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Suppose Australia Copied US Employee Relations Practices

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As Australia debates possible changes in its labour law, I am told that there are those who argue it should copy elements of the American system. How weird! While I love my country, I never thought of it as a model of good labour relations. But based on the assumption that American experience has some relevance, this paper consists of three parts. The first describes recent developments in American employee relations (not just union-management relations) broadly conceived. After all, if you want to copy US practices you should know what they are. Next I discuss one major but perhaps insufficiently recognized difference between our countries' labour relations: we are more legalistic. My final section comments specifically on some proposed changes in Australian labour law, supposedly suggested by American practice, though this practice may be misunderstood.

Recent Developments in US Employee Relations Practice

Union Decline

Union-management relations are not a major issue in the US, not with overall union density down to 12 per cent and only nine per cent in the private sector. True, some unions have developed innovative organizing techniques and there have been notable organizing triumphs in some low-wage industries, such as hotels and janitor service, that are heavily populated by recent immigrants. But these gains have been counterbalanced by *overall* loss of membership and substantial wage cuts caused by concession bargaining in industries such as steel, autos, and airlines.

Few workplaces that are already unionized have gone non-union, but many have downsized or gone out of business altogether, in many cases shipping their work overseas. But neither have many new workplaces gone union. The union problem has been inability to organize the non-union workplace. Few non-union employers face a realistic union threat and those who do have a well-stocked larder of well-honed methods to keep themselves union-free. Many of these methods are technically illegal but the penalties for violating the law are almost laughably weak. If the employer loses after a long, drawn-out legal procedure, it must post a notice saying it won't violate the law again and, if an

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employee is found to have been discharged because of legal union activity, he or she must be reimbursed for back pay lost. These are hardly strong deterrents.

The public sector situation is very different. While private sector density dropped from roughly 40 per cent in the 1950s to nine per cent today, density in the public sector jumped from very roughly 10 per cent in the 1950s to 36 per cent today. Why? Changes in the law (chiefly at the state level) legitimated union representation and collective bargaining; further, few public sector employers use the union prevention techniques so common in the private sector. If they did, they might be subject to political retribution. Most public employees can strike. They can also vote.

From Employees as Assets to Employees as Costs

'High commitment management' (also called 'employee involvement' among other names) was the reigning fad among 'progressive' firms circa 1990. IBM and other icons of the period, for example, proudly offered their employees lifetime employment. Forms of worker participation were common, such as job enrichment, quality circles, and work teams. Jobs were broadly defined so as to give employees greater autonomy. Efforts were made to reduce obvious status differences, for example by calling workers 'associates' and managers 'team leaders'. A heavy stress was placed on training and indoctrination, including ceremonies designed to deepen employees' identification with their employer. Much of this involved emulating Japanese practices, seen at the time as more productive than those of American firms. Few companies carried these policies very far, but they did seem the wave of the future. Many companies bragged about their policies in the ads and annual stockholders' reports.

Things have changed, both in rhetoric and practice. US management pays less attention to high commitment policies generally. There is less emphasis on human resource development as either a social obligation or a source of company profits (especially since the payoff is in the long run). IBM and the like, once known for their generous benefits and strong company cultures today show little hesitation in laying off employees or cutting benefits. And, workers in these firms are not typical blue-collar types; they are knowledge workers. Management consultants preach sticking to 'core competencies' while other functions are 'outsourced' to specialized (typically non-union) vendors. HRM departments have been downgraded in terms of size, status, and pay relative to other staff departments, especially finance.

There is less job security all around. There is a new argument that high mobility (called 'boundaryless careers') is good; employees should be responsible for their own careers. Workers and especially managers should expect to work for many employers during their lifetimes. In this way, they learn more skills, become more versatile, and gain broader perspectives.

Job insecurity has spread even to top management. Particularly since recent scandals, such as at Enron, top executives today are watched more closely by their boards of directors. CEOs are increasingly held responsible for both improprieties and bad judgment (and perhaps even for bad luck). Excess dependence on subprime mortgages led to the departure of CEOs from Merrill Lynch

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and Citigroup, two of the world's largest financial institutions. When hedge funds acquire a firm their emphasis normally is on quick, short-run results and then to take the firm public again. This typically means layoffs at all levels. Some call this a regime of 'lean and mean'.

From Labour Law to Employment Law

Understandably, given the decline of unions, the importance of labour law — concerned with union-management relations — has also decreased. In its place, a new field has developed: employment law. This concerns itself with an individual's rights vis-à-vis their employer. As a consequence, law schools offer fewer classes in labour law and many lawyers have converted themselves into employment lawyers.

Probably the largest number of employment law cases involve a series of laws passed from 1972. These laws outlaw discrimination in terms of employment on the basis of race, gender, ethnicity, age (over 45), religion, physical disability and, in some states, sexual preference. In contrast to the token legal penalties for employers that discriminate on account of union activity, these laws have real teeth. They are enforced by both administrative agencies and trial in civil courts with juries who often award large damages. AT&T (a major telephone company), for example, paid US$66 million because it discriminated against employees on the basis of pregnancy. Earlier it paid US$75 million to settle two similar cases.

One result has been major changes in HRM practices. For example, if one ethnic group scores higher than another on a selection test, that test must be validated. That is, it must be shown to accurately predict performance on a key aspect of the particular job for which the test is being used as a selection device. Some wags call the law 'The Psychologists' Full Employment Act'. Equal employment laws have kept lawyers busy with difficult issues. For example, evolving law requires employers to make 'reasonable accommodation' to physical disability provided employees can perform essential aspects of the job. What is reasonable? What is essential? The net result has been to spur formalisation of HRM practices. Many companies elaborately document the performance of older employees to avoid charges of age discrimination if they are fired. Another result has been considerable expenditures on ramps and the like to make the required 'reasonable accommodation' for physical disability.

Given management's reaction to unionism, one might have expected companies to have vigorously resisted these laws. Though many did at first, now they are generally accepted. The current term for what was once called 'affirmative action' is 'diversity'. Diversity is justified on the grounds that having a diverse workforce in an increasingly multi-ethnic society is just good business. Managerial performance appraisals increasingly take into account managers' success in integrating their work force. Though many will argue this is not enough, there has been progress at all levels, even to top management. Especially for women, the 'glass ceiling' has cracked. A growing number of blacks and women are serving as CEOs. There have been women CEOs, for example, in Hewlett-Packard, Lucent, Xerox, Pepsi Cola, and Reynolds Tobacco.

Increasingly, in 'progressive' companies with large numbers of white collar jobs, efforts are being made to make work 'family-friendly'. There are laws requiring maternity leave (though unpaid). Beyond this, some companies provide child day care, flexible work schedules, lactating rooms, and washing machines on the job.

Nevertheless, average wages for women, blacks and Hispanics are still well below those for white and Asian men. In the case of women this is, in part, because of family obligations. After increasing rapidly in the post-war period, the proportion of working-age women actually working has stabilized at roughly 60 per cent.

Another development has been the erosion of the common law doctrine of employment at will. State courts in particular have recognized a growing number of grounds for challenging employer discipline. These include an 'implied covenant of good faith and fair dealing', 'public policy', and 'implicit contracts'. In non-union firms, in a small way, these take the place of arbitration under union contracts (or, in Australia, collective agreements). To avoid legal complications, non-union firms are making increasing use of ombudsmen, informal grievance procedures and even binding arbitration.

Sexual harassment is a major issue (at least it makes the headlines), involving a large number of cases. Technically, it is a form of discrimination on the basis of gender, even when a female supervisor harasses a male subordinate. Often it leads to large damages. In one case, a jury awarded a legal secretary $US8 million (later reduced) because, at a drunken Christmas party, a partner dropped ice cubes down her bra and attempted to fondle her breasts.

The law recognizes two forms of harassment: 'quid pro quo' — for example, sex in return for promotion; and 'hostile environment' — for example, subjecting female employees to suggestive sexual remarks. These raise difficult questions. What is harassment? When can management be held responsible for permitting harassment? When should they be aware of it? What should they do about it? Companies react by establishing elaborate procedures for reporting harassment. California law requires all supervisors (including professors who supervise students) to take a two-hour course on sexual harassment.

Many cases involve individual job rights. For example, when may employers establish dress codes, test for drug use, make use of polygraphs, test for genetic abnormalities, or disseminate medical or performance evaluation reports? For example, is it religious discrimination to prohibit dreadlocks? May a male employee keep a picture of his bikini-clad wife on his desk? Some people may be offended, or even feel harassed. Recently several top executives (including CEOs from Boeing and American Red Cross) were fired because they were insufficiently discrete in their consensual erotic relations with fellow executives. Does a top executive have the right to have an affair, or to do so publicly?

Many of these issues involve changing social and even religious values and these differ over time and place. For example, what was once viewed as active flirtation or just 'kidding around' is now sexual harassment. Attitudes towards gays and lesbians differ greatly from one part of the country to another.

Compensation

In this area, there have been what, in my view, are major injustices, if not scandals. Wages for the average worker have barely kept up with changes in the cost of living, though university graduates have done somewhat better than average. Middle managers have done better yet and salaries plus 'performance' bonuses plus the value of stock options have exploded. High pay for successful managers is perhaps understandable but failures have also received enormous 'golden handshakes'. Michael Ovitz was given US$140 million to induce him to resign after only 14 months of service as Walt Disney's second-in-command. Stan O'Neal received US$160 million after being discharged as Merrill Lynch's CEO, presumably for his responsibility in the sub-prime mortgage debacle. This raises some questions in comparative ethics. Tremendous differences in salary levels are okay; consensual sex between executives is unethical.

Benefits

Space limits and a mean editor prevent me from covering a major current US controversy, even in this year's Presidential campaign. This concerns employee benefits, especially pensions and health insurance, both publicly and privately provided. As the US population ages, both have become more expensive. Suffice it to say, the Bush administration and many employers have sought to privatize these benefits, cut them back, and transfer various forms of risk from the employer to the employee. The Democrats wish to extend them, though Clinton and Obama disagree as to the mechanisms. These issues have played a major role in the relatively few strikes still occurring in the US.

Who is More Legalistic: USA or Australia?

When I first visited your country in 1979, I assumed your labour relations would be more legalistic than ours. After all, your disputes were settled by legally-binding arbitration. Then I found it wasn't that simple. No one told me that arbitrators' courtrooms were fitted with both a dais and a table. Arbitrators did conciliate. Further Australia was bedevilled with numerous small strikes, few of which were settled by arbitral decisions or even by reference to the previous, presumably legally-binding awards.

A major difference between our two countries is that, at least in principle, in the US we make a sharp distinction between 'rights' and 'interests'. Disputes over interests are settled through collective bargaining and strikes, if bargaining fails. Disputes over rights relate to how contracts (both explicit and implied) are interpreted and applied. These are settled through an often elaborate grievance procedure, with binding arbitration if this fails, but rarely by strikes.

Union-management contracts in the US tend to be much larger than Australian awards (at least the ones I've seen). The main points of many are printed in pocket-sized booklets so stewards and foremen have them instantly available. Some are far too long to fit in a pocket, so there are often supplements dealing with technical details such as pensions or required staffing levels. American contracts are long in duration as well as size. Three years was once the standard

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duration. Now five years is increasingly common. Given contract duration and the many issues covered, negotiations tend to be time consuming. Some start six months or longer before the contract expires. Almost all contracts contain 'no strike clauses' prohibiting strikes or lockouts (which rarely occur) for the duration of the contract. Some make explicit provision for discipline if this clause is violated. 'Wildcat strikes' (in violation of the contract), once common, are now quite rare.

The parties themselves select and pay for grievance arbitrators. Arbitrators' awards are rarely violated. After all, the big issues — unless they are new and unforeseen — are dealt with in the contract. The fact that arbitrators are selected by the parties themselves may make a difference. (Once I told an American labour leader that Australians bow their heads to the arbitrator when entering an arbitral hearing room. 'This would never happen in America', he said. 'After all we pay the [obscenities].')

Decisions by better-respected arbitrators get published. This is a form advertisement which helps them get business. They are frequently cited by other arbitrators and by practitioners in their arguments in arbitration procedures. Together they constitute a new form of common law, often called 'industrial jurisprudence'.

In my opinion, American arbitration procedures may get too legalistic. They may lead to suboptimal decisions which are in the interest of neither party. The same may be said of American industrial relations as a whole. Five years may be too long to let problems fester. After all, a major union function is to allow workers to participate in decisions important to them. Based on this logic, an occasional strike is a good thing; it provides an opportunity for participation. On the other hand, American industrial relations provide a degree of certainty and far less of the guerrilla warfare that I saw in Australia in 1979.

Some American Reactions to Some Proposed Changes in Australian Law

My mean editor lets me make some strictly space-rationed comments as to what I'm told are some proposed changes in Australian labour law that presumably have American counterparts.

Representation elections (you call it 'majority voting'): This sounds reasonable. Workers should have the right to determine which union will represent them, if any, and they should do so freely by secret ballot. The trouble in practice is that in the campaigning prior to elections, management has some major advantages. For example, it can call meetings — that all employees are required to attend ('captive audiences') — at which management can make anti-union speeches, often prepared by 'union-free' consultants, with no requirement that these speeches be accurate. The union's only chance to reply is if it can catch up with workers off the job. Management often uses spies to uncover union supporters whom it then fires. After lengthy National Labor Relations Board hearings, thousands of workers are found to have been fired for union activity each year. But the law works slowly and, as discussed earlier, the penalties for violating it are trivial.

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Unions today are lobbying for what has been called 'The Employees' Free Choice Act'. This would provide that a union would become the employees' representative once a majority of those in the relevant, defined bargaining unit sign cards designating it as such. This would be faster than holding elections, but has the drawback of not being secret and it still allows forms of coercion by both sides. Given a choice, I would prefer greatly increasing the penalties for violating the law.

Defined bargaining units: If you are going to provide mechanisms for making a union an exclusive bargaining agent, you have to decide whom it will represent.

Union access to work sites: If a worksite is unionised, the terms of access are normally determined by the contract. Access to non-union worksites has been increasingly limited. For example, companies can prohibit non-employees from soliciting on company parking lots just as long as other forms of non-employee soliciting, say for a charity, are also prohibited. This means that if a union wants to distribute flyers it must do so at the parking lot's entrance with no guarantee that drivers will slow down to pick these up or stop to talk. I view this as much too restrictive, making it extremely difficult for unions to communicate with prospective members.

Pattern bargaining: I can't understand why a labour supporter would be opposed to this. A major union objective is to 'level the playing field' and take wages 'out of competition'. This also is in management's interest. It prevents management from being subjected to 'unfair competition'. Some countries legally 'extend' contracts from union to non-union firms.

Good faith bargaining: This is a fairly meaningless requirement in the US. Actually the relevant Taft-Hartley Act requires just bargaining and makes no reference to 'good faith'. In practice the main requirements are the following:

a. The parties must be willing to meet at reasonable times and places.

b. They can't begin negotiations by saying 'I'll never make any concessions'. However, there is no requirement that they actually make concessions.

c. If requested to do so, management should provide data relevant to bargaining, for example payroll records.

d. If management says it can't afford to meet the union's demands it must provide financial data supporting this claim. This is the only significant requirement and means that management has learned it should never claim poverty unless it is willing to 'open its books'.

Lockouts: These are rare in the US, but to preserve symmetry I would permit them.

Compulsory unionism: In the US there are two main forms: the 'closed shop' — where anyone whom the employer hires must already be a union member (and often is recruited from the union hiring hall); and the 'union shop' — which requires that newly-hired non-members join the union after a reasonable period of time. The closed shop is technically illegal, though the prohibition is often ignored. The union shop is legal although employees need not actually join as long as they as they pay reasonable union dues. Unions

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perform important services for those covered by their contracts. It seems reasonable that they help pay for the cost of that service. The law also provides that individual states may prohibit all forms of compulsory unionism. This seems unfair.

Reinstatement of an individual right to protest a dismissal as unfair: As mentioned earlier, any discipline (not just discharge) can be challenged in the US if it involves discrimination against a member of a 'protected class' (such as 'African-American') or, as sometimes put, if the individual would not have been disciplined but for his/her membership in such a class. Most US union contracts offer much broader protection. The typical contract says that discipline shall be for 'just cause' only and then leaves the term 'just cause' largely undefined. This is not a serious problem because the term has been defined by thousands of arbitration decisions handed down by private arbitrators. These decisions constitute a major subject of 'industrial jurisprudence'. Australians (both union and non-union) should be granted the same protections. Note, these cover all forms of discipline, such as written warnings.

I have run out of space. Please remember that what works in the US may not work in Australia.

Good luck Australia. Bill-draft well.

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