

Enterprise Bargaining, Managerial Prerogative and the Protection of Workers Rights: An Argument on the Role of Law and Regulatory Strategy in Australia under the *Workplace Relations Act 1996 (Cth)*

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Abstract

Since the beginning of the 1990s successive Australian national governments (from both right and left of the political spectrum) have overseen a shift in the regulation of employment relations from one based on centralised arbitrated awards to one of enterprise-bargaining. The ostensible purpose of this policy was to facilitate the development of workplace-focussed systems of regulation which were sensitive to the need for flexible production and employment systems in the context of the global economy.

However, this policy was introduced only subject to certain conditions which purported to guarantee the security of workers. These guarantees are substantively set out in the terms of the Workplace Relations Act 1996 (Cth). They include the statutory commitment that workers will not be 'disadvantaged' as a result of entering into enterprise-based agreements; that such agreements will only be made with the genuine consent of the majority of workers; and that such consent will be appropriately informed.

The evidence suggest that whilst many of the objectives of the enterprise bargaining project have been attained (particularly the goal of greater flexibility in employment systems), the law has been less effective in protecting the interests of workers, particularly their power to influence decision-making at the place of work.

The major impact of enterprise bargaining upon the workplace, the paper proposes, has been the restoration of managerial prerogative which previously had been mediated through arbitration or the power of trade unions.

Finally, the paper draws conclusions on the changing role of the institutions which regulate Australian industrial relations. Historically, Australian industrial tribunals have combined the features of judicial bodies and regulatory agencies. One of the key objectives of the Workplace Relations Act has been not merely to shift the focus of regulation to the enterprise, but to shift the source of the regulation to the parties themselves. This, combined with its markedly increased workload following the shift

to enterprise bargaining, has reduced the investigative and judicial role of the Australian Industrial Relations Tribunal. Instead, the Australian Industrial Relations Tribunal appears to be playing what looks increasingly like an administrative role and, as a consequence, its capacity to moderate on the processes and outcomes of enterprise bargaining is greatly reduced. The paper concludes that a shift is occurring in Australian labour law from a mixture of self-regulation and centralised 'command and control', to 'enforced self-regulation', thus signalling a systemic and profound reorientation in regulatory policy and technique in Australian labour market regulation

1. Introduction

Prior to the 1990s, the great majority of Australian workers were employed under a highly protective system of labour law. This system was based on legislation which both constituted and regulated industrial tribunals with powers to deal with industrial disputes between employers, employees and their representative institutions (particularly trade unions). Among other powers, tribunals were authorised to make 'awards' which embodied the rights and conditions of workers in industries, occupations and workplaces. Such awards determined standards of employment for around 90 percent of the employed population in respect of wages, working hours, various types of leave provisions, classifications of work, termination and severance pay, overtime and penalty rates for extraordinary hours and so on. Both the legislation and awards provided further support for trade unions and dispute procedures. They also provided limited scope for the employment of certain forms of irregular labour (e.g. contractors, casual and part-time employees). In short, the Australian compulsory arbitration system was a thoroughgoing system of industrial regulation based on the concept of 'fair and equitable' wages and conditions, which also empowered trade unions (particularly by guaranteeing recognition and representation rights). As a consequence there were clear limits on the extent of managerial prerogative, and on the operation of a 'free' labour market.

Australia is a constitutional federation of states, and in general terms the system of compulsory arbitration and awards operated historically both at Federal government and State government level with a fair degree of uniformity. However, from about the 1920s onwards, the Australian Federal government system emerged as the most prominent and leading system of regulation and this paper focuses upon the policy debate and regulatory response at this level. Despite periods of controversy, general support for the system, from both right and left of the political spectrum, had endured until the 1980s. However, the decision of the Australian Labor government in the mid-1980s to open up the Australian economy to increased global competition led to a basic rethink on the nature of industrial relations. In particular, the system of centralised award regulation, with its rigid job classification structures, and its restrictions on the flexible use of labour, was seen as inimical to the adaptation of Australian industry to the demands of the global economy. Something needed to be done to 'unpick' the system, and to allow for a form of regulation which might be more responsive to competitive forces.

Three key questions emerged as a result of these policy deliberations. The first was, assuming the need to ‘re-regulate’ the system to make it more ‘flexible’ or more responsive to the demands of international competition, how should this be done? What institutional and legislative changes were needed to bring this about? The second question gave rise to more contentious considerations. What were to be the purposes of the ‘new’ regulation? How were employment systems to be made more flexible and more productive, and how were these aims to be balanced against the maintenance of ‘fair’ conditions of employment for workers? The third question was, how would the role of the institutions which regulate the industrial relations system need to change in order to facilitate and reflect the new aims of the system?

In response to the first question, the fundamental position reached was that there should be a shift from the ‘centralised’ determination of employment conditions by industrial tribunals¹ towards a system of regulation founded on enterprise-based bargaining between employers, employees and unions. Rather than maintaining a common standard of employment conditions and practices in the hiring and utilisation of labour across all like-industries and occupations, an enterprise-based system would permit and encourage the development of employment systems and standards which would meet the *particular* needs of enterprises for competitive purposes.

The answer to the second question, was, on the other hand, far more contentious and open to debate. Was the shift to enterprise bargaining based on a supposition that this would tend to foster leading-edge, innovative work organisation and employment systems, or did it leave open the prospect that the system would drive down wages and conditions as part of a cost-cutting path to profitability?

The answer to the third question is possibly the most under-explored and yet potentially the most significant. If the aim was to shift the source of the regulation to the parties themselves, what role would the Australian Industrial Relations Tribunal (AIRC) play? Would it be consistent with the overall regulatory changes for the AIRC to maintain its investigative and rule setting roles?

2. The Shift to Enterprise Bargaining and the *Workplace Relations Act 1996* (Cth)

The beginnings of a shift to more enterprise-based regulation began, as noted earlier, under the Australian Labor government (1983-1996) in the mid-to-late 1980s. However, such early developments, in the period from about 1988 onwards, were tentative and gradual. The formal link between the Australian trade union movement and the Labor Party ruled out the possibility of more radical labour market policies. As a consequence of this, the central role in wage determination and employment regulation of the Australian Industrial Relations Commission (AIRC), and registered trade unions, was substantially maintained. The development of enterprise-based regulation was still largely overseen by the AIRC, and the moves to reduce the rigidities of award classifications, and to ‘flexibilise’ the use of labour and the scheduling of work, continued to be monitored as part of the compulsory arbitration

¹ Principally the Australian Industrial Relations Commission established and regulated pursuant to the *Workplace Relations Act 1996* (Cth) (see particularly Parts II and VI).

system.² As a major concession, the labor government's *Industrial Relations Reform Act 1993* (Cth) permitted the negotiation of 'enterprise flexibility agreements' between employers and groups of workers without the need for trade unions to be involved.

Far more substantial reform to the system of employment regulation became possible with the election of the Liberal/National Party Coalition government in 1996. This government was committed to a more 'free market' approach to labour and employment regulation. Its policies included a substantial weakening of the institutions of compulsory arbitration, a reduction in the power and influence of the industrial tribunal system, cutting back the scope of industrial awards, and a reduction of the power and influence of trade unions.³ Simply put, the aim of this government's labour law policies was to facilitate 'free' bargaining between employers and individual employees, or between employers and groups of employees or with trade unions at the enterprise level. The role of third parties *external* to enterprises, including the Australian Industrial Relations Commission through awards, and trade unions through industry or multi-enterprise agreements, was to be reduced as much as possible.

These policies were put into place in the Coalition government's *Workplace Relations Act 1996* (Cth) (*WRA*). For the purposes of the present discussion it is not necessary for us to describe this legislation in any detail. The important elements are as follows: awards were stripped back to 20 allowable matters, and the role of the AIRC in fixing wages was largely reduced to establishing and maintaining 'safety net' conditions.⁴ Consequently the scope for bargaining between the parties was considerably enhanced. At the same time, the power of the AIRC to intervene in the bargaining process was severely limited. The role of trade unions as workplace regulators was also markedly reduced.

On the other hand, this push towards enterprise-based bargaining did not signal a 'deregulation' as such of employment relations. The thrust of the new legislation was to reduce the number of mandatory conditions of employment determined through sources external to the enterprise. But the sheer weight of new legislation required both to shape the bargaining system, and cut it away from centralised regulation whilst maintaining some supervisory role for the AIRC, produced an Act which, if anything, was appreciably longer and more complex than its predecessors.

Various forms of agreements were made possible under the *WRA* which facilitated bargaining between employers and groups of employees (Australian Workplace Agreements – or AWAs),⁵ between employers and groups employees,⁶ and between employers and trade unions.⁷ The important points to note about all these forms of agreements is that each of them permitted the parties to regulate their respective

² R. Mitchell and M. Rimmer, 'Labour Law, De-Regulation and Flexibility in Australian Industrial Relations' (1990) 12 *Comparative Labor Law Journal* 1.

³ B. Creighton and A. Stewart, *Labour Law*, Federation Press, Sydney, 4th ed., 2005, pp 57-61.

⁴ See Part VI Division 1 of the *WRA*.

⁵ See Part VID of the *WRA*.

⁶ Section 170LK *WRA*.

⁷ These appear in various forms, including agreements made arising out of industrial disputes (s.170LO agreements) and agreements made between incorporated employers and unions (s.170LJ agreements). The discussion in this paper focuses on s.170LK and s.170LJ agreements.

employment systems within the enterprise in derogation of most external minimum standards, but in order to do so, and to obtain the approval of the authorities for their formalisation, the agreements had to meet certain substantive and procedural conditions set out in the legislation.⁸

This returns us to the second of our questions posed earlier. Assuming that enterprise-bargaining was being ‘regulated’ to produce, or facilitate, certain outcomes, what were these outcomes which it was desired to achieve? Clearly the bottom line in ‘re-regulating’ employment relations was to improve the competitiveness of Australian industry and the state of the Australian economy. The objectives of the *WRA* emphasised the ‘pursuit of . . . international competitiveness through higher productivity and a flexible and fair labour market’.⁹ However, there are many different types of flexibility in labour markets (assuming this to include flexible use of labour *within* firms) and different, even opposed, methods of increasing productivity. One option might be, for example, the reduction of labour costs through the lowering of wages and conditions. An alternative approach would involve making more effective use of labour through improved, more dynamic employment systems. Whereas the terms of the *WRA* were extensive and detailed in relation to the processes and procedures for the making and approval of agreements, its provisions gave much less guidance on the preferred substance of bargaining outcomes. There were a few pointers however.

First, the principal object of the *WRA* (s.3) was to work towards ‘*cooperative workplace relations*’.¹⁰ This reflects the substance of much of the criticisms aimed at the traditional system of conciliation and arbitration – that it entrenched antagonistic and adversarial (and hence less efficient and productive) relations between capital and labour. Proponents of enterprise bargaining had long emphasised the efficiencies and greater productivity which would emerge from co-operative, ‘high trust’ workplace systems founded on flexible employment, employee involvement in workplace decision-making and so on.¹¹

Perhaps, though less clearly, drawn from the same inspirations are the requirements imposed in the *WRA* upon the Office of the Employment Advocate (OEA) in advising parties about AWAs, and in approving AWAs, to promote better work and management priorities.¹² On the other hand, whilst the AIRC is under a general obligation to perform its obligations in relation to the making and approval of (collective) certified agreements,¹³ its special obligation under Part VIB of the *WRA* is to do no more than facilitate the making and certification of enterprise-based agreements.¹⁴

⁸ In the first instance, AWAs (individual agreements) require the approval of the Office of the Employment Advocate (OEA), whereas the various forms of collective agreements require the certification of the AIRC. The AIRC has some power to oversee the approval of AWAs when such matters are referred on to it by the OEA (s.170VPC(3) *WRA*).

⁹ Section 3(a) *WRA*.

¹⁰ Our emphasis.

¹¹ R. Mitchell and J. Fetter, ‘Human Resource Management and Individualisation in Australian Labour Law’ (2003) 45 *Journal of Industrial Relations* 292, at 295-301.

¹² Section 83 (2) *WRA*.

¹³ Section 170LA *WRA*.

¹⁴ Section 170L *WRA*.

There is, then, very little legislative guidance for the AIRC, and only slightly more for the OEA, in relation to the sorts of outcomes which the system should be pursuing through the enterprise bargaining process. This seems to suggest that the government was not interested in prescribing, nor even in suggesting, what bargaining should be about, and what the content of agreements should include. Indeed, the terms of the *WRA*, although they exclude some items from inclusion in the terms of agreements, specifically require only one prescribed clause to be included in (collective) certified agreements (a dispute settlement procedure).¹⁵

A second indicator of government intent is found in the so-called ‘no disadvantage test’ (NDT). The terms of the *WRA* required that for an enterprise agreement to be formalised (i.e. approved by the OEA or certified by the AIRC) the authorities had to be sure that the agreement would not ‘disadvantage’ the employees covered by the agreement. Whilst, as we shall see shortly, there are some weaknesses in this statutory test, it may be taken as some sort of an indication that it was not desirable for businesses to drive down labour costs over-vigorously in the process of enterprise bargaining. Prior to the election of the Coalition government in 1996 the future Prime Minister had made an undertaking to employees that they would not be made ‘worse-off’ as a result of the shift from centralised awards to enterprise agreements.¹⁶ Various other safeguards were also included in the *WRA*. These included a number of procedural requirements designed to make sure that employees were properly informed about the content of agreements, and that they had genuinely given their consent to the terms of such agreements.¹⁷

We come to a closer examination of the effectiveness of these provisions, and some of the actual outcomes of the enterprise bargaining outcomes, in the following sections of the paper. Our analysis is not exhaustive, and is intended only to illustrate how the outcomes may have differed from expectations. The analysis begins from the starting point suggested in the foregoing discussion. To recap briefly: the terms of the *WRA* were designed principally to develop further the shift in Australian employment regulation from centralised and uniform norm setting, towards differentiated enterprise-based regulation by agreement. Third parties (trade unions and industrial tribunals) were to have greatly reduced capacity to intervene in this process. There is considerable evidence to support the proposition that this strategy was designed to encourage more flexible, ‘high trust’, partnership-style agreements with a focus on ‘enhanced’ performance.¹⁸ However, as we have noted, it is probably fair to say that this evidence is found more in critical literature and government (extra-parliamentary) papers than in the terms of the legislation itself. On the face of it, as we have noted, the terms of the *WRA* were not particularly inimical to a cost-reduction rather than a high performance strategy, although several of the procedural safeguards appeared at least to set some limits in how far such an approach may be taken.

¹⁵ Section 170LT(8) *WRA*.

¹⁶ R. Mitchell, R. Campbell, A. Barnes, E. Bicknell, K. Creighton, J. Fetter and S. Korman, ‘What’s going on with the “No Disadvantage Test”? An Analysis of Outcomes and Processes under the *Workplace Relations Act 1996* (Cth.)’, Working Paper No. 33, Centre for Employment and Labour Relations Law, The University of Melbourne, 2005, p.3.

¹⁷ See, for a brief outline, Creighton and Stewart, above n.3, pp.238-240.

¹⁸ See Mitchell and Fetter, above n.11.

These uncertainties make it difficult to determine precisely what policy was intended to be pursued. Probably the government was quite sanguine about potential outcomes, believing these best to be pursued by employers (with at least nominal agreement from employees). However, whatever the intentions of the legislation might have been, there is now a body of evidence which can contribute to an assessment of what the outcomes of enterprise bargaining have been in point of fact. The following two sections of the paper outline some of these results.

3. Regulatory Safeguards in Enterprise Bargaining

The No Disadvantage Test

The NDT was the key regulatory support for the government's pre-election promise in 1996 that workers would not be made 'worse off' under a system of enterprise bargaining. However, that commitment was not an unambiguous promise that workers would suffer no deterioration in their existing working conditions. The NDT only requires the authorities to refuse approval or certification of agreements if the agreement 'would result, on balance, in a reduction in the overall terms and conditions of employment' measured against award conditions and other relevant laws.¹⁹ It does not require agreements to be measured against actual working conditions. There is thus both a degree of unreality to the test, and, at the same time, a considerable discretion in the authorities to approve agreements 'on balance', and, in the case of collective agreements, to certify such agreements even when employees are 'disadvantaged' if the certification is not contrary to the public interest because, by way of example, the employer's business is suffering a temporary economic downturn.²⁰ In short, the NDT is a very limited regulatory protection.²¹

There is considerable dispute over the effectiveness of the NDT in protecting the employment conditions of workers. The proponents of the government's policies would no doubt point to the overall increase in the levels of real wages, and the productivity improvements over the past decade, as positive outcomes of enterprise bargaining although the extent of these increases is strongly contested. Survey evidence also indicates that, in general, employees covered by enterprise agreements are on higher wages than those who are on award rates only.

However, whilst much of this survey evidence no doubt accurately reflects some general trends in enterprise bargaining outcomes, it also masks several other effects which can only be seen clearly by examining agreements on a case-by-case basis. The evidence derived from an examination of particular agreements points to a more complex, and perhaps less rosy picture.

The Centre for Employment and Labour Relations at the University of Melbourne²² was commissioned by the Victorian State Government to undertake a study of the

¹⁹ Section 170XA (1) and (2) WRA.

²⁰ Section 170LT (2) WRA.

²¹ See Mitchell et. al., above n.16; O. Merlo, 'Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining' (2000) 13 *Australian Journal of Labour Law* 207; P. Waring and J. Lewer, 'The No Disadvantage Text: Failing Workers' (2001) 12 *Labour and Industry* 65.

²² www.law.unimelb.edu.au/celrl/

operation of the NDT in 2004.²³ This research examined 36 enterprise agreements (a mixture of collective agreements between employees and unions,²⁴ collective agreements between employers and groups of employees,²⁵ and agreements between employers and individual employees²⁶).²⁷ The research involved us undertaking a line-by-line comparison of the relevant award under which the employees were notionally working with the agreement for the purpose of determining whether or not the agreement passed the NDT. The agreements were then ranked by us, according to our perceptions of how the agreement measured up against the NDT.

We also undertook a more partial analysis of a further 48 agreements (12 in each four nominated industries), with a view to supporting our detailed analysis with further quantifiable data. In addition, the research exercise was supported by information obtained through several largely unstructured, informal interviews with members of the AIRC and the OEA, plus other parties engaged in the enterprise-bargaining formalization process.

The key to understanding the outcomes of enterprise bargaining in Australia is that the application of the NDT must be understood at two levels. At the most obvious and superficial level, the parties are engaged in a process which centres on monetary considerations. In almost all agreements this involves the trading away by employers of certain rights, such as defined numbers of working hours, limited spread of working hours, overtime and penalty rates and some annual and other leave provisions, in exchange for higher wages. These concessions make the employer's production and employment systems considerably more flexible and, one must assume, more productive. At this level it is easier to evaluate the fairness of the exchange.

However, at a second level, there are other exchanges taking place through the enterprise bargaining system going to matters such as functional flexibility, job control and worker empowerment which are not being accounted for in the NDT process. We return to this issue shortly.

Looking more closely at the results of the Melbourne research, the conclusions drawn were that there were serious doubts as to whether the NDT was adequately protecting employees in the shift to enterprise bargaining. For example, our detailed analysis of 36 agreements revealed 8 to be highly questionable when examined against the award, 11 to be marginally questionable and 17 acceptable. All of these agreements had been approved (in the case of individual agreements) or certified (in the case of collective agreements) by the authorities. Not surprisingly, all of the agreements in the highly questionable category were either AWAs (individual agreements) or agreements between employers and groups of employees. In other words, where employees are

²³ R. Mitchell et al., *Protecting the Worker's Interest in Enterprise Bargaining: The 'No Disadvantage Test' in the Australian Federal Industrial Jurisdiction – Final Report*, Workplace Innovation Unit, Industrial Relations of Victoria, 2004. Report available from the Centre for Employment and Labour Relations Law at the above website, (n.22).

²⁴ Section 170LJ agreements.

²⁵ Section 170LK agreements.

²⁶ Australian Workplace Agreements.

²⁷ Equal numbers of agreements in four industries: retail, trade, building and construction, automotive component manufacturing, and food manufacturing were examined.

not represented by trade unions, the outcomes in enterprise bargaining appear far more likely to be detrimental to employee interests than otherwise.

However, it does not follow from these results that employees are necessarily suffering a deterioration in wage outcomes as part of enterprise bargaining. On the contrary, perhaps only in a small percentage of cases are employees receiving less wages than they would be under the awards covering their employment. In many cases employees will be receiving appreciably more pay than they would under the award. And, it may also be the case that wage increases or decreases are the result of other labour market developments. The relationship between enterprise bargaining and wage levels is thus both complex and uncertain. As a consequence, the conclusion that many worker's conditions are being eroded in the shift to enterprise bargaining rests upon a somewhat different flow of argument which looks at the outcomes of enterprise bargaining more generally.

First, whilst even if most employees are earning more money through enterprise-bargaining, the difference between the monetary outcomes offered by the award, and those offered by the agreement, are often very thin. The Melbourne research indicated that to be so, particularly in respect of the non-union based agreements examined in detail.

Secondly, it is quite clear that through the process of enterprise bargaining, employees are trading away many other non-monetary rights which do not even appear to be considered relevant by the authorities in the NDT process. These items may themselves be divided into two groups. One category pertains to the employee's *quality of working life*. The NDT requires the authorities to apply the NDT 'on balance'. Our argument would be that 'on balance' it is difficult to avoid the conclusion that many employees are suffering a significant deterioration in the quality of their working lives in several respects. For example, many have suffered the loss of a clearly defined working week, being required to work irregular hours, or on permanent call, with consequent disruption to personal and family life. Many workers are denied discretion as to when they can take annual leave. Many no longer have control/discretion over the nature of their job duties and functions. Much of this discretion has been traded away in enterprise bargaining agreements.²⁸

The second category concerns the issue of workplace *power*. Awards, made on the application of unions, have provided a basis for union-based power within business enterprises. In shifting to non-union based agreements, such as AWAs and employer-group worker agreements, employees are, in most cases, being stripped of protective power to offset against managerial discretion. In other words, not only is the process of enterprise bargaining transforming what were employment rights into areas of managerial discretion, but at the same the agreements are removing the countervailing power influences which might ameliorate the exercise of that discretion. Many agreements now considerably extend the employer's power on matters such as the scheduling of work, the definition of job duties and functions and so on, without any

²⁸ Though the extent to which managerial control/discretion has been conceded through enterprise bargaining is much less in union-based agreements than in AWAs and s.170LK agreements: R. Mitchell, *Australian Industrial Instruments and the Capacity to Manage*, Paper delivered to the Institute of Public Affairs, November 2003. Paper available from the Centre for Employment and Labour Relations Law, at the above website (n.22).

need for consultation with the employees or trade unions. One might expect that such transfers would require what might be termed a ‘non-union premium’²⁹ as part of the NDT, but, as we have noted above, these matters appear not to be regarded as relevant by the formalising authorities.

To sum up: enterprise bargaining has delivered to employers much greater discretion and flexibility in organising work. Whilst the survey evidence indicates that generally speaking this change has not been brought about in company with major wage reductions at the expense of labour, it is also the case that in a high proportion of instances, the NDT is failing adequately to protect employees from a deterioration ‘in relation to terms and conditions of employment’³⁰ when considered more broadly. Compounding that problem is the fact that wage reductions are undisputedly occurring in some specific instances.

The ‘Genuine Agreement’ and ‘Informed Consent’ Requirements

Two further requirements for the certification of collective agreements by the AIRC are:

- That the agreement either be genuinely *made* by a valid majority of employees (in the case of agreements between employers and groups of workers), or be genuinely *approved* by a valid majority of employees (in the case of agreements between employers and unions);³¹ and
- That any agreement by a so-called valid majority be appropriately ‘informed’.

Under the terms of the *WRA* a ‘valid majority’ may be secured either through a ballot, or through some other method of obtaining approval. ‘Informed’ consent requires both that the employees have access to a copy of the agreement at least 14 days before the agreement is made or given approval by the employees,³² and that prior to its making or approval the employer has ensured that the terms of the agreement have been explained to all the employees whose employment is to be subject to the agreement.³³ Such explanations, furthermore, must be appropriate considering the particular circumstances and needs of the employees (for example, as appropriate for women, or persons from a non-English speaking background, or young persons).³⁴ The *WRA* does not define exactly what an ‘explanation’ entails. In particular, it does not make it clear whether such an explanation requires the employer to compare the agreement with the award, or to explain how it compares with other agreements in the same industry.

Research has also been carried out in the Centre for Employment and Labour Relations Law examining the effectiveness of these provisions in safeguarding the interests of employees in the enterprise bargaining process.³⁵ This research involved

²⁹ D. Peetz, ‘Individual Contracts, Collective Bargaining, Wages and Power’, Centre for Economic Policy Research, Discussion Paper No.437, Australian National University, Canberra, 2001.

³⁰ See Mitchell et. al., above n.16, p.30..

³¹ Section 170LK(1) and s170LJ(2) of the *WRA*.

³² Section 170LE *WRA*.

³³ Sections 170LJ(3)(a), 170LK(3) and 170LR(2)(a) *WRA*.

³⁴ Section 170LJ(3)(b), 170LK(3) and 170LR(2)(b) *WRA*.

³⁵ M Bare, ‘To What Extent Does the AIRC Test the Assertion that Employees are Giving Informed Consent to the Making of a Certified Agreement?’, Unpublished Research Paper, Centre for Employment and Labour Relations Law, The University of Melbourne, 2004.

an examination of AIRC case files of both union and non-union agreements, across two industries (security and vehicle building), and over a split time-frame. The research was also supported by interviews carried out with AIRC members and other relevant parties. The aim of the research was to examine the extent to which the written documentation supporting certification of the agreement addressed the ‘valid agreement’ and ‘informed consent’ issues, and to what extent further evidence is advanced during the certification hearing as to these matters.

For various reasons to do with the very small sample size examined (40 agreements) and the lack of detailed transcript on the AIRC files in many cases, the research findings must be treated with caution. However, certain preliminary findings are at least suggested by the evidence.

First, the AIRC members rely mainly on the statutory declarations which are required to be provided by employers and trade unions, in support of the application for certification of the agreement. Much, therefore, hinges on the information provided in these declarations. The research indicates, however, a surprising lack of detail in the declarations meeting the WRA’s ‘valid majority’ and ‘informed consent’ requirements. For example, in about 45 percent of the cases examined, there was no indication in the statutory declarations of what mechanism was used to assess whether a majority of employees had made or approved the agreement. Further, in the case of union-based agreements, *none* of the cases examined provided any evidence of whether or not non-unionists had been included in the ‘valid majority’ process.

Similar gaps appear in relation to the ‘informed consent’ provisions. Many statutory declarations carry very little information on whether employees have been told of the consequences of making the agreement, and how the terms of the agreement compare with the award or other instruments. In many statutory declarations it is not even made clear that the employer has gone beyond giving the employees the opportunity to ask questions about the agreement rather than taking positive action to explain the consequences of its terms.

Other evidence casts further doubt on the adequacy of relying on the statutory declarations accompanying the certification application. For example, in the files examined there is clear indication that the statutory declarations are being prepared in standard form for both employers and unions, in identical terms, even across multiple enterprises. In other words, these are not descriptive answers to the ‘valid majority’ and ‘informed consent’ questions, but tailor-made identical responses from both employers and unions, or employers and worker representatives (in the case of non-union agreements) on a prepared, formulaic basis. This is, in turn, indicative of a ‘rubber stamping’ policy among members of the AIRC, perhaps suggestive of a different regulatory environment, an issue to which we return in Part 5 of the paper. And, whilst it is open to AIRC members to examine documents other than the required statutory declarations (which might include details of voting ballots and so on), the research reveals that the use of such further documentation occurs in only about 25 percent of cases, and usually at the parties’ (rather than the AIRC’s) initiative.

Secondly, and noting that certification hearings generally are listed to take no more than 10 minutes in respect of each agreement, it appears that in only a minor

percentage of cases (about 25 percent of the files containing full transcripts of proceedings) is there evidence that the AIRC members had either received further oral submissions, or had asked questions of advocates concerning the ‘valid majority’ and ‘informed consent’ issues.

In summary, then, this body of research seems to indicate that the regulatory approach to ensuring that employees are adequately protected in the process of making enterprise agreements is rather perfunctory. The practice is to rely on the formal statements of the parties (employer and unions) through the required documented submissions. There must be some doubt, therefore, whether in all cases employees can be shown to have given their informed consent to agreements pursuant to which they will be engaged following certification.

4. Outcomes in Enterprise Bargaining: the Content of Agreements

As we noted in the introductory section of this paper, the shift in policy from mandated national and industry common employment standards to a system of differentiated regulation based on agreement at enterprise level raised two principal questions. The first question was *how* was this to be done? The second was to what effect? What kinds of employment systems and workplace regulations were to be pursued through the enterprise-based system?

The answer to the first of these questions was quite straight forward. Common employment standards, mandated through awards or legislation were not to be removed,³⁶ but parties could avoid them, by agreement, provided they met certain procedural and substantive safeguards set out in the *WRA*. We have examined the operation of some of these safeguards in Part 3 of the paper, and concluded that they do not meet the *WRA*’s apparent objectives. This is a point to which we will return later in this part of the paper.

As we noted earlier, however, the answer to the second question was, and still is, considerably more open to debate. There is no disputing the argument that the enterprise-bargaining system was introduced to bring about reforms making Australian enterprises more competitive. It is well established, however, that there are different strategies available to managers in achieving this goal. These are often captured in the comparison drawn between the so-called ‘high road’ to success, and the alternative ‘cost-cutting’ route, which is thought to characterise a less desirable approach. Proponents of the ‘high road’ tend to emphasise the idea of ‘high performance’ workplace (HPW) systems or ‘high involvement’ workplace (HIW) systems which entail flexibility, high trust between employer and employee, employee involvement in workplace decision-making, training, and so on. In short, this approach envisages a workplace in which efficiency and productivity improvements are driven by enhanced *quality* of work performance and product or service.

We also noted earlier that there is very little in the terms of the *WRA* to guide the parties as to what kinds of employment practices are deemed desirable as a strategy

³⁶ Although awards were nevertheless to be subjected to a ‘simplification’ process to reduce the number and scope of matters which could be legitimately included in them: see s.88A and s.89A *WRA*.

for promoting enterprise bargaining, and it must be assumed that the government preferred to leave these matters to the parties. On the other hand, it has been argued³⁷ that much of the extra-parliamentary policy statements leading up to, and following the introduction of, the WRA in 1996, suggested that enterprise bargaining would pave the way for the more 'quality' focused HPW or HIW system to emerge,³⁸ and the incorporation in the Act of the NDT would seem consistent with a view that a cost-cutting agenda was not a preferred approach.

We can turn now to assess some of the outcomes of the enterprise-bargaining process. In this examination we are making an assessment of the extent to which enterprise agreements contain provisions that indicate a HPW or HIW strategy by the parties. Before we commence this examination, however, two caveats are necessary. First, this is not a survey of all of the evidence arising from research on the content of enterprise agreements. We are using the evidence here selectively for the purpose of presenting one possible outlook on the progress and impact of enterprise bargaining since the WRA came into effect.³⁹ Secondly, we cannot be certain that the terms of enterprise agreements *per se* are the appropriate sites to search for evidence of particular employment and work performance systems.⁴⁰ It is clearly open to suggestion that particular workplace systems which exist on the ground may not be reflected at all in the terms of enterprise agreements. For the purposes of argument in this paper, however, we are treating the contents of agreements as at least 'indicative', if not definitive, of enterprise practice.

Australian Workplace Agreements

The introduction of non-collective agreements (AWAs) which bound employers and individual employees, but which permitted them to contract out of much of the standard employment conditions set by industrial tribunals through awards, was, not surprisingly, a very contentious policy.⁴¹ Many commentators viewed this as no more than a cost-cutting road to productivity gains, permitting employers to reduce labour costs by cutting wages and increasing hours of work.

Research work carried out by Mitchell and Fetter on the content of AWAs explored the incidence of features in such agreements which might be seen as demonstrating an alignment between the promotion of individual agreements and the 'high road' to enterprise success through the construction of HPW systems. Broadly, the findings of this research, the validity of which has been challenged,⁴² were as follows.

³⁷ See Mitchell and Fetter, above n.11.

³⁸ Note, however, that this is a generalised and contentious view of the policy literature. It has been argued that neither the government nor the supporters of enterprise bargaining had suggested a system based on the ideas of HPW or HIW: see P. J. Gollan and J. Hamberger, 'Australian Workplace Agreements and High Performance Workplaces: A Critique of Mitchell and Fetter' (2003) 45 *Journal of Industrial Relations* 521.

³⁹ For example, we have not reported here, nor relied upon in our analysis, the results of attitudinal surveys carried out under commission from the OEA: see, for example, P. Gollan, *Australian Workplace Agreements Employee Attitude Survey (weighted findings)*, Office of the Employment Advocate, Commonwealth of Australia, Sydney, 2002.

⁴⁰ See Mitchell and Fetter, above n.11, p.320; Gollan and Hamberger, above n.37, p.525.

⁴¹ See R. C. MacCallum, 'Australian Workplace Agreements: An Analysis' (1997) 10 *Australian Journal of Labour Law* 50.

⁴² See Gollan and Hamberger, above n.37.

First, there is no doubt that AWAs are a considerable source of *flexible* employment practices and conditions at enterprise level. Almost all AWAs facilitate flexibility in working hours, including the removal of ordinary hours of work or the spread of ordinary hours across a much broader time frame including weekends and public holidays. AWAs also expand the rights of employers to call out employees outside of normal working hours, and to work extraordinary hours ‘as directed’. Further, hours of work are increasingly defined as a commitment to work ‘the number of hours required to do the job’ or to meet ‘the operational requirements of the business’ or the number of hours set by the employer’s ‘work pattern’.⁴³

In addition, AWAs tend to introduce various types of pay flexibility, including annualised salaries which incorporate overtime and penalty rates. Wage increases through various forms of enterprise or personal performance reviews are increasingly in the control of managerial discretion.

Very important also are the developments in the terms of AWAs in respect of functional flexibility. Generally speaking, although they have been simplified substantially over the past decade,⁴⁴ awards still set out ‘classifications of work’ within which employees are engaged. These continue to set some limits upon what an employee can be required to do according to various qualification requirements, skill levels and job content. Increasingly, however, AWAs are introducing flexibilities by permitting employers to use labour in highly discretionary ways, thus challenging notions of employee ‘job control’ or work stability. Generally speaking there are limits to which employers may require employees to fulfil duties beyond the norm. Limits are set, for example, by ‘reasonableness criteria’ or by ‘training and skill’ criteria. But many AWAs go beyond this and specify powers in the employer to require employees to undertake any duties specified at the employer’s discretion.⁴⁵

It is clear, then, that AWAs are providing outcomes which are consistent with the drive for flexibility, and which, one can assume, are contributing to the improved productivity which has been evident in Australian workplaces.⁴⁶ But what contribution are AWAs making to greater efficiency and productivity through the development of new employment systems, typified as HPW systems? Most research on the content of AWAs has reported unfavourable outcomes in this regard.⁴⁷ The Mitchell and Fetter study, for example, found that by and large the emergence of employment systems in AWAs based on ‘flexible’ production were very largely still based on hierarchical models, and upon managerial authority and discretion. There

⁴³ Mitchell and Fetter, above n.11.

⁴⁴ See Creighton and Stewart, above n.3, at pp.177-179.

⁴⁵ The extent to which this may be legal affective is, however, subject to doubt: J. Fetter and R. Mitchell, ‘The Legal Complexity of Workplace Regulation and its Impact Upon Functional Flexibility in Australian Workplaces’ (2004) 17 *Australian Journal of Labour Law* 276.

⁴⁶ See I. Watson, J. Buchanan, I. Campbell, and C. Briggs, *Fragmented Futures: New Challenges in Working Life*, Federation Press, Sydney, 2003, p.189; M. Wooden, *The Transformation of Industrial Relations*, Federation Press, Sydney, 2000, pp.533ff.

⁴⁷ See Mitchell and Fetter, above n.11; A. Roan, T. Bramble and G. Lafferty, ‘Australian Workplace Agreements in Practice; “Hard” and “Soft” Dimensions’ (2001) 43 *Journal of Industrial Relations* 387; M. Cole, R. Callus and K. van B. Barneveld, ‘What’s in an Agreement? An Approach to Understanding AWAs’, Paper given at ACCIRT/OEA Seminar, *The AWA Experience: Evaluating the Experience*, Sydney, 2001.

was ‘much less evidence of worker empowerment, information sharing, and consultative mechanisms’ in AWAs, beyond rhetorical preambles committing the enterprise to ‘cooperation and trust’, ‘industrial democracy’ and ‘open book management’.⁴⁸ There were few AWAs providing formal mechanisms of employee consultation through workplace committees and other structures, few references to group work, teams and quality circles, and so on. It must also be remembered that all of these kinds of prescriptive work and organisation practices have been systematically removed from awards. The general conclusion of the authors was that enterprise bargaining through AWA negotiation was not ‘providing, in any systematic way, employment systems’ which corresponded to the ‘high trust’, ‘high involvement’ or HPW system.⁴⁹

Collective Agreements

A different group of researchers have carried out a similar investigation to that of the Mitchell and Fetter work, but with a view to testing the contents of collective rather than individual agreements for indications of HPW employment systems.⁵⁰ As we noted earlier, collective agreements within the Australian labour law system may be formalised either as agreements between employers and groups of employees or between employers and unions. Just as the *WRA* provides little guidance on the preferred policy outcomes in respect of AWAs, the Act is equally impartial when it comes to collective agreements of either type. There is, however, a link in the human resource management literature between the development of HPW systems and *collective* as well as individualised agreements.⁵¹ Thus the potential is there for an assessment of the extent to which such agreements are advancing the development of the HPW system in the enterprise bargaining process. This research has produced results which are mainly consistent with those in the case of individualised agreements (AWAs) but with some unexpected outcomes.

First, both types of collective agreements suggested strong moves towards more flexible pay systems, escaping the rigid award structures of weekly earnings, coupled with overtime and penalty rates.⁵² Perhaps surprisingly, there was no marked difference here between union-based agreements, and those between employers and groups of employees. The shift to performance-based pay, was, however, less pronounced in union-based agreements, and *individual* worker performance in calculating pay was also much lower in union agreements as compared with non-union agreements. The conclusion was that whilst the trend to pay flexibility was

⁴⁸ Mitchell and Fetter, above n.11, p. 316.

⁴⁹ Mitchell and Fetter, above n.11, p. 317.

⁵⁰ P. Gahan, R. Mitchell, K. Creighton, T. Josev, J. Fetter, and D. Buttergeig, ‘Regulating for Performance? Certified Agreements and the Diffusion of High Performance Work Practices’, Paper delivered to the Australian Labour Law Association, Second National Conference, *Employment Regulation for a Changing Workplace*, Sydney University Law School, 2004.

⁵¹ See S. E. Black and L. M. Lynch, ‘How to Compete: The Impact of Workplace Practices and Information Technology on Productivity’ (2001) 83 *Review of Economics and Statistics* 434.

⁵² See Gahan et. al., above n.50, p. 11. Indicators of pay flexibility include moves away from methods based on calculating pay as a set amount combined with rates for overtime; and shifts towards annualised salaries and often performance related pay. This might include profit share or employee share ownership.

important, union-based agreements were more protective against excesses and showed a preference for collectivised arrangements.⁵³

Similar outcomes were noted in respect of temporal flexibility.⁵⁴ High levels of flexible working time are present in both union- and non-union agreements. However, as might be expected, a substantially higher proportion of non-union agreements provide for no set 'ordinary hours' of work, and for an unlimited managerial determination of the spread of ordinary hours of work. In short, working time flexibility is present in both forms of agreements, but union agreements constrain more tightly the exercise of managerial prerogative on this matter.

The same pattern is repeated in respect of functional flexibility.⁵⁵ Both forms of collective agreements provide for flexibilities in job duties and job location which extend the employers control. These flexibilities suggest enterprises which are, in terms of work organisation, far more flexible than employment systems regulated pursuant to awards. However, the unrestrained managerial discretion to vary existing duties, or to add new duties, is far more pronounced in the case of non-union than in the case of union-agreements.

The Gahan et al research also investigated the employee empowerment side of the HPW system equation. Seventy per cent of union-based agreements contained provisions for consultation between employers and employees or employees represented by unions.⁵⁶ This figure dropped to about twenty-five per cent in the case of non-union based agreements. However, even in cases where consultation requirements are present, the data suggests that these imply no highly co-operative or collaborative systems of employment embodying major tenets of the HPW or HIW model. Much of this consultation is 'advisory' rather than joint decision-making in form. Only about in thirty-eight per cent of union-based agreements and a much lower percentage of non-union agreements contain formalised structures (like works councils or workplace committees). References to 'team work' appear in only about ten per cent of union agreements and in far fewer non-union examples. Other HPW indicators such as 'quality circles', 'total quality management' are virtually absent in both forms of agreement. 'Continuous improvement' clauses are present in about 21 per cent of union-based agreements and twenty-five percent of non-union-based agreements.

What does this information tell us about the progress of cultural change in employment systems? Broadly speaking the evidence arising from the contents of collective agreements confirms that enterprise bargaining is producing more flexible workplaces, but not models of workplaces which reflect the HPW system constructed on co-operation, partnership and high employee involvement.

⁵³ Gahan et. al., above n.50, p. 12.

⁵⁴ Indicators include: no set ordinary hours; variation to hours (including span/ spread of hours) determined by employer alone or in consultation (but not necessarily agreement); ordinary hours worked over unlimited spread of hours, right of employer to require additional hours.

⁵⁵ Functional flexibility means flexibility in duties and or location. Indicators include the absence a duties clause; the employer's right to add to or change duties; capacity of the employer to transfer employees to another site, provision for employees to have a say in determining functions; involvement of unions in determining functions.

⁵⁶ This figure is consistent with other industrial relations research literature that highlights that union organisational presence does not necessarily imply that they are active in enterprises.

Industrial Democracy through Enterprise Agreements

A final piece of research evidence enables us to extend and refine the assessment made in the above discussion of the incidence of 'employee involvement' structures in enterprise-based agreements. This research, carried out in the Centre for Employment and Labour Relations Law by Shelley Marshall and Samantha Korman, examines the incidence and nature of Joint Consultation Committees in Federal Certified Agreements from 1991 to 2003. The research draws on data from the Agreements Database and Monitor (ADAM), a database maintained since 1993 by Australian Centre for Industrial Relations Research and Training (ACCIRT),⁵⁷ and a closer examination of 48 Federal certified agreements. In contrast to the Gahan et al study, which tested for the presence of any requirement to consult, this research tested for a more meaningful and ongoing mechanism of joint employer and management consultation where such requirements were present.⁵⁸

Forty-five per cent of registered Federal enterprise agreements in the ADAM database, spanning the years 1991 to 2003, included provision for a formal consultative committee. When this data was examined, it showed a steady increase in the number of joint consultative committees (JCCs) provided for in Federal collective agreements over time. The percentage of agreements that containing provision for JCCs increased from 20 percent in 1995 to 54 percent in 1996, reaching a peak of close to 58 percent in 1999 and then reducing to 33.3 percent in 2003. The marked increase may have been related to the void left by the removal of award provisions for consultation prior to termination, change and redundancy that the AIRC had developed and inserted into most Federal awards prior the introduction of the *WRA*. With the introduction of the *WRA*, consultation was no longer an 'allowable matter' and consequently such provisions were required to be removed from awards.⁵⁹

There was a marked difference between union and non-union agreements in the character of consultation arrangements. Only 33 per cent of non-union agreements included JCC clauses, whereas 49 per cent of agreements made with unions included a provision for such arrangements. Interestingly, neither agreements made with unions or with employees generally required that unions be represented on the committee. (Only around 11 percent of agreements made provision for union representation.) It may be that, in practice, it will be a union representative that sits on the committee,⁶⁰ however, this was not established by the formal arrangements. Nevertheless, this finding shows that in formal terms JCCs are not conceived of as an alternative representative mechanism for unions, but rather, they are conceived of as a representative mechanism for employees more broadly.

⁵⁷ Data for this survey provided to us by Larissa Bamberry of Australian Centre for the Industrial Relations Research and Training, (ACIRRT). ACIRRT is based at the University of Sydney.

⁵⁸ The ADAM database tested for 'the provision of a formal structured committee at a workplace, which typically provides a forum for discussion between representatives of the employees and management. The committee must be in existence, that is, not a commitment to create a committee at some time.'

⁵⁹ Section 89A of the *WRA*.

⁶⁰ The data collected in the Australian Workplace Industrial Relations Survey (AWIRS) 1995 found a strong presence of union representatives on JCCs.

The 48 agreements which were examined more closely revealed interesting detail concerning the requirements in the provisions regarding frequency of meetings, the range and type of matters considered and the powers of the JCCs.⁶¹ Many agreements (13 out of 48) did not specify how often the JCC would meet, which may mean that they are ad hoc occurrences. Of those agreements that specified the frequency of meeting, most specified monthly, quarterly meetings or bi-annual meetings. Of those agreements that detailed the required membership of the committee, most specified even numbers of management and employee representatives (23 compared with 7 which did not). Whilst union representatives might not have an assured membership on the committee, 33 out of the 48 agreements provided for some broader type of union involvement in the committee. Twelve agreements permitted union officials to attend committee meetings and 18 agreements included a union delegate on the committee.

An examination of clauses specifying the subject matter that committees are allowed or empowered to address revealed that most JCCs are designed to discuss matters of strategic importance to the enterprise. For example, 34 agreements mentioned productivity. This may be evidence that the JCCs were conceived of as an HWP mechanism. Matters that may be thought of as 'employee empowerment issues' were provided for less. Matters such as job satisfaction, quality of working life or job security were mentioned in only 8 agreements.

Little is indicated from an examination of the agreements concerning the influence of the committees over management decisions: i.e., whether they are merely a mechanism for the gathering of employee views, or whether there is an obligation incumbent upon management to be bound by employee views. Thirty-one of the 48 agreements did not specify what decision-making powers the committee had. Fourteen agreements permit the committee to make recommendations. Only one agreement specified that 'all decisions of the committee will be acted upon by the management and or union/workplace' after a decision is made by consensus.

To sum up: whilst the data suggests that JCCs are a significant institution of employee 'voice' in Australia, it does not appear that they are also a significant mechanism for the extension of union or employee *power*. They may act as a consultative mechanism for increasing productivity by securing employee cooperation through information sharing. But it is doubtful if they are encouraging the kind of employee involvement in decision-making which is indicative of the more advanced models suggested in some of the human resource management literature.

* * *

To this point we have examined the reconstruction of Australian industrial and employment relations from a 'centralised' and 'standardised' system of regulation by state agencies (albeit with a high degree of employer and union involvement) into a 'decentralised', 'enterprise based' system of 'self-regulation' by the enterprise parties themselves.

⁶¹ Caution should be exhibited in making generalisations from this small sample.

This reconstruction, however, though fundamental in outlook, is still built on the foundations of the previous regulatory regime. Enterprise-bargaining was not written onto a clean slate. Guarantees were made to workers that previous basic employment rights and conditions would be preserved and that the enterprise-bargaining system would not derogate from this position.

The terms of the *WRA* reflect this approach. As we have seen, the Act permits the negotiation and formalisation through state agencies (the OEA and the AIRC) of individual and collective enterprise agreements, but only in compliance with normative and procedural safeguards which are designed to protect the minimum conditions offered to workers under state regulation. Theoretically, and speaking generally, enterprise parties can only negotiate up from these minimum standards.

One common interpretation placed upon the development of enterprise-bargaining as a policy, and the terms of the *WRA* supporting that policy, was that enterprise-bargaining was designed principally to facilitate flexible and high-performance work organisation and employment systems encouraging innovation in products and services to meet national and global market demands. The development was not about cost cutting as a central competitive driver.

We have reviewed the evidence pertaining to the regulatory devices designed to structure enterprise bargaining according to these objectives. Some things are clear. Flexible employment and work organisation systems have developed strongly throughout industry and business generally. Broadly speaking, however, it seems that much of this is being carried out through substantially increased managerial discretion, which hitherto was limited by legal provisions in awards, and by the activities of industrial tribunals and trade unions. Although we may speculate on the various reasons for the increased productivity in the Australian economy over the past decade, it seems highly unlikely that this is due to the development of innovative partnership relations between employers, employees and unions to any marked degree.

Australian workers are also, so it seems, when taken as a whole financially better off. The rise in real wages has been mentioned, although we cannot be certain about the reasons for these increases or the true extent of the rise. But leaving to one side the wages issue, do other aspects and outcomes of the enterprise-bargaining system shed a less favourable light on the transformation of Australian employment relations over the past decade?

The evidence assembled and examined in this paper strongly suggests that there are reasons to be cautious in evaluating enterprise bargaining as an unqualifiedly successful transformation of Australian employment relations. It is clear from our evidence, for example, that the labour law system is *not* protecting *all* workers, nor is it protecting all workers' rights in the shift to enterprise bargaining. Rather, the evidence suggests that employees are working longer hours, that they are working harder, that they are engaged in more diverse tasks, and that they have less control over their working (and thus private) lives. There is less *security* of pay. Even where workers are financially better off in terms of pay, when measured against the state-mandated minima, that income benefit may be quite marginal, and often comes at a substantial cost in terms of trade-offs.

In short, if enterprise bargaining is responsible for increased productivity and increases in real wages, those improvements are constructed overwhelmingly on the back of harder and longer work, and more stressful lives, rather than on product and organisational innovation.

These are important conclusions. They also give rise to a number of issues concerning regulatory policy and strategy to which we examine briefly in the next part of the paper.

5. The *Workplace Relations Act 1996* (Cth) and Regulatory Strategy in Australian Labour Law

To understand what is going on in a regulatory sense in Australian labour law, it is necessary for us to give some closer attention to the type of regulation which lay at the heart of the compulsory arbitration system, and what regulatory change the coalition government is attempting to achieve through its statutory policies. Our discussion is not intended to introduce a complete analysis of the work of compulsory arbitration tribunals as ‘regulatory agencies’, nor the extent to which that regulation was ‘good’ regulation according to criteria set down in the regulatory literature.⁶² Rather, our concern here is to set out in a preliminary and descriptive way some issues arising from our previous discussion which appear to offer some scope for future analysis within a ‘regulatory’ discourse or framework.

Australian labour law was, and still is, largely characterised by rules set down in legislation regulating the conduct of employees, employers and their representative associations, in industries, occupations, and at work locations. In Australia some of this legislation set out directly⁶³ specific rights and obligations on the parties to industrial relationships (actors) arising out of industrial disputes, or disagreements, or bargaining, or workplace incidents (the regulated field). Some of these rights and obligations were about specific employment standards (like pay and leave), or recompensed parties for certain losses or injuries incurred in workplaces. Others were about how actors and institutions were to organise and conduct themselves (for example, how trade unions were to be constituted and managed, and the limits upon them and their members to engage in industrial action).

This form of labour law arguably fits the ‘command and control’ model of regulation where the regulator (in this case the state) both makes and enforces the rules set down.⁶⁴ But the task of Australian labour regulation was not restricted to the direct creation of labour rights and obligations. As we noted in our introduction, the legislative framework at the Federal and State government levels created statutory bodies (agencies) in the form of industrial tribunals, with powers to make industrial awards. These awards were, speaking numerically at least, the *major* source of workplace norms, covering terms and conditions of employment, union rights,

⁶² See generally R. Baldwin and M. Cave, *Understanding Regulation*, Oxford University Press, Oxford, 1999.

⁶³ See Mitchell and Rimmer, above n.2.

⁶⁴ R. Baldwin, C. Scott and C. Hood, *Regulation*, Oxford University Press, Oxford, 1998, p. 24.

disputes procedures, classifications of work, limitations on particular forms of work, and so on.

Historically Australian tribunals appear to have combined the features of judicial bodies and regulatory agencies. The arbitrator's role has been 'quasi-judicial' in so far as the tribunals hear claims, consider evidence and make legally binding decisions.⁶⁵ On the other hand, the awards made in these deliberations were not simply confined to the immediately disputants, but were promulgated as rules or codes governing entire sections of industry and the workforce.

One of the key objectives of the *WRA* has been not merely to shift the focus of regulation to the enterprise, but also to shift the *source* of the regulation to the parties themselves (i.e. employers, employees and trade unions). Further, the terms of the *WRA*, and the government's general labour market policies, prefer that regulation should first and foremost be by agreement between employers and individual employees (with as little interference from unions – especially on an industry-wide basis – as possible). Put in terms of regulatory discourse, the aim of the *WRA* is to shift as much as possible from command and control type regulation to 'self-regulation' at the workplace.⁶⁶ In keeping with this strategy, the *WRA* attempts to reduce the level of mandatory employment standards, particularly through award simplification, to a minimum.

What regulatory issues arise from this redirection in industrial relations policy? As a preliminary point, we should start by noting that it is by no means clear how far the traditional industrial tribunal system corresponded to the simple command and control model of regulation in the first place. Whilst it is true that the system produced mandatory norms which were, at least ostensibly, enforced by state agencies, at the same time there was heavy involvement in the dispute settlement process and in the formation of outcomes by the parties themselves.⁶⁷ There is, consequently, at least scope for an argument that the traditional labour law model embodied a high degree of 'self-regulation' as well as 'command and control'.

However, leaving that point to one side, our earlier analysis of the development of enterprise bargaining does point to some important regulatory developments in Australian labour law. First, the new system, embodied in the terms of the *WRA*, is clearly not 'self-regulation' pure and simple. As our text has demonstrated, this is a form of 'enforced self-regulation' under which the parties 'make their own rules but have to submit them to public agencies for approval'.⁶⁸ As we have noted, the public agencies responsible for approving the instruments of self-regulation submitted by the parties are the OEA (in the case of AWAs) and the AIRC (mostly in the case of collective agreements, but sometimes in relation to AWAs). The agreements of the parties embodying the self-regulated standards they wish to set for their enterprises can only be formalised, if they comply with certain statutory standards, a number of which we have examined.

⁶⁵ M. Perlman, *Judges in Industry*, Melbourne University Press, Melbourne, 1954.

⁶⁶ On self-regulation, see Baldwin and Cave, above n.63, ch.10.

⁶⁷ See Perlman, above n.66; B. Dabschek, *Australian Industrial Relations in the 1980s*, Oxford University Press, Melbourne, 1989.

⁶⁸ See Baldwin, Scott and Hood, above n.65, p.28.

One key point arising from these developments concerns the regulatory expectations of all of the parties involved, including the government, the regulatory agencies and their members, the regulated parties, and those acting for them in a professional capacity.

It is helpful here to compare the OEA with the AIRC. The OEA was a new regulatory agency introduced in the *WRA 1996*. It does not have powers of conciliation and arbitration and it operates in a very different way from the traditional *modus operandi* of the AIRC. Its various functions include the approval of AWAs. Although the OEA is subject to direction from the Minister, generally speaking how it goes about exercising its functions is relatively unconstrained by statute. It has systematised the approval of AWAs to maximise the scope for the parties themselves to ensure their agreements meet the requirements of the *WRA*. The OEA holds no formal hearings pertaining to the approval of AWAs. In short, the OEA as a regulator in the enterprise-bargaining process is far more oriented towards a process of administrative oversight and documentation perusal, than independent investigator and adjudicator.⁶⁹

The trend over the past decade or so has been for Federal governments (particularly since the introduction of the *WRA*) to limit and hedge-in the independent powers of the AIRC in respect of most aspects of that institution's functions.⁷⁰ As we have noted, the volume of work and the legislative constraints on members, are having major effects on how the AIRC goes about its role in supervising the enterprise bargaining process and its outcomes. Time pressure has resulted in increasing reliance by AIRC members upon paper work submitted by the parties which is often in a standardised form and a corresponding failure to carry out serious independent investigations of the circumstances of the agreements. This has resulted in the work of the AIRC more closely resembling the OEA than that of the independent investigative process which previously characterised the work of the former body.

In our analysis of the outcomes of enterprise bargaining, we observed that this altered regulatory approach may be producing results which do not correspond with the apparent objectives of the *WRA* as seen in the terms of the legislation. We suggest that this has become the source of considerable regulatory confusion and conflict.

At least two views may be taken of the regulatory framework surrounding the enterprise-bargaining system. One view might be that the *WRA* establishes particular rights invested in all employees to the effect that they cannot be bound by a set of enterprise regulations which have been determined without the appropriate consent and or which amount to a deterioration in their 'terms and conditions of employment' as defined. That might be the interpretation placed upon the relevant parts of the *WRA* by unions and employees, and by some members of the AIRC. It will also be the view of some lawyers acting for enterprise parties engaged in the bargaining process. For example, some lawyers interviewed for the research work outlined in Parts 3 and 4 of this paper attested to the fact that they thought it their professional responsibility to be certain that no employee suffered a statutory disadvantage in the enterprise-bargaining process.

⁶⁹ See Mitchell et. al., above n.16.

⁷⁰ See A. Stewart, 'A Simple Plan for Workplace Regulation?' *Industrial Law News*, Issue 7, 20 July 2005, www.cch.com.au, pp.1-3.

But there is a second view. Upon that view, one which no doubt fits with the objectives of the government, and the functions of the OEA, but which is also supported by many more recently appointed members of the AIRC, the legislation is principally to facilitate a shift in the techniques of regulation in workplaces. There are inevitably various trade-offs largely concerning matters of efficiency which are inherent in the exercise of such regulatory powers. Regulating for the specific protection of each individual affected *as part of the process* from this point of view may not be seen as consistent with such regulatory objectives.

6. Conclusion

The shift in Australian labour law from a mixture of ‘self-regulation’ and centralised ‘command and control’ style regulation to ‘enforced self-regulation’ thus signals a systemic and profound reorientation in regulatory policy and technique. But at the same time, given that these policies have been constructed onto an older-form system and partly based in pre-existing institutions, there is considerable confusion and conflict within and between institutions, and regulatory actors and subjects, about the purposes and direction of these reforms.

Much of the research carried out on the enterprise-bargaining process in the Centre for Employment and Labour Relations Law at the University of Melbourne raises questions about both the objectives of the enterprise-bargaining system and whether it is meeting the standards set by the framing legislation. But these observations should not obscure the importance of the larger-order issue inherent in the transformation of Australian labour law – from state-centred employment rights to a state-supervised market-based regime.