JURIDIFICATION AND LABOUR LAW: A LEGAL RESPONSE TO THE FLEXIBILITY DEBATE IN AUSTRALIA

ESRC Centre for Business Research, University of Cambridge
Working Paper No. 93

Richard Mitchell
Centre for Employment and Labour Relations Law
Baldwin Spencer Building
University of Melbourne
Parkville
Victoria 3052
Australia

Phone: +61 3 9344 6924
Fax: +61 3 9349 4623
Email: r.mitchell@law.unimelb.edu.au

June 1998

This Working Paper relates to the CBR Research Programme on Corporate Governance, Contracts and Incentives

Abstract

This paper examines the proposition that the introduction of the new Workplace Relations Act 1996 has brought about a "dejuridification" of the Australian framework of labour law. At the outset, the paper deals with the traditional award-based system of compulsory arbitration which dominated the Australian employment relation scene between the 1930s and the 1980s, and which was characterised by high levels of regulation. It then notes the rigidities and inefficiencies of the traditional system, which eventually led to its reform. There is a brief analysis of the political process underlying the various initiatives introduced with a view to achieving greater flexibility in the employment relationship, culminating in a discussion of the main features of the Workplace Relations Act 1996. The author contends that, despite having as one of its aims a simplification of employment relations, the Act has brought about greater complexity in the regulatory framework. To demonstrate this by example, the paper then deals with the process of individualisation of the employment relationship under the Act. It discusses in some detail the (individual) Australian Workplace Agreements, the substantive and procedural requirements for their approval, and their likely impact on the overall position of the parties to the bargaining process. The conclusion, with respect to the Agreements, is that their complexity and high costs are likely to deter the parties from opting out of the centralised award system. The author doubts the ability of the Agreements to induce greater flexibility at Australian workplaces, claiming that other avenues may be more appropriate. As concerns the overall impact of the Workplace Relations Act, the paper concludes the rather than inducing true "dejuridification" of Australian labour law, the Act has at best left the level of regulatory saturation in labour law at the same level, and is unlikely to cause much noticeable change in the bargaining process.

Acknowledgements

I gratefully acknowledge the comments and assistance of Breen Creighton and Richard Gough on an earlier version of this paper. The present version was completed while I was a visitor to the Faculty of Law and ESRC Centre for Business Research at the University of Cambridge in 1997. All remaining errors, of fact and interpretation, are the responsibility of the author.

Further information about the ESRC Centre for Business Research can be found on the World Wide Web at the following address: http://www.cbr.cam.ac.uk

JURIDIFICATION AND LABOUR LAW: A LEGAL RESPONSE TO THE FLEXIBILITY DEBATE IN AUSTRALIA

Since the early 1980s there has been considerable debate over the "juridification" of areas of social concern - "juridification" describing not merely the proliferation of legal norms, but implying also several "dysfunctional problems" in the performance of law as social regulation.[1] Within the debate on juridification, much of the focus has been upon labour law. According to Simitis "juridification" as an expression is "nowhere more justified than where the structure and the objectives of labor [sic] regulation are being discussed. In fact, labor law constitutes the classic paradigm for juridification." [2] If we are to go by the attention paid to the language and concepts of "juridification" amongst labour lawyers in Europe,[3] Simitis is undoubtedly correct in his summation, or at least correct in his supposition that labour law appears as a major culprit in the over-regulation thesis. However, with very few exceptions, neither the language of the "juridification" debate nor the analytical approach to law and policy developed by Teubner, Daintith and others[4] has attracted much attention among Australian labour lawyers. This is perhaps surprising as there is scope in both these areas of discourse for a deeper understanding of the complex ordering of Australian labour markets which occurs through combinations of state policies, legislation, administrative decisions, and tribunal awards and orders at a dual governmental level. From the reverse position, it is also the case that Australia rarely features as a country example in international labour law discussion. This, too, is surprising as it undoubtedly has had for most of this century, and probably still has, the most highly "juridified" labour law system of all the market-based industrialised nations.

None of this is to say that Australian labour lawyers and policy-makers have been untouched by what has become an international concern with regulation of employment and labour markets. On the contrary, the question of labour flexibility (ignoring here the multiple and potentially inconsistent aspects of that concept) has been a major political concern

of the past ten years and certainly the major divide between the industrial relations policies of the principal political parties in Australia. Industrial relations policy was probably the most important single reason for the surprise election defeat of the Liberal-National Party (Conservative) in 1993.

These remarks serve as the introduction to this short paper. In it I intend to touch upon a few aspects of the Workplace Relations Act 1996, an Act of the Parliament of the Commonwealth of Australia. The purpose is not to discuss the new legislation in close detail. The institutional, procedural and substantive reforms made to labour relations and employment conditions in this legislation would require a much fuller treatment than is possible here. Rather the intention is to point to the restrictions which may impact upon a government's capacity to make change in the case of a heavily regulated system. As a result the discussion is heavily simplified and generalised.

The Workplace Relations Act was introduced by the Liberal-National Party coalition government when it was eventually elected to office early in 1996. The purpose of the legislation was to attempt to meet the government's policy of labour market deregulation. Again drawing on Simitis, deregulation as a response to "juridification" requires (in the view of its proponents) not only an attack on the substantive rules of labour law, but on its procedural mechanisms as well.[5] Unfortunately for the government its aspirations for labour market reform were obstructed in several respects. These included crucial compromises to its own platform brought about by political hesitancy in the pre-election period, and subsequent changes to the legislation brought about by a hostile Upper House.[6] The result was a legislative framework for labour relations which in many respects is more complex than ever, and in which the requirement for substantive protection has necessitated a procedural regime which is likely to render the "flexibilising"[7] aspects of the new laws devoid of any real meaning.

The Australian Labour Law Tradition

At the turn of this century Australian legislatures (those of the Federal government and the six federated States) embarked upon the introduction of systems of conciliation and arbitration for the settlement of industrial disputes. That process was completed by about 1915, and since then the institutions and processes of compulsory arbitration ("compulsory arbitration" being a convenient short-hand descriptor for the Australian labour law system) have essentially characterised employment and labour relations. This system did not replace all other forms of employment regulation - the common law, and other statutes, continued to be of relevance. However, compulsory arbitration so dominated the labour relations process that other regulation was pushed to the margins of operation, both in law and in practice.[8] Of course the "compulsory arbitration" system changed over the decades. But until the Workplace Relations Act 1996, its fundamental constituent elements had remained (on the whole) largely intact, and as a result still set the standard for labour law in Australian public policy.[9]

What were these fundamental characteristics of Australian labour law? Put simply they may be reduced to four foundational, linked, legal and institutional concepts. First, the legislation provided for permanent industrial tribunals with widespread powers over industrial disputes. Those powers included the facilitation of workplace inspection, and the making of awards which covered the terms and conditions of employment of the employees and employers involved in the disputes. Secondly, the powers of the tribunals were compulsory, both at the jurisdiction phase and at the settlement phase. Whilst it was never obligatory upon those involved in industrial disputes to bring them within the system, the tribunals were empowered to take control of a dispute whether or not the disputants wished it, and the outcome was binding upon all parties. There was, therefore, no escaping the net of regulation, and in essential respects wages and conditions of employment were regulated out of competition. Thirdly, the system closely integrated trade unions within its fabric. They were encouraged

to register under the compulsory arbitration regime,[10] and were given substantial inducements to do so. These included preference in hiring to their members, and rights to enter workplaces for inspection purposes. Registration largely guaranteed trade unions an organisational monopoly over their constituent trades, industries and occupations.[11] As a matter of industrial practice, therefore, trade unions were recognised in this scheme of labour law as joint regulators of industry, along with employers and the tribunals. Finally, direct industrial action by the disputants was severely circumscribed by the legislation of compulsory arbitration. The underlying theory to the system was that the settlement of a dispute through the process of compulsory arbitration was "industrially just", and thus replaced the need for industrial pressure with its concomitant social dislocation.[12] In practice direct industrial action was always a major feature of Australian labour relations, notwithstanding the legal prohibitions. Nevertheless in line with the theory, and in contrast with the accepted norms of British and U.S. labour relations, such action was subject to doubt not merely legally but also as an issue of legitimate process.

Even in this highly abstracted legal and institutional description, one may perceive the elements of a highly juridified system of labour regulation. Unlike the British system, for example, Australian labour law virtually made it compulsory for employers to recognise trade unions and to bargain with them over certain mandatory subjects.[13] Employers would find themselves respondents to awards covering their employees whether or not they engaged in negotiation. It made no sense therefore to resist trade union recognition. And further, unlike both the British and American systems of labour law, Australian labour law, through the awards process, prescribed and secured the uniform minimum standards of employment. Thus in both procedural and substantive rules Australian labour law projected from the beginning the "dense materialisation" of juridification, in which "the state displaced contractual commitments, restricted the decision-power of the parties, and... changed the regulation level".[14] Increasing the regulation level was a process, moreover, which continued unabated throughout

this century. Generally speaking compulsory arbitration statutes became more voluminous and complex over time, as governments sought to develop and implement additional employment and labour relations policies, or to refine or alter existing policies. Thus for example, the first of the Federal Acts, a relatively short statute of fewer than 100 sections introduced in 1904,[15] had become by the mid to late 1980s a voluminous provision of more than 350 sections (of which close to one third regulated the internal affairs of trade unions) accompanied by regulations, rules and forms which added hundreds of pages to a standard compilation of labour relations legislation.[16] Equally if not more importantly, the detailed regulation in awards also proliferated. By the mid-1980s, awards had grown from relatively short instruments covering some basic terms and conditions of employment, into much longer documents often running into hundreds of clauses and sub-clauses, finely detailing almost every aspect of employment.[17] This process was assisted by decisions of the High Court in the 1970s and 1980s which helped to restrict the concept of managerial reserved rights and thus allowed the expansion of matters which might be covered by awards.[18]

It is possible to describe the labour relations outcomes of these regulations only very generally in this brief coverage. At its peak the award system probably covered the employment conditions of more than ninety percent of Australian employees, though this figure had dropped to about eighty percent by 1990 and remains at about that level today. Improvements in pay and conditions reflecting rising national economic prosperity were distributed by the industrial tribunals[19] according to various criteria. These criteria reflected economic circumstances, the relative power positions of capital and labour, and most importantly the policy priorities of the particular government of the day.[20] After 1975, the major criterion used for national wage movement was adjustment for cost-of-living increases. Industry standards reflecting productivity or other improvements were generalised by award flow-on based largely on the principle of comparative wage justice across trades and occupations. Exclusion of

application was possible through the principle of incapacity to pay, but this was rarely implemented.

The great bulk of award provisions imposed obligations upon employers rather than employees and unions, and most large-and medium-sized employers in the private sector would have been covered by several awards. Award content included matters affecting the wage/work bargain (pay, leave etc.), employer respondency (widely drawn lists of employers covered by the award), union security (rights to enter premises, preference in hiring and firing for union members), and matters of process (dispute and grievance settlement procedures). It is not the case that awards regulated the labour process in any Tayloristic manner such as by setting out in detail the various steps to be taken in the production of a particular manufactured product or service. They did, however, regulate employment in ways which were often perceived as making the flexible use of labour impossible or at the very least an administrative nightmare. For example, the categories of employment were frequently broken up into minutely-graded functions, usually separated by largely inconsequential pay differences (the most celebrated case being the leading Metal Trades Award which, until the broadbanding exercise of the late 1980s, contained more than over 350 classifications of employee). Mixed-functions clauses enabled employment across classification, but only with administrative complexity. Many other rigidities characterised the award system. These included limitations upon the numbers of casual and part-time employees who might be hired, restrictions upon the ordinary hours of working (outside of which penalty rates were applicable), and problems with leave arrangements (thus giving rise to difficulties with plant closures over holiday periods). These were, no doubt, features of regulation in other systems but in Australia awards were legal minima, unable to be bargained away in productivity or performance-oriented packages with unions or individual employees. Furthermore, to repeat a point made in a rather oblique way earlier, awards were by tradition almost solely instruments of distribution. They permitted little in the way of incentive or performance bargaining whereby employers could

trade-off employment rigidities for higher pay or bonus systems. Nor did awards commonly specify performance targets. In this respect the employer had to rely upon the uncertainties and imprecision of the powers available to it in the employment contract, which were usually preserved, explicitly or implicitly, in the award.[21]

Taking, for the purposes specific to this paper, the critical view of compulsory arbitration, the position may be summed up in the following way. Australian industrial tribunals had extreme and unwarranted powers to regulate employment relationships. Whilst these powers might be useful in serving some economic and industrial relations policies (for example in operating an incomes policy at a macro-level)[22] they were out of place in an otherwise deregulating economy which was opening up to the pressures of international competition. In short, the traditions of compulsory arbitration were perceived as being fundamentally incompatible with an economy which required a shift to flexible workplace relations, and which being would emphasise productivity and efficiency criteria rather than standardised industry or occupational protections for labour.

Unpicking the System

Generally speaking it might be said that compulsory arbitration as an instrument of regulation enjoyed bi-partisan political support from about 1930 until the 1980's. Serious indications that support had begun to break down on the conservative side of politics began to emerge in the late 1970's and early 1980's,[23] but that challenge was halted with the election of a Labor government in 1983. Crucial to this incoming government's platform was its historic "Accord" with the trade union movement acting through the Australian Council of Trade Unions. That agreement went through several stages during the 1980s and into the 1990s, but initially it sought to constrain wages and to implement improvements in the social wage (including tax cuts, superannuation and health scheme improvements). Wage movements were tied, at least notionally at this stage, to increases in the cost of living, though various

discounting principles administered by the Australian Conciliation and Arbitration Commission (as it then was) effected what was in reality a redistribution from wages to capital. Distribution thus remained the focal point of the tribunal's activities.

The substantial break with this tradition came in the second half of the 1980's, following a famous speech given by the federal treasurer (and subsequent Labor Prime Minister) Paul Keating in which he compared Australia's future, in unflattering terms, with that of a "banana republic". Thereafter, the labour law system was used increasingly as a tool of micro-reform aimed at improving the efficiency and productivity of Australian workplaces. Wage increases were tied to agreements by the parties that they would bargain directly over the elimination of restrictive work practices, over changes to the organisation of work, and over the training and skilling of workers (the "Restructuring and Efficiency Principle" 1987).[24] Opinions vary about the success or otherwise of this initiative, but there is no doubt that it had some effect in pushing the parties into a less reliant stance towards the industrial tribunal system. Changes made in the award restructuring process at this point included flexibilities in payment methods and in working time arrangements, and some performance-based pay initiatives. How seriously these restructuring agreements were implemented is, however, uncertain. In 1988, the Commission introduced a new principle (the "Structural Efficiency Principle") which again tied wage increases to undertakings by the parties to bargain over key issues, including the broadbanding of skill levels, career paths, new flexibilities in taking leave, and the review of restrictions in part-time and casual employment.[25] These award strategies were supplemented by legislation introduced by Labor in 1992 and again in 1993 seeking to facilitate the making of enterprise agreements between unions and employers, and, in some instances, between employees and employers where there was no union organisation on site.[26]

It is important to note that the award system, in this context, provided a sub-statutory level through which reform could be implemented without change to the legislative framework of compulsory arbitration. To some observers, therefore, the very structures of the Australian system offered the possibility that reform at the micro-level might be negotiated without a full scale assault on labour law taken as a whole.[27] In its 1988 overhaul of the federal Act (renamed the Industrial Relations Act at that stage), Labor had declined to make any substantial changes to the legal framework of the system. However, by the early 1990s, and notwithstanding the award restructuring and enterprise bargaining pushes, doubts about the capacity for serious change within the structures of existing laws and institutions were growing apace, even within the Labor Party itself. For opponents outside the labour movement the reforms instituted under Labor were too slow, inadequate in substantive terms, and had produced only marginal results. Nothing less than a thorough deregulation of the workplace (thus following Labor's deregulatory initiatives in other sectors such as finance and industry protection) was required in these quarters.

But what would such a deregulation mean in relation to the compulsory arbitration system? Extreme critics of the system targeted both the institutions and outputs of the system. The tribunals and unions, each supporting the influence of the other, were portrayed as unwarranted external interferences hampering the development of efficient labour market arrangements. Awards were seen as too prescriptive, and too rigid to permit enterprise or individual negotiation. Nevertheless the industrial tribunal system, and its associated award "protection" have had long-standing popular, as well as political, support in Australia and as a result the pursuit of a radical policy of deregulation might have been expected to be politically hazardous. The complete abandonment of both compulsory arbitration and awards in New Zealand,[28] and in the Australian State of Victoria,[29] however, provided an added impetus to the case for deregulation, and in 1992 the Liberal-National Coalition Party fought a federal election campaign, which it was expected to win easily, on an explicit programme of labour law deregulation. It lost the

election and removed its leader (a right-wing former Professor of Economics). In the lead up to the next federal election the same Party revealed very few specifics on its labour law platform. It made a general promise, however, to the effect that awards would be retained and that "no worker would be worse off in overall terms" as a result of any labour market reforms.

It is necessary to appreciate the practical significance of this latter commitment. The Liberal-National Party Coalition was elected to power in 1996 with an overwhelming majority in the lower house (the House of Representatives), but was in a minority in the upper chamber (the Senate). Consequently, the government's labour market programme was subjected to close scrutiny by the minor parties in the Senate, and the "no disadvantage" commitment was utilised as the yardstick against which much of its policy and subsequent legislation was judged. As a result the Workplace Relations Act 1996, whilst giving effect to the most far reaching changes ever made to the compulsory arbitration law, was necessarily a compromise measure.

The Workplace Relations Act 1996

The new Workplace Relations Act was undoubtedly a measure concerned with introducing "flexibility" into employment relations. This was made clear in the principal objects of the Act which emphasised international competitiveness, productivity, and flexible and fair labour markets,[30] as well as the maintenance of minimum standards. The objects also placed the principal responsibility for determining employment matters upon "employer and employees at the workplace or enterprise level".[31] In overall terms the Act attempted both to flexibilise and individualise employment relations in many different ways. In this brief discussion attention is restricted to four key aspects of the legislative programme.

(i) *Removal of third parties*

The Act attempted to reduce the influence of the Industrial Relations Commission and trade unions in the regulation of employment conditions as a prerequisite to a less centralised, more individualised and more flexible system. It is not the intention here to deal with these matters in detail. However, in brief it can be said that there are grounds on the face of the legislation for supposing that the Workplace Relations Act has diminished the stature and role of the Commission, and effected a substantial diminution in the position of trade unions in the labour market. The position seems clearer in the case of the trade union movement. For example the objects of the Act no longer include the maintenance of union power - the philosophical basis of the system of industrial representation is now "freedom of association".[32] The Commission is expressly forbidden to include clauses in awards which give preferences to union over non-union members, and rights of unions to enter business premises have been significantly curtailed.[33] Trade unions have also had their powers to intervene in bargaining between employers and employees sharply diminished. These new arrangements contrast markedly with the unions' traditionally privileged status in the compulsory arbitration system, but were not seen as politically risky by the government, and were allowed to pass by the minor parties controlling the Senate. However, notwithstanding all of this, registered trade unions have retained the right to make application for awards governing their constituents. Provided that awards continue to play a meaningful role in the maintenance of a broad spread of minimum employment standards (as they presently do) it must be expected that Australian trade unions will continue to exert power in the labour market, and, what is more, a power which will ultimately transcend their organisational abilities.[34]

The intent of the Act in relation to the Industrial Relations Commission is perhaps less straightforward, but at least one commentator has argued that the legislation was "calculated seriously to weaken [among other things] the role and standing of the AIRC [the Tribunal]".[35] However, it

must be said that, for reasons outlined earlier, an outright attack on the Commission was probably difficult in political terms even had its disestablishment been an important policy objective, and it is doubtful whether this was the government's preferred position in any case. Judged by the submissions made to the Senate Committee Inquiry into the legislation,[36] the preoccupations of many leading opponents of the existing system were with award regulation and the status of trade unions rather than with the Industrial Relations Commission *per se.* Nevertheless, there are visible changes to the role of the Commission on the face of the legislation. The objects of the Act now give priority to direct negotiation between employer and employee. Intervention by the Commission in dispute settlement is relegated to Object (h) and then priority is given to conciliation over arbitration. Compulsory arbitration (or indeed any arbitration) is only permitted as a last resort.[37] The Commission is now also restricted in its ability to take control of disputes which otherwise fall within the jurisdiction of state industrial tribunals.[38]

On the other hand, whilst the Industrial Relations Commission has lost some of its jurisdiction, it has gained powers in other areas. These include the power to scrutinise individual employment agreements which parties are seeking to have recognised under the legislation.[39] The Commission also has new powers to act in dismissal cases.[40] These new powers may serve to enhance rather than diminish the Tribunal's role. Finally, and crucially, the Commission has retained the power to make and vary awards and in the end it is most likely that its influence as a regulator will be assessed by the continuing strength and relevance of this award function.

(ii) Reduction of awards

It was contended above that the scope and influence of awards are critical factors in sustaining the prestige and power of the trade union movement and probably of the Commission also. For reasons specified earlier, reducing the significance of awards was undoubtedly a major

priority for the government. In its original Bill[41] it sought to do this by restricting awards to eighteen "allowable matters", and by limiting arbitration to these and incidental matters only.[42] This limitation has been interpreted, quite understandably, as a radical weakening of the status of awards[43] but there are several reasons why it may be too early to draw such a conclusion as to the continued importance of the award structure in Australia. First, and most obviously, as a result of changes forced to the legislation in the Senate, the number of separate allowable award matters in section 89A of the Act was extended to twenty, and items within the enumerated matters in some cases were extended also.[44] In this extending process, powers were also added to the legislation enabling the Tribunal to arbitrate and make awards, subject to certain conditions, on exceptional matters.[45] Secondly, it remains to be seen whether, aside from one or two obviously important excluded issues - specifically going to the employment of part-time, casual and off-site employees -[46] the restricted content of awards will seriously undermine award regulation. An examination of the application of section 89A to a typical award would suggest that most important issues are able to be covered even disallowing the possible extensions provided by the "incidental" and "exceptional" categories of allowable matter.[47] Thirdly, by virtue of yet a further change to the legislation brought about in negotiation between the government and the controlling parties in the Senate, awards will continue to be the yardstick by which agreements are approved or disapproved under the legislation. They will thus be critical in moderating the degree of flexibility able to be purchased by agreement.

(iii) Promotion of bargaining

Bargaining rather than award regulation is thought by the government to hold the key to greater flexibility in employment relations. Thus bargaining is promoted as the preferential mode of dispute settlement, and the results of bargaining are prioritised over and above awards. This process is given legal effect throughout the terms of the Workplace Relations Act, including the Act's objects, and in the highly

complex ordering of the status of the different classes of agreements and awards available under the statute.[48] The bargaining process is also privileged in the form of a protected right to strike not available to unions and employees engaged in award negotiation.[49]

(iv) *Preference for individualised agreements*

Within the "bargaining preference" strategy, the Workplace Relations Act reveals a further layer of preferred process, which accords priority to individualised agreements (i.e. employment agreements between individual employee and the employer) over awards and (in some instances) collective agreements. This intent is perhaps less transparent than the preference for bargaining generally, but is indicated most clearly in the ranking status applied to awards and agreements under the Act. Generally speaking, during its period of operation, an individual agreement (styled an "Australian Workplace Agreement"- AWA - in the Act's provisions) entirely displaces an award applying to the same employment. Furthermore, an AWA may operate in conjunction with a prior existing collective agreement (though giving way in the event of an inconsistency), but where an AWA exists prior to a later arising collective agreement, the AWA operates to the *entire exclusion* of the collective agreement. In the latter instance the distinction is slight but the preference is obvious. Individual agreements, when designed by the parties to be the operative instrument of their relation, will (again generalising for there are some exceptions) exclude other regulatory industrial instruments whether or not the latter extend a greater range or superior quality of minimum standards to those offered by the agreement.

Australian Labour Law : Juridification and Flexibility

The process of introducing greater flexibility into Australian employment relations has thus followed a path common to Britain, New Zealand and the USA over the past two decades. But does this strategy also imply a slowing down, or even a reversal (as recently

suggested by Gladstone),[50] of the process of juridification in employment relations? One would think that a very strong case could be made out in support of the view that in respect of those three countries a reversal of juridification, both in terms of the volume of regulatory norms and a return to individualisation, had in fact occurred.[51] However it is far less clear that such a conclusion could be drawn in the case of Australia. Whilst it is the case that the volume of award regulation will undoubtedly be substantially reduced by the Workplace Relations Act, this must be balanced by the fact that the Act itself, with its 536 sections, 14 schedules, and 137 regulations remains more dense and complex than ever before. It is not possible to give examples in chapter and verse here, but one illustration might be indicative of the ongoing "dense materialisation" of Australian labour regulation under the new Act. It is possible for an employee governed by the Workplace Relations Act to be covered by at least four types of employment instrument (not including other legislation) - a contract of employment, an AWA, a collective agreement (certified under the Act), and an award. An employee will always have a contract of employment at common law, but it is not yet clear what the legal relationship between it and the forms of agreement (AWA and collective agreement) certified or approved under the Act will be. Nevertheless, it follows that it is possible for an employee to be covered by three levels of employment instrument under the Act at the one time (contract of employment, AWA, certified collective agreement : or contract of employment, certified collective agreement, award), and this without including the possible application of collective agreements which are not certified under the Act. When this is placed in the context of a Federal system in which the awards and agreements of State tribunals also operate, sometimes upon the same employment, the degree of complexity, and the saturation level, of regulation is readily apparent.

Turning to the issue of individualisation, whilst the intention to privilege individual agreements over most other instruments of industrial regulation is manifested in the Workplace Relations Act, it does so (for reasons and in ways detailed in the next section of the

paper) only in circumstances where the parties' decisions have been made (employing yet another phrase by Simitis) "against a background clearly defined by the data set by law". [52] It must remain open to doubt, therefore, whether the Workplace Relations Act has effected a "dejuridification" of labour law to any meaningful degree.

Legislating for Individualisation

The final substantive part of this paper deals, in rather more descriptive detail, with the process whereby parties to an employment relationship may enter into an individual employment agreement (AWA) which will be given legal priority over other instruments of industrial regulation. The purpose is to open up for examination the legal background against which the parties must condition their responses to the demands of their relationship and its future organisation.

Since this paper is written with a non-Australian readership in mind, it is not proposed to enter into the legal intricacies brought about by the Federal constitutional structure and its impact upon Australian labour law. Generally speaking, employees may make AWAs with all incorporated employers, with the Commonwealth government and its authorities, and with certain other classes of employer.[53] In practical terms this means that individual employment agreements excluding the effect of award (and much other) public labour regulation may be made throughout most of the large- and medium-scale industry sector, and in a substantial part of the public sector also. The major gap is in the small business sector where non-incorporated employers are predominant and in which perhaps half the employed workforce are located. The response of the government to this problem has been to allow those employees to make agreements (including individual agreements) under the separate State industrial statutes, and to accord such agreements priority over Federal awards.[54] As a result the great bulk of Australian employees, and their employers, have available to them (subject to the conditions set by the "legal background") the means to negotiate employment agreements which may, by choice, be isolated

from general industrial regulation. In terms of prescribed content, the Act requires only that the provisions of an AWA pertain to the relations of employer and employee;[55] that it contain provisions relating to discrimination ; and that it contain a disputes resolution procedure.[56]

Having set out the categories of parties and prescribed content of an AWA, the Workplace Relations Act proceeds to the provision of a negotiating framework within which the parties must operate. Either or both parties may appoint a bargaining agent to act on their behalf in AWA negotiations. Agents can be, but need not be, trade unions.[57] Provided an agent is properly appointed and the other party informed of that fact, "recognition" of the agent must not be refused.[58] There is no indication in the Act as to what "recognition" means, and whether or not there is a correlative obligation to bargain with the agent. Parties are entitled to assistance from the Employment Advocate (a newly created institution under the Workplace Relations Act), including advice about how to comply with the filing and certification requirements for AWAs.[59] As indicated earlier, parties may take "protected" industrial action (including individual employees!) with a view to compelling or inducing the other party to enter an AWA on particular terms and conditions. The protection is against legal proceedings brought as a consequence of the industrial action, and is limited in nature.[60]

However, it is when the conditions for filing and approval of AWAs are examined that the full impact of the "legal background" becomes clear. For individual agreements to stand free of most other industrial regulation they must be appropriately filed and approved under the Act. Thus the level of flexibility attainable will depend upon the conditions attached to these procedures. The first stage is the filing of the agreement. An AWA must be filed with the Employment Advocate within 14 days of the date of its conclusion.[61] In order to be filed the AWA must be signed, dated and witnessed. In it the employer must make a declaration that it complies with the Act's requirements as to content, must declare whether or not AWAs were offered on the same

terms to all comparable employees, and must declare that the employer gave the employee a copy of an "information statement" prepared by the Employment Advocate.[62] The information statement is a critical part of the "legal background" because it is required to inform both the employer and (particularly) the employee about Commonwealth statutory entitlements, occupational health and safety laws, services provided by the Employment Advocate and rights to be represented by a bargaining agent.[63] Once these preconditions are satisfied (and the Employment Advocate may require more information of the employer by gazetted notice)[64] a filing receipt must be issued.[65]

With the formal filing of the agreement begins the approval stage of the process. The agreement may only be approved and given effect if it meets the standards laid down in the Act. The conditions for approval may be divided into two groups. First, the Employment Advocate must be sure that the agreement passes the "no-disadvantage" test, and secondly it must be satisfied that the agreement meets the "additional approval requirements".[66] These latter requirements include, among other things, that the employee must have received a copy of the AWA the requisite number of days before signing it (5 for a new employee, 14 for an existing one) ; that the employer explained the effect of the AWA to the employee after the employee had received a copy but before the employee had signed it; that the employee genuinely consented to the agreement; and that the employer, if failing to offer the AWA to all comparable employees, had not acted unfairly or unreasonably in so doing.[67] There will be difficult questions of interpretation and proof in respect of each of these conditions, but it is required only that the Employment Advocate "be satisfied" that they are met.

On the other hand, the Employment Advocate must be sure that the "no-disadvantage" principle applies in order to approve the agreement, and it is this test which locks the parties into the existing regulatory net most profoundly. An agreement passes the "no-disadvantage" test if it does not disadvantage employees in relation to their existing terms and

conditions of employment.[68] This will only be the case if approval of the AWA would not result, on balance, in a reduction in the overall level of terms and conditions applying to the employee under relevant awards[69] or any other industrial law deemed relevant by the approving body.[70] Stripped of its legalese, this means that whilst individual agreements may be made which derogate from awards and other industrial standards, they may not diminish the total "value" of the package legally available to the employee under such other regulation. Thus changes can be made to the terms and conditions imposed by public regulation, and a restatement of priorities in the employment relationship may be arrived at in an AWA. This may result in the omission of many award and other standards, for example the removal of penalty and overtime rates, leave allowances and so on, but only at a cost of higher wages or other obligations upon the employer. On the face of the legislation (and subject to an exception discussed shortly) the avenues open to the employer in the AWA process do not include cost-cutting at the expense of the employee. It is also clear that some fundamental public standards, such as occupational health and safety laws and regulations, will not be permitted to be bargained away in an AWA even for adequate compensation (assuming that the value of such public goods could be quantified).[71]

It may be the case, however, that the Employment Advocate (in the language of the Act) "has concerns" (this must mean "is unsure") whether or not the agreement lodged for approval meets the "no-disadvantage" test. In such instances the Employment Advocate must refer the AWA to the Industrial Relations Commission for approval. This provision, and those requiring scrutiny of AWAs before approval by the Employment Advocate, were important additions to the Workplace Relations Bill in the Senate, and were intended to meet concerns that without scrutiny there would be no assurances that AWAs would comply with the public standards required by the Act. Presumably the involvement of the Commission in this process was intended to add further assurance to the supervisory procedure, and particularly to maintain the prominent and informed role of the

Commission in safeguarding industrial standards.[72] In keeping with the direction given to the Employment Advocate, the Commission must approve the AWA if it "is satisfied" that it meets the "no-disadvantage" test, though it need only be satisfied rather than "sure" that that is the case. However, extending the range of the Commission's discretion even further, the Act provides that it "must" approve the AWA, even if it is not satisfied that it meets the "no-disadvantage" test, if it is not contrary to the public interest to do so.[73] A textual note to the sub-section conferring this discretion upon the Commission states that "An example of a case where the Commission may be satisfied that approving the AWA is not contrary to the public interest is where making the AWA is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, a business or part of a business."[74] This is potentially an extremely important breach in the wall of public employment standards in Australia. The legislation appears to invite the Employment Advocate to pass on difficult cases to the Commission, because the Advocate has no power to allow a borderline case through on a public interest ground. But the intent of the Act is clear in the case of the Commission. It must approve agreements which permit a downward variation of employment terms and conditions to the disadvantage of employees when that variation is otherwise in the public interest. This is an "incapacity to pay" principle in another form, permitting derogation from regulatory standards in times of business crisis and so on. How widely it will be applied is, of course, unknown at this stage. However, it is pertinent to note at this juncture that the approval process for AWAs, both before the Advocate and the Commission is, unlike the award and certified collective agreement processes, strictly private.[75]

Whilst it is far too early to assess what the impact of this particular "flexibilising" strategy there is reason to suppose that it is unlikely in practice to undermine award regulation to any substantial degree. The general consensus of opinion among impartial observers is that the procedures for securing an AWA (or similar State) form of employment regulation will be too complex and time consuming to attract much

interest from employers.[76] Media surveys of practice in the Act's first twelve months of operation have tended to confirm this prognosis. Fewer than 150 employers had completed AWAs with employees as at December 30th 1997.[77] Australia has experienced numerous attempts to make employment relationships more flexible since the early 1990s. Many of these have involved legislative changes to labour law systems permitting parties to opt-out of the centralised award system, either through enterprise-based collective agreements or individualised agreements. In some instances also, these provisions were much less subject to conditions set by the "general legal background" than the comparable parts of the Workplace Relations Act. Despite this, the evidence seems to show these "flexibilisations" on the whole to have been failures,[78] although there is a lack of detailed case-study research on the situation in Victoria where the award system was completely abolished.[79]

If the supposition that the new "individualisation" processes will be ineffective is correct, what other avenues for flexibility exist in the Federal system? Two major possibilities arise. First, certified collective agreements may provide an avenue for (limited) award avoidance, but these too are subjected to complex and time-consuming procedures and confining conditions for certification. Flexibilities brought about through changes to the common law contract of employment, or an uncertified collective agreement, will be procedurally much simpler, but of course cannot omit or vary by partial deletion the public standards set down in awards. They may only add to those standards in a way which increases the benefit to the employee. Whilst awards continue to lay down minimum standards which are close to actual market rates, the scope for flexibility in this "over-award" form of instrumentation is restricted.[80] Anecdotal evidence suggest that a second possibility, award non-compliance, is already a significant avenue of "flexibility" employed widely in the small business sector. However, such business conduct is illegal, and is therefore a risky (though not unknown) strategy in the larger enterprise sector, where inspection and enforcement is at least something of a possibility.

Conclusion

It is difficult to be definite about the present state of Australian labour law, whether judged by standards of flexibility, deregulation or juridification. Certainly it can be said that an assault has been made on the position of trade unions in labour market regulation, and perhaps also, but less transparently, on the Australian Industrial Relations Commission. Furthermore the position is not politically static, and there is a strong likelihood that further inroads will be made in the government's next period of office assuming it is re-elected. But it is difficult to draw the conclusion that Australia is responding to the pressures for greater flexibility in employment relations through a process of "dejuridification" or "deregulation". The Workplace Relations Act undoubtedly challenges uniform award regulation (and other public industrial standards) and empowers the individual parties as never before in the Federal system, but only against a background of complex substantive and procedural legal norms.

On the other hand perhaps it is possible to utilise another conceptual category, and to describe Australian labour law as in a process of "*re*juridification", meaning that it employs more law, or different law, to bring about flexibilisation.[81] In the early 1990s Mitchell and Rimmer identified the award restructuring process as a means of adapting the Australian labour law system from within.[82] In this portrayal it had certain common features with the process described by Deakin as underway in Europe as a response to the difficulties of juridification.[83] In each of these instances, flexibility was pursued without the attack on labour law institutions and fundamental norms which characterised deregulation in some other countries. Nevertheless, it might be problematic to describe the Workplace Relations Act even in terms of "*re*juridification". In the end it must accepted that it is not merely the existence of legal norms which gives descriptive force to a system, but also their relevance in application. If this were not the case, the American system of collective bargaining would appear as a highly juridified model still, rather than the relatively dejuridified (and

deregulated) system that it surely now is.[84] For reasons advanced above, aside from one or two clear issues,[85] it is not possible to be confident that the Workplace Relations Act will give rise to anything more than inconsequential change in the level of regulatory saturation in labour law, or in the degree to which the parties to employment relationships will be reinvested with determining power over them. In the final analysis the Workplace Relations Act may constitute no more than a further instance in the process of juridification.

Notes

1. See Teubner (1987).

2. Simitis (1985:93).

3. See, for example, Clark (1985); Giugni (1985); Muckenberger (1988); Clark, Wedderburn (1987). The issue seems to be of continuing significance, see Meenan (1997).

4. See for example Daintith (1988).

5. Simitis (1985:112-113).

6. The Workplace Relations Bill was referred to a Senate Economics References Committee following its passage through the lower house and its presentation to the Senate on the 27th June 1996. That Committee reported in August of the same year recommending (by majority) a number of changes to the legislation. Many of these were given effect through negotiation in the Senate between the government and the major party holding the balance of power in that chamber (the Australian Democrats).

7. These and similar expressions are common to the discourse on deregulation and flexibility see, for example, Giugni (1987:199). They are adopted in this paper as suited to the discussion.

8. In practice industrial disputes were settled in the tribunals, and rarely by recourse to law in the civil courts. This practice began to break down only when the pressure for over-award wages began to threaten the control of the industrial tribunals in the post-war boom (and really from the mid-1960s onwards).

9. The Federal industrial tribunal system probably never covered as many as 50 per cent of all workers under industrial awards. However by the 1920s the Federal tribunal (then the Court of Conciliation and Arbitration) had established itself as the leader, and its movements in industrial standards tended to be followed by State tribunals. By constitutional law, Commonwealth laws and the awards and orders of Federal tribunals, had paramountcy to the extent of any inconsistency (Australian Constitution, section 109).

10. This was not the case in two of the six State systems, but in practice the unions were privileged clients within those systems also.

11. In the Federal and some State systems, statutory provisions existed which restricted the registration of unions which might operate in the same trade, industry, or set of occupations as existing registered unions.

12. For an account of the political, industrial and legal contexts at the time of the formation of the system see Macintyre and Mitchell (1989).

13. These were defined as the subjects of "industrial disputes" and "industrial matters" in the legislation. In general these tended to be far -reaching by definition, but tended also to be read down by appeal courts so as to protect managerial prerogative. For a discussion of the details of this see Creighton, Ford and Mitchell, (1993), particularly chapters 17 and 18.

14. Simitis (1985:103 and 107).

15. The Conciliation and Arbitration Act.

16. See the CCH *Australian Industrial Relations Act 1988*, 3rd ed, CCH Australia Ltd., North Ryde, 1996.

17. A leading example being the Metal Trades Industry Award from which much of the comparative wage "flow-on" commenced in industry generally

18. See Creighton, Ford and Mitchell (1993: 522-564).

19. As explained briefly above (n.9) the Federal tribunal set the standard in this distributive process.

20. For example, award wages were reduced by around 10 per cent in the depression years of the early 1930s, and in the period of the 1950s and 1960s the determining policy of the tribunal was the control of inflation.

21. This gave rise to complex legal difficulties as to the extent of the employer's power to control work effort when the award and the contract of employment overlapped, see Creighton, Ford and Mitchell (1993: 164-180).

22. In the period of the 1980s the centralised powers were able to be used to effect a redistribution away from wages to profits and to the social wage.

23. See, for example, Mitchell (1983); Mitchell (1985)

24. *National Wage Case, March 1987* (1987) 17 I.R. 65.

25. *National Wage Case, August 1988* (1988) 25 I.R. 170.

26. For an account of this legislation see McCallum (1993); Naughton (1994).

27. Mitchell and Rimmer (1990).

28. The New Zealand system was a forerunner of the Australian systems, first introduced in the Industrial Conciliation and Arbitration Act 1894.

29. Introduced in the Factories and Shops Act 1896.

30. Section 3 (a). The word "fair" was added as a Senate intervention.

31. See section 3 (b).

32. See section 3 (f) and Part XA of the Act.

33. See section 94, and section 127AA and Part IX Division 11A.

34. On the most reliable figures trade union density was almost 50 per cent in 1982. By 1990 this had declined to about 40.5 per cent. The 1996 figure was 35 per cent.

35. Ford (1997: 1).

36. See n. 7.

37. Section 89.

38. Section 111AAA.

39. Section 170VPB(3).

40. Section 170CE(1).

41. The Workplace Relations and Other Legislation Amendment Bill 1996, first introduced into the House of Representatives on 23rd May 1996.

42. See the present section 89A (2) and section 89A (6). Existing awards will have to be modified to accommodate the limited allowable matters within a period of 18 months of the commencement of section 89A (i.e. by 30th June 1998). Otherwise the non-allowable matters cease to operate at that date of expiry; see the Transitional Provisions to the Act, Schedule 5 Part 2.

43. Ford (1997: 11).

44. The section 89A allowable award matters are (a) classifications of employees *and skill -based career paths* ; (b) ordinary time hours of work and the times within which they are performed, *rest breaks, notice periods and variations to working hours*; (c) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system; (d) piece rates, tallies and bonuses; (e) annual leave and leave loadings; (f) long service leave; (g) personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, *cultural leave* and other like forms of leave; (h) parental leave, including maternity and adoption leave; (i) public holidays; (j) allowances; (k) loadings for working overtime or for casual or shift work; (l) penalty rates; (m) redundancy pay; (n) notice of termination; (o) stand-down provisions; (p) dispute settling procedures; (q) jury service; (r) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; (s) *superannuation*; (t) *pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises*. The words in italics were added to the allowable matters as a result of changes made to the Bill in the Senate.

45. Section 89A(7).

46. See section 89A(4). Even in respect of part-time employees, however, some regulation is permitted. An award may contain provisions setting minimum consecutive hours and a regular pattern in the hours of regular part-time employees: see s. 89A(5).

47. See the example utilised by Pittard (1997: 69-70).

48. See, for example, sections 170LX, 170LY, 170LZ, 170VQ and 170VR.

49. See Part VID Division 8 and Part VIB Division 8.

50. Gladstone (1997).

51. It is clear that "collectivism" is a characteristic of juridification, see Simitis (1987: 103 and 105).

52. Simitis (1987: 104).

53. Section 170VC.

54. Section 152.

55. Section 170VF.

56. Section 170VG.

57. Section 170VK(1) and (5).

58. Section 170 VK(2) and (3).

59. See section 83BB(1).

60. For example notice must be given (section 170WD), and the protection doesn't apply to certain injuries (section 170WC(1) and (2)).

61. Section 170VN(3).

62. Section 170VO(1).

63. Section 170VO(2).

64. Section 170VO(1).

65. Section 170VN(2).

66. Section170VPB.

67. Section 170VPA(1).

68. Section 170XA(1).

69. If there is no award applying to the employment of the employee, the certifying body must "designate" an appropriate award against which the employment terms of the relevant employee may be measured - section 170XE.

70. Section 170XA.

71. Section 170VR(2).

72. *Report of the Economics References Committee*, August 1996, Executive Summary and Chapter 4, paras. 4.279-4.283.

73. Section 170 VPG (4).

74. Note to section 170VPG(4).

75. See sections 170WHD and 170WHA.

76. For example, McCallum (1997: 59-61).

77. See *The Australian Financial Review*, December 30th 1997, pp. 4-5.

78. See for one example, O'Donnell and Pragnell (1997).

79. For details on the Victorian changes of 1992 see Naughton (1993), Creighton (1993).

80. Note, though, that the longer term strategy is to reduce awards to base minima rather than close to actual rates and conditions.

81. Gladstone (1997: 2 and 20).

82. Mitchell and Rimmer (1990).

83. Deakin (1991).

84. Simitis's discussion of juridification ignores this aspect of U.S. labour law. His thesis was constructed in the early 1980's and draws upon much earlier accounts of the importance of the U.S. legal and institutional apparatus in labour relations, see, for example, the works cited in Simitis (1987: footnote 45).

85. The removal of certain trade union rights, and the diminution of award coverage over certain types of employment, must be counted as significant.

Bibliography

Clark J. (1985) 'The Juridification of Labour Relations:A Review Article' *Industrial Law Journal*, 14: 69-90.

Clark, J. and Wedderburn, Lord (1987) 'Juridification - A Universal Trend?', in Teubner (ed.) (1987).

Creighton, B. (1993) 'Employment Agreements and Conditions of Employment Under the Employee Relations Act 1992 (Vic.)' *Australian Journal of Labour Law*, 6: 140-158.

Creighton, B., Ford, W. and Mitchell, R. (1993) *Labour Law: Text and Materials* (Sydney: Law Book Co.).

Daintith, T. (1988) *Law as an Instrument of Economic Policy: Comparative and Critical Approaches* (Berlin: de Gruyter).

Deakin, S. (1991) 'Legal Change and Labour Market Restructuring in Western Europe and the US' *New Zealand Journal of Industrial Relations*, 16: 109-125.

Ford, W. (1997) 'Reconstructing Australian Labour Law: A Constitutional Perspective' *Australian Journal of Labour Law*, 10: 1-30.

Giugni, G. (1985) 'Juridification of Italian Labor Relations' *Comparative Labor Law Journal*, 8: 309-32.

Giugni, G. (1987) 'Juridification: Labour Relations in Italy', in Teubner (ed.) (1987).

Gladstone, A. (1997) 'Legal Perspectives: the Juridification of the Employment Relationship', in Meenan (ed.) (1997).

Macintyre, S. and Mitchell, R. (eds.) (1989) *Foundations of Arbritration* (Melbourne: OUP).

McCallum, R. (1993) 'Enhancing Federal Enteprise Bargaining: The Industrial Relations Reform Act' *Australian Journal of Labour Law*, 6: 63-68.

McCallum, R. (1997) 'Australian Workplace Agreements: An Analysis' *Australian Journal of Labour Law*, 7: 147-169.

Meenan, F. (ed.) (1997) *Legal Perspectives - The Juridification of the Employment Relationship.* Vol. 5 of the Official Proceedings of the 5th IIRA European Regional Industrial Relations Congress (Dublin: Oak Tree Press).

Mitchell, R. (1983) 'The Development of Federal Labour Law Policy Under the Coalition Government: Some Comments on the 1982 Bill.' Industrial Relations Paper, Law and Politics of Industrial Relations Programme, Australian National University, Canberra.

Mitchell, R. (1985) 'Liberal and Labor Governments and Labour Legislation: Is There a Trend to Direct Intervention?', in Sutcliffe, P. and Ralston, D. (eds.) *Trends in Australasian Industrial Relations* Proceedings of the 1985 Conference of the Assocation of Industrial Relations Academics of Australia and New Zealand.

Mitchell, R. and Rimmer, M. (1990) 'Labour Law, Deregulation and Flexibility in Australian Industrial Relations' *Comparative Labour Law Journal*, 12: 1-34.

Mückenberger, U. (1988) 'Juridification of Industrial Relations: A German/British Comparison' *Comparative Labor Law Journal*, 9: 526-56.

Naughton, R. (1993) 'The New Bargaining Régime Under the Industrial Relations Reform Act' *Australian Journal of Labour Law*, 6: 121-139.

O'Donnell, M. and Pragnell, B. (1997) 'A Failed Australian Experiment? Enterrpise Bargaining under the New South Wales Industrial Relations Act 1991', in Meenan (ed.) (1997).

Pittard, M. (1997) 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' *Australian Journal of Labour Law*, 10: 62-88.

Simitis, S. (1986) 'Juridification of Industrial Relations' *Comparative Labor Law Journal*, 7: 93-142.

Teubner, G. (ed.) (1987) *Juridification of Social Spheres* (Berlin: de Gruyter).

Statutes

Factories and Shops Act 1896 (Victoria)
Industrial Conciliation and Arbitration Act 1894 (New Zealand)
Commonwealth of Australia Constitution Act 1901
Conciliation and Arbitration Act 1904 (Commonwealth)

Cases

National Wage Case, March 1987 (1987) 17 I.R. 65
National Wage Case, August 1988 (1988) 25 I.R. 170.