



**THE INDIVIDUALISATION OF EMPLOYMENT
RELATIONSHIPS AND THE ADOPTION OF HIGH
PERFORMANCE WORK PRACTICES**

FINAL REPORT

Prepared for the Workplace Innovation Unit, Industrial Relations Victoria

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INTRODUCTION

This Report provides an overview of the impact which the introduction of Australian Workplace Agreements ('AWAs') by the *Workplace Relations Act 1996* (Cth) ('WRA') has had on work practices and outcomes. In particular, we were asked to analyse a representative sample of AWAs in order to identify the nature of work practices that AWAs have been used to introduce, and the extent to which AWAs have been deployed in a strategic way to support more innovative industrial relations and workplace-related practices associated with 'High Performance Work Systems'.

We manually inspected 500 AWAs made and approved pursuant to the terms of the WRA between 1999 and 2002 with special attention paid to those made by large employers. We found that most AWAs were used to introduce flexibility in employees' hours and pay arrangements. Only a small number of employers – usually, though not exclusively, those of a large size – used AWAs to introduce work practices consistent with the 'high performance' model of workplace relations.

The first two parts of this Report define the concept of the High Performance Work System and present that model in the context of a strategy of individualisation and (more controversially) deunionisation. The third and fourth sections detail the legal framework underpinning AWAs and the extent to which these new agreements have penetrated the workforce. Part five presents the findings of our empirical research into the content of AWAs, which enables us to form some general conclusions about the nature of work practices being introduced.

1 HIGH PERFORMANCE WORK SYSTEMS

Over the past two decades the 'High Performance Work System' (HPWS) has emerged as one of a cluster of new 'employment systems' developed under the aegis of human resource management (HRM) theory. These work systems have in common the objective of offering business a 'competitive advantage' in a global economy through the strategic integration of enterprise objectives and employee commitment and participation.

At the outset, it is important to note that there is some imprecision and overlap in the HRM literature over the precise definition of the HPWS model and its relationship to other HRM models put forward in the academic literature. These models are variously described, and contain often quite different elements. They also are variously labelled, sometimes called 'High Performance Work Systems', sometimes 'Transformed Workplaces', 'High Commitment Workplaces' or 'High Trust Workplaces', and on other occasions, the expression 'High Involvement Work Systems' is invoked. Though these have much in common with each other, and indeed with other like concepts such as 'Partnerships at Work', there are subtle differences of emphasis according to label, and as a result the constituent elements of each system may vary (Osterman 1994; Kalleberg and Moody 1994; Whitfield and Poole 1997; Edwards and Wright 2001).

Furthermore, there are more deeply analytical accounts which distinguish between 'production systems' and 'employment systems', between 'hard' and 'soft' varieties of HRM, and accounts which challenge various assumptions inherent in much of the HRM literature, particularly on the basis of methodology, outcomes, and causation (Ichniowski *et al.* 1996; Whitfield and Poole 1997; Deery and Walsh 1999a).

Despite these problems of definition, 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 (Sisson and Storey 2000; Collins 2001).

Typical indicators of job flexibility referred to in the HRM literature include flexible working hours and duties, job control, use of new technology, and changes in work organisation. Indicators of employee empowerment include involvement in decision-making (for example, through consultative committees or employee representation on the board of directors), sharing of information, formal grievance procedures, non-hierarchical forms of work, and the use of teams or autonomous work groups. An emphasis on individual performance is indicated by the use of financial incentive structures, such as profit sharing and employee share ownership schemes as well as by linking performance appraisals with pay. Indicators of quality include the use of Total Quality Management schemes as well as the use of various formal training systems and the precise definition of employee career paths. Loyalty to the business is indicated by various recruitment and retention policies, including formal inductions and internal labour markets. Finally, a range of miscellaneous policies which promote employee security and satisfaction are also important indicators of a HPWS approach. These include measures relating to redundancy, equal opportunity and anti-discrimination, occupational health and safety, family friendly management (including the provision of child care, paternity or maternity leave, family leave, compassionate leave and the availability of flexi-time or part-time work) and the provision of sick leave and other benefits (see Roan *et al.* 2001; Sisson and Storey 2000; Ramsay *et al.* 2000; Cappelli 1999; Mabey *et al.* 1998).

This is a representative set of indicators and there is no necessary combination which may be used as an archetype. However, for the purposes of this Report we have focused upon a representative sample of some of these as a means of searching AWAs for requisite content. These indicators are fully detailed in the explanation of our research methodology, presented in part five.

2 INDIVIDUALISATION, DEUNIONISATION AND THE HPWS MODEL

One strand of HRM scholarship views the individual relation between employer and employee as pivotal in the formation of work practices which engender enterprise success (cf. Black and Lynch 2001; Applebaum *et al.* 2000; Kalleberg and Moody 1994). Although the HRM approach is not necessarily inconsistent with collectivism or a union-based partnership approach — for instance, it could accommodate a role

for trade unions in fostering mutual trust between employees and their employer — the primary thrust of HRM theory endorses a shift from collectivism to individualism in the employment relation and consequently facilitates principally a non-union, or at least a highly co-operative enterprise union approach, to managerial strategy.

One view of this individualisation process is that it serves merely to restore areas of job control to management previously shared with, or exercised exclusively by, unions, and thus allows employers to reduce costs through greater exploitation of labour (Chin 1997; Stewart 1999: 18). This perspective also fits with much of the available empirical data, although the evidence is contested.¹ It is clear that the de-regulatory² labour market policies of various Australian governments since the late 1980s, including those embodied in the terms of the WRA, have to some degree been influenced by arguments based on the economic theory that free and open competitive markets produce the most efficient outcomes. Of itself, this view supports 'individualised' employment relations because it demands the removal of collective power which otherwise distorts market outcomes.

Certainly the AWA provisions of the WRA, to the extent that they can be said to encourage the adoption of a HPWS model by employers, offer assistance to employers in creating the conditions in which unions may more easily be excluded. For example, the parties may exclude most external regulation of their affairs, including those instruments of regulation such as awards and collective agreements which maintain a central role for trade unions.³ Accordingly, the AWA provisions appear to endorse the view that collective regulation through the arbitration system, and the centralised aspirations of trade unions, are antithetical to the development of 'innovative human resource strategies' (Reith 1998: 4) such as HPWS:

Those who are present at the workplace, be they managers, human resource specialists, supervisors, or shop floor employees are best placed to develop working arrangements that are most suited to improving efficiency and productivity of the business ... (Reith 1998: 11).

Such arrangements may be made via collective agreements, but, as we noted earlier, and the preceding quote confirms abundantly, collective outcomes *through trade unions* are not favoured as a means of implementing the HRM agenda.

However, when examining the empirical evidence regarding the types of work systems being introduced by employers, the links between individualisation, deunionisation and the HPWS model are not clear cut. In his report based on the 1998 National Institute of Labour Studies Workplace Management Survey, Wooden concluded that employers pursuing individualistic employment arrangements were more likely than non-individualising employers to be high commitment workplaces characterised by HRM features such as consensus decision-making, team work and information sharing (Wooden 2000).

On the other hand, the study of 'individualised' workplaces undertaken by Deery and Walsh based upon the Australian Workplace Industrial Relations Survey 1995 (Deery and Walsh 1999a) came to the opposite conclusion. That study found that negotiations of any sort over workplace issues were uncommon amongst 'individualising' employers, that the overwhelming majority of such firms had not entered into such negotiations during the previous 12 months, and that less than one third of them had

negotiated over staffing levels, wage increases, occupational health and safety, technology, and changes in work practices (Deery and Walsh 1999a: 120–2). To compound this situation, only a minority of ‘individualising’ workplaces had in place quality circles, semi-autonomous groups and continuous improvement methods. In short, in employment practice there seems to be little evidence of a causal connection between ‘individualisation’ as a process and the adoption of a HPWS agenda, and where there is such a connection it seems unlikely to have arisen as a result of bargaining between the employer and individual employee or collective agent acting on behalf of that employee.

The Deery and Walsh conclusions are consistent with research findings in Britain. Studies carried out of the individualisation process in British companies demonstrate very little evidence of bargained or negotiated outcomes (Deakin 1999). Rather, the studies confirm an earlier finding that individualised agreements are largely derived from standard terms of employment proposed by employers. British research has also shown there to be ‘little evidence that the creation of individual, non-union working arrangements have been associated with high trust HRM strategies’ (Deery and Walsh 1999a: 118).

One very obvious effect of the individualisation process has been the corresponding ‘derecognition’ or ‘exclusion’ of unions from workplace governance. This is also a finding common to Australia and Britain (Brown 1999). In Australia, two thirds of ‘individualised’ workplaces had no union presence according to a recent study (Deery and Walsh 1999a: 120), and in many industries and enterprises where there *is* union presence their resistance power has been weakened by legal and labour market factors. Indeed, in several highly-publicised instances, some large employers have strategically deployed individual agreements with the objective of deunionising the workforce, or else with the aim of undermining a union’s collective bargaining claim (Fetter 2002). One outcome of this, of course, has been a consequent restoration of unilateral power to management, as union restraints and controls at the workplace have been rolled back (Deakin 1999).

As Stewart has pointed out, this newly (re)acquired managerial power may be used to arrive at any number of agendas, but one of them might well be ‘to create the kind of “high trust” environment and positive employee involvement promoted by human resource management theory’ (Stewart 1999). However, the evidence does not suggest that employers are seeking to utilise their recovered and/or extended managerial powers for ‘high trust’ HRM purposes. In Australian workplaces where substantial deunionisation was taking place Deery and Walsh found no evidence that ‘high trust’ HRM policies were being used as union substitution devices. Ironically their study suggested that ‘team building’; taskforces/ad hoc committees; regular meetings between employees and management; joint consultative committees; suggestion schemes; and, grievance procedures’ were ‘significantly more likely to be associated with workplaces that had *stable or increasing levels of unionisation*’ (Deery and Walsh 1999b: 28).⁴

In some respects this evidence once again matches the British findings. Greater managerial discretion to set terms and conditions of employment, according to a major British study, did not necessarily imply an enhanced role for individual

contracts as incentive devices for eliciting employee co-operation. Rather the British evidence indicated that the key effect of ‘individualisation’ was the enhanced capacity of management to bring about desired flexibilities, including functional flexibilities, through the opportunity to set employment conditions at will (Deakin 1999: 130–1). In other words, the increased managerial power in British enterprises was being used to support some elements of the ‘flexible’ or HPWS model but not those which are consistent with a more devolved model of an enterprise employment system. This is a point to which we return in our concluding section.

We turn next to an outline of the AWA legislation.

3 AUSTRALIAN WORKPLACE AGREEMENTS: THE LEGAL FRAMEWORK

The legal framework governing the operation of AWAs is set out in Part VID of the WRA. Section 170VF(1) defines an AWA as a written agreement that ‘deals with matters pertaining to the relationship between an employer and employee’. Such an agreement may be made between an employee and an employer whose business may be regulated by federal law under the *Australian Constitution*: this includes, among others, all corporations registered in Australia, the Australian government, and employers engaged in interstate trade.⁵ One estimate is that the corporations power alone covers 85% of all non-farm employees and 89% of private sector employees. The obvious consequence of this is that the AWA provisions potentially cover the great proportion of the Australian workforce.

The key feature of an AWA is that, during its period of operation, it operates to the total exclusion of any otherwise applicable general federal award and any State award or agreement. Although it may be subject to any applicable federal certified agreement already in existence, this is only to the extent of any inconsistency with that agreement, and once that agreement expires, it ceases to impact upon the AWA. An AWA completely excludes all certified agreements which come into operation after the AWA is made. The AWA also prevails over conditions of employment specified in State laws (save those dealing with a limited range of prescribed matters, such as occupational health and safety) and over certain federal laws specified in the regulations. The AWA continues to apply even if the business is transmitted to another employer (who is also subject to federal jurisdiction).⁶

The AWA may be made with new employees before the commencement of their employment or with existing employees. The employer must offer an AWA in the same terms to all comparable employees, unless there is a valid (fair or reasonable) reason not to do so, and the Act allows employers to negotiate AWAs collectively with several employees.⁷

As we noted earlier, the Act pays lipservice to the idea that an AWA is a result of negotiation: it provides for the parties to appoint ‘bargaining agents’ and to take protected industrial action in the course of negotiations. However, the Act anticipates that more commonly the employer will draft the AWA and present it to the employee on a take-it-or-leave-it basis. The employer is required to give the employee a copy of the AWA together with an information statement prepared by the Employment

Advocate ('EA') and must explain the effect of the AWA to the other party. There is a minimum cooling-off period (five days for existing employees; 14 days for new employees) before signing. The only recognition of the imbalance of bargaining power is found in the legislative prohibitions against duress, misleading information, threats and intimidation.⁸

The content of an AWA is largely left for the parties to determine, although as we noted earlier there is broad general scope for the EA to provide assistance and guidance on these matters. Section 170VG of the Act imposes only three explicit requirements on content. First, each AWA must contain a provision prohibiting various types of discrimination as proscribed by the regulations; if the AWA omits this clause, the AWA is taken to include the regulatory text. Second, the AWA must contain a dispute resolution procedure of some sort; if one is not included, the model procedure found in the regulations (providing for bilateral discussions before conciliation or arbitration) applies. Finally, the AWA must not prohibit or restrict disclosure of its details by either party.

In order to take effect as an AWA, the agreement must be lodged for the approval of the EA within 21 days of its signing. The employer must attach a declaration that the AWA complies with the statutory requirements and disclose whether or not it has offered an AWA in the same terms to all comparable employees. The EA must issue a filing receipt where these filing requirements have been met (or, if they have not been met, where there is no disadvantage to either party).⁹

The EA must approve the AWA if it is 'satisfied' that all of the statutory requirements are met and if it is 'sure' that it passes the 'no-disadvantage test'. The AWA passes this test if it 'does not disadvantage the employee in relation to their terms and conditions of employment'— ie if it does not result, on balance, in a reduction in the overall terms and conditions of employment enjoyed under the legislation and the award which would otherwise apply to the employee (or, if no award applies, the award which is deemed by the EA to be appropriate for the purpose of comparison).¹⁰

If the EA is not 'sure' that the AWA passes the test, it can resolve its concerns by accepting undertakings from the employer or by condoning other action. If its concerns are not resolved in this way, the EA must refer the AWA to the Australian Industrial Relations Commission ('the Commission'). If the Commission is 'satisfied' that the AWA passes the no-disadvantage test (and it may resolve its own concerns by accepting undertakings) it must approve the AWA. Even if the AWA fails the no-disadvantage test but it is 'not contrary to the public interest to approve the AWA', the Commission must also approve the AWA; a legislative note suggests that this might occur where making the AWA is part of a reasonable strategy to deal with a short-term business crisis.¹¹

The filing and approval process is private and confidential. Third parties are not permitted to intervene at any stage the process.¹² All proceedings are held in private and the officials involved are not permitted to disclose the identity of the parties on pain of imprisonment (subject to some exceptions).¹³

If approved, the AWA is taken to have commenced operation on the day it is filed, or some later date specified by the parties.¹⁴ It ceases to operate if it is terminated by the Commission (upon one party's application)¹⁵ after the passing of the 'nominal expiry date' of three years (or a shorter period as provided by the parties). The AWA may also cease operation if it is terminated or replaced early by agreement (with the approval of the EA), if it terminates according to its own provisions, or if the employment relationship comes to an end. During its life, the AWA may be varied by a similar approval process to the original.¹⁶

During its period of operation, breaches of the AWA are prohibited, as is the taking of industrial action before the nominal expiry date. A party may enforce these prohibitions in court by seeking a penalty (maximum \$10,000 for a body corporate or \$2,000 in other cases), injunctions and/or damages.¹⁷

Three crucial aspects of this legal framework should be noted. First, a major *incentive* to employers for using AWAs lies in the fact that it is possible for them to fashion their employment systems around the use of individualised arrangements to the exclusion of most external collective forms of regulation. Awards are completely excluded by AWAs. Certified agreements made with unions may be excluded if the employer structures its employment arrangements accordingly. Even if certified agreements are operative in the workplace, AWAs may still be used as an additional source of rights and obligations provided they do not conflict with the terms of the certified agreement. Furthermore, many other state-based labour laws may be excluded by operation of an AWA.

Secondly, at the same time there seems little doubt that the sheer volume of technical and administrative requirements in making, negotiating and filing constitutes a major *disincentive* to employers in utilising the process (Business Council of Australia 1998). This point is taken up in Part 4 of the Report below.

Thirdly, the evidence seems to suggest that 'no disadvantage' test has not proved a very effective legal device in preventing 'under-award' deals being struck through enterprise-based bargaining (Merlo 2000; Waring and Lewer 2001). We return briefly to this issue in part five of this Report.

4 THE PROGRESS OF INDIVIDUALISATION

Measured in terms of AWA approvals only, the progress of individualisation in Australian workplaces appears to be slight at best. The AWA provisions of the WRA became effective in March 1997. By the end of October that year, a mere 3,350 AWAs involving 164 employers had been approved by the EA, although a further 198 had been referred on for consideration by the AIRC. Subsequent increases were steady, but slow. By the end of October 1998, the number of approvals had risen to 7,500, with a further 6,500 under consideration. The Office of the EA announced the arrival of a milestone, 50,000 AWA approvals on 23rd of February 1999. By the end of October 2000, this figure had increased to almost 135,000. At that stage a total of 2,577 Australian employers had successfully processed AWAs covering some, or all, of their employees. At the date of writing (November 2002), 275,000 AWAs had been

processed (of which it is estimated that only 130,000 were still operative) in 4,753 businesses (OEA 2002).

Despite the increasing trend in the rate of approvals, AWAs statistically constitute only a very minor aspect of Australian industrial regulation, covering a tiny proportion of the workforce (1.9%).¹⁸ Whilst the uptake of AWAs has reached into most parts of the economy to some degree, they tend to be only of importance in terms of concentration (by employee) in communication services, government, mining, cultural and recreational services, and electricity, gas and water. Key areas of industry such as construction, retail, transport and manufacturing by contrast have relatively low levels of AWA penetration (OEA 2002).

Most employers with AWAs are small and medium-sized businesses. A mere 12% of businesses with AWAs were large businesses with 500 or more employees (DEWR/OEA 2002: 157). On the other hand 37% were businesses employing fewer than 20 employees and a further 30% were lodged by businesses employing between 20 and 99 workers. In short, 67% of employers with AWAs are officially regarded as small or medium sized businesses. These figures do, however, understate the importance of big business in AWA penetration. First, whilst big business constitutes only the smaller proportion of businesses with AWAs, they nevertheless cover the largest proportion of employees with AWA coverage. Of *employees* with AWAs, 41% are employed by large businesses with over 500 employees. In addition, there has been noticeable growth in the numbers of large employers taking up the AWA option for employment regulation. In 1998, only 8% of businesses with AWAs were large employers, but by 2001 this number had grown to 24% (DEWR/OEA 2002: 157).

The low incidence of AWAs generally, and the fact that they have failed to penetrate more than a small percentage of the workforce, does not of itself, however, present a completely accurate picture of the penetration of the individualisation process *per se*. One must also include several tens of thousands of statutory individual agreements formed under Western Australian and Queensland legislation (Wooden 2000: 75)¹⁹ as well as several hundreds of thousands of unregistered (and often even unwritten) common law individual agreements. A recent study carried out under the auspices of the National Institute of Labour Studies ('NILS') (see Wooden 2000) estimates that coverage of such informal agreements rose from 12% to 15% of the workforce in the period from 1995 to 1998, although this figure presumably includes many agreements which are not truly intended to decollectivise the employment relation.

To sum up, it is necessary to be cautious in assessing the extent of the drift from collectivist to individualist practices in Australian workplace relations, and the impact of the AWA regime in that process. The NILS/Wooden research reveals a much stronger underlying trend towards individualisation than is disclosed in the rate of AWA approvals. It is also necessary to acknowledge that the impact of the AWA regime is perhaps greater than its statistical presence suggests. The rate of increase in approvals suggests that overall employer interest in the possibilities of the scheme is progressing steadily if not rapidly (DEWR/OEA 2002: 150). In addition, anecdotal evidence suggests that some enterprises have been induced to pursue AWA strategies principally in response to similar business initiatives by competitors (Fetter 2002).

5 THE EVIDENCE: THE CONTENT OF AUSTRALIAN WORKPLACE AGREEMENTS

In order to discover whether employers might be using AWAs to implement aspects of the HPWS model we conducted an empirical survey of a large number of agreements. The research was based on two groups of AWAs obtained from the Office of the Employment Advocate ('EA') covering two different time periods. The first batch consisted of 300 AWAs manually lodged with and approved by the EA at the end of 1999; each AWA was the first one signed by that employer with one of its employees. These consisted predominantly, though not exclusively, of quite small private sector businesses. The second batch of 200 were randomly selected AWAs from employers that lodged an AWA electronically after June 2001 and were delivered to us in April 2002. Large employers were over-represented in this group, presumably because they are more likely to use the EA's electronic lodgement service.

Our findings are fairly consistent regarding the use of AWAs overall. However, whilst we do briefly set out the general findings in relation to the first set of agreements, we have concentrated largely upon the second batch of 200 AWAs insofar as our major conclusions are concerned. In the case of both sets of agreements, we manually inspected each agreement for relevant indicators of a HPWS approach and recorded the substance of the relevant provisions. We were especially concerned to record indicators of functional flexibility, namely whether the employer could transfer the employee to another site, add new duties or vary existing duties, and whether there were any restrictions on those powers. In terms of temporal flexibility, we recorded whether the agreement provided set actual working hours, starting times and/or the spread of time in which work was to be performed, and if so, whether those specifications could be altered unilaterally by the employer. We noted whether the employer could compel the employee to work additional hours. We also recorded various forms of pay flexibility, including flexibility in calculating pay and the relevance of individual performance to present or future remuneration. We were especially interested in those agreements which provided no additional payment for overtime and those which allowed the employer to reduce unilaterally the employee's remuneration, as these are the most extreme indicators of pay flexibility.

Apart from these three major forms of flexibility, we also searched the AWAs for relevant provisions pertaining to a number of other issues including employee participation, teamwork, consultation, training, dispute resolution and employment security. We also took note of any HRM rhetoric employed in the agreements, usually in the introductory clauses.

As well as a clause-by-clause inspection, for each agreement we attempted to make a global assessment of the way the various clauses interacted which enabled us to draw some conclusions about the character of the agreement taken as a whole. We were thus able to classify the agreements either as 'single issue' agreements, 'flexible' agreements concerned mainly with pay and temporal flexibility or, finally, 'high trust' agreements which most conform most closely to the HPWS ideal.

Although we did not disaggregate the data according to the type of business or type of work performed, we are confident that our findings in relation to the first batch of agreements are typical of small businesses generally; we make special findings which apply in relation to large service-sector businesses when we come to consider the second batch. In comparing this second group of agreements to the first we were also able to determine what differences were emerging in the content of AWAs over a different time frame, and with a different mix of enterprise size.

5.1 General Observations

Turning to consider the first set of agreements, taken as a whole there was very little to indicate that the individualisation process through AWAs was demonstrating any sort of a managerial shift towards the new employment paradigm outlined earlier. A substantial number of the agreements were simple in construction, and sought to achieve only a limited objective such as the liberalisation of the ordinary hours of work. Many of these could be characterised as virtual single issue agreements. In our view, these findings match the outcomes of similar research projects carried out on the content of AWAs (Roan *et al.* 2001; Cole *et al.* 2001).

Even where these AWAs were more complex, as a general rule they were overwhelmingly oriented towards pay and temporal flexibility. Almost all of the agreements contained some aspect of flexible working hours. These included examples where there was no set ordinary hours of work, or where ordinary hours could be set across a significant spread of time, including weekends and public holidays. Other examples included the right of the employer to call out the employee outside of normal working hours, the right to require the employee to work at 'such other times as may be reasonably required', and the right to require the employee to work overtime 'as directed'. Where these clauses existed (which was in virtually all of the AWAs examined in this batch) there was some upper limits on the hours worked set by reference to compulsory breaks between shifts, restrictions on overtime, weekend work, consecutive shifts and so on.

On the issue of pay, most AWAs in this first batch fixed pay for the duration of the agreement. Only a minority of agreements had provision for performance appraisals, and where the agreements allowed for the possibility of a pay increase this usually was within the absolute discretion of the employer. In a few instances the employer's prerogative included the discretion to reduce pay (usually pursuant to a performance review) or to transfer the employee to lower paid duties. Performance-related pay was a feature of only slightly more than one-quarter of this first group of AWAs, and, consistent with the degree of managerial prerogative over pay increases generally, the rules governing the application of these bonuses and other types of rewards were set by the employer.

In the case of functional flexibility we found that about 40% of this first set of AWAs contained some element of unilateral managerial discretion to vary the duties of the employee. This included a requirement upon the employee in many agreements to perform duties additional to his or her regular duties which were 'reasonable' and/or 'within the employee's competence'. A few agreements allowed the employer to vary

or add job duties for any reason and at any time, and in a few instances the employer was empowered to second the employee to another business. On the whole, however, this first set of agreements did not contain the depth or diversity of *functional* flexibility provisions that we expected would characterise AWAs.

Thus, collectively this first set of AWAs appeared to us to conform to the traditional model of hierarchically structured employment relations. A large proportion of the agreements were designed with only limited objectives in mind, such as bringing about one or two modifications to the award on hours and pay. Those agreements which went further towards the idea of the 'flexible firm' did so in the overwhelming number of cases by extending managerial unilateralism in pay and hours in particular. Such arrangements did not, of course, correspond with the model of a HPWS employment system to any great degree. We found very little evidence of the communication of information on a non-hierarchical basis. Grievance procedures were evident in all cases, but these are, in any event, required by the terms of the statute. Apart from that, there were very few references to information sharing, to consultation, to consultative committees and the like. Similarly there was little evidence of teamwork and other decentralised governance arrangements within the enterprise. And, as we noted, performance-based pay seems to have been largely controlled in these agreements through performance indicators set by management rather than through consultative means.

Our examination of the second set of AWAs disclosed some continuing patterns when compared with the earlier set of agreements, but also some potentially interesting divergent developments.

First, as was the case with the first set, a sizeable proportion of AWAs (perhaps as much as 50%) continue to be concerned not with major change to the employment system but with making one or two specific changes to the relevant award, usually over working hours and/or pay.

Secondly, many AWAs in this group contained preambles or sets of objectives which set out more elaborately the model or concept of employment envisaged by the agreement. In a few instances these did little more than add a rhetorical flourish to the agreement, for example where the agreement included a set of objectives based around 'high quality performance', 'maintaining and promoting an open and communicative work environment' and 'actively participating to create an effective, highly productive quality team', but which otherwise maintained the form of a traditionally structured hierarchically-based employment agreement. Other sets of objectives were still quite clearly fixed in the traditionalist paradigm. For example, one agreement contained a principal objective to the following effect:

in their day-to-day work employees can have a positive influence on improving the productivity and flexibility of the business. This directly influences [the employer's] ability to meet and exceed customer needs, so maintaining and increasing the demand from the market for [the employer's] services. Ultimately, it is upon this happening that the employment security of [the employer's] employees depends. The aim of this Agreement is to specify the arrangements and initiatives that will enable employees to act upon their shared responsibility with the aim of maximising employment security.

Another agreement contained a clause as follows:

The employee shall conduct himself or herself in a fit and proper manner whilst employed. At all times the employee is expected to demonstrate honesty, courtesy and a strong work ethic to the employer, its investors, clients, the public, and other employees.

However, despite these very diverse sets of aspirations evident in AWAs there was an obvious growth in the numbers of agreements which had a fairly clear vision of a ‘new’ type of employment system developed around the idea of the ‘high trust’, ‘high performance’ workplace. These were small in number, but clearly linked such objectives with other provisions of the agreement constructed as a notional flexible model of employment. We will return to this issue shortly.

Thirdly, and again speaking generally, most of this second batch of agreements were characterised by changes to award regulation of wages and working time and contained some aspects of pay flexibility, temporal flexibility or both. In order to introduce administrative efficiencies and facilitate the working of longer hours, these AWAs typically provided for annualised salaries (approximately one third of all agreements) or provided for single hourly rates of pay. At least one quarter of the agreements required the employee to work overtime without the employer having to make additional payments.

5.2 Detailed Analysis of the Second Group of Agreements

In this subsection we present a detailed analysis of the second dataset consisting of 200 AWAs. We focus on the three major forms of employment flexibility — pay, temporal and functional flexibility — as well as the issue of worker empowerment. For each matter we have classified the major types of clause typically found in the agreements and have presented the results in tabular form.

5.2.1 Pay Flexibility

Table 1 sets out the major forms of ‘pay flexibility’ evident in the second set of AWAs. In contrast to the traditional ‘inflexible’ award-based remuneration system (whereby remuneration is strictly linked to the duration of working time), this type of flexibility resides in the ability of the employer to pay a fixed remuneration to the employee, regardless of the number of hours worked, or else it involves the right of the employer to pay a variable level of remuneration depending on factors such as personal employee or business performance.

This type of flexibility is attractive to employers for several reasons. First, it may allow the business to reduce labour costs by paying lower-than-award remuneration, since penalty rates need not be paid for overtime.²⁰ Second, it may allow the business to improve productivity, as linking remuneration to individual or business performance may encourage greater employee effort. Third, flexible payment systems such as annualised salaries are often simple to administer and hence may reduce administrative costs to the business organisation.

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.

As Table 1 indicates, 8.5% of the 200 AWAs examined (17 in number) contained no pay clause of any type. On their face this might suggest that there is an unlimited degree of pay flexibility attached to the position insofar as the employer appears to have an unfettered discretion to establish and vary by fiat the manner and extent of employee remuneration, subject to any applicable statutory requirements.²¹ However, in most of these cases the AWA was concerned only with making minor adjustments to working arrangements and consequently expressly preserved the operation of the applicable award in relation to most other matters, including pay.

Nevertheless, a very small number of agreements (fewer than five) contained no pay clause and *at the same time* expressly excluded the operation of the award. There is, of course an issue here as to how such agreements were able to pass through the ‘no disadvantage test’ process when there appears to be no other relevant instrument referred to in the agreement, although that question need not concern us here. We must assume, however, that if AWAs have inadvertently been processed without any regulatory mechanism for pay being applicable, a court would be required, in the event of a dispute between the parties over remuneration, to have resort to the common law in filling this gap.²²

Of the 183 agreements (91.5%) which did contain a pay clause, we found various levels of flexibility generally corresponding with the method of payment. The least flexible agreements were those that (like many awards) required the employer to calculate different rates of pay for different periods of working time (eg ordinary hours and overtime) and then add a range of separate allowances based on working arrangements (eg shift allowances), the possession of various skills or tools (eg a first aid allowance), as well as individual or group performance (eg a higher duties allowance). This group of agreements accounted for approximately half of the 200 AWAs. Pay flexibility appears not to have been a concern in these types of agreements.

A more flexible form of remuneration was found in those agreements which abolished the various allowances and provided for a single *hourly* rate of pay which applied to all hours of work. Of the 62 agreements (31%) which provided for pay to be calculated on an hourly basis, only a small minority provided for a single rate. However, even a single hourly wage retains some inflexibility as additional hours must still be compensated at the same rate.

The most flexible arrangements (in terms of reducing both labour and administration costs) were those which provide for a fixed remuneration *regardless of actual time worked*. This was usually achieved by means of a clause providing for a fixed weekly salary (27 agreements; 13.5%) or a predetermined annually amount (68 agreements; 34%).²³ However, most of these clauses reintroduced some inflexibilities (such as the provision of allowances or additional payment for overtime) so that only about one third of them provided for a truly pre-fixed rate of pay.

Overall, we found that 25% of all AWAs (50 agreements) provided the employer with the cost-saving flexibility of not being obliged to compensate employees for additional hours worked. As already indicated, the extraction of unpaid overtime was most commonly found under those agreements which provided for a fixed annual salary.

Turning to the other aspect of pay flexibility, ie the freedom to match remuneration to individual performance in order to motivate greater effort, Table 1 indicates that 37 agreements (18.5%) provided for some performance-based pay. The most common examples of performance pay were bonuses or 'staff rewards' points systems. The construction of these clauses often left significant room for further flexibility at the prerogative of the employer. This was achieved in two ways.

First of all, the criteria for granting these performance incentives usually depended not just on individual performance (as assessed by management) but also on other extraneous factors including company productivity, income, profit margins and so forth. This reservoir of managerial prerogative allows the employer the flexibility either to minimise labour costs (since, for example, the provision of a small bonus may be justified by reference to poor individual or company performance), to motivate exceptional individual performance (since employees cannot be certain of the minimum level of performance required in order to win the bonus) or to reduce administrative costs (since a discretionary system is inexpensive to operate).

The second form of performance-based pay flexibility able to be implemented according to managerial prerogative was the discretion not to pay the performance-based component of the employee's remuneration at all. The legal power to do this rests with the fact that many of the performance-based bonuses were not formally *guaranteed* by the terms of the agreement. Most of these types of agreements provided only that a bonus '[might] be payable'. This extends to the employer a further form of flexibility, namely the opportunity to respond to a less than expected profitability performance through the reduction of wage costs.

This is also the case with the five agreements (2.5%) which purported to permit the employer to unilaterally *reduce* the level of the employee's (non-performance-based)

salary during the life of the agreement. Whether or not this kind of discretion is ultimately subject to the control of the courts through the power of the implied term depends on the (as yet undetermined) relationship between the contract of employment and the AWA.

We found very few instances in these agreements of other forms of pay flexibility such as profit sharing or employee share ownership schemes.

5.2.2 Temporal Flexibility

The second major form of work flexibility is the ability to match the temporal use of labour to the day-to-day requirements of the business. This flexibility obviously is desirable from the point of view of the employer, but also has reciprocal benefits for those employees who seek less rigid working arrangements — for example, those seeking to balance work and family responsibilities. Table 2 sets out the main types of temporal flexibility found in our examination of the second batch of AWAs.

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.

Consistent with the position on pay flexibility, Table 2 reveals that 11.5% of all agreements were silent on the issue of working hours. Once again, if these agreements also successfully excluded the operation of the award they might confer on the employer the ability to set or alter working hours at will, subject only to any express or implied contractual restrictions and any relationship that these might have with the AWA itself. Nevertheless, the majority of the 21 agreements omitting an hours clause were concerned with adjustments to a single aspect of work (such as cashing out accrued leave entitlements) and preserved the operation of the award in all other respects, including in relation to the issue of working hours.

The most prevalent form of temporal flexibility, found in 36% of all agreements (72 AWAs in number), was 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 pay was calculated. This flexibility permits the employer unilaterally to increase the amount of work performed to respond to increases in production or demand, a level of control which may be exercised on a daily basis without the expensive and time-consuming obligation to negotiate with employees and/or their

representatives. Moreover, as noted in section 5.2.1 above, in one quarter of agreements the employer was not obliged to compensate employees for their additional work. The efficiencies in terms of labour costs (compared with the cost of hiring additional casual labour) and administrative costs speak for themselves.

The next most popular form of temporal flexibility was the lack of prescribed standard or 'ordinary' working hours. This flexibility was achieved in one of three ways. First, slightly more than one quarter of AWAs (52 of 200 agreements) contained a clause obliging the employee to meet a broad commitment to work the number of hours necessary to meet 'the requirements of the job', 'the operational requirements of the employer' and/or 'the aims of the business'. Second, perhaps a further 20% of all agreements *did* prescribe ordinary hours but then included an obligation to work a further 'reasonable number of additional hours'.²⁴ A third means of achieving the goal of virtually unlimited working hours was by use of a clause which specified ordinary working hours but permitted the employer to add to these unilaterally; this was found in 14% of cases (28 of 200 AWAs). Putting the figures together, it appears that over 60% of employers have made some departure from the notion of a working week of fixed duration.

The last major type of working time flexibility was the absence of restrictions on the times at which employees may be required to perform work. Like flexibility in the *number* of hours worked, flexibility in the *pattern* of working time is designed principally to better match the supply of labour to the needs of the business and production schedules. Accordingly, this form of flexibility is most prevalent in businesses which operate during outside standard working hours, such as manufacturing plants and many service industries. This flexibility was achieved in one of several ways.

First, 13% of the agreements (26 of 200 AWAs) failed to prescribe a spread of working hours or else specified that the spread was unlimited. A second group of agreements specified a spread of working hours that was virtually unlimited (for example, requiring work at any time of the week except on Sundays) or prescribed a spread of hours that went well beyond the standard hours of operation of the business or the normal hours of work of such an employee. For instance, in one AWA a mechanic could be required to work at any time 'up to five hours after the close of business'. The number of such agreements could not be accurately counted as it was usually impossible to ascertain the usual hours of operation of the business. However, a similar phenomenon was observed in a third group of clauses, found in 14.5% of all AWAs, in which a spread of hours was specified but the employer was given the power to vary unilaterally that arrangement. Although these three types of clauses may be worded differently they have the same effect, namely the obligation for employees to work at the times required by the employer. Looked at together, it appears that at least one third of employers have achieved the power to require their employees to perform work during non-standard hours.

5.2.3 *Functional Flexibility*

The final form of flexibility studied was functional flexibility: working arrangements which move away from job demarcations and other restrictions on the type of work

which may be performed by an employee. This form of flexibility has been, rhetorically at least, the type most sought after by employers, especially large employers (Fetter 2002), and the type allegedly most lacking under the traditional award-based arrangements. The attraction of a functionally flexible workforce is that employees may be allocated to tasks in the most efficient way possible (based on the talents and availability of the individual) (ie without economic cost (such as the requirement to pay a higher salary for more difficult or less desirable work). Consequently, a smaller workforce may suffice in order to carry out a given volume of work.

Table 3 below sets out the various forms of functional flexibility achieved through AWAs.

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.

More than a quarter of the agreements (27%; 54 of 200 AWAs) included no clause detailing the duties of the employee. On their face, such agreements may provide the employer with the flexibility to set and vary duties at will, subject only to any express or implied contractual restrictions and any relationship that these might have with the AWA itself.

However, many of these 54 agreements without a duties clause did include a position description, either as a formal annex to the AWA or otherwise incorporated into the agreement. Such a document may facilitate a high degree of flexibility or else may reintroduce inflexibilities into the position. For example, a broad job description, such as a reference to an office worker's incidental cleaning role, will enhance the flexible utilisation of labour. On the other hand, a limited or excessively precise position description may impair the flexible use of the employee's labour. For example, one AWA contained a position description which specified in minute detail the steps to be followed by a milk bar employee in preparing a sandwich.

Of those 146 agreements which did contain a duties clause, 33% (48 AWAs, representing 24% of the total number of agreements) expressly reserved to the employer the right to *vary* existing duties. Fifteen of those 48 agreements also spelled out that such variation must be either 'reasonable', 'within the employee's competence', or else formally recorded on the position description.²⁵

A larger proportion (68%) of the AWAs containing a duties clause authorised the employer to add *new* duties to the employee's position (100 agreements; 50% of the total number of AWAs). Approximately half of these clauses (55 agreements) hedged this power by specifying that the new duties must be 'reasonable', 'within the employee's capabilities', or 'incidental to the existing position'. These restrictions may have been a concession to employee fears about the possible capricious use of an open-ended power. On the other hand, the other half of such clauses (45 agreements) contained no express restrictions on the employer's power to add new duties, thus permitting an almost unlimited flexibility in the utilisation of employee labour. Among these, the most flexible clauses were those that required the employee to carry out all duties 'assigned to [them] from time to time' without limitation.

Finally, 19% of agreements (38 of 200 AWAs) permitted the employer to transfer the employee to a different site. The power to transfer is an important flexibility which again permits the employer to deploy employees in the most efficient way or to develop the business in new geographic areas. This power was usually unilateral and unfettered, although some clauses indicated or guaranteed the employee's right to refuse, obliged the employer to pay relocation costs, or placed other restrictions on the power. In addition to these 38 agreements, a further group specified that the employer could transfer the employee to 'different parts of the business'; these have not been included as 'transfers' as it is not clear if this refers to the variation of the employee's duties rather than a physical transfer of the employee (whilst retaining their existing duties).

5.2.4 *Worker Empowerment*

Table 4 sets out the major forms of worker empowerment found, dealing with the issues of consultation and teamwork. In both of these matters it was difficult to ascertain the true extent of worker empowerment at the workplace from the content of the agreement (see Cole *et al.* 2001). First of all, as we noted earlier, the rhetorical commitments in the preamble or objectives of an AWA were not often matched in the content of the agreement. Thus one can find frequent references to such goals as 'Open Book Management', 'open and communicative working environment', 'culture of co-operation and trust', and 'increas[ing] industrial democracy', but far less frequently arrangements and structures to reconcile these ambitions with other aspects of management style. Secondly, where clauses dealing with empowerment did occur, they were exceedingly vague and non-specific. Presumably most of the details are formally recorded in an external document such as a company policy manual, worked out informally between the parties, or else prescribed by management.

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.

More than four fifths of the AWAs contained no reference to consultation between the employer and employee regarding work issues. Of those agreements which did countenance dialogue, the most common clause was one vaguely promising informal consultation on issues of workplace change. This was found in 11.5% of agreements (23 of 200 AWAs). Seven agreements merely informed the employee that they would be 'advised' of workplace change which affected them.

Only seven agreements (3.5% of AWAs examined) provided for formal mechanisms of employee consultation through workplace committees and similar structures. References to consultative committees and other formalised consultation processes were principally of two types. In some cases the rationalisation for formalised consultation was that it would serve as a mechanism for the passing of information from management to the workforce. Other types of provisions clearly empowered, to a degree, the employee. For example, some AWAs established elected consultative committees with relatively confined responsibilities to discuss change and redundancy, although these were sometimes also tempered by caveats attached about the powers of such committees; for example, '[i]t is recognised that as technology is introduced and project developments are completed, some reduction in staffing levels is inevitable'. In some other agreements Joint Consultative Committees were given far greater scope within the overall employment system. In one agreement, for example, the Committee was required to meet monthly and was responsible for reviewing and renegotiating the AWA, the promotion of teamwork, the resolution of disputes, the development of the company handbook and for 'other functions determined by the employer' as well as serving as a mechanism for communicating information to the company's employees.

References to teamwork were also few and far between. Although 20.5% of agreements (41 of 200 AWAs) made some reference to teamwork, most of these were merely 'weak' rhetorical commitments to the ideals of collaborative endeavour or which used the concept of teamwork in a traditional hierarchical manner, for example, statements to the effect that 'team members will endeavour to be punctual for all shifts and to work in a friendly and courteous manner at all times'. Only 8.5% of agreements made 'strong' reference to the HRM ideal of team-based work organisation; this was seen, for example, in clauses providing for Team Leaders to

decide rosters or for responsibility to be devolved to the team level. In most cases these were the only references to work groups in the agreement.

Generally speaking, then, there was much less evidence of worker empowerment, information sharing and consultative mechanisms than there was of 'workplace flexibility' in both groups of agreements. On the whole the agreements we examined failed to demonstrate much commitment to the 'high trust' or HPWS model of an empowered employee.

5.3 Summary

It is clear from the foregoing analysis that there does exist in the AWAs examined certain features which are consistent with the HPWS model espoused in much of the HRM literature. In particular, the ability of the employer to cast to one side the constraints of awards and collective agreements on matters such as pay and working hours, and the growth of 'functional flexibility', in theory provides the vehicle for businesses to adapt to the demands of competing in a global economy. This is, however, only one part of the story. What we observe overwhelmingly in the content of these AWAs is the development of flexible employment through managerial prerogative. What is missing from the equation are those other features which distinguish the 'high trust' or HPWS model from more traditional 'hierarchical' employment systems. This requires, as we noted earlier, that the employment system should not merely be flexible but also should encourage greater responsibility and 'empowerment' of employees through consultation, information sharing and so on.

In broad general terms, therefore, our view is that the AWA process is not, at the moment, producing in any coherent or strategic way employment systems which correspond to the 'high trust' or HPWS model. Nor do they appear to introduce 'workplace partnerships' in any meaningful sense, since by definition they are exclusive of unions, and, as we have noted, the level of commitment to a style of 'partnership' with employees through information sharing, consultation, joint decision making and team work, producing devolved responsibility and worker 'empowerment', is slight. Furthermore, we think that this conclusion is also justified on the available case study evidence. The series of case studies commissioned by the EA itself revealed very little innovation or commitment to new work systems.²⁶ One of those studies revealed that the sole purpose was to avoid union influence whilst others emphasised a desire to avoid award regulation and to introduce more cost-effective employment measures. The most forward looking of these agreements was principally targeted at temporal and pay flexibility.

These conclusions are also broadly consistent with our own and other studies of several highly publicised instances of individualisation in Australian workplaces, and with the case study and survey data presented in the first part of this Report. Certainly our reading of the facts and circumstances surrounding the individualisation of employment relations at the Comalco Aluminium Ltd site at Weipa in Queensland in the period 1993–95, and the BHP Iron Ore Pty Ltd site in the Pilbara region of Western Australia in 1999 is consistent with the view that, at least at the time of their introduction, such agreements were designed principally either to squeeze out or otherwise pressure the union and/or to produce flexibilities in working arrangements

which could not be achieved through awards or enterprise agreements with unions (Fetter 2002; Hearn Mackinnon 1997; Moir 1996). The same can be said for an aborted attempt by the Commonwealth Bank of Australia to introduce AWAs to its employees in 2000.

It is necessary, however, for us to acknowledge that there are some examples of well-rounded agreements characterised by many features of the ‘high trust’ or HPWS model which may represent the emergence of something of a slight trend in AWAs. These amounted to only a few of the agreements we examined, and were confined to the later-period group. They also seem to be present in the larger kinds of enterprises, as might be expected, though again not exclusively so.²⁷ Such agreements are frequently characterised by temporal and pay flexibility, variable duties, but also include performance based pay, consultation mechanisms, performance management and reviews, and often team-based work structures. How such systems work in practice is, of course, another matter, but there is no doubting the growing presence (though still slight overall) of such AWAs amongst the great diversity of employment arrangements.

5 THE ROLE OF THE WORKPLACE RELATIONS ACT 1996 (CTH) IN PROMOTING THE HPWS

If the premise is that ‘individualisation’ of labour relations has been introduced as part of a broader workplace regulatory agenda, what has been the role of the *Workplace Relations Act* and the regulatory institutions in giving effect to that agenda? If, as we have noted, the Act has been fairly ineffective in promoting a HPWS agenda based on the individualisation of employment relations, why is that so, and what could be done about it?

There are, we suggest, at least two different strategies through which the government’s individualisation strategy might have coupled itself with the HPWS agenda. One of these would have been to utilise the processes of individual *bargaining* to encourage consideration of such matters as flexible work, performance-based pay, and employee participation. A second way would have involved the state, through its legislation and/or its institutions, to mandate or otherwise facilitate the development of the HPWS agenda within enterprises. The legal and empirical evidence suggests that there has been a considerable lack of responsiveness from both state and enterprise management in relation to each of these possibilities.

First, whether by design or accident, the legislation associated with the making and processing of AWAs does not support, or even seriously suggest, a requirement for individual bargaining as such. It is true that the language of the WRA is couched in terms of ‘bargaining’ over AWAs. It allows for ‘bargaining agents’ and it stipulates that such agents must be ‘recognised’. It also permits the individual worker to strike as a bargaining weapon. Other provisions perhaps suggest that employers may not merely impose AWAs.

However, all that aside, legally the WRA provides little in the way of support for the individualisation process to be a bargained one. In reality the obligation to recognise a bargaining agent is vacuous. There is no obligation upon the employer to bargain, nor

to act in good faith. In the absence of such requirements, there could be no statutory responsibility to bargain over matters arising from the HRM agenda. Anecdotal evidence suggests that the AWA process in practice may be more likely to be unilateral rather than bilateral (Senate Committee 1999: 230, 311–12), and as we noted in Part 2 of this Report, the weight of the empirical evidence seems to support the view that individualisation is more likely to be an imposed rather than a bargained process.

What role then might the state play through its legislation and institutions, in pursuing the HPWS agenda? It is necessary to bear in mind here that it is one thing to legislate for the protection of minimum standards through the establishment of legal rights, and quite another to legislate to attempt to bring about attitudinal or cultural change on the part of the parties to a relationship. As Collins has pointed out in the case of recent British employment legislation, regulating for trust, co-operation and flexibility presents the legislator with a very difficult task (Collins 2001). As a result there may be a considerable gap between policy aspiration and regulatory specifics.

How broad is this gap in the Australian case? The Federal government's WRA does at least make very specific its key HRM associated objective — ie 'to provide a framework for *cooperative* workplace relations'. That appears in section 3 of the Act. Beyond this, there is very little in the remaining 533 sections of the Act, or its numerous regulations or various schedules, which demonstrates clear legislative purpose to develop the co-operative HRM agenda. There is an acknowledgement of the importance of family friendly policies in the Act's objects, and also of higher productivity.²⁸ The objects also mention flexible 'labour markets'²⁹ but, perhaps surprisingly, not flexible 'employment practices'. At the same time the government's 1996 industrial relations policy statement explicitly ruled out the possibility of a legally mandated formal system of employee participation in decision-making at the enterprise level (Reith 1996: 11).

One might have expected that an obvious vehicle for the development of the individual co-operative employment relations agenda was through the AWA approval process itself. Yet the WRA requires only two mandatory clauses in AWAs — an anti discrimination provision, and a dispute resolution provision. Whilst the Act requires that an AWA must not disadvantage an employee when measured against certain legal criteria,³⁰ it provides no capacity in either of the two supervising institutions (the Employment Advocate and the Australian Industrial Relations Commission) to refuse to approve an AWA on grounds that it lacks content assisting in the development of the HRM agenda or a substantially different workplace culture. Further, as we saw earlier, there is no compulsion to bargain or negotiate over particular matters which might form the basis of a high trust co-operative employment relationship.

In the absence of direct legislative provision in the terms of the WRA, we must look elsewhere for indications of government guidance on the direction of its policy. The clearest potential examples are found in the functions devolved to the Office of the Employment Advocate ('EA') under section 83BB of the Act, and the government's legislation assisting the promotion of employee share-ownership schemes.

Unlike the British *Employment Relations Act 1999*, the WRA contains no *specific* provision for the spending of money on the promotion of co-operative work practices. However there is a clear educative and promotional charter set down for the Employment Advocate in the terms of the WRA, much of it focussed upon the AWA regime. Among its functions the Employment Advocate is charged with ‘providing advice to employers and employees, in connection with AWAs’. In performing this function, the Employment Advocate must have particular regard to ‘assisting workers to balance work and family responsibilities’ and to ‘promoting better work and management practices through Australian workplace agreements’.³¹ In short, there is clear scope in these provisions for the Employment Advocate to promote the HRM/HPWS agenda and other workplace change through advice, suggestion and education of the parties to the employment relationship.

As was the case with the individual agreements concept, plans for the development of a high proportion of employee share-ownership in enterprises have been on the agenda since at least the late 1980s, and in relation to this issue it is clear that both policy and regulatory initiatives fairly unambiguously fit the ideas behind the high commitment employment strategy. Since it came to office, the Coalition government has legislated to restructure the tax system in various ways in order to facilitate and encourage greater share ownership among employees, or in ways which are at least beneficial to such schemes. In addition the government has intervened in the corporations law area, removing prospectus requirements for some classes of employee share schemes.³²

In summary then, we see in these various regulatory measures a legal and institutional framework not necessarily directed towards, or suited to, the propagation of a co-operative high trust model of HRM/HPWS in Australian enterprises. The government is willing to intervene and lead the way in relation to some associated policies (such as employee share ownership) but not with respect to others (such as employee participation in decision-making). Thus apart from very limited exceptions, individualisation sits as the one major initiative in the WRA which can clearly be identified as directly associated with the HRM strategy.

It is doubtful if we can explain this gap between policy and regulation in terms of either a failure of inspiration (as Collins has suggested was the case in Britain), or a failure of nerve on the part of the government (Collins 2001: 36). In its approach to workplace relations reform, the Coalition has not lacked for policy initiative, and has demonstrated a confident and forthright outlook. Thus we must draw a rather self-evident conclusion. Whilst the government is prepared to use strong tactics to roll back protective conditions of employment and to weaken the institutions of collective regulation (eg trade unions and industrial tribunals) it is unwilling to compel, and perhaps even unwilling to prod, employers to move towards a new agenda by the available routes outlined earlier. This is, of course, quite in keeping with the government’s view that cultural change in the form of high trust and high performance workplace concepts cannot be legally prescribed. It is also consistent with the government’s ideological position that externally imposed conditions will not assist the efficiency of enterprises.

But as we have seen, this does leave open the relevance of policies, regulatory strategies, and institutional functions which might *encourage* and *promote* rather than dictate outcomes, and in this respect we have suggested that the government's vision might be regarded as lacking in both design and imagination. In the absence of mandatory provision or other strong state guidance, the evidence suggests that the gains being made towards the creation of modern HRM workplaces at the present time are limited to small numbers of workplaces at best.

6 CONCLUSION

One argument for the introduction of a legal system of individualised employment contracts was that it might support the development of highly productive and competitive employment systems based on high trust, high performance and employee empowerment. Our empirical study concludes that most AWAs do not appear to have substantially shifted work arrangements away from the traditional hierarchical model of workplace governance towards systems which empower employees and thus draw upon the worker's skills and expertise in developing the efficiency of the organisation.

One reason for this failure may be that employers neither want nor need access to AWAs to bring about flexibilities in enterprise management. It may be the case that many employers are able to pursue aspects of the flexible, high trust, high performance workplace model through enterprise agreements with trade unions. Alternatively, it might be hypothesised that changes in economic, social and labour market conditions and practices over the past two decades have been sufficient in themselves to produce much greater managerial power to bring about change unilaterally (ACIRRT 1999), and that legal empowerment through the AWA process is relatively unimportant, even insignificant.

Turning to the question of AWA content, the evidence presented here paints a fairly complex picture. We venture to suggest, however, that AWAs may be divided broadly into three main groups. First there are those agreements whose purpose is fairly perfunctory. These aim to achieve one or two limited objectives by way of cutting loose from other regulation (either the award or an enterprise agreement). This may also be associated with a desire to move from collective relations through the union to individualised arrangements with employees directly. These probably account for perhaps as much as 50% of the agreements we examined, and, importantly, these included the great majority of public sector AWAs.

Second, there are those agreements whose major purpose is to recover several aspects of managerial control over work organisation through flexibilities that are not available under award or through union-based agreements. As we have noted, these types of arrangements are characteristic of the 'flexible firm' model and may also suggest the presence of features characterising the 'high trust' or HPWS model but they essentially embody the ideas of traditional hierarchical employment contracts. These types probably account for 40-50% of the AWAs we perused.

Third, as we have seen, there are a few, but certainly an increasing number of, AWAs which are, in their terminology and their content, specifically oriented towards the

introduction of a radically new work system and culture. These may constitute 5% of agreements. Again, these outcomes tend to match the Cole *et al.* (2001) research findings.

International literature has drawn a distinction between two fundamental ways in which businesses can pursue economic growth and profitability. One of these is an approach which attempts to restore high profitability in the short term through cost reduction methods — wage cuts, greater intensification of work effort, workforce reductions, increases in casual and temporary employment, and hierarchical organisation characterised by strong management controls and related high rewards for managers. The second approach is productivity centred, favouring a long-term view of business strategy centred on a highly waged, highly skilled workforce, collaborative or participative work systems, high levels of investment in training and skill development and employment security (Streek 1987; Thurow 1993; Boreham *et al.* 1996). It is apparent from our assessment of AWA content that those agreements falling into the first two of our categories are essentially consistent with the cost reduction strategy rather than the productivity-centred approach. These constitute the overwhelming proportion of AWAs approved under the terms of the WRA.

Similar research to that carried out for this Report has been conducted by Roan *et al.* (2001) and Cole *et al.* (2001). Whilst the approach towards AWAs in these projects has stressed somewhat different indicators, and adopted different methodologies from our own work, we believe that the findings in those projects are broadly similar to our own. The EA has recently responded to some of this research in an important address (Hamberger 2002). In it, the EA rejects the general findings of the Roan *et al.* (2001) research. In large part, the EA relies upon evidence traversed in earlier sections of this Report, including the case studies commissioned by the EA, and the NILS/Wooden research. As we have noted earlier, our reading of some of that research differs from that of the EA, and our understanding of other recent research results, also referred to earlier in this Report, confirms us in that stance. We remain, therefore, largely sympathetic to the Roan *et al.* (2001) conclusions whilst acknowledging some limitations in the approach taken in that work. It should be noted that our research has gone beyond the mere counting of provisions listed in AWAs. We have also looked closely at the content of various clauses and attempted to make some assessment of the kinds of flexibilities provided for and the extent to which these are determined largely by management or with the agreement of employees. We have also examined the content of clauses in agreements for indications of high employee involvement in workplace organisation and decision-making.

However, we do accept the validity, to a degree, to the EA's observations that the methodology adopted by Roan *et al.* (2001) necessarily skews the results (as we noted of our earlier set of agreements), in view of the fact that the sampling method inevitably over-represents small employers and thus the likelihood of poor outcomes rather than good outcomes in terms of the analysis adopted. That being said, when we elected to take a very small sample of what we perceived to be the most progressive of the HPWS type agreements and tested them for employer size, the results were more or less an equal split between large employers and those which could only be regarded as small/medium businesses at best.

We also agree with the EA's proposition, one similarly noted in the Cole *et al* (2001) research, that the face of the agreement does not necessarily reveal what is going on in practice within the enterprise. But again, we feel compelled to point out that in the absence of proper case studies conducted on how employment systems actually operate within an organisation, the face of the agreement seems to be a reasonable starting point for an analysis.

Those brief issues of reservation aside, we stand by our final conclusion. That is, the AWA process is not presently producing innovative work practices consistent with the HPWS model to a widespread degree. Further, as we noted in Part 5 of this Report, the terms of the WRA and the role of the key regulatory institutions have been inadequately conceptualised and developed to foster a HPWS model to any significant degree. If culture change is to occur in work systems, significant policy rethinking and a new legislative approach is required.³³

ENDNOTES

¹ See the differing perspectives presented to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee (1999).

² The expression ‘de-regulatory’ is used here as shorthand for a combination of processes which include de-institutionalisation and de-centralisation. It describes the *intent* of policy to reduce the impact and volume of labour law norms imposed upon labour hire conditions by agencies operating independently of the parties to the employment relationship itself. As a descriptor of the impact on the *extent* of the volume of labour law *per se*, the expression is plainly a misnomer.

³ In a subtle ordering process, AWAs are clearly preferred over other forms of regulation. See ss 170VQ, 170 VR of the WRA. Note however that there are some external regulations which cannot be excluded. It is also the case that the preferred status of AWAs is considerably weakened by the substantive and procedural safeguards to which the AWA is subjected — see the discussion below.

⁴ Emphasis added.

⁵ Workplace Relations Act 1996 (Cth) 170VC.

⁶ Sections 170VQ, 170VR, 170VS.

⁷ Sections 170VF, 170VPA, 170VE.

⁸ Sections 170VK, 170WC, 170VPA, 170VO, 170WF, 170WG.

⁹ Sections 170VN, 170VO, 170VPA.

¹⁰ Sections 170VPB, 170XA, 170XE.

¹¹ Sections 170VPJ, 170VPB, 170VPG and attached note.

¹² Section 170WHA.

¹³ Section 170WHB–WHD.

¹⁴ Section 170VJ. For new employees, this may be the date of commencement of employment: s 170VJ(1)(c).

¹⁵ Section 170VM(3). Note that the Commission can refuse to terminate the AWA if the refusal is in the public interest.

¹⁶ Sections 170VH, 170VM, 170VL.

¹⁷ Sections 170V–VZ.

¹⁸ It is difficult to accurately assess the penetration levels of AWAs owing to the difficulty of separating out ‘live’ AWAs from those which have come to the end of their term. See (Plowman 2001: 9). Although the figures are confused (OEA 2002), the OEA is presently calculating the penetration of AWAs at around 1.9% of wage and salary earners.

¹⁹ By way of contrast, only 1500 individual workplace agreements were approved in Queensland in the first 17 months of operation of that State’s individual agreements scheme (Wooden 2000: 10).

²⁰ The question of how these flexibilities may be accommodated under the no-disadvantage test is problematic but will not be considered here.

²¹ For example, State laws which prescribe the timing and method of payment or set minimum wage rates may apply to the agreement (cf WRA 170VR(1)).

²² A court would imply some sort of term requiring the payment of a reasonable wage: *Fagan v Public Trustee* (1934) 34 SR (NSW) 189; *Way v Latilla* [1937] 3 All ER 759 (HL). This wage might, for example, be informed by reference to the rates payable under an otherwise applicable award.

²³ The same result was also achieved through some clauses providing a fixed salary calculated by multiplying a fixed hourly wage rate by a fixed number of standard hours, irrespective of the number of hours actually worked.

²⁴ The precise number of agreements with this type of clause was not counted in this study.

²⁵ This is not really a restriction on managerial prerogative but merely a formality to be complied with.

²⁶ World Competitive Practices, *OEA Case Study — Peabody Resources (Ravensworth Mine)* (1999); World Competitive Practices, *OEA Case Study — Telstra* (1999); Australian Centre for Industrial Relations Research and Training, *The AWA Experience at D&S Concreting* (1999); Curtin University of Technology and University of Western Australia, *A Case Study on the Introduction of Australian Workplace Agreements: Pharmacia and Upjohn* (1999). See <<http://www.oea.gov.au/graphics.asp?showdoc=/home/case.asp>>.

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²⁷ Approximately half of the types of agreements we thought best exemplified a serious commitment to the high trust model, at least on their face, were in businesses of 500 or more employees. However, the other half were constituted by agreements involving employers in the 20–99 employee range. In view of their relatively small size, the high incidence of high performance work systems in this sector was of some surprise to the authors.

²⁸ Sections 3(i) and 3(a).

²⁹ Section 3(a).

³⁰ See the discussion on the legal framework for AWAs in Part 3 of this Report.

³¹ See relevant provisions in s. 83BB of the Workplace Relations Act 1996.

³² For example the *Taxation Law Amendment Act (No 2) 1995* (Cth.) (provided a more generous taxation base for employee shareholding by increasing the tax exemption limit); *A New Tax (Income Tax Law Amendment) Act 1999* (Cth) (reduced capital gains rates and lowered income tax rates on income derived from employee held shares); and the *Corporate Law Economic Reform Act 1999* (Cth).

³³ Useful points to consider are proposed in (Collins 2001; 2002).

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