Command and Control in the Workplace: Agreement-Making Under *Work Choices*

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Abstract

This article provides an overview of the radical changes in workplace agreement-making introduced by the 'Work Choices' amendments to the Workplace Relations Act. It outlines the six types of statutory workplace agreement and the procedures, termination rules and content requirements associated with them. While some agreement-making procedures have been simplified, this has come at the cost of independent oversight. Furthermore, the government's overall regulatory approach is shown to be prescriptive, punitive and one-sided. The article contrasts the new workplace agreements with contracts and observes that alternative regulatory frameworks could readily have been created, with greater respect for party autonomy.

Introduction

The federal government's 'Work Choices' amendments to the Workplace Relations Act (WRA) have radically altered workplace agreement making in Australia. The reforms create new forms of statutory agreements, remove mechanisms for their independent scrutiny, permit their unilateral termination and enable far greater governmental control over their content. This article outlines the Work Choices scheme, highlighting their underlying 'command and control' regulatory philosophy. The article then contrasts the workplace agreements created it by it with contract-based approaches to workplace ordering.

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The Structure of Agreement-making under Work Choices

Categories of agreement

There was an opportunity under Work Choices to rationalise the categories of legal agreement available in the workplace. Instead the legislature has created six types of statutory industrial agreements (called 'workplace agreements'). Although the procedures for making those agreements have in some respects been simplified, the scheme remains at least as complicated as its immediate predecessor. In contrast to the pre-Work Choices position,[1] the new scheme, insofar as it applies to private employers located in states, is constitutionally based on the corporations power.[2]

Greenfields agreements ('170LL agreements') under the pre-Work Choices legislation are now known as 'union greenfields agreements' (s 329). A new alternative to union greenfields agreements, called an 'employer greenfields agreement' has been established (s 330). Here we encounter our first curiosity: since a greenfields agreement frequently concerns a new business, there may well be no employees, in which case it is very unclear in what sense it makes sense to refer to an 'agreement'. Moreover, whereas greenfields agreements under the pre-Work Choices legislation were possible only in relation to new businesses, the new legislation extends their availability to new businesses, *projects* or *undertakings* (s 323), a considerably wider scope.

The last category of agreement is a 'multiple-business agreement' (s 331) which enables a collective agreement (including a greenfields agreement) to be made with more than one employer. As with the former '170LC agreements', this category is subject to a restriction not present in relation to the other categories; a multi-business agreement may be made only if an employer applies to the Employment Advocate (EA) for authorisation. Authorisation may be given only if the EA is satisfied that that it is in the public interest to do so, having regard to whether the matters 'dealt with by the agreement ... could be more appropriately dealt with by [another form of collective agreement]. This restriction, maintained from the previous law, evidences the government's determination to have employment matters dealt with at the enterprise rather than industry level.[3]

The various categories of agreement form part of a hierarchy of statutory instruments. A workplace agreement prevails over any award while it is in operation (s 349) as well as over employment-related Commonwealth laws specified by regulation (chiefly concerning the public sector). Only one

workplace agreement can apply to an employee (s 348(1)) and an AWA prevails over all other forms of workplace agreement at all times (s 348(2)), in contrast to the position under the previous law.

Agreement-making procedure[4]

A major change between the pre- and post-Work Choices regimes concerns the process for approval of agreements.[5] The previous legislation provided for close scrutiny of agreements by governmental agencies – the EA in the case of AWAs and the Australian Industrial Relations Commission (AIRC) in the case of collective agreements as well as AWAs on reference by the EA. This scrutiny was predicated on the 'no disadvantage test' (NDT) which required an evaluation of the content of agreements against applicable awards.[6] This test has been abolished. The control over content of agreements is now achieved in two ways. First, agreements cannot provide conditions less favourable that the five matters in the Australian Fair Pay and Conditions Standard (AFPCS) (ss 172 and 173).[7] The AFPCS in general establishes a much lower floor of conditions than that provided for in awards and therefore the NDT's abolition will enable the making of workplace agreements with worse conditions than was possible under the old WRA. Second, workplace agreements are subject to provisions concerning prohibited content and protected award conditions. These are considered below.

In addition to the very significant attenuation of *content* rules *favourable* to employees, the safeguards over the agreement-making process have also been substantially weakened. Neither the AIRC nor the EA has a major role in scrutinising workplace agreements. Indeed, the AIRC has no role relating to workplace agreements at all – the certification process has been abolished. The EA has also lost most of its powers of scrutiny, it is now largely a registry for agreements. Employers must lodge agreements with the EA, accompanied by a declaration (the content of which is to be determined by the EA and is presumed to include matters such as a statement that the agreements meet the AFPCS: see s 344). However, the EA does not (except in relation to prohibited content) examine or approve agreements or determine whether they have been consented to.

Under Work Choices, approval is a matter for the employer and employees. The WRA specifies certain procedures that must be followed leading up to the approval. These vary according to agreement category. As was the case under the previous law, employees (and in the case of AWAs, employers) may appoint a bargaining agent when negotiating an AWA or a non-union collective agreement (other than a greenfields

agreement) (Part 8 Division 3). An employer must recognise an employee's bargaining agent and in the case of an employee collective agreement, must meet and confer within the seven days between the presentation and approval of the agreement. There is, however, no obligation to negotiate in good faith and there is certainly no obligation on an employer to negotiate one form of agreement rather than another. As is discussed elsewhere in this special issue, Australian workers have no right to collective bargaining.[8]

An employer must also give employees seven days notice of a proposed workplace agreement (other than a greenfields agreement) and provide them with 'ready access' to the proposed agreement, as well as an information statement. At the end of this period, an agreement is approved in the case of an AWA if it is signed and dated by the parties and witnessed. Collective agreements (other than greenfields agreements) are approved by either a majority vote or majority approval. The requirements under the previous law of their being a *valid* majority and *genuine* approval, requirements which led to considerable dispute before the AIRC in certification hearings, have been removed. However, prohibitions against coercion and duress, and against making false or misleading statements in relation to agreement-making remain (ss 400-401), with an additional provision (s 400(6)) confirming the position established in *Burnie Port Authority v MUA*[9] that it is not duress to make acceptance of an AWA a condition of engagement.

An important feature of agreement-making procedures is that the presumption of validity is reversed. Whereas under the pre-Work Choices law, the EA and/or the AIRC had to be satisfied that the specified procedures were complied with prior to approving an AWA or a collective agreement, under Work Choices a workplace agreement is valid once lodged, even if the procedural requirements have not been met (s 347(2)).

This reversal highlights a key feature of the Work Choices approach to compliance in the context of agreement-making. Compliance is achieved not through independent oversight of content and process but through the imposition of civil penalties, coupled with standing rules enabling one of the parties to the agreement, a workplace inspector, or in some cases a union or bargaining agent to apply to the Federal Court to impose such a penalty. There are thirty-seven 'civil remedy provisions' imposing a penalty in relation to agreement-making (s 407). This reflects a 'command and control' approach to agreements, an approach generally characteristic of the federal government's mode of regulating employment relations (Howe 2005). Command and control methods of regulation are frequently counterproductive, except where they are used to prevent serious harms

or to punish recalcitrant offenders (Ogus 1994: 245-256; Bardach and Kagan 1982).

In addition to opposing penalties, the Federal Court may declare part or all of a workplace agreement void (s 409) in cases where the agreement was not approved by one of the parties, or was procured by duress or misleading statements; this corrects an important omission in the pre-Work Choices legislation. However, a declaration that an agreement is void operates only prospectively (s 412(1)). This may work injustice in the event that improper employer action meant that an employee was working under worse conditions than she or he should have been prior to the court action. However, the Federal Court also has powers to vary an agreement (s 410) and to order compensation for any loss or damage suffered by an employee in relation to the contravention of agreement-making procedures (s 413)

While the new agreement-making procedures are simpler than their predecessors, this has come at the cost of any mechanism which would lead to the on-going development of sound agreement-making norms. There is now no institution which can monitor and evaluate how workplace agreements are made and, on the basis of this monitoring, establish fair, workable, processes of agreement-making. The decision to eliminate monitoring institutions precludes the adoption of innovative and responsive[10] regulatory alternatives to command and control. Such alternatives commonly allow actors a considerable measure of self-regulation, but only on the condition that their decisions be subject to external examination (see, e.g. Dorf and Sabel 1998; Parker 2002). This external examination adds an important degree of public accountability to self-regulatory measures, recognising that some forms of self-regulation have negative impacts on matters of public concern. Moreover, external examination permits the identification and diffusion of sound self-regulatory practices, enabling the creation of realistic, rolling, benchmarks that can be used to drive up standards. Under the previous legislative regime, the EA, and (much more so) the AIRC, provided this public-minded external examination. The AIRC was able to develop a detailed body of norms regarding both the process[11] and content[12] of agreement-making (Stewart 2004). The certification process enabled it to require parties to collective agreements to adhere to those norms. To a lesser extent the EA performed a similar function in approving AWAs.

Under Work Choices, the accumulated experience of both the AIRC and the EA has now been jettisoned. Indeed, it is unclear how the lodgement process can lead to the development of any new content or process

standards at all. The EA can make workplace agreements public (although it cannot reveal the names of parties to AWAs) (ss 165 and 166). However, there is no requirement on the EA to analyse workplace agreements or develop new norms.[13]

Termination

Another dramatic change to the pre-Work Choices position is the law relating to termination of workplace agreements. As under the previous law, workplace agreements can be terminated by consent (s 382), following procedures analogous to those for making and varying agreements. However, the new law now provides for unilateral termination by a party, even if this is not provided for in the agreement. Once an agreement has passed its nominal expiry date (which may be no more than five years from the date of lodgement, or one year in the case of an employer greenfields agreement: s 352), a party to the agreement can terminate it by lodging a declaration of unilateral termination with the EA (s 393). In contrast to the old law, termination by one party is not now dependent on the approval of an external authority and it can occur even if the workplace agreement attempts to prohibit it. The terminating party – and it is plain that it will usually if not always be the employer - must give the other party or parties ninety days notice of the termination. An employer terminating a workplace agreement may also give undertakings about the conditions to apply post-termination and those undertakings are subject to the compliance provisions of the Act in the same ways as workplace agreements (s 394).

Unilateral termination is a very powerful weapon for an employer seeking to improve its bargaining position since it forces employees to bargain simply to retain the status quo. This is because the effect of terminating a workplace agreement is to terminate entitlements in that agreement even if it has not been replaced by another agreement (ss 347, 399). The terms and conditions of employees covered by the agreement will be reduced to those provided by contract, the AFPCS and by protected award conditions (defined below). Other award conditions do not apply. Conditions that could be lost on unilateral termination include, for example, pay above the relevant AFPCS classification, paid parental leave, specific forms of leave, enhanced superannuation and workload regulation.

The termination provisions also make it clear that where an employee's conditions of employment are governed by any category of workplace agreement, the employee's award entitlements (other than the protected conditions) are destroyed for the duration of her or his employment. A

workplace agreement displaces applicable awards while it is in effect and the awards do not revive upon the agreement's termination.

Indeed, the Work Choices allows awards to be permanently displaced even in the complete absence of any form of negotiation. This is the case where an employer respondent to an award uses an employer greenfields agreement for a new business (or new 'project' or 'undertaking'). The agreement takes effect even though it was created unilaterally and has not been approved by employees. It nonetheless has the effect of eliminating much of the underlying award.

Content

Work Choices radically changes the controls over agreement content, particularly in relation to what cannot be in a workplace agreement. The replacement of the no disadvantage test with the AFPCS has already been referred to above, but there are many other provisions affecting content. First, there are matters that are presumed to be in agreements, unless they are expressly excluded. One such matter is the model dispute resolution process set out in Divisions 2 and 3 of Part 13 of the Act (s 353). That process includes reference to the AIRC to assist with dispute resolution, but expressly excludes the AIRC resolving a dispute through arbitration or through determining the rights and obligations of the parties, unless the parties agree to authorise it to do so. In other words, the default position in workplace agreements is that they cannot be enforced other than by litigation. If one party (most likely the employer) refuses to comply with an obligation in a workplace agreement, the other party must seek a remedy through the courts.

Unfortunately, the remedies available through court proceedings are quite narrow. Courts can impose civil penalties for breach of a workplace agreement. In agreements other than AWAs, employers can recover wages and contributions to superannuation funds (s 720). Employees on AWAs are entitled to seek compensation more broadly – for loss or damage suffered (s 721). All of these remedies focus on monetary compensation and do little to ensure that important non-pecuniary entitlements in agreements are complied with. Such entitlements include granting leave appropriately, ensuring workloads are distributed fairly, ensuring that a person's duties correspond to their classification and conversion from casual to permanent status. The weakness of the judicial remedies means that failure to specify an arbitration procedure in an agreement may severely prejudice an employee because such entitlements may be enforced through an arbitral process, depending on the terms of the agreement.[14]

As the default position is that there is no entitlement to arbitration, an employee will be forced to bargain actively to create one, assuming she or he realises that it will be otherwise unavailable. While to some extent this was true of the previous law, it was not necessary under that law to specify the arbitral powers of the AIRC in the event of arbitration under an agreement ('private arbitration'), since the AIRC could exercise its general powers conferred under s 111.[15] These powers include, for example, summoning witnesses and requiring documents to be produced. The Work Choices legislation provides that s 111 does not apply to private arbitration (s 711). This means that the AIRC will have only those arbitral powers expressly conferred on it by the parties. A party to a workplace agreement who wishes to have a dispute referred to arbitration will now not only need to provide for arbitration in the agreement, she or he will need legal advice in order to draft an arbitration clause which confers appropriate power on the arbitrator.

Another set of matters presumed to be in a workplace agreement are 'protected award conditions' (s 354). There are nine protected award conditions set out in the legislation, although they can be expanded by means of regulations. They are: rest breaks; incentive-based payments and loadings; annual leave loadings; state public holidays; days substituting for state public holidays; certain allowances; overtime and shift loadings; penalty rates; and outworker conditions. With the exception of outworker conditions, all protected award conditions can be excluded or modified if the workplace agreement expressly so provides. This can be done with little difficulty. Most protected award conditions are thus not protected in the sense of being mandatory (as is the case with the AFPCS). They are simply default terms; an employee must be informed if these entitlements are not to be included in the agreement, but has no legal right to insist on their inclusion.

While there are now few matters that must be in a workplace agreement, there is a now an open ended power to make regulations to prescribe what must *not* be in an agreement, that is 'prohibited content' (s 356). A term of a workplace agreement is void to the extent that it contains prohibited content (s 358). In another instance of 'command and control' regulation, penalty provisions prohibit employers lodging agreements with prohibited content (s 357) and prohibit anyone negotiating an agreement from seeking to include prohibited content (s 365).

There appears to be no limitation to what matters may be specified as prohibited content; it seems that also that there is no limitation as to scope: content can be prohibited in all agreements or in relation to certain

industries, or certain types of agreements. Furthermore, except in relation to agreements made prior to the entry into force of the principal provisions of the Work Choices legislation on 27 March 2006, regulations specifying prohibited content can have retrospective effect. A term in a workplace agreement may be valid at the time it was made, but subsequently be rendered void. It is clear that this extremely broad and unguided regulation-making power is capable of destabilising bargains, as terms crucial to one of the parties may become inoperative.

The Workplace Relations Regulations 2006 specify a long list of prohibited terms (Reg. 8.5, 8.6, .8.7 and 8.8). Prohibited terms include those that:

· provide for payroll deduction for union fees;
· entitle employees to paid or unpaid trade union training leave;
· indicate how a future agreement should be renegotiated;
· enable a union to participate in a dispute resolution procedure in its own right (even in a union collective agreement);
· provide for right of entry for union officials;
· restrict or regulate the conditions of independent contractors and labour hire workers;
· provide for annual leave to be foregone other than in accordance with the AFPCS;
· provide for information about employees to be given to unions (other than where legislatively required);
· 'encourage or discourage union membership';
· allow industrial action;
· prohibit disclosure of the details of an agreement;
· provide a remedy for unfair dismissal on the basis that it is harsh, unjust or unreasonable;
· include 'objectionable provisions' (provisions contrary to Part 16, which deals with freedom of association);
· directly or indirectly restrict the ability of a person bound by the agreement to offer, negotiate or enter into an AWA;
· are discriminatory; or
· deal with matters that do not pertain to the employment relationship.[16]

This list obviously imposes the government's view of appropriate workplace norms on the agreement-making processes – a point further discussed in the last part of this article.

There is no mechanism for challenging a governmental decision to specify content as prohibited, other than through the ordinary parliamentary processes of disallowing regulations. With Coalition control of both Houses

of Parliament, disallowance is unlikely. It is regrettable that decisions to invalidate aspects of workplace agreements, and to render parties to arguments in public fora (such as Senate inquiries, AIRC hearings or court proceedings) against certain content being prohibited. Once again, the federal government prefers a 'command and control' approach to industrial regulation to the more participatory forms of norm-making and compliance characteristic of recent innovations in work regulation (see, e.g. Estlund 2005, Lobel 2005; Nossar et al 2004) and indeed of the pre-Work Choices institutions (Howe 2005; Johnstone and Mitchell 2004; Murray 2005).

While there is no effective means of debating whether or not content should be prohibited, it is likely that there will be many disputes about whether or not a term should be interpreted as including prohibited content. Many such disputes will be determined by the courts, either because the government seeks to impose a civil penalty or because one party to the agreement seeks to establish that a term relied on by the other party is void. The Act also requires the EA to vary an agreement to remove prohibited content (s 363). In contrast to court proceedings, the EA is not obliged to hold a hearing prior to determining whether content is prohibited. Parties are limited to making written submissions (s 365).

A further prohibitory control over content pertains to the incorporation of industrial instruments (s 355) Terms of a workplace agreement are void if they have been incorporated by reference from state or federal awards, other workplace agreements or

collective agreements or memoranda of understanding. An exception exists for awards or previous workplace agreements regulating the terms and conditions of employment of the employees covered by a new workplace agreement immediately before the new agreement is made.

This provision seems designed to ensure that workplace agreements are 'closed and comprehensive' in relation to other industrial instruments.[17] While it is no doubt useful to consolidate industrial entitlements into one document, the prohibition is selective; it does not prevent incorporation by reference from non-industrial instruments, such as employer policy manuals.

Workplace Agreements and Contracts

A surprising feature in what is supposed to be a comprehensive reform of workplace agreement making is the near silence on contracts. Contract is of course the pre-eminent legal device giving effect to private ordering generally and provides the institution enabling the law to enforce obligation

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in a binding individual employer-employee relationship (as well as other forms of work relationship). Given the individualist and market-based orientation of much of the government's rhetoric and its dislike of specialist industrial institutions, it might have been thought that contract would play a prominent role in the new scheme.

However, the new WRA has very little to say about the relationship between the mechanisms it creates and employment contracts. The Act does provide that the AFPCS overrides any less favourable contractual provision (ss 172, 173) but it does not attempt to explain the relationship between the statutory workplace agreements and employment contracts. This relationship is fraught. Prior to the original enactment of the WRA, the High Court's decision in *Byrne v Australian Airlines Ltd*[18] made clear the fundamental disconnection between common law and the predominant statutory instrument at the time: awards. *Byrne* held that, except in the case of express agreement or specific statutory provision, the content of the employment contract is quite distinct from the content of awards. The modes of enforcement too, are quite separate; there is, generally speaking, a much more attractive range of remedies available in the case of breach of contract and they cannot ordinarily be used to enforce award terms. Such remedies include damages for loss and in some instances orders of specific performance and injunctions.

Byrne dealt with award and employment contracts and did not explain the relationship between statutory workplace agreements (a relatively recent innovation when the case was decided) and employment contracts. The nature of this relationship has assumed greater importance with the enactment of the WRA since the Act created new forms of workplace agreement, particularly the AWA. As Fetter and Mitchell (2004) have demonstrated, the precise legal relationship between an AWA and a contract of employment is complex and unclear. Indeed, it is uncertain whether an AWA can itself have contractual effect (Fetter and Mitchell 2004: 278). The same may be said of collective workplace agreements,[19] although there are additional problems of agency and intention to create legal relations which often mean that collective arrangements do not have contractual effect.[20] The Work Choices amendments do not address these uncertainties.

The uncertainty is not merely a matter of legal technicality, but relates to basic issues of restraints over managerial prerogative. Thus, we do not know if a broad employer power conferred in a workplace agreement can be overridden by an express or implied term in a contract of employment (Fetter and Mitchell 2004: 300). For example, if a workplace agreement

allows an employer to change an employee's duties or work hours, is this power constrained by an express term in a previously signed contract of employment setting out duties or by an implied term of mutual trust and confidence, should such be found to exist in Australian law?

Such problems invite a consideration of why there has not been an attempt to create greater coherence between contracts and workplace agreements. It should be possible to ground the system of workplace agreements in contractual principles. To be sure, contracts of employment have been associated with injustice, particularly towards employees. However, contract is a highly flexible and adaptable institution (Collins 1999) and as Joellen Riley has comprehensively argued (Riley 2005), contemporary common law developments have the potential to reduce much of the past injustice. Moreover, the experience of Australian trade practices legislation suggests that statutory modification of contractual principles can be implemented in a straightforward manner, without undermining the strengths in contract. That this approach can be adopted in the context of employment law is illustrated by workplace regulation in New Zealand where there are only two interacting forms of agreement – individual employment contracts and collective agreements. The interrelationship between them is set out elegantly in that country's Employment Relations Act 2000 (see in particular Parts 5 and 6).

In contrast, the post-Work Choices WRA creates highly regulated forms of agreement that depart in very significant ways from basic contract principles. Let us compare workplace agreements and employment contracts. Certainly, there are some features of workplace agreements under Work Choices that more closely resemble common law contracts than was previously the case. Contracts do not require independent scrutiny as a condition of validity and there is no requirement in Australian law that they be negotiated in good faith or collectively. The same is true of workplace agreements under Work Choices. However, as indicated above, there are sound regulatory reasons why these features of contract ought *not* be maintained in the workplace context.

On the other hand, there are very many differences between employment contracts and workplace agreements. First, it is not possible to have a contract without agreement between at least two parties yet an employer greenfields 'agreement' exists without any such agreement. Second, there are no inherent restrictions on the duration of a contract and it is not possible for one party to refuse to comply with her or his obligations at a specified point (that is, to terminate unilaterally), unless this is provided for in the contract. Third, there are no restrictions on incorporating material by

reference, provided the material is identifiable and it is clearly intended to give it contractual force. Fourth, although contracts establishing arbitration procedures would, at common law, need to specify in detail the arbitration procedures and powers of the arbitrator, Australian and international practice is to stipulate that process and those powers in legislation, so that contracts need only succinctly refer to arbitration (see, e.g. Commercial Arbitration Act 1984 (NSW), Commercial Arbitration Act 1984 (Vic).

Fifth, if a contract is flawed because of duress or misrepresentation, a court may render it void from the date the contract was made, not merely from the date of the court action. Sixth, contractual remedies are superior to remedies available for breach of workplace agreements, particularly in relation to compensation and to orders to perform an obligation (admittedly restricted in the employment context) or to cease harmful activity.

Finally, and most significantly, contractual principles enable parties to regulate a broad range of matters as they see fit. True, contractual terms may be unenforceable on the basis of illegality or doctrines such as restraint of trade. Many statutes also regulate the content of contracts, usually by specifying directly which aspects of agreements are prohibited, or, where the illegality is specified in legislative instruments, by giving detailed guidance as to the nature of such instruments.[21] However, such intrusion into private ordering is usually connected to a clear public interest rationale, and not a partisan vision of what private ordering should achieve, whatever the view of the parties.

Contrast this position with the extraordinarily prescriptive interference with workplace agreement making reflected in the 'prohibited content' matters set out above. Whereas in contract an employer could agree with an employee not to dismiss the employee harshly, or to deduct union dues from an employees pay, or to inform the employee of the existence of any relevant industrial organisation, or to allow the employee to attend union training days, it is unlawful to include these provisions in a workplace agreement. These matters cannot be inherently harmful, since otherwise they would be prohibited in *any* form of agreement, including contracts. They simply reflect the government's desire to impose throughout Australia a workplace model based on weak job security and a largely negative approach to freedom of association (Quinn 2004).

Conclusion

In seeking to create a new legal framework for workplace agreements, the federal government could have adopted at least three regulatory strategies.

First, it could have pursued a decentralised, private ordering approach. It could have abolished the statutory forms of agreement and left workplace ordering to be determined by the ordinary rules of contract and other common law principles. Such an approach was adopted in the New Zealand Employment Contracts Act 1991 and in the labour law reforms introduced in Victoria in the early 1990s. Experience has shown that this is disadvantageous to employees, partly[1] because traditional common law principles have tended to favour employers and inhibit collective arrangements. Nonetheless, as the changes to the New Zealand framework in 2000 and 2004 illustrate, it is possible to make simple modifications to the common law principles (such as defining a duty of good faith or imposing a duty of mutual trust and confidence) in order to moderate the disadvantage.

A second approach would be to reform existing institutions, such as the AIRC, along the lines suggested by contemporary developments in regulatory theory. The institutions could have been made more 'responsive' by simplifying the highly convoluted legislative procedures that had accumulated since the introduction of statutory enterprise bargaining. This could have been done by giving the institutions a broad remit to develop flexible norms for agreement-making, based on evaluation of what occurs at workplaces and then trusting the institution, and employers and employees, to devise those norms.

Either of these approaches would be likely to lead to a diversity of agreement-making forms. Some would have a strong collective focus, with a prominent role for unions, and would cover an extensive range of matters. In other contexts, individual employment arrangements would predominant. Under the private ordering approach, the diversity would be largely influenced by market power and/or the capacity of employees to coordinate. Under the responsive approach, the diversity would emerge from institutional learning about which arrangements best suited various kinds of workplaces.

However, the government has rejected both of these approaches in favour of command and control. Parties at the decentralised level are unable to determine for themselves the approach to industrial regulation most appropriate for their situation. They are directed by the federal government to conform with its vision of the workplace. It is a vision that is highly contentious politically and economically, one rejected by many, perhaps most Australians, and one that cannot be contested through deliberative processes. Whereas the private ordering and responsive regulation approaches promote innovation and diversity in the workplace, the

government punishes those who deviate from its vision. Thus, the agreement-making provisions in the Work Choices era are not a vehicle for facilitating decentralised arrangements so much as a means to project governmental control into the workplace. As such they bear little resemblance to the workplace laws of other liberal democratic states.

Notes

[1] For a comprehensive exposition of the previous law, see Creighton and Stewart 2005.

[2] See, in particular definition of employer in s. 6. There is no equivalent to former Division 3 of Part VIB, which relied on the conciliation and arbitration power. Unless otherwise indicated, references to legislation are to the *Workplace Relations Act* 1996 (Cth) as amended by the *Workplace Relations Amendment (Work Choices) Act 2005*. The following discussion is based mainly on Part 8 Division 2 of the amended Act.

[3] See s. 3(d). Note that joint ventures and analogous business activities can be treated as a single business and thus can use the other forms of agreement: s. 322.

[4] Part 8 Divisions 3-5.

[5] The discussion here deals with making agreements. There are broadly similar provisions dealing with variations: see Part 8 Division 8.

[6] See old WRA Part VIE. This test was not always accurately applied: see R. Mitchell et al 2005.

[7] See Part 7 for the content of the standard.

[8] In contravention of ILO Convention 98, there is no mechanism for facilitating collective bargaining, nor is there any union recognition procedure, such as those in the United Kingdom, the United States or Canada. This matter is dealt with in more detail in the article by Colin Fenwick.

[9] (2000) 103 IR 153.

[10] On responsive regulation, see Ayres and Braithwaite 1992.

[11] See, for example, the nuanced approach to fair bargaining in the AIRC Full Bench decision of *Sensis Pty v CPSU*, (2003) 128 IR 92 in which the AIRC, while denying that there was a duty

under pre-Work Choices legislation to bargain in good faith, accepted that it had power to issue directions to ensure fair processes within the context of the legislative regime. See Stewart 2004: 258-262.

[12] Through the application of the no disadvantage test.

[13] Although it is a function of the EA to 'promote better work and management practices through workplace agreements': s.151.

[14] See *NTEIU v University of Wollongong* (2003) 123 IR 77. See Stewart 2004: 266-270.

[15] See *CFMEU v AIRC* (2001) 203 CLR 645. See Kollmorgen and Maher 2001; Stewart 2004: 263-266.

[16] *See Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 209 ALR 116, although note that the definition of 'pertaining to the employment relationship' is potentially broader that in that case, especially in relation to collective agreements.

[17] On incorporation practices in pre-Work Choices workplace agreements see Fetter and Mitchell (2004: 289-299).

[18] (1995) 185 CLR 410.

[19] The High Court in *CFMEU v AIRC* (2001) 203 CLR 645 stated that a certified agreement has effect according to the general law: at 658.

[20] See, for example, *Ryan v Textile Clothing and Footwear Union Australia* (1996) 66 IR 258.

[21] See, for example, the regulation of contracts in the Trade Practices Act 1975 (Cth) or the Fair Trading Act 1999 (Vic).

[22] The main disadvantage for employees has arisen because a private ordering approach to agreement-making usually involves a reduction in mandated labour standards. However, one does not entail the other. A system whereby workplace agreement-making is largely governed by private law can sit alongside an expanding set of workplace standards. This has been the direction of recent workplace law reform in United Kingdom and New Zealand.

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