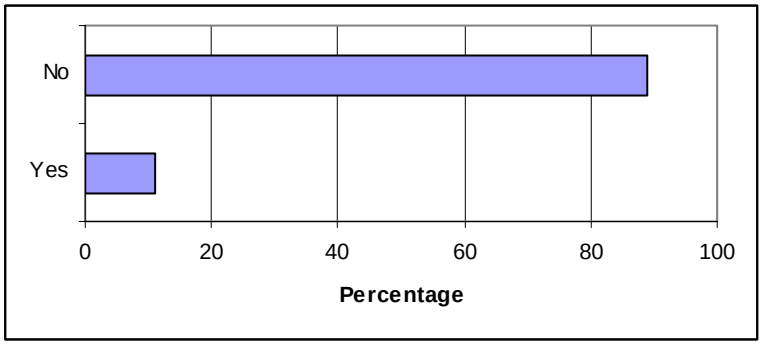
Figure 6: Incidence of formal consultative committees based on jurisdiction in 2004



Union Representation on Consultative Committees

Only 11 per cent of Federal enterprise agreements required that unions be represented on JCCs (513 out of 4681 agreements). This does not preclude unions being represented in practice, as was borne out by AWIRS 1995 which found that 84 per cent of consultative committees had union representatives sitting on them.[87] However, the fact that union representation is not generally specified as a requirement in agreements is significant. This perhaps suggests that JCCs are not formally understood to be a means by which union representation is extended into the workplace; rather, they are a means of extending *employee* representation.

Figure 7: Union representatives on JCCs



Additional Agreements Analysed

Because the ADAM data does not provide details about further characteristics of JCCs, such as those outlined by Marchington or considered by Mitchell et al, a small

[87] Above, n 41, 193-4.

selection of Federal enterprise agreements was analysed more closely. A selection of 48 agreements[88] certified under relevant provisions of the *WR Act* (as they existed prior to the 2005 Work Choices changes) was carried out using Wagenet's advanced search engine.[89] To qualify for analysis, the consultative committee was required to be a formally constituted, ongoing mechanism for consultation between an employer and employees.[90] An effort was made to select agreements from a range of industries: accordingly, eight different industries are represented in the selection.[91] Where evidence of 'pattern bargaining'[92] was found, only one agreement was selected from the group of similar agreements in order to demonstrate diversity. The enterprise agreements chosen included both union agreements (section 170LJ), and non-union agreements (section 170LK). The agreements selected were, however, predominantly section 170LJ agreements. Figure 8 sets out a breakdown of the types of agreements considered in this study, by industry. One agreement (*Bovis Lend Lease*)[93] provided for two different consultative committees, both national and regional, bringing the total number of committee clauses considered to 49.

Figure 8: Types of agreements by industry and whether union or non-union

Industry	**Number of s170LJ Agreements**	**Number of s170LK Agreements**
Accounting, Finance and Management	5	1
Agriculture, Forestry and Fishing	5	1
Building and Construction	5	1
Liquor and Accommodation	5	1
Manufacturing	5	1
Metal and Mining	5	1
Transport	6	0
Wholesale and Retail Trade	4	2
Total Number of agreements	**40**	**8**

[88] The relatively small sample size in this study must be borne in mind when considering the findings set out below; to give some indication of how the sample size compares to the total number of enterprise agreements, the AIRC certified 5,580 enterprise agreements in 2002-2003: Australian Industrial Relations Commission, *Annual Report of the President of the Australian Industrial Relations Commission and Annual Report of the Australian Industrial Registry 1 July 2002 to 30 June 2003*, p 12, (see Table 3).

[89] See <http://www.wagenet.gov.au/WageNet/Search/search.asp>.

[90] Clauses providing for *general* consultation between the employer and employees were not considered for the purposes of this research, if they did not provide for a formal consultative mechanism. Further, references to specialised committees, such as occupational health and safety committees, were not included in the study.

[91] The industry categories chosen were accounting, finance and management; agriculture, forestry and fishing; building, metal and civil construction (referred to herein as 'building and construction'); liquor and accommodation; manufacturing; metals and mining; transport; and wholesale and retail trade. These industries were chosen from the industry classifications provided by the Federal Government on its Wagenet database.

[92] That is, a process by which unions seek and obtain common agreement outcomes across more than one enterprise, or on an industry basis; this practice has now been significantly circumscribed by the 2005 Work Choices amendments (see amended *WR Act*, eg ss 421, 431, 439, 497).

[93] *Bovis Lend Lease/CFMEU – Construction and General Division Joint Development Agreement Mark V 2003*, AG827373.

Frequency of Meetings

Figure 9 sets out the frequency of meetings as specified in the agreements examined. This data is important as it is considered that there may be a relationship between the frequency of meetings and the influence that JCCs are able to exercise.[94] Where meetings were held infrequently, we could speculate that the discussion may have been restricted to a smaller range of topics, and limited to single decisions, rather than the ongoing operation of the enterprise.

Figure 9: Frequency of JCC meetings

Monthly	9
Every 2 months	3
Tri-annually	1
Quarterly	8
Every 6 weeks	1
Bi-Annually	6
Annually	1
Other	7
Frequency of meetings not provided	13
Total	**49**

13 of the 49 agreements did not specify how often committee meetings were to take place. Of the agreements that stated the frequency of meetings, the majority provided that committee meetings were to be held monthly, quarterly or bi-annually. Seven of the 49 agreements fell into the category of 'other': these agreements specified that meetings should occur on a regular basis (four agreements); 'from time to time'[95](one agreement); or 'as required',[96] or 'on an as needs basis'[97] (two agreements).

Composition of Consultative Committees

Figure 9 sets out the composition, by industry, of JCCs in the agreements examined, indicating whether they provided for equal representation of management and employee representatives, or greater employee representation.

[94] See eg Marchington, above n 3, 540.
[95] *Sharnie Orchards & Packhouse Certified Agreement 2002*, AG813795.
[96] *Novotel Century – Sydney – Certified Agreement 2004*, AG835628.
[97] *Boise Cascade Office Products Belmont Western Australia Certified Agreement 2001-2004*, AG814666.

Figure 9: Composition of committees

Industry	Equal Representation	Greater Employee Representation	Unclear/No indication
Accounting, Finance and Management	2	3	1
Agriculture, Forestry and Fishing	5		1
Building, and Construction	5		2
Liquor and Accommodation	3		3
Manufacturing	1	2	3
Metal and Mining	3		3
Transport	2		4
Wholesale and Retail Trade	2	2	2
Total	23	7	19

There were no instances in any of the agreements of greater numbers of employer representatives than employee representatives on the committee. The number of representatives on the committees varied from one employee and one company representative, through to as many as thirteen (or more) representatives in total.[98] Agreements commonly provided for between two to four representatives each for both employees and management. Thirteen of the 49 agreements stated that the committee would be constituted by employee and management representatives, but did not specify the exact number of representatives on the committee; nor did they always specify that there would be equal representation. These findings are similar to those of Mitchell et al.[99] It might be argued that those agreements with greater employee representation evidence a greater intention by management to hear a cross-section of employee/union views within the company. Interestingly, there were no significant differences between the composition of committees in section 170LJ as compared to section 170LK agreements. Almost one quarter of the agreements (11 out of 49) made provision for people who were not committee members to attend committee meetings. This included, for example, union representatives,[100] additional management representatives,[101] advisors and guests.[102] In some agreements, additional parties had

[98] *Goodman Fielder Consumer Foods (Wahgunuah) & NUW Agreement 2003*, AG829318, clause 14.2; see also *Figgins Holdings Pty Ltd Enterprise Agreement 2003*, AG828911, clause 8, which provided that there could be a total of between ten to fourteen representatives.
[99] Mitchell et al, above n 17, 211.
[100] See for example *The Westin Melbourne Agreement 2003*, AG828077, clause 32.3(e); and *Pental Products Pty Ltd and the National Union of Workers Enterprise Agreement 2003*, AG828545, clause 9.3(v).
[101] See for example *Pental Products Pty Ltd and the National Union of Workers Enterprise Agreement 2003*, AG828545, clause 9.3(v).
[102] See for example *Motor Accidents Insurance Board Enterprise Agreement 2001*, AG811742, clause 14.8; *Goodman Fielder Consumer Foods (Wahgunuah) & NUW Agreement 2003*, AG829318, clause

speaking rights (although no voting rights), while in other agreements, these parties were able to attend solely in the capacity of an observer to the meeting.[103] In some instances, if additional parties were to attend meetings, they were required to give advance notice to the committee of their intention to do so.[104]

Manner of Appointment of Committees

Figure 10 sets out the manner of appointment of consultative committee members and chairpersons.

14.3; *John Holland Pty Ltd Rail Infrastructure Maintenance Agreement 2003-2006,* AG825299 Appendix 1, clause 5.

[103] See for example *Baron Forge Contractors Pty Ltd and CFMEU Building and Construction Industry Collective Bargaining Agreement 2002-2005* , AG83503, clause 4(ii) of the Consultative Committee Constitution.

[104] See for example *Multiplex Constructions (NSW) Pty Ltd CFMEU Enterprise Agreement 2002-2005*, AG821269, clause 10.5; this clause required that the union send advance notice of any issues it intended to raise at the meeting, should the State Secretary or nominee wish to attend the meeting.

Figure 10: Manner of appointment[105]

Method of appointment	Number
Employee reps elected by employees	24
Employee rep to be an elected union delegate	1
Union reps to be elected by union members	2
Unions to nominate employee/union reps	4
Company reps to be nominated or elected	6
Not specified	19
Chair/deputy to be elected by employee reps	5

In the majority of agreements employee representatives on committees were to be elected by employees. A large number of agreements, however, did not indicate the manner of appointment. At the same time, though, the composition of the committee was often described in specific detail in these agreements, thus making it likely that appointment must have been determined elsewhere. Some agreements provided particular details regarding elections to committees. For example, the *Motor Accidents Insurance Board (Tas) Agreement*, where the committee comprised both union and non-union representatives, specifically stated that non-union staff representatives were to be elected by non-union staff.[106]

The majority of agreements referred to management or employer representatives, but there was typically no indication in the agreement of the level of seniority required of managerial representatives. One exception was the *AW Harvester Agreement*, which specified that at least one of the management representatives on the committee was required to have the ability to make decisions that impacted upon the workplace.[107] The level of management involved in JCCs has clear implications for whether the discussions in the committees are likely to be of a strategic or operational nature, or focused on trivial matters.[108]

It is interesting to observe that six of the agreements examined provided for company representatives on the consultative committee to be elected or nominated.[109] Some agreements set out more specific details on the election of representatives. The *Illawarra Credit Union/FSU Enterprise Agreement,* for example, stated that elections should be by secret ballot.[110] Six agreements provided for union involvement in the manner of appointment.[111] Surprisingly, one of the agreements containing such a

[105] The number of different methods of appointment shown in Figure 10 exceeds 49, because in some agreements alternatives for appointment were specified in the event that one method of appointment was not practical.
[106] *Motor Accidents Insurance Board Enterprise Agreement 2001*, AG811742, clause14.6.
[107] *A W Harvesting & Camdale Services Enterprise Bargaining Agreement 2002-2005*, AG830888, see clause 2.3 of attachment 2 - the Enterprise Consultative Committee Agreement .
[108] See Marchington, above, n.3, p.535
[109] *A W Harvesting & Camdale Services Enterprise Bargaining Agreement 2002-2005*, AG830888; *Hilton on the Park Workplace Agreement 2002-2005,* AG 820995; *Selkirk Brick Pty Ltd Enterprise Agreement No. 4 2004*, AG835234; *Murray Goulburn Co-operative Company Limited, Reliability Agreement 2002*, AG815860; *HWE South Middleback Ranges Enterprise Agreement 2003*, AG831651; *Country Road – Retail Team Members Enterprise Agreement 2003*, AG826388.
[110] *Illawarra Credit Union/FSU Enterprise Agreement 2002*, AG818597.
[111] *A W Harvesting & Camdale Services Enterprise Bargaining Agreement 2002-2005*, AG830888; *Australian Paper Agreement 2003-2006*, AG831286; *Bhagwan Marine and AMOU Masters, Deck and Radio Officers Agreement 2002*, AG 831273; *Murray Goulburn Co-operative Company Limited,*

clause was a section 170LK non-union agreement (*Murray Goulburn Co-operative*). Overall, however, there were no great differences in the manner of appointment of committee representatives between section 170LJ and section 170LK agreements.

Union Involvement in Consultative Committees

Figure 11 sets out the number of agreements (by industry) that provided for some type of union involvement – that is, membership, observation rights or access to the minutes – in consultative committees. Union involvement in JCCs potentially changes their character. Union involvement may be beneficial for unions and their members, as it provides a means for unions to become more informed about workplace issues, and may help close the 'representation gap' created by (among other factors) decreasing union membership and coverage.[112] In a workplace in which unions have not previously been active, regular union attendance at meetings with management results in union involvement in the workplace extending beyond a negotiating round every three years. In those workplaces in which shop stewards or union representatives have been active, JCCs may provide a regular and legitimate forum for raising concerns on behalf of employees.[113]

Trade union involvement in the JCC may also give the committee greater 'clout', as a consequence of the superior experience of union representatives in negotiating with management, and because of the institutional strength they carry behind them. On the other hand, union involvement may also change the characteristic of the JCC into a more adversarial and less cooperative forum. Where union representatives are concerned that JCCs are used as a way to 'co-opt' workers into managerial strategy, or to increase their workloads, they may block discussions or limit the subject matter to mundane matters, eg 'tea, towels and toilets'.[114] Unions may perceive that JCCs challenge the role of unions by providing workers with an opportunity to participate directly, and by fostering greater organisational commitment, thereby forging a unitarist relationship between management and employees.[115] The effect and nature of union involvement in JCCs in practice is thus by no means obvious from the data examined in this paper.

Reliability Agreement 2002, AG815860; *West Coast Railway Enterprise Agreement 2003-2006*, AG835068; *Figgins Holdings Pty Ltd Enterprise Agreement 2003*, AG828911.

[112] See eg Mark Bray, Peter Waring, Duncan Macdonald and Stephane Le Quex, 'The 'Representation Gap' in Australia' (2001) 12 *Labour and Industry* 1.

[113] Marchington, above n. 3, 538

[114] See McGraw and Palmer, above n.4.

[115] See eg research on other participatory schemes conducted by R Kelly, 'Total Quality Management: Industrial Democracy or Another Form of Managerial Control?' (1995) 6 *Labour and Industry* 119; and S Bertone, M Brown, P Cressey, J Frizzell, C Keating, A Morris and D Worland, *Developing Effective Consultative Practices*, Melbourne, South Pacific Publishing, 1999.

Figure 11: Number of agreements that provided for union involvement

Industry	Did the agreements provide for union involvement in the committee?	
	Yes	**No**
Accounting, Finance and Management	4	2
Agriculture, Forestry and Fishing	3	3
Building and Construction	5	1
Liquor and Accommodation	5	1
Manufacturing	4	2
Metal and Mining	3	2
Transport	4	2
Wholesale and Retail Trade	4	2
Total	**33**	**15**

Figure 11 shows that almost three quarters of the agreements examined made some provision for union involvement in JCCs. Figure 12 breaks this down, showing the different ways in which agreements provided for that involvement

Figure 12: Nature of union involvement in consultative committees

Nature of involvement	Number
Union delegates officials, convenors, or nominees on committee	18
Union members on committee	8
Union official permitted to attend committee meetings	12
Other union involvement of some description	6

Figure 12 shows that union involvement in JCCs occurred in both a direct and indirect manner. Many agreements stipulated that some or all of the employee representatives on the consultative committee were required to be union members or union officials. Some agreements permitted union officials or union representatives to attend committee meetings (although they were not actually committee members). Other agreements permitted union involvement in a more indirect way, for example by requiring that the union be sent a copy of the minutes from each meeting. Just over a quarter of the agreements did not provide for any union involvement whatsoever.

Subject Matters Dealt with by Consultative Committees

Figure 13 sets out the different subject matters dealt with by the consultative committees. Our analysis of the JCC clauses regarding issues considered by committees was concerned primarily with two aspects: first, the strategic importance of the subject matter to the enterprise; and secondly, whether the committees were concerned with 'high performance workplace systems' (HPWS) or 'employee empowerment' issues. HPWS are work systems that aim to boost productivity by increasing employment flexibility (including reward, temporal and functional

flexibility).[116] HPWS typically involve practices such as performance-based pay, profit-sharing, and consultative mechanisms like work teams and quality circles.[117] Employee empowerment encompasses topics such as work/life balance, career development, workplace equity and job satisfaction. The distinction is somewhat artificial, since the process of consultation may itself be empowering, particularly where it is over matters which are normally the domain of managerial prerogative, such as productivity. However, as the following discussion shows, the distinction provides some useful insights into the nature and utility of JCCs.

Figure 13: Matters stipulated in agreements to be considered by JCCs

Matters Considered	
Absenteeism	3
Alterations to Specific Conditions of Employment*	3
Amenities	4
Any Matters	7
Career Path Advancement	4
Casual Employment	2
Changes in the Workplace **	20
Company Close-downs	3
Consider Recommendations for Sub-committees	1
Company Objectives/Strategic Plans	10
Development and Implementation of HR and other Company Policies	3
Develop Consultation Skills of Committee	1
Development of New Initiatives	2
Developing/Maintaining Open Communication/Consultation between Management and Employees	9
Discipline	1
Engagement of Contractors	5
Environmental Protection	1
Equal Opportunity	3
Grievance/Dispute Resolution	9
Implementation and/or Monitoring of the Agreement	25
Improve Industrial Relations at the Enterprise	1
Job Satisfaction/Quality of Working Life/ Job Security	8
Occupational Health and Safety	10
Performance Assessment	4
Problems and Issues of Concern	7
Productivity***	34

[116] See Gahan et al, above n.29, at 1.

[117] J Sung and D Ashton, *High Performance Work Practices: Linking Strategy and Skills to Performance Outcomes* (Report for the UK Department of Trade and Industry, undated) 8. See further eg Bill Harley, 'Hope or Hype? High-Performance Work Systems' in Bill Harley, Jeff Hyman and Paul Thompson (eds), *Participation and Democracy at Work: Essays in Honour of Harvie Ramsay* (Palgrave Macmillan, 2005), 38.

Proposals/Negotiations for the Next Agreement	4
Redundancy	5
Renewal of Canteen Contract	1
Role of Supervision	1
Rosters	8
Skills and Training	22
Staffing Issues	2
Variation of Existing Awards	2
Wages and/or Working Conditions	4
Work Environment	6
Work Organisation	9

* '**Alterations to Specific Conditions of Employment'** includes changes such as the size of teams and tallies; designation of teachers; time off in lieu of payment for overtime; and fixing prices for meals.

** '**Changes in the Workplace'** includes technological change; changes to work practices; changes in workplace structure; and shift changes.

*** '**Productivity**' includes any references to productivity; competitiveness; restrictive practices; work practices; flexibility; key performance indicators; targets; best practice; waste reduction; customer service; cost effective machine/equipment improvements and quality.

The findings of this study are largely similar to those of previous empirical work carried out on the topic.[118] It is evident from the long list of subject headings in Figure 13 that the consultative committees set up under agreements examined in our research were empowered to deal with a multitude of different matters. Many of these issues could be described as being of strategic importance to enterprises – for example, productivity (identified in 34 of the 49 agreements), workplace changes (20), company objectives/strategic plans (10), communication/consultation between management and employees (9), redundancy (5) and closures (3). The committees were not simply empowered to deal with matters arising under the agreements, along the lines of the narrow reading by the AIRC of the 1993 legislative provisions for consultation in the enterprise bargaining process.[119] Seven of the 49 agreements provided that the committee could discuss any issue relevant to the workplace (or words to that effect). The prominence of strategic business issues in many of the agreements examined may have been a continuing legacy of the 1991 *National Wage Case* and the 1993 enterprise bargaining consultation provisions, as discussed earlier.[120] It may also suggest that JCCs were seen by management as a means to adopt HPWS-type strategies.

Subject matters specified for consideration by JCCs which might fall under the category of employee empowerment were less prominent among the agreements analysed. Examples included skills and training (22 agreements), grievance/dispute resolution (9), work organisation (9), job satisfaction/quality of working life/job security (8), occupational health and safety (10), career path advancement (4), performance assessment (4), and equal opportunity (3).

On the whole, while the JCCs appeared to be empowered under the agreements examined in this research to deal with matters of strategic importance to the business, this may be of little consequence unless the committees also had the power to influence decision-making on those subjects.

Powers of Consultative Committees

Figure 14 sets out the powers of JCCs under the agreements analysed. It sets out whether the committees had the power to make decisions or recommendations, or whether no indication of the committees' powers was provided by the terms of the agreements.

Figure 14: General powers of Committees

General power to make decisions	Power to make decisions over specific matters	General power to make recommendations	No indication/unclear
3	4	14	31

[118] See Mitchell et al, above n. 17, 212.
[119] See Mitchell et al, above n. 58, and accompanying text.
[120] See nn 16 and 59-72, and accompanying text.

Most of the agreements (31 of 49) were silent on the question of the powers of the committee, which suggests that either the powers of the committee were limited, or they were determined by other instruments. Only three agreements gave the JCC power to make decisions over all matters they were empowered to discuss, in contrast to merely having the power to receive information or make recommendations to management. The remainder (14 agreements) gave the consultative committees the power to make recommendations to management. The ability to make recommendations may provide the committee with the opportunity to influence management decision making, but ultimately management is free to accept or reject any recommendations as it sees fit. Where the committee only has the power to make a recommendation, this may nevertheless be significant. For example, although the consultative committee at *Country Road* did not have decision making powers, the agreement specified that the company would not initiate any changes in the workplace without first giving the committee an opportunity to provide feedback on the proposed changes.[121] The *AW Harvesting Agreement* made provision for similar arrangements.[122]

A further four agreements gave the consultative committees the right to make decisions over *specific* matters which they were empowered to discuss, but not a general power to make decisions. For example, the *Vodusek Meats Agreement* provided that any change to the conditions of employment of regular daily employees had to be agreed to by the consultative committee.[123] Under the *AW Harvesting Agreement*, the company was not permitted to offer part-time employment unless the consultative committee or the union agreed to this.[124] The *Pental Products Agreement* provided that the consultative committee '[would] determine the constituency of the training committee' (subject to certain stipulated principles).[125] And lastly, in the *Flooring Weatherill Park Agreement* (a non-union agreement), if the company needed to close down its operation for a short period of time, agreement with the consultative committee was required before this could occur.[126] While these provisions limit the power of JCCs to make decisions to a narrow range or issues, they may potentially provide employees and unions scope for co-decision making with managers over working conditions and other matters of importance to employees. Under the majority of agreements, however, the limited decision-making powers of committees would (most likely) have constrained their ability to influence the outcome of significant managerial decisions.

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[121] *Country Road – Retail Team Members Enterprise Agreement 2003*, AG826388, Part D under the heading 'Purpose and Role of the Consultation Committee'.
[122] *A W Harvesting & Camdale Services Enterprise Bargaining Agreement 2002-2005*, AG830888, clause 2.1 of attachment 2 - the Enterprise Consultative Committee Agreement.
[123] *Vodusek Meats and the AMIEU Agreement 2004*, AG834196, clause 11.1.4.
[124] *A W Harvesting & Camdale Services Enterprise Bargaining Agreement 2002-2005*, AG830888, clause 2.5.
[125] *Pental Products Pty Ltd and the National Union of Workers Enterprise Agreement 2003*, AG828545, clause 38.
[126] *Flooring Wetherill Park Enterprise Bargaining Agreement 2004*, AG831547, Appendix A (a)(iii)

5. Concluding Observations about the Data, International Comparisons, and Future Prospects for Workplace Consultative Mechanisms in Australia

The data examined in this paper suggests that JCCs are a durable, indeed perhaps even a growing, institution of employee *voice* in Australian labour relations. However, it does not appear that JCCs are acting as a significant mechanism for the extension of employee *power*. Data from the ADAM database provides support for the proposition that during the 1990s, increasing numbers of consultative committees of a formal and ongoing nature were provided for in Federal enterprise agreements. Whether this represents a broader trend in Australian workplaces can only be determined by a survey on the scale of AWIRS, as the ADAM data is limited to information concerning consultative structures under the provisions of enterprise agreements. For the years in which there is an overlap between the ADAM and AWIRS data, however, there appears to be a coincidence of trends for the workplaces covered by both data sets.

The Keating Labor Government's encouragement of the formation of JCCs under enterprise agreements in the 1990s was a contributing factor to the growth in the number of JCCs in Australian workplaces. However, given that the incidence of JCCs continued to increase after support for JCCs was removed from Federal industrial relations legislation by the Coalition Government, and there is no apparent legal spur for JCC growth at the State level, reasons for the continued experimentation with formalised consultative structures must be looked for outside the legal terrain. The decentralisation of Australian industrial relations since the early 1990s, the decline of traditional avenues for worker representation (ie trade unions and collective bargaining), and the increased popularity of human resource management practices that emphasise open communication between management and employees, may provide part of the explanation. Recent research by Pyman et al indicates that the growing interest in bodies such as JCCs in Australia has formed part of the emergence of a plurality of workers' voice mechanisms, including union, non-union and 'direct' arrangements (eg JCCs, staff meetings and quality circles).[127]

The data presented in this paper suggests that productivity, flexibility and other issues of strategic importance to businesses are prominent among the matters that JCCs are authorised to discuss. However, employee representatives on the committees are generally not empowered with decision-making rights over these issues.

Overall, despite the continued growth in the incidence of JCCs, the absence of legal requirements for the establishment of consultative bodies in Australian workplaces may restrict the extent to which they act as genuine representative mechanisms for employees. As Markey points out, '[t]o the extent that [JCCs] rely on management discretion in their formation, structure and powers, their limitations are clear.' Further, where they rely on union support, their capacity to act as mechanisms for employee voice is hampered by declining union membership levels.[128] Providing a legal mandate for JCCs may do more than increase their incidence, it may also ensure that JCCs are

[127] See Pyman et al, above n. 1.
[128] Markey, above n.2, 542.

democratic and representative of *all* employees, including part-time, full-time, male and female workers. The evidence presented in this paper suggests that, at least in so far as they are provided for in enterprise agreements, there is often no process for elections in voluntarily-formed JCCs. Further, as we have noted, the powers of the committees are often limited. Legal requirements for JCCs might include guidance as to the composition of committees, arrangements for independent elections of employee representatives, and co-decision making rights for JCCs over certain subject matters (particularly business restructuring issues, eg closures, mergers, transfers and large-scale redundancies).[129]

Some international comparisons may assist in placing the Australian data unearthed in this paper in perspective. The upward trend in the incidence of JCCs in Australia is matched by developments in New Zealand. According to Haynes at al's 2003 survey of New Zealand workers, 49.8 per cent of respondents reported the existence in their workplace of a joint management/employee committee that meets regularly to consult over workplace issues.[130] In a similar survey carried out in the United Kingdom in 2001, 52.5 per cent of respondents indicated that consultative committees operated in their workplace.[131] Other evidence suggests that the incidence of JCCs in the UK declined from 34 per cent of workplaces in 1984 to 29 per cent in 1990 and 1998, leading Millward et al to conclude that they were 'not enduring institutions of employee representation'.[132] Other data also portrays the declining coverage of joint consultation arrangements in the UK, although from a higher base: from 47 per cent of workplaces in 1998, to 39 per cent in 2004.[133] Whatever the precise level of JCC presence in UK workplaces may be, it is considered likely that consultative practices and structures will proliferate over the next few years under the influence of new UK regulations implementing the European Union *Information and Consultation Directive 2002*.[134]

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[129] The need for information, consultation and negotiation rights for workers over these types of issues has been repeatedly highlighted by many instances of corporate collapses and restructuring in Australia in recent years, involving companies such as Ansett, HIH Insurance, One.Tel, Arnott's, Telstra, Holden, Qantas, Coles Myer, National Australia Bank, Ajax Fasteners, Huon Corporation, Amcor and AGL; see further Forsyth, above n 70, 2-4, 81-84.

[130] Peter Haynes, Peter Boxall and Keith Macky, 'Non-Union Voice and the Effectiveness of Joint Consultation in New Zealand' (2005) 26(2) *Economic and Industrial Democracy* 229, 238; the authors point out (at 239) that the inclusion of occupational health and safety committees in this data may over-estimate the incidence of consultative structures.

[131] W Diamond and R B Freeman, *What Workers Want from Workplace Organisations: A Report to the TUC's Promoting Trade Unionism Task Group*, Trades Union Congress, London, 2001, cited in Haynes et al, above n.130, 238.

[132] Neil Millward, Alex Bryson and John Forth, *All change at work? : British employment relations 1980-98, as portrayed by the workplace industrial relations survey series***,** Routledge, London, 2000, 110.

[133] B Kersley, C Alpin, J Forth, A Bryson, H Bewley, G Dix and S Oxenbridge, *Inside the Workplace: First Findings from the 2004 Workplace Employment Relations Survey*, Department of Trade and Industry, London, 2005, cited in Mark Hall, 'A Cool Response to the ICE Regulations? Employer and Trade Union Approaches to the New Legal Framework for Information and Consultation' (2006) 37 *Industrial Relations Journal* 456, 462.

[134] See Mark Hall, 'Assessing the Information and Consultation of Employees Regulations' (2005) 34 *Industrial Law Journal* 103; and Hall, above n.133, identifying some early activity on the part of employers in terms of assessing or modifying their workplace consultation procedures to ensure compliance with the new laws, but little indication of unions or employees seeking to utilise the regulations as part of their strategic organising efforts.

The EU directive, and its transposition into domestic law in the UK, could serve as models for law reform in Australia.[135] Australia could also turn to German law for inspiration in crafting a framework of legal rights for workplace consultation, as Germany's works council system is widely recognised as the optimal model for worker participation internationally.[136] German law establishes an extensive framework of rights for employees to participate in a wide range of business decisions, and strong, permanent workplace structures through which these rights can be exercised effectively.[137] It is important to appreciate that works councils constitute only one of the three pillars of German industrial relations, the two others being collective bargaining and employee and trade union representation on the supervisory boards of companies.[138] Further, the German model operates on the basis of mutually reinforcing levels of 'social partnership' at the 'micro' or firm level (ie works councils); at the sectoral or 'meso' level (ie collective bargaining); and at the 'macro' level (ie tripartite arrangements for discussing wages and economic policy).[139] These institutional aspects of Germany's labour law and industrial relations systems would need to be borne in mind when attempting to 'transplant' that country's workplace consultation laws to the Australian setting.[140]

However, it seems unlikely that any attempt will be made to establish a system of mandatory consultative structures under Australian law in the foreseeable future. This is clearly not part of the Coalition Government's workplace relations policy agenda. In fact, the amendments introduced by the Work Choices Act have further eroded the statutory support for workplace consultation under Federal law. As we have noted, case law since the 1996 amendments led to the removal of consultation provisions from Federal awards.[141] It is now made clear that such provisions are not 'allowable award matters',[142] although (as before) provisions for consultation over specific issues or for the establishment of JCCs may be included in workplace agreements.[143] The statutory redundancy consultation provisions[144] have also been wound back, primarily by limiting the types of orders that the AIRC may make under these provisions.[145]

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[135] See further Forsyth, above n.70, Chapter 4.
[136] Carola Frege, 'A Critical Assessment of the Theoretical and Empirical Research on German Works Councils' (2002) 40 *British Journal of Industrial Relations* 221, 222.
[137] See Forsyth, above n.70, Chapter 3; Gollan, Markey and Ross, above n 1, Chapters 6 and 7.
[138] Shelley Marshall, Book Review, 'Works Councils and Bargaining with(in) Neo-liberalism' (2003) 16 *Australian Journal of Labour Law* 234, 236.
[139] Doug Miller, 'Social Partnership and the Determinants of Workplace Independence in West Germany' (1982) 20 *British Journal of Industrial Relations* 44.
[140] See further Forsyth, above n 70, Chapter 6.
[141] See nn 33-34 above and accompanying text.
[142] That is, consultation is excluded from the list of allowable matters in s 513 of the amended *WR Act*; further, the outcome of the *2004 Redundancy Test Case* (whereby provisions for consultation over redundancies could be restored as terms of Federal awards as 'redundancy disputes procedures', see n 35 above) is overridden by ss 513(1)(m) and 514 of the amended *WR Act*, which provide that the disputes procedure in an award is the 'model dispute resolution process' in Part 13 of the legislation, and a provision for any other dispute settling procedure is not an allowable award matter.
[143] Such provisions are not prescribed as 'prohibited content' for agreements under s 356 of the amended *WR Act* and Ch 2, regs 8.4-8.7 of the *Workplace Relations Regulations 1996*.
[144] See nn 24 and 32 above and accompanying text.
[145] See amended *WR Act* ss 668-671; the Commission cannot make any orders for reinstatement of redundant employees, withdrawal of termination notices, disclosure of an employer's confidential

On the other hand, there has been an upsurge in interest over the last decade among some unions, the ACTU and the ALP, in works councils and the broader concept of workplace democracy. In part, this has been a response to declining union membership levels, with unions considering whether works councils could assist them to redress that decline.[146] The recent spate of corporate collapses, closures, relocations and retrenchments has also led the ACTU to promote the merits of works councils as collective employee consultative structures in relation to business restructuring issues, operating alongside union-based collective bargaining.[147] Accordingly, a change of government at the Federal level may open the door to the prospect of statutory backing for formalised arrangements for workplace consultation in Australia. If that occurs, then the findings in this paper, echoing those of Mitchell et al almost ten years ago,[148] make one thing very clear: a strongly supportive legal framework is necessary to ensure that JCCs are able to function as genuine mechanisms for the expression of employee voice in Australian workplaces.

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information, or payment of compensation or severance pay; further, the AIRC can no longer make orders for severance pay or for consultation over redundancies in order to give effect to relevant ILO Conventions (ie due to the repeal of former Part VIA, Division 3, Subdivision D of the *WR Act*).

[146] See eg Evatt Foundation, *Unions 2001: A Blueprint for Trade Union Activism* (1995) 128-133; ACTU, *unions@work* (Report of the Overseas Delegation, 1999) 17; Martin Foley, 'Democratising the Workplace: Unions and Works Councils?' in Gollan, Markey and Ross, above n 1, 37, 39-44

[147] See eg Greg Combet, 'Employee Consultation in an Australian Context: The Works Council Debate and Trade Unions' in Gollan and Patmore, above n.1, 134, 138.

[148] Mitchell et al, above n.17, 197.