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**HUMAN RESOURCE MANAGEMENT
AND THE INDIVIDUALISATION OF
AUSTRALIAN INDUSTRIAL RELATIONS**

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ABSTRACT

By tradition, Australian industrial relations has been regulated by industrial awards and collective agreements made by, or under the auspices of, industrial tribunals. The central parties to these agreements and awards were employers and trade unions. The individual employment contract between employer and employee was subject to these collective arrangements which, generally speaking, set the minimum floor of employment conditions from which the parties could not derogate.

In common with other countries, there was a strong push for 'deregulation' of the labour market throughout the 1980s and the 1990s in Australia. In 1996 the Liberal/National Party Coalition Conservative government introduced new federal labour laws which permitted employers and employees to enter individualised employment relationships by excluding the operation of much collective regulation from their affairs.

This paper explores the supposed rationales for this legal development, and outlines the legal conditions which are imposed upon this statutory individualisation process. It also examines the evidence in order to address certain questions. How effective has the individualisation process been in Australia? Explicitly or implicitly, what sort of employment system outcomes were envisaged? What forms of flexibility has it been able to introduce into the employment relationship? And to what extent has it been able to promote a 'high performance' HRM agenda in Australian workplaces?

1 INTRODUCTION

Over the past two decades the individual employment relationship has risen to prominence as a central concern in labour relations. One source of this interest has emerged in the field of 'new institutional economics' which has picked up and developed earlier ideas about the efficiency of particular types of employment relationships and the consequent preference for particular legal forms of that relationship over others.

A second source of interest is found in the field of labour law where scholars have been increasingly concerned with the legal form and incidents of the *individual* as opposed to the *collective* employment relationship. As Simon Deakin has recently pointed out,¹ the trend in the legal discourse has tended to focus on the *inadequacy* of the contract of employment as a legal device, and, from an historical perspective, on the relatively shortlived period of dominance of the open-ended long-term employment model.

¹ S. Deakin, 'The Many Futures of the Contract of Employment' in J. Conaghan, R.M. Fischl and K. Klare (eds.), *Labour Law in an Era of Globalisation*, Oxford University Press, Oxford, 2002, ch.9.

Thus in the past two decades the concerns of labour lawyers and institutional economists have increasingly begun to intersect. As traditionally structured labour markets and employment relations systems have begun to break down, the instability of the standard legal employment model has been exposed, inducing something of a crisis of confidence in the functions and purposes of labour law, and a questioning of the relevance of the contract of employment as we know it.

Yet a further source of ideas focussing on the individual employment relation is found in the development of modern human resource management (HRM) during the 1980s and 1990s. Although there is considerable debate over the elements of an HRM approach, and an acknowledgment of diverse 'hard' and 'soft' varieties, it seems generally settled that HRM views the *individual* relation between employer and employee as pivotal in the formation of work practices which engender enterprise success. Predominantly HRM thus endorses a shift from collectivism to individualism in the employment relation and consequently leans either to a non-union or co-operative enterprise union approach to managerial strategy.

Underlying one strand of this HRM outlook is the desire to improve business competitiveness in a global economy through a strategic integration of enterprise objectives with employee performance and commitment. Thus HRM focuses upon the elements which can enhance the value of the employee's contribution to the business - flexibility in work performance (flexible working hours and duties for example), empowerment of the employee through participation in workplace decision-making (including team work, consultative committees and so on), performance related reward systems (such as profit sharing and employee share ownership schemes), commitment to quality of service or product (total quality management) and loyalty to the business concern.² This is, essentially, a model of a notional 'high trust' or 'high performance work system' enterprise.

Whilst labour lawyers have engaged with the implications of the new institutional economics, in addition to grappling with the numerous difficulties arising in their own discipline from the challenge to the hegemony of the standard individual employment contract, they have been rather less enthusiastic in exploring the implications and prospects inherent in the HRM 'high trust' agenda for enterprise strategy and governance. For example aside from one or two partial exercises, until recently there had been no attempt in the field to provide a thematic elaboration of the strengths and weaknesses of the contract of employment as an instrument for the development of the HRM project.³

One reason for this might be the general rhetorical nature of much HRM literature: 'high trust', 'flexibility', 'commitment' and 'participation' are highly inexact terms, and the ideas embodied in these values seem rather misplaced in the context of the

² See generally K. Sisson and J. Storey, *The Realities of Human Resource Management*, Open University Press, Buckingham, 2000; also H. Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17.

³ Many major labour law texts have no index entries for HRM, for example see the British text S. Deakin and G. Morris, *Labour Law*, Butterworths, London, 3rd.ed. 2001. The Australian text B. Creighton and A. Stewart, *Labour Law: An Introduction*, Federation Press, Sydney, 3rd.ed., 2000, has one paragraph on the subject.

relatively fixed rights and obligations expressed in the form of the employment contract.

A second reason undoubtedly is connected with the purpose(s) of labour law. Traditionally labour lawyers have viewed the purpose of their field as designed to promote the power of, and protect the interests of, employees vis-à-vis the employer rather than the reverse. As a result they have tended to be more interested in the de-unionisation effects of individualisation, the corresponding decline of collective employee power, and the consequent enhancement of managerial prerogative, than in the utilisation of the individual relationship to promote competitiveness.

One suspects, however, that this outlook has been fundamentally altered as a result of very recent developments in labour law. The cardinal case in point is the British Employment Relations Act 1999, which appears at last to have brought into close explicit relationship the content of labour law and the agenda of modern HRM. The basis of this connection is the 'partnership at work' model which embodies many of the core ideas of 'high trust' HRM, and which also subtly informs the Act's agenda for encouraging and nurturing voluntary arrangements for consultation and sharing of information between management and workers.⁴

Australian labour law also appears to have reached an interesting juncture in relation to these ideas about the individual employment relationship. Following a decade of ideological struggle between Labor and Conservative factions over the industrial relations agenda, the idea of an individualised system was legislatively endorsed in the Liberal/National Party's Workplace Relations Act 1996 (Cth) (WRA) through the introduction of statutory individual employment contracts known as Australian Workplace Agreements (AWAs). This policy breakthrough had been preceded by some earlier similar initiatives at State government level. But what kind of 'individualised' system did this legislation envisage? Was it part of a strategy to develop 'high trust' workplaces for improving productivity and competitiveness? If so, how effective has it been in this respect, and how effective has the legislative policy been in pursuing the individualist strategy *per se*?

2 STATUTORY INDIVIDUALISED EMPLOYMENT AGREEMENTS AND THE HRM AGENDA

One view of the individualisation process, and it is a popular view, 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. This perspective also fits with much of the available evidence, although the evidence is contested. It is clear that the de-regulatory 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.

⁴ See particularly H. Collins, 'Is There a Third Way in Labour Law?' in J. Conaghan, R.M. Fisch and K. Klare above n.1, ch.23.

But market-based arguments do not appear to have been the only source, or necessarily even the major source, of inspiration for a new industrial relations agenda in Australia. The historical record shows the steady development of ideas based around many of the key concepts of modern HRM in the push for reform since the mid-1980s.

One of the seminal influences in this process was the Business Council of Australia's Study Commission, which began in 1987 and was concluded in 1993 after the publication of the last of its three major Reports into the future of labour relations in Australia. Among the ideas promoted in this lengthy inquiry were the substitution of the expression 'employee relations' for 'industrial relations', the promotion of 'common purpose' (as opposed to adversarialism) in employee relations, an 'enterprise focus' (as opposed to centralised arrangements), 'co-operation' in workplaces, employee involvement in enterprise decision-making, and employee commitment to the enterprise. The endorsement of an *individualisation* strategy (i.e. one in which individual agreements would be recognised, and awards and compulsory arbitration phased out) was eventually formally endorsed by the Study Commission in its final report *Working Relations: A Fresh Start for Australian Enterprises*.

A similar set of ideas emerged in a succession of Industrial Relations Policies released by the Conservative Coalition Parties from 1986 onwards. Those policies also commonly stressed 'co-operation', 'common intention', 'flexibility', and 'employee participation'. The associated proposal to support individualisation of employment relations was initially rather oblique. The 1986 Policy and its 1988 update referred, rather disingenuously, to 'Voluntary Agreements' which might be 'negotiated individually by employees or groups of employees'. In the Coalition's 1990 policy statement 'Voluntary Agreements' were at last defined as 'separate agreements between the employer on the one hand and each employee concerned on the other'. With the release of the Jobsback Policy in 1992 caution was finally thrown to the wind. 'Direct' contractual arrangements between employer and employee were declared to be 'the single most important industrial relations reform in Australia'.

As we noted earlier, the policy of individualisation was partially realised with the introduction of AWAs in the WRA in 1996. At the same time the Act formalised some of the content of the HRM agenda in its Objects clauses. The principal Object of the Act is for 'cooperative workplace relations', and primary responsibility for employment relations is to rest with the 'employer and employees at the workplace or enterprise level'. AWAs appear in the statutory scheme as one of a number of instruments regulating employment relations. However, parties opting to structure their relations around such individualised arrangements can do so to the exclusion of most external regulation of their affairs, and thus the individual employment agreement may obtain supremacy.

We see, therefore, the emergence of an individualist notion of labour law in the context of a particular set of concepts about ideal enterprise management. Collective regulation through the arbitration system, and the centralised aspirations of trade unions, are seen as antithetical to the development of these 'innovative human

resource strategies'.⁵ '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 ...'.⁶ 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.

At this point we can return to some earlier questions. If the premise is that 'individualisation' of labour relations has been introduced as part of a broader workplace agenda, how effective have the Act and its supporting institutions been in giving effect to that agenda? Has the process of individualisation itself been effective in promoting the HRM programme? If, on the whole, the Act has been fairly ineffective in promoting an HRM 'high trust' agenda based on individualisation of employment relations why is that so, and what could be done about it? These and other issues are considered in detail in later sections of this paper.

Before turning to the specific details of the reported information, and the research carried out for this project, consideration can be given to some ways in which the individualisation strategy might have coupled itself with the HRM or partnership agenda. There are, we suggest, at least three different strategies which might have evolved. 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 route would have been for employers to establish such a model unilaterally by exercise of managerial prerogative. A third way would have involved the state, through its legislation and/or its institutions, to mandate or otherwise facilitate the development of the HRM 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 three possibilities. We focus on each of them in turn.

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 is far more likely to be unilateral rather than bilateral.

⁵ P. Reith, *Workplace Agreements: The Benefits for Jobs, Wages, and Economic Security*, Ministerial Discussion Paper, Department of Employment, Workplace Relations and Small Business, 1998, p. 4.

⁶ Above n. 5, p. 11.

The empirical evidence resulting from survey work is less 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 also to be high commitment workplaces characterised by HRM features such as consensus decision-making, team work and information sharing.⁷ This finding is directly contrary to the study of ‘individualised’ workplaces undertaken by Deery and Walsh based upon the Australian Workplace Industrial Relations Survey 1995.⁸ That study indicated that when negotiations *were* to take place the overwhelming preference of ‘individualising’ firms was for direct negotiations with individual employees, rather than with union officials or *collective* groups of employees. However the study also 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. 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 ‘high trust’ agenda.

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.⁹ 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’.¹⁰

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.¹¹ In Australia, two thirds of ‘individualised’ workplaces had no union presence according to a recent study, and in many industries and enterprises where there *is* union presence their resistance power has been weakened by legal and labour market factors. 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.¹² For the purposes of present argument, the critical issue is how that power is utilised by the employer. As Andrew Stewart has pointed out, managerial control may be used to arrive at any number of

⁷ M. Wooden, *The Transformation of Australian Industrial Relations*, Federation Press, Sydney, 2000.

⁸ S. Deery and J. Walsh, ‘The Character of Individualised Employment Arrangements in Australia: A Model of “Hard” HRM’ in S. Deery and R. Mitchell (eds.), *Employment Relations: Individualisation and Union Exclusion*, Federation Press, Sydney, 1999, ch. 6.

⁹ S. Deakin, ‘Organisational Change, Labour Flexibility and the Contract of Employment in Great Britain’ in S. Deery and R. Mitchell above n.6, ch.7.

¹⁰ S. Deery and J. Walsh above n.6, at p.118.

¹¹ On Britain see W. Brown, ‘Individualisation and Union Recognition in Britain in the 1990s’ in S. Deery and R. Mitchell above n. 6, ch.8.

¹² S. Deakin above n.7.

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’.¹³

Here again the terms of the WRA appear to be only partially helpful in realising the government’s agenda. The provisions of the Act offer assistance to employers in creating the conditions in which unions may more easily be excluded, and hence through which ‘individualised’ employment relations might be introduced, though it is clear that there are limits to this process.¹⁴ However, as indicated earlier, 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*’,¹⁵

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’ has been the enhanced capacity of management to bring about desired flexibilities, including functional flexibilities, through the opportunity to set employment conditions at will.¹⁶

In the absence of progress through these two available routes to the HRM or ‘high performance employment system’ type enterprise, it is necessary to return to a consideration of what role the state might play through its legislation and institutions, in pursuing this 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 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. As a result there may be a considerable gap between policy aspiration and regulatory specifics.¹⁷

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 - i.e. ‘to provide a framework for cooperative workplace relations’ (our emphasis). That appears in section 3 of the Act. Beyond this, there is very little in the remaining 533 sections of

¹³ A. Stewart, ‘The Legal Framework for Individual Employment Agreements in Australia’ in S. Deery and R. Mitchell above n. 6, ch.1.

¹⁴ The legal provisions governing this process are outlined in the next session of this process.

¹⁵ S. Deery and J. Walsh ‘Union Decline in Australia: The Role of Human Resource Management Practices and the Union-Hostile Workplace’(1999) 12 *Australian Journal of Labour Law* 21 at p.28: our emphasis.

¹⁶ S. Deakin in S. Deery and R. Mitchell above n.7 at pp.130-131.

¹⁷ H. Collins above n. 1.

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. The Objects also mention flexible 'labour markets' but, perhaps surprisingly, not flexible 'employment practices'. 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.

One would have thought that the most obvious vehicle for the development of the individual co-operative employment relations agenda was through the AWA 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,¹⁸ 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 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'.¹⁹ In short, there is clear scope in these provisions for the Employment Advocate to promote the HRM agenda and other workplace change through advice, suggestion and education of the parties to the employment relationship. Its contribution in this respect is considered in Part 4 of this paper.

As was the case with the individual agreements concept, plans for the development of a high proportion of employee share-ownership in enterprises has 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 'co-operative' or 'partnership' 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

¹⁸ See the discussion on the legal framework for AWAs below.

¹⁹ See relevant provisions in s. 83BB of the Workplace Relations Act 1996.

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.²⁰

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 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). And 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. 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 (e.g. trade unions and industrial tribunals) it is unwilling to compel and is unwilling perhaps even to prod employers to move towards a new agenda by the available routes outlined earlier. This is, of course, quite in keeping with the view that 'high trust' and 'high performance workplace systems' cannot be legally prescribed, and also 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.

We turn next to an outline of the AWA legislation followed by a consideration of the government's promotional policies in the context of the evolving AWA scheme.

3 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

²⁰ 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).

others, all corporations registered in Australia, the Australian government, and employers engaged in interstate trade.²¹ 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.²² 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.²³ 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.²⁴ The AWA continues to apply even if the business is transmitted to another employer (who is also subject to federal jurisdiction).²⁵

The AWA may be made with new employees before the commencement of their employment or with existing employees.²⁶ 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,²⁷ and the Act allows employers to negotiate AWAs collectively with several employees.²⁸

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’²⁹ and to take protected industrial action in the course of negotiations.³⁰ 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 EA and must explain the effect of the AWA to the other party.³¹ There is a minimum cooling-off period (five days for existing employees; 14 days for new employees) before signing.³² The only recognition of the imbalance of bargaining power is found in the legislative prohibitions against duress, misleading information, threats and intimidation.³³

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

²¹ Workplace Relations Act 1996 (Cth) 170VC.

²² Section 170VQ.

²³ Section 170VQ(6).

²⁴ Section 170VR.

²⁵ Section 170VS.

²⁶ Section 170VF.

²⁷ Section 170VPA(1)(e).

²⁸ Section 170VE.

²⁹ Section 170VK.

³⁰ Section 170WC.

³¹ Sections 170VPA(1)(b); 170VO(1)(b), (2); 170VPA(1)(c).

³² Section 170VPA(1).

³³ Section 170WF-WG.

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.³⁴ 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.³⁵ The EA must issue a filing receipt where these filing requirements³⁶ have been met (or, if they have not been met, where there is no disadvantage to either party).³⁷

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’.³⁸ 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 employee³⁹ (or, if no award applies, the award which is deemed by the EA to be appropriate for the purpose of comparison⁴⁰).

If the EA is not ‘sure’ that the AWA passes the test, it can resolve its concerns by accepting undertakings from the employer⁴¹ or by condoning other action.⁴² If its concerns are not resolved in this way, the EA must refer the AWA to the Australian Industrial Relations Commission (‘the Commission’).⁴³ 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.⁴⁴ 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 crisis business crisis.⁴⁵

The filing and approval process is private and confidential. Third parties are not permitted to intervene at any stage the process.⁴⁶ All proceedings occur held in private

³⁴ Section 170VN(3).

³⁵ Section 170VO(1)(b).

³⁶ Set out in s 170VO(1) and 170VPA.

³⁷ Section 170VN(2)(b).

³⁸ Section 170VPB(1).

³⁹ Section 170XA.

⁴⁰ Section 170XE.

⁴¹ These undertakings are taken to form part of the AWA: s 170VPJ.

⁴² Section 170VPB(2).

⁴³ Section 170VPB(3).

⁴⁴ Section 170VPG(2)-(3).

⁴⁵ Section 170VPG(4) and attached note.

⁴⁶ Section 170WHA. For new employees, this may be the date of commencement of employment: s 170VJ(1)(c).

and the officials involved are not permitted to disclose the identity of the parties on pain of imprisonment (subject to some exceptions).⁴⁷

If approved, the AWA is taken to have commenced operation on the day it is filed, or some later date specified by the parties.⁴⁸ It ceases to operate if it is terminated by the Commission (upon one party's application)⁴⁹ after the passing of the 'nominal expiry date' of three years (or a shorter period as provided by the parties)⁵⁰. 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.⁵¹ During its life, the AWA may be varied by a similar approval process to the original.⁵²

During its period of operation, breaches of the AWA are prohibited, as is the taking of industrial action before the nominal expiry date.⁵³ 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.⁵⁴

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.⁵⁵ This point is taken up in Part 4 of the paper 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.⁵⁶ We return to this issue in the concluding section of this paper.

⁴⁷ Section 170WHB-WHD.

⁴⁸ Section 170VJ.

⁴⁹ Section 170VM(3). Note that the Commission can refuse to terminate the AWA if the refusal is in the public interest.

⁵⁰ Section 170VH.

⁵¹ Section 170VM.

⁵² Section 170VL.

⁵³ Sections 170VT, 170VU

⁵⁴ Section 170VV-VZ.

⁵⁵ See Business Council of Australia, *Building Co-operative and Productive Workplaces: Priorities for Workplace Reform*, Submission to the Federal Government, 1998.

⁵⁶ O. Merlo, 'Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining'(2000) 13 *Australian Journal of Labour Law* 1; P. Waring and J. Lewer, 'The No Disadvantage Test: Failing Workers'(2001) 12 *Labour & Industry* 65.

4 THE PROGRESS OF INDIVIDUALISATION AND THE PROMOTION OF POLICY

4.1 Progress

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.

Despite the increasing trend in the rate of approvals, which appears in any case to have levelled off to some degree, AWAs statistically constitute only a very minor aspect of Australian industrial regulation, covering a tiny proportion of the workforce (1.2%). 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.

AWAs also seem largely confined to small and medium-sized businesses. A mere 8% of approved AWAs were in businesses with 500 or more employees. On the other hand 41% were in businesses employing fewer than 20 employees and a further 27% were lodged by businesses employing between 20 and 99 workers. In short 68% of AWAs were lodged by employers officially regarded as 'small business'.

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*. Other factors need to be taken into consideration.

First it is necessary to bear in mind that access to statutory forms of *individualised* industrial agreements is also available in two State jurisdictions, and that such agreements operate to the exclusion of collective regulation (both Federal and State) in the same way as AWAs. The most important of these State systems is that operating in Western Australia, where legislation permitting the making of individualised agreements derogating from collectively settled conditions has been in place since 1993. The progress of individualisation in that State, as compared with the Federal system, appears very robust. An accurate assessment is difficult to make, because the official figures made available by the WA Commissioner for Workplace Agreements record only the number of agreements approved. They do not account for

agreements which have expired, nor do they calculate the number of employees covered by the agreements. However, as Wooden has pointed out, the data shows that more than 40,000 WA workplace agreements were lodged in the financial year 1997-1998 alone, suggesting that in all likelihood the penetration density among employees would be very high in a workforce of about 300,000 employees covered by the West Australian system.⁵⁷

Secondly, 'individualisation' is not an outcome or strategy which can be understood solely in terms of the formal agreements processes at State and Federal level. Employers may 'individualise' without taking the step of legislatively formalising their agreements. It is thus relevant to take into consideration the total number of individualised arrangements, whether formalised or not. A recent study by the National Institute of Labour Studies provides some evidence on the extent of individualisation in this total sense. As a preliminary matter, however, it is necessary to note some difficulties with this broader sense of 'individualisation'. At common law all employees have an individual contract of employment. These contracts traditionally are subject to collective regulation. Since individualisation refers to a process in which individual agreements override, rather than are subject to, collective regulation it is necessary to distinguish the ordinary contract of employment from these other individualised arrangements. The NILS Workplace Management Survey makes the distinction by defining the type of 'individualised' arrangements under scrutiny here as a management strategy where 'such agreements [are] not only...the result of negotiations between individual employees and the employer, but [also are distinguished] by the requirement that the provisions of those agreements differ in some way from, or significantly supplement, relevant awards or collective agreements'.⁵⁸

Based on this definition of 'individualisation' Wooden reported that the average proportion of non-managerial employees covered by individual agreements in Australian workplaces had increased from about 12% to 15% in the period from 1995 to 1998. These and other indicators enabled Wooden to conclude further that 'the coverage of individual agreements is growing but...this growth has been predominantly the result of more workplaces shifting their entire workforce on to individual contracts and agreements'. Wooden also reported that 'individualisation' was less developed in large workplaces (more than 500 employees) and in large firms (more than 5000 employees), and was predominantly found amongst skilled workers. Individual agreement making was far less likely among blue-collar workers, and at workplaces where there was an active union presence. Individualised arrangements were found to be most prevalent in property and business services. More than 58% of all workplaces in this sector had individualised arrangements and on average such agreements covered almost half the sector's non-managerial workforce. Individual agreements were also found to be relatively common in public utilities (electricity, gas, water, communication), retail, mining, and a miscellaneous category covering government administration, health and community services, and education among others. On the other hand, individual agreements were found to be relatively uncommon, and covering relatively few workers, in manufacturing, construction,

⁵⁷ The continuation of this system is currently under question following a change of government in Western Australia.

⁵⁸ M. Wooden above n. 5 at p.75.

accommodation, cafes and restaurants, transport and storage, and finance and insurance.

What conclusions can be drawn in comparing these findings on ‘individualised’ agreements with those on the incidence and penetration of AWAs? Some information is provided in Table 1. [This data is current for May 2001].

TABLE 1: Industry penetration of individual agreements (including AWAs)

Industry	Incidence of individual agreements (% of non-managerial employees) ¹	Incidence of AWAs (% of all employees) ²	Proportion of individual agreements which are AWAs (%)
Agriculture, forestry and fishing	no figure	1.0	n/a
Mining	16	5.0	31
Manufacturing	5	1.0	20
Public utilities³	20	5.0	25
Construction	7	0.4	6
Wholesale trade	13	0.4	3
Retail trade	18	1.0	6
Accommodation, cafés and restaurants	4	1.0	25
Transport and storage	8	2.0	25
Finance and insurance services	6	2.0	33
Property and business services	47	1.0	2
Other⁴	22	1.9	9

¹ Source: M. Wooden, *The Transformation of Australian Industrial Relations* (2000) 78.

² Source: Department of Employment, Workplace Relations and Small Business and the Office of the Employment Advocate, *Agreement Making in Australia under the Workplace Relations Act, 1998 and 1999* (2000) 83.

³ Includes: electricity, gas and water supply; communication services.

⁴ Includes: government administration and defence; education; health and community services; cultural and recreational services; personal and other services.

In the first place it is obvious that there are major differences between the two sets of figures, and that there are many more non-formalised individual agreements than there are AWAs in industries where individualisation is most advanced in both categories of agreement. Thus, for example, in mining individual arrangements cover 16% of employees, whilst only 5% are covered by AWAs, whilst in public utilities (electricity, gas, water, communication) the relevant figures are 20% and 5% respectively.

Secondly, there are areas of industry in which individualised arrangements are relatively well established according to the NILS/Wooden definition, but in which AWAs are relatively low in number compared with other industries. These include wholesale trade, retail, and property and business services especially, where according to the available data 47% of all employees are covered by ‘individualised’ agreements, yet only 1% are covered by AWAs.

A third point to be made concerns the propensity to use AWAs as the individualising mechanism. As noted above this varies from industry to industry, but it does not correlate to the extent of individualisation. Thus in some relatively highly

individualised industries such as mining and public utilities there is also a relatively high use of AWAs. On the other hand there is a similar relatively high use of AWAs in industries which are very under-individualised by the NILS/Wooden measure. These include transport and storage, manufacturing, finance and insurance, and accommodation, cafes and restaurants.

Several explanations can be offered to account for the apparent discrepancy between the progress of 'individualisation' at large, and the slow rate of AWA approvals. First in industries and occupations which are free of award or collective agreement coverage, there is no legal necessity for employers to resort to AWAs to individualise the relationship. The trend over the past decade and beyond has seen the extent of award and collective agreement coverage decline, and thus correspondingly for the proportion of the workforce solely on individual arrangements to increase. In such cases the individual agreement fills the gap created by the absence of union-based collective regulation.

Secondly, many 'individual' arrangements are restricted to over-award or extra-award conditions. Such agreements have been traditionally widespread, and, as we noted earlier, do not necessarily constitute evidence of an individualisation strategy insofar as they may otherwise be consistent with an employer's commitment to collectively negotiated general standards. On the other hand it is clear that much of the current activity in the 'over-award' area is being carried on for anti-collectivist purposes. There have been several celebrated instances of major employers seeking to introduce flexible employment practices by offering what are essentially 'over-award' terms to employees on condition that they agree to enter into statutory individual employment agreements (whether Federal or State based). Since in these cases such enhanced terms of employment were not made available to employees who refused to enter into the formalised individual arrangements, a clear 'individualisation' (ie anti-collectivist) strategy is discernible. In several notable instances unions have managed to resist these strategies by using the freedom of association provisions of the WRA. As a result, whilst employees may have moved away from a collectivised understanding of their employment relationship in such cases, the arrangements have remained informal, and are largely evidenced in the decline of trade union membership in the employer's enterprises rather than in AWA approvals.

Thirdly, there is little doubt that many 'individual' arrangements are unlawful insofar as they derogate from award- or collective agreement-based regulation but are not statutorily approved. This point has been noted by the EA which issued a warning in October 2000 to employers who 'unwittingly' enter into individual contracts undercutting award conditions without the required formalisation.

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 stronger underlying trend towards individualisation than is disclosed in the rate of AWA approvals. At the same time the NILS research probably overstates the extent of the 'individualisation' process when considered as an anti-collectivist strategy. For reasons outlined above, some indicators that fall within the NILS/Wooden definition may not be anti-collectivist in orientation, and many employers may be pursuing individualised tactics in the mistaken belief that to do so informally is lawful. Many

of them would not pursue the same strategy if they understood the substantive and procedural limitations upon their power to do so lawfully.

It is also necessary to acknowledge that the impact of the AWA regime is far greater than its statistical presence suggests. The rate of increase in approvals, although this appears to have levelled out to some degree, suggests that overall employer interest in the possibilities of the scheme are developing rapidly. Figures released by the Office of the EA show that in the 1999-2000 financial year AWA approvals increased by 40% over the previous year. Anecdotal evidence suggests that some enterprises have pursued AWA strategies principally in response to similar business initiatives by competitors.

Finally AWAs represent the leading edge of the government's workplace relations policies. The importance of this should not be underestimated. The AWA regime, supported by the WRA, and propagated through the EA, in theory provides a formal picture of how the government and its agencies intend the course of 'individualisation' to develop. One is entitled to draw the conclusion that the AWA regime thus both acts as a catalyst for the growth of 'individualisation', and through the leadership and educational functions of the EA sets an agenda for the appropriate content of individual agreements and perhaps even for the conduct of individual relationships. These aspects of the AWA regime are considered in the following section.

4.2 The Promotion of Policy

From the beginning the government was anxious to emphasise two key points in relation to enterprise bargaining and the role of AWAs within it. First, it claimed that improved economic conditions during the 1990s (including the period before its election in 1996) were closely linked with, among other things, the growth of enterprise-based bargaining and workplace agreements. Thus the policy of individualisation, only, as we have seen, a very minor aspect of enterprise bargaining, was associated with improved productivity, employment growth and the rise in wages and living standards. Secondly, the government also consistently pointed to the improved employment outcomes which it perceived as available to employers and employees through the individual agreements process. Examples of the range of flexibilities and work-system innovations which might be introduced in AWAs were the subject of a string of reports and policy statements emanating from the Department of Employment, Workplace Relations and Small Business (now the Department of Employment and Workplace Relations) and the EA, particularly from 1998 onwards.

It was evident, however, that the progress of AWAs was not meeting the government's expectations. From the outset critics had predicted that AWAs would not be a popular employment relations option for employers because of the legal technicalities and procedural costs that would be associated with their formalisation under the WRA.⁵⁹ As we observed earlier, the rate of growth in the numbers of AWAs since 1996 has been extremely slow, and there is no doubt that in this respect the

⁵⁹ See R. McCallum, 'Australian Workplace Agreements: An Analysis' (1997) 10 *Australian Journal of Labour Law* 50.

outcomes have failed to measure up to the expectations of the government. But perhaps more important was the perceived lack of initiative on the part of employers in utilising the potential of AWAs to restructure employment arrangements in innovative ways. From the government's point of view, lack of appreciation by employers of how AWAs might engender more flexible and productive workplaces was probably in part an explanation for the relative lack of interest in adopting the AWA mechanism in the first place.

Policy development by the government (in association with the work of the EA) was thus addressed to these two closely associated problems – how to develop an appreciation among the parties of the benefits of AWAs, and how to simplify the AWA process so as to encourage and facilitate AWAs in greater numbers.

The government's response was a further round of legislation to deal with a number of perceived problems associated with the WRA 1996, including those arising from the operation of the AWA provisions. First details of its proposals to simplify the AWA provisions were contained in the government's pre-election industrial relations policy of 1998. These proposals were more comprehensively spelled out in the Ministerial Discussion Paper issued in May 1999. The most important intended changes for AWAs foreshadowed in this paper included:

- Amalgamating the filing and approval procedures into a one step process (thus establishing a presumption that an AWA, once accepted, met all statutory conditions and required no further intervention).
- Simplifying the number of requirements for making AWAs
- Allowing the EA to administer the 'no-disadvantage' test in all cases (thus eliminating the need for referrals to the AIRC in particular cases).
- Eliminating the need for a no-disadvantage test in the case of AWAs for higher-earning employees
- Further entrenching AWAs as the paramount form of industrial instrument
- Removing the requirement that identical AWAs be offered to comparable employees

Proposed legislation containing these and other changes to the WRA were introduced into parliament on 30th June 1999 in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill. The government's principal justifications for its AWA proposals (contained in Schedule 9 of the Bill) included the cost savings flowing to the parties and the EA in making and processing agreements, the reduction in delay of process, and the continued safeguarding of the parties interests through the enhanced role of the EA.

For several reasons which need not concern us here, the prospect of support for this legislation in the Senate, where the Australian Democrats held the balance of power, was under a cloud from the outset. Early indications were that the Democrats were unlikely to support the legislation. On the 11th August 1999 the Bill was referred to a Senate Employment, Workplace Relations, Small Business and Education Legislative Committee. The Report of the Committee was presented to the Senate on 29th of November of that year. Whilst a majority of the Committee shared the view that there was a causal connection between the improved economic performance in Australia

and the WRA 1996, the Labor members of the committee, and the Australian Democrat Senator Murray, were opposed to most key elements of the Bill. Crucially for this discussion, Senator Murray was not prepared to support the AWA proposals in the Bill, labelling them 'regressive'. Thus the legislation was unable to proceed. Following the failure of its omnibus legislation, the government attempted to process the AWA reforms separately through a special Bill devoted to this purpose (the Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000). Although the government portrayed this second bill as essentially dealing with technical and procedural amendments to the AWA process, it contained substantively the same set of measures as the earlier Bill. Once again the proposed legislation was referred to a Senate Committee, where it met with the same fate as the 1999 proposals. Since then essentially the same legislation has been submitted to Parliament by a different Minister under a different title (the Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2002. At this point of time, the Bill still remains unsupported in the Parliamentary upper house.

Aside from these attempts to make AWAs easier to process, the government was also active in promoting ideas about the kinds of provisions that it wanted to see contained in AWAs. Here the government drew, largely rhetorically, from the set of ideas supporting the 'high performance workplace' concept. AWAs, the government, urged, could be used to develop a culture of mutual trust between management and the workforce, and permitted flexibility which could better reflect the local needs and circumstances of particular workplaces. By way of example it pointed to typical provisions contained in AWAs. These included more than mere flexibility in working conditions and practices providing for temporal and pay flexibility. AWAs could also promote greater productivity and flexibility through the development of teamwork, multi-skilling and training. Furthermore they could provide employees with ongoing participation in work issues.

As we noted earlier, the functions of the EA were drafted specifically to give it a major role with respect to AWAs, and increasingly from 1998 onwards, the EA was engaged in a set of activities designed to promote this cause. This involved a wide ranging strategy including advertising in the print media, the publication of advice in the form of AWA Information Sheets, the development of an online software programme to assist parties to draft AWAs, and the development of template agreements to suit particular sectors, or particular industries.

However, to return to concerns expressed earlier in this paper, it is unclear what contribution all of this activity has made to the development of the kind of 'individualised' workplaces the government has in mind. This stems from a lack of precision at two levels. First we do not know with any exactitude what lies inside the 'black box'⁶⁰ which contains the so-called 'high-performance workplace', nor the government's vision for such a workplace. We do know that the government's vision is influenced by the rhetorical ideas of a flexible workplace, improved job quality, and employee empowerment and commitment, but not much beyond that. Second, it is unclear whether it is possible in Australia for the state and its institutions to mandate, promote or assist the development of 'high performance/high trust' workplaces from

⁶⁰ H. Ramsay, D. Scholarios and B. Harley 'Employees and High-Performance Work-Systems: Testing Inside the Black Box' (2000) 38 *British Journal of Industrial Relations* 501.

without. The WRA, we earlier noted, offers little other than the individualisation process itself. More importantly, the promotional material of the EA, on our reading, does not appear to offer a very rounded impression of the new workplace. In particular the great preponderance of ideas promoted in the industry and sector templates, and other examples put forward by the EA, are restricted to issues of conditions and workplace practices, temporal and pay flexibility and family friendly policies. Much of this activity can be cost-cutting in orientation and not necessarily associated with the development with the ‘high trust’ agenda, ‘partnerships at work’ or ‘high performance work systems’. Far less prominent are initiatives drawn from other parts of the ‘black box’ – obligations on the employer to move to a system which enhances the quality of the job through multi-skilling and training, and which empowers the employee in workplace decision-making through work teams, autonomous work groups and formal mechanisms for information sharing and communication.

If we are correct in drawing the broad conclusion that policy development has been overwhelmingly more associated with some parts of the ‘black box’ than others, that will reflect rather badly upon the government, and justify the cynicism of the opponents of individualisation. That opposition and cynicism might be compounded by the fact that in developing its template AWAs, the EA has in particular cases relied very heavily on the advice of, and in some cases evidently collaborated with, employer organisations in relevant industries. Neither trade unions nor independent HR specialists appear to have been consulted on model AWA content.

5 THE EVIDENCE: THE CONTENT OF AUSTRALIAN WORKPLACE AGREEMENTS

Sample AWAs were provided to us by the EA for the purposes of carrying out this research. We received the agreements in two batches 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 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. We examined these two sets of agreements for relevant indicators of what we have labelled ‘high trust’ or ‘high performance’ workplace systems. In this process we searched the AWAs for relevant provisions pertaining to a number of issues including various forms of flexibility, employee participation, teamwork, consultation and performance-related pay. In examining the second group of agreements we were 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.

Taken as a whole there was very little in the first set of agreements 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. 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 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 AWAs examined) 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 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 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 are 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.

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 achieving 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 'high trust' or 'high performance' 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 case, 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 evident 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. For example these AWAs typically annualised salaries, provided for single hourly rates of pay, incorporated overtime payments into the general rate and so on. In many agreements (perhaps 50%) wage increases still remained to be decided on the basis of managerial discretion. For example many agreements provided for annual salary reviews under which management would determine the rate of increase in accordance with 'relevant salary market movement, budget and individual performance' or, alternatively, on the 'commercial competitiveness' of the enterprise and its 'capacity to pay'. The majority of agreements contained clauses governing performance management and review.

Though it was not always easy to determine on the face of the agreement, most of these seemed to envisage performance indicators being set by management, though some clearly recognised this as a consultative process between employer and employee. Many agreements adverted to the possibility of wage increases over the life of the agreement but explicitly excluded any guarantee to that effect. One agreement required the employee 'to justify any claims for a pay rise' based upon the employee's 'reliability, absenteeism, the ability to care for the company's assets, flexibility in attitude towards work and general work performance throughout the previous twelve months'. On the other hand many agreements (about 50%) provided at least for some automatic increases on an annual basis.

Varieties of performance-based pay were also more in evidence in these second period AWAs than in the first set we examined. The most common examples were bonus or 'staff rewards' points systems. Mostly these were within a range set by management according to different performance indicators relating to productivity, sales income, profit margins and so on. Much less usually they were guaranteed in the terms of the agreement. For example one agreement provided that 'where the employee earns for the business through...services inclusive of product and service sales, in excess of three times his or her gross weekly wage, he or she will be paid 22.75% of each additional dollar of gross sales...generated' and another guaranteed a bonus of \$500 if the employer reduced its water consumption by 10% in the previous twelve month period. Less frequent than these types of provisions, but nevertheless relevantly in evidence among this set of AWAs, were examples of profit sharing (for example where 1% of the value of the business, plus 10% of the change of the value of the business, at the end of each financial year was to be paid into a bonus bank, with one third of this sum to be distributed equally among all employees) and employee share ownership schemes. Performance-based pay, profit sharing and employee share ownership are all-important indicators of the high trust/high performance work system model.

Types of temporal flexibility were diverse, but also features of most of this group of AWAs. They included broad commitments 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', and commitments to work a 'reasonable number of additional hours' over and above ordinary hours. Other types of working time flexibility included requirements that employees work the number of hours set by the employee's 'work pattern'. In some instances specific potential commitments were nominated in the agreement, for example that '50 hours additional attendance may be required'. As might be anticipated clauses requiring 'reasonable overtime' were common. In most instances, but not all, additional hours were to be paid for by various form of allowances, penalty and overtime rates and in some cases by time off in lieu of payment.

Fourthly, the role of functional flexibility seemed much more extensive in this second group of agreements, and made an important contrast with the findings drawn from the earlier set. At least two thirds of these agreements authorised some level of variation to the duties of the employee within the life of the agreement, although for reasons not relevant to the argument here the potential for variation was legally clouded somewhat by the frequent inclusion or incorporation by reference of detailed

position descriptions and other documents relevant to the employment relationship. Again the range of managerial prerogative on this point was quite considerable. Many agreements set down duties in the form of position statements or job descriptions but permitted the employer to require the performance of any duties which were reasonably within the skill and competence of the employee. Sometimes the job description was described as 'non-definitive' and to be regarded as a guide only and other agreements anticipated that the position description would be altered as the employer saw fit. Other types of clauses in common use went much further. One agreement stated that the employee 'must undertake any duties or tasks which the Company from time to time require. The Company may from time to time and at its absolute discretion, vary the duties and tasks allocated to the Employee...The Employee will attend at such locations within Australia, as the Company may in its absolute discretion direct from time to time'. General requirements that employees 'be flexible with respect to work practices and work patterns' and that they must fulfil all duties 'set by their manager from time to time' (sometimes but not always qualified by a condition that the duties required be 'reasonable') were also frequently present in this set of agreements.

It will be clear from the foregoing summary that there is in this statutory form of individualised employment relations certain features which are consistent with the 'flexible employment 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 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/high performance work system' 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. What do the content of AWAs tell us about the existence of these kinds of features?

Generally speaking there was much less evidence of worker empowerment, information sharing and consultative mechanisms than there was of 'employment flexibility' in both groups of agreements. 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.

It is true, of course, that the written content of the agreement does not necessarily reveal the full picture of what is happening within the organisation, but on the whole the agreements we examined failed to demonstrate much commitment to the 'high trust/high performance work system' model. Very few agreements provided for formal mechanisms of employee consultation through workplace committees and

similar structures (probably less than 5% of all of the agreements we examined). Similarly there were relatively few references to group work, teams and quality circles, although there were many more references to teamwork in general than to consultative committees.

References to consultative committees and other formalised consultation processes were principally of two types, again reflecting the bifurcation of approach noted above. 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; 'the company will advise you of any impending change which will affect your employment with us or the performance of your work'. 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 responsibilities of such committees; for example 'It 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. Again there were rather more rhetorical commitments to this form of employment organisation than AWA clauses following the ambition through. Typical clauses included 'a team based approach to work', 'wherever it is appropriate, responsibility will be devolved to you and your team', 'workgroups...will recommend the best way in which to operate, will review and continuously improve their departments' and so on. In most cases these were the only references to work groups in the agreement. Other types of clauses used the concept of teamwork in a more 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'.

In broad general terms, therefore, our view is that the AWA process is not, at the moment, producing in any systematic way employment systems which correspond to the 'high trust' or 'high performance work system' 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. 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.⁶¹

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 paper. 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 to produce flexibilities in working arrangements which could not be achieved through awards or enterprise agreements with unions.⁶² 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/high performance work system’ model which may represent the emergence of something of a 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.⁶³ 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.

6 CONCLUSION

One argument for the introduction of a legal system of individualised employment contracts was that it would engender the development of highly productive and competitive employment systems based on high trust and employee empowerment.

⁶¹ 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>>.

⁶² See, eg, B. Hearn Mackinnon, ‘The Weipa Dispute: Ramifications for the Spread of Australian Workplace Agreements’ in A. Frazer, R. McCallum and P. Ronfeldt (eds), *Individual Contracts and Workplace Relations*, Australian Centre for Industrial Relations Research and Training, University of Sydney, 55; M Moir, ‘Individual and Collective Bargaining in Australian Labour Law: The *CRA Weipa Case*’ (1996) 18 *Sydney Law Review* 350.

⁶³ Although, such agreements are not exclusive to large businesses. 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.

This individualisation agenda was given effect in the Australian government's Workplace Relations Act 1996.

This strategy seems clearly enough to have failed in two principal respects. First AWAs have failed to penetrate the labour market to any appreciable degree, covering less than 3% of employees. Second, where AWAs are in use they 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.

Several reasons appear evident for these failures. First the legal nature and complexity of the individualisation project in the terms of the WRA 1996 is unhelpful. Designed, on their face, principally to facilitate flexibility but at the same time prevent cost-cutting approaches to labour hire, the AWA provisions are complex and introduce delay and administrative burden, and thus, ironically, further expense. Secondly, quite apart from these first mentioned reasons, employers may neither want nor need access to AWAs to bring about flexibilities in enterprise management. As we noted earlier there is strong evidence to suggest 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, 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/high performance' work system 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.

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.⁶⁴ 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 1996.

The argument in this paper is founded on the premise that the drive for individualisation of employment relations was directed towards the achievement of new approaches and cultures in workplace regulation, and not the production of quick profits through cost reduction measures. Such an approach was part of the political compromise which produced the 'no disadvantage test', as well as forming the substantial rhetorical content of the government's unceasing promotion of the AWA programme. The fact that the outcomes have generally disappointed must inevitably give rise to questions about the bona fides of the government and its supporters in this matter. Alternatively it raises questions about the government's legislative strategy including the utility of Act's safeguards, such as the no disadvantage test, and the role of the EA.

Similar research to that carried out for this paper has been conducted by Roan, Bramble and Lafferty.⁶⁵ Whilst the approach of these authors stressed somewhat different indicators, and adopted a different methodology from our work, their findings are broadly similar to our own. The EA has recently responded to this research in an important address.⁶⁶ In it, the EA rejects the general findings in the Roan, Bramble and Lafferty research. In large part, the EA relies upon evidence traversed in earlier sections of this paper, including the case studies commissioned by the EA, and the Wooden/NILS research. 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 paper, confirms us in that stance. We remain, therefore,

⁶⁴ See, for example, W. Streek, 'The Uncertainties of Management in the Management of Uncertainty: Employers, Labor Relations and Industrial Adjustment in the 1980s'(1987) 1 *Work, Employment and Society*281; L. Thurow, *Head to Head: The Coming Economic Battle Among Japan, Europe and America*, Allen and Unwin, Sydney, 1993; P. Boreham, R. Hall and B. Harley, 'Two Paths to Prosperity?: Work Organisation and Industrial Relations Decentralisation in Australia' (1996) 10 *Work, Employment and Society* 449.

⁶⁵ A. Roan, T. Bramble and G. Lafferty, 'Australian Workplace Agreements in Practice: The "Hard" and "Soft" Dimensions' (2001) 43 *Journal of Industrial Relations* 387.

⁶⁶ J. Hamberger, Employment Advocate, 'Australian Workplace Agreements, Management Strategy and the Impact on Employees', Address to the International Employment Relations Association, Gold Coast, 7 July 2002 http://www.oea.gov.au/graphics.asp?showdoc=/home/./news_room/speeches-020707.asp.

largely sympathetic to the Roan et al analysis. However, we do accept the validity, to a degree, to the EA's observations that the methodology adopted by Roan et al 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 HRM/high performance workplace 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 that the face of the agreement does not necessarily reveal what is going on in practice within the enterprise. This is a point we made earlier in this paper. 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 present model of regulation set down in the AWA provisions of the WRA 1996, and the facilitation of AWA development through the EA, are not presently producing the outcomes that might be expected. If there is to be a legislative approach to the promotion of a culture change in work systems, significant reform is required.⁶⁷

⁶⁷ Useful points to consider are proposed by Hugh Collins in the work cited in notes 1 and 4 above.

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