AUSTRALIAN INDUSTRIAL INSTRUMENTS AND THE CAPACITY TO MANAGE

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The Capacity to Manage Index – A New Diagnostic Tool

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by

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This very brief paper reports on the outcomes and progress of a series of research projects being carried out by the Centre for Employment and Labour Relations Law at the University of Melbourne. Some of these projects have been supported by funding from Industrial Relations Victoria and others by the Centre itself. Some of the work has been completed, and disseminated in published form.[1] Other parts of the work are in various stages of completion or are just beginning.

The focus of these research projects has been on various questions concerning individualisation in workplaces, Australian Workplace Agreements, high performance workplace systems, certified agreements, the no-disadvantage test and legal problems arising from the complexity and conflict in various instruments and sources of terms regulating employment.

None of these projects has been, or will be, associated with exploring the 'capacity to manage' as such. They arise from different research agendas and questions. However many of the issues concerning the content of enterprise agreements are common to both the Centre's agenda and to the IPA's Capacity to Manage project, and for that reason I expect that the outcomes and direction of the Centre's research programme will be of interest to those attending this seminar.

Australian Workplace Agreements and High Performance Workplace Systems.

Most of the work completed by the Centre at this stage concerns the content and orientation of Australian Workplace Agreements (AWAs). We took as our starting point the argument (admittedly a contentious one) that one of the reasons for the introduction of AWAs was to allow the individual parties to pursue workplace relations which corresponded to the human resource management (HRM) notion of the high performance workplace systems (HPWS). We defined this as follows:

> … the basic focus of the HPWS (and all other related HRM models) is upon the elements which can enhance the value of the employee's contribution to the business. These include: flexibility in work performance, empowerment of the employee through participation in workplace decision-making, performance related reward systems, commitment to quality of service or product and loyalty to the business concern…

[1] 1. See R. Mitchell and J. Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations*, 292-325; and R. Mitchell and J. Fetter, *The Individualisation of Employment Relationships and the Adoption of High Performance Work Practices*: *Final Report*, Prepared for the Workplace Innovation Unit, Industrial Relations Victoria (2003), pp. 1-31.

In short, we were looking for two different sets of indicators; first those which facilitated the flexible use of labour resources, and second, those which went towards empowering the employee at the same time, thereby combining flexibility with the heightened impact of employee skills and effort.

Our published material on these issues contains a great deal of detail which it is not possible to re-examine here. It will suffice for present purposes to refer to the four tables presented at the end of the paper. Our examination of the content of AWAs took place in two stages. First we examined 300 agreements manually lodged with and approved by the Employment Advocate's Office (EA) at the end of 1999. Subsequently a second batch of agreements (200 in number) randomly selected from those lodged electronically with the EA after June 2001 were examined. The attached tables report the results from this second batch of agreements.

What do the results of this examination tell us about 'flexibility' in AWAs, and hence, as a consequence, about the capacity to manage where AWAs are the regulatory instrument applying to the particular employment?

Generally speaking our findings were as follows. With respect to 'pay flexibility' our view was that AWAs offered considerable leeway to employers to break away from the inflexible award-based remuneration systems where pay is strictly linked to the duration of working time. The most flexible arrangements concerned those where remuneration was fixed regardless of actual time worked and those where remuneration was matched either to individual employee performance or firm performance. Overall 25% of all AWAs provided employers with the cost-saving flexibility of not being obliged to compensate employees for additional hours worked. At the same time 18.5% of all AWAs provided for some form of performance-based pay (PBP). A high proportion of cases in which PBP was in evidence did not in fact legally guarantee the performance-based pay component. In many instances this was a matter of managerial discretion.

The most prevalent form of temporal flexibility was found in the right of the employer to require the employee to work additional hours over and above the standard number of hours by reference to which ordinary hours was calculated (36% of all agreements). As noted above, in many of these cases the employer was not obliged by the agreement to compensate employees for their additional work. Another popular form of flexibility was the lack of a prescribed set of ordinary hours of work – such as where the AWA obliged the employee to meet a broad commitment to work the number of hours necessary to fulfil 'the requirements of the job', 'the operational requirements of the employer' or 'the aims of the business'. All told, our estimate was that more than 60% of AWAs make some departure from the notion of the working week of fixed duration.

Functional flexibility has also been an important source of managerial discretion through AWAs. Fifty per cent of all AWAs examined gave the employer the right to add new duties to the employee's tasks, and 24% gave the employer the right to vary existing duties. In many instances these rights were circumscribed by various conditions including a 'reasonableness' criterion, and whether the new or varied/extended duty was

within the limits of 'the employee's skill, training and competence'. However, in more than half the AWAs containing such flexibilities there were no limitations of any kind upon the employer's right to add new duties or to vary them. Nineteen per cent of all AWAs examined contained the power for the employer to transfer employees to another site. In most cases this power was unilateral and unfettered.

Our view of this evidence was that AWAs extended considerable flexibility in the payment and use of labour. That seems, self-evidently, to indicate a high capacity to manage labour resources. It is true that we have not carried out the same exercise as the IPAs team in terms of allotting points for or against certain clauses. However, on the whole it is unlikely that there is much in the content of AWAs which would restrict the capacity of managers to manage. Trade unions are rarely involved in the negotiation of AWAs, and in most cases certified agreements and awards are, in respect of most of their content, excluded.

Finally, on this point, the flexibilities obtained through AWAs were, in our view, consistent with the HRM notion of the HPWS. But as we noted at the outset, such systems are said to operate only where the traditional 'hierarchical' model of work embodied in the common law contract of employment is flattened out so as to draw employees into the decision-making process, particularly in setting the parameters and goals of the newly 'flexibilised' firm.

Here, as Table 4 illustrates quite unequivocally, AWAs are falling well short of such objectives. More than 80% of AWAs contain no reference at all to consultation between management and the employee. That doesn't mean to say that consultation doesn't take place. But it does mean that it is not part of the legal arrangement embodied in the AWA.

AWAs are not leading to the adoption of HPWS in the firms we examined if the terms of the agreements are reliable indicators of such practices.

Certified Agreements and High Performance Workplace Systems

One argument put to us in the course of our research into AWAs was that whilst the HPWS may not be evident in such individualised agreements they might be evident in the terms of collective agreements. Confining the present discussion to agreements formalised under the Federal government's *Workplace Relations Act 1996,* two types of agreements are most relevant, agreements made between employers and groups of employees under s.170LK of the Act, and, far more common, agreements made between employers and unions under s.170LJ of the Act.

A group of researchers, reflecting a joint project between the Centre for Employment and Labour Relations Law and Industrial Relations Victoria is engaged in this project.[2]

[2] The group comprises Richard Mitchell, Director of the Centre, and Kate Creighton and Tanya Josev, student research assistants in the Centre; Joel Fetter, Research Associate of the Centre and articled clerk at Minter Ellison; Dr Peter Gahan and Dr Donna Buttigieg of Industrial Relations Victoria, Victorian Government' and Paul Mangan, student research associate of Industrial Relations Victoria.

Several hundred certified agreements have been collected, and their contents classified in broad correspondence with the indicators searched for in the AWA research. The agreements have only just been collated and thus research is at a very early stage. Findings are, therefore, very general and of a preliminary nature only.

By reason of the fact that s.170LK agreements are between employers and groups of employees, and may not involve the participation of unions acting as agents or representatives, logically one would expect that the outcomes in these agreements would more closely resemble those in AWAs rather than in union-based agreements.

To some extent the preliminary evidence seems to bear out this supposition. First, s.170LK agreements do appear strongly to permit a greater spread of working hours than would be the case in awards, and also to permit the employer unilaterally to vary this spread of hours.

Second, there is strong evidence of functional flexibility in s.170 LK agreements, although to a lesser degree than in AWAs. Twenty per cent of agreements entitle the employer to add new duties, and about 25% permit a variation of duties (but usually tempered by the 'skill, training and competence' condition). There appears to be less evidence of unlimited employer power unilaterally to alter duties in s.170LK agreements than in AWAs.

Thirdly, s.170LK agreements excluding overtime payments for hours worked in excess of the standard number of hours, or worked outside the ordinary spread of hours, appear in about the same proportion of cases as they do in AWAs, and the same is true of PBP.

On the other hand, there are also some (at least superficially) surprising outcomes. For example, there are far fewer types of pay flexibility in s.170 LK agreements than in AWAs. One instance of this is the very rare occurrence of annualised salaries in s.170 LK agreements compared with their very high percentage occurrence in AWAs (34%).

Another major difference is found in the level of employee involvement in decision-making. Almost 25% of s.170 LK agreements contain provisions for joint consultative committees, though almost exclusively composed of employer and employee representatives to the exclusion of union representatives. Informal forms of consultation are present in almost 20% of s.170 LK agreements.

The tentative conclusion is that perhaps s.170 LK agreements between employers and collectives of employees don't look quite so much like AWAs as we expected. Employer discretion (or capacity to manage if you like) looks less unfettered, and employee involvement more consolidated than in AWAs.

As might be expected, collective agreements between employers and unions (s.170 LJ agreements) differ most markedly from the highly flexible AWA regulated employment. That is not to say, however, that s.170 LJ agreements appear to model the HPWS, and we will have to reserve our judgement on that at this preliminary stage of the investigation.

But what we can say about s.170 LJ agreements is this: they appear to offer considerably less flexibility (and hence arguably less 'capacity to manage' in terms of the IPAs Capacity to Manage Index) than do AWAs. Some examples of this are as follows:

- Only 9% of s.170 LJ agreements provide that individual worker performance is a factor in salary reviews, compared with 20% of AWAs

- Only 5% of s.170 LJ agreements allow for an unlimited spread of working hours compared with 13% of AWAs

- Only 23% of s.170 LJ agreements give the employer the right to add new duties compared with 50% of AWAs

- Generally speaking, it appears that few, if any, s.170 LJ agreements allow for unpaid overtime (compared with 25% of AWAs)

- Flexibility on the number of working hours, spread of ordinary hours of work and so on seems much less liberal in s.170 LJ agreements than in AWAs.

At the same time, s.170 LJ agreements provide for a much greater degree of employee involvement in decision-making. An important indicative statistic here is the fact that 70% of s.170 LJ agreements have consultation clauses compared with less than 20% in AWAs. Thirty eight per cent of s.170 LJ agreements establish or recognise a consultative body within the enterprise, some with very extensive terms of reference.

Two key issues may be isolated arising from the discussion of collective agreements.

First, whilst these results are very tentative at this stage, it seems unlikely that the processes of collective bargaining are producing to any substantial degree workplaces which resemble the 'ideal' model of the HPWS. At least that seems to be the case based on the face of s.170 LK and s.170 LJ agreements.

Secondly, if we define the 'capacity to manage' as relatively unrestricted 'managerial prerogative; (which seems to be the definition assumed in the IPAs Capacity to Manage Index) then it is clear, and entirely to be expected, that as a tool of enterprise-based regulation AWAs offer the greatest 'capacity' and union-based collective agreements the least.

Conclusion: The Capacity to Manage

What conclusions can we draw from these brief remarks which might be of relevance or value to the Capacity to Manage project?

First, it seems to me that the Capacity to Manage Index, focussing as it does upon 'EBAs', is over generalising its approach. Perhaps lumping together all 'enterprise' agreements (including State and Federal, union based and non-union based) is unhelpful.

Unions are workplace regulators, and the legislation gives them status as such. Consequently the extent to which agreements are between employers and unions, or the extent to which unions are involved in agreements between employers and groups of employees (or individual employees for that matter) is going to affect the outcome as embodied in the terms of the agreement. The CMI Reports on Food Manufacturing, Construction and the Automotive industry acknowledge that the capacity to manage (as defined) is greater in non-union than in union-based agreements. But this is hardly surprising. The point that does not seem to be recognised in these reports is the differing *expectations* which one might have in relation to the capacity to manage (as defined) arising out of the different regulatory regimes applying in the case of each different type of regulatory instrument.[3]

As the CMI methodology acknowledges, Australian businesses are already extensively regulated by legislation and awards. They are also in a regulatory relationship with trade unions. This is to say nothing of the common law. All of these forms of regulation impact, most commonly negatively, upon the capacity to manage as defined.

As a result of this pre-existing regulation, commencing an analysis of EBAs with even the expectation of a neutral starting point is surely problematical. In other words, whilst the CMI gives a picture of the content of the agreements it examines, the conclusions it draws relating to the capacity to manage are to some extent unrealistic, being largely de-contextualised from the regulatory framework.

Thirdly, it must follow that the 'capacity to manage' will be at its zenith when EBAs impose no restrictions on managerial prerogative whatsoever (the CMI methodology does concede that clauses relating to employee remuneration should be taken out of the equation). The capacity to manage, under this definition, would be further enhanced if all other instruments of workplace regulation, legislation, awards and so on were also abolished. Employment relations would then rest legally almost exclusively upon the contract of employment.

It is sometimes thought that the contract of employment contains no inbuilt doctrinal limitations to the right of employers to manage their own businesses. This has always been something of an exaggeration, but the key point is that courts have largely forsaken an important role in the development of the contract of employment precisely because of the regulation of the employment relationship through other regulatory agencies and instruments. Strip those away and, as recent developments make clear, the tendency in the common law courts to expand their supervisory role would assert itself vigorously.[4]

Finally it needs to be pointed out, in relation to a project such as this one in particular, that consultative processes and other aspects of union and employee involvement in management may be, and very often are, valuable, positive, efficient inputs into running a

[3] And, self-evidently of course, the differences from which an analysis would proceed may also be based on the type of industry, location, union character and so on.
[4] See Richard Johnstone and Richard Mitchell 'Regulating Work' in C. Parker, J. Braithwaite, C. Scott and N. Lacey (eds.) *Regulating Law*, Oxford University Press (forthcoming 2004).

business. A project designed to assess the capacity to manage needs to be aware of this, but defined in its present terms the IPAs capacity to manage project cannot take account of this possibility.

OUTCOMES ARISING FROM SEARCH OF AWAS FOR INDICATORS OF FLEXIBILITY AND EMPLOYEE INVOLVEMENT IN ENTERPRISE MANAGEMENT

Table 1: Pay Flexibility

	No	**%**
Agreements without a pay clause	17	8.5
Agreements providing for remuneration to be calculated:		
• On an hourly basis	62	31
• On a daily basis	3	1.5
• On a weekly basis	27	13.5
• On an annual basis	68	34
Agreements providing for performance-related pay	37	18.5
Agreements providing that individual worker performance is at least one factor in salary reviews	40	20
Agreements which provide no extra pay for overtime worked	50	25
Agreements which allow the employer to reduce pay	5	2.5

No: Number of agreements (N =200); **%**: Percentage of agreements containing provisions of each type.

Table 2: Temporal Flexibility

	No	**%**
Agreements without an hours clause	21	11.5
Agreements providing no set ordinary working hours	52	26
Agreements permitting the employer to vary unilaterally the number of ordinary hours to be worked	28	14
Agreements providing for ordinary hours to be worked within an unlimited spread of hours	26	13
Agreements permitting the employer to vary unilaterally the spread of hours in which ordinary hours are to be worked	29	14.5
Agreements giving the employer the right to require additional hours to be worked	72	36

No: Number of agreements (N =200); **%**: Percentage of agreements containing provisions of each type.

Table 3: Functional Flexibility

	No	**%**
Agreements without a detailed duties clause	54	27
Agreements giving the employer the right to add new duties, including agreements which restrict this power to duties which are:	100	50
• Reasonable	20	10
• Within the limits of the employee's skill, training and competence	20	10
• Incidental to the job	12	6
• Safe	3	1.5
Agreements giving the employer the right to vary duties, including agreements which restrict this power to changes which are:	48	24
• Reasonable	1	0.5
• Within the limits of the employee's skill, training and competence	10	5
• Formally recorded on a position description	4	2
Agreements giving the employer the right to transfer the employee to another site	38	19

No: Number of agreements (N =200); **%**: Percentage of agreements containing provisions of each type.

Table 4: Worker Empowerment

	No	**%**
Agreements containing no consultation clause	163	81.5
Agreements under which the company commits itself to 'advise' employees of workplace change	7	3.5
Agreements under which the company will engage in informal consultation with employees regarding workplace change	23	11.5
Agreements under which the company will engage in formal consultation with employees regarding workplace change	7	3.5
Agreements making reference to teamwork	41	20.5
• Strong reference	17	8.5
• Weak reference	24	12

No: Number of agreements (N =200); **%**: Percentage of agreements containing provisions of each type.

SOURCE: Richard Mitchell and Joel Fetter: *The Individualisation of Employment Relationships and the Adoption of High Performance Work Practices: Final Report* (2003) Prepared for the Workplace Innovation Unit, Industrial Relations Victoria.