

# The Framework of Australian Labour Law and Recent Trends in 'Deregulation'

**Joo-Cheong Tham**

Associate Lecturer, La Trobe University

## I. INTRODUCTION

For most of the twentieth century, the Australian labour law framework centred on the compulsory conciliation and arbitration system. At the heart of this system was an independent industrial tribunal which possessed compulsory powers over industrial disputes including the power to issue binding determinations described as awards. Two other fundamental characteristics of this system were the integration of trade unions into the system and severe restrictions on industrial action.<sup>1</sup>

Amid the economic difficulties of the 1980s, a strong coalition of political forces emerged advocating, in various ways, the 'deregulation' of Australian labour law.<sup>2</sup> Under the auspices of the Australian Labor Party federal government ('ALP government'), such pressure bore fruit with a significant reduction of the role of the compulsory conciliation and arbitration system. In 1996, the Liberal-National Party Coalition federal government ('the Coalition government') was elected to office proposing further 'deregulation' of Australian labour law.

This paper has two key aims. First, it sets out the present framework of Australian labour law. Moreover, it canvasses recent trends in the 'deregulation' of Australian labour law.

## II. FRAMEWORK OF AUSTRALIAN LABOUR LAW

The framework of Australian labour law comprises:

- the constitutional context;
- the federal award system;
- statutory agreements;
- legislative minimum conditions; and
- common law contracts of employment.

These various sources of labour regulation will be discussed in turn.

### A. Constitutional context

In Australia, the provisions of the federal Constitution do not directly prescribe working conditions. Being primarily concerned with a division of legislative powers between the federal and State Parliaments, the Constitution's importance in the realm of labour regulation is in providing the federal Parliament with the power to make laws relating to labour conditions.

Even then, only one of the heads of power is explicitly concerned with labour regulation, namely, the power to provide for '(c)onciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.'<sup>3</sup> Far from being a general power to regulate labour conditions, this power is confined in significant respects. Its use must involve a particular process, conciliation and arbitration. Moreover, this process must be

---

<sup>1</sup> Richard Mitchell, 'Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia' (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 113, 116.

<sup>2</sup> Australian Centre for Industrial Relations Research and Training ('ACIRRT'), *Australia at Work: Just Managing?* (1999) Chapter 2.

<sup>3</sup> *Commonwealth of Australia Constitution Act 1900* s 51(35). For a review of the power and the federal award system, see Breen Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24(3) *Melbourne University Law Review* 839-865.

It should be noted that section 117 of the Constitution prohibits discrimination on the basis of a citizen's residence in a particular State. This provision has had the effect of invalidating State occupational requirements which discriminated against out-of-State Australian citizens, see *Street v Queensland Bar Association* (1989) 168 CLR 461.

animated by a specific purpose, that is, the prevention and settlement of inter-state disputes.

Despite these confines, the conciliation and arbitration power is of historic significance. Its significance lies in the use of this power to support one of the mainstays of Australian labour regulation, the federal conciliation and arbitration system, more commonly known as the federal award system. At its height, the federal award system covered nearly a third of the Australian workforce.<sup>4</sup> More importantly, this system, in exercising a deep influence on state award systems, functioned as a pacesetter for Australian labour regulation. Against this background, it is not surprising that one commentator has characterised the conciliation and arbitration power as the Constitution's promise of industrial citizenship.<sup>5</sup>

While the conciliation and arbitration power is the only head of power which is explicitly concerned with labour regulation, other heads of power have been relied upon in enacting industrial statutes. In particular, the constitutional powers to legislate with respect to '(f)oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'<sup>6</sup> ('corporations power') and with respect to '(e)xternal affairs' ('external affairs power') have become increasingly prominent.<sup>7</sup> The corporations power, for example, is the constitutional basis for two streams of agreements provided under the *Workplace Relations Act 1996* (Cth) ('*Workplace Relations Act*'), the principal federal industrial statute.<sup>8</sup> Meanwhile the external affairs power has been used primarily to enact international labour standards into domestic law. A key instance of such use is the implementation of the International Labour Organisation's Family Responsibilities Convention through the enactment of a statutory scheme of unpaid parental leave.<sup>9</sup>

## B. Federal award system

The federal award system is presided over by an independent tribunal, the Australian Industrial Relations Commission ('AIRC').<sup>10</sup> In essence, the AIRC conciliates and arbitrates industrial disputes within its jurisdiction. Such jurisdiction is defined by both constitutional and statutory provisions. For instance, the AIRC is empowered to act only with respect to 'industrial disputes'. The statutory definition of this phrase, while incorporating the constitutional limitations, further restricts it to disputes about 'matters pertaining to the relationship between employers and employees.'<sup>11</sup> In other words, the AIRC's jurisdiction is limited to persons in employment relationships.

Once the AIRC's jurisdiction is invoked, typically by virtue of the existence or possibility of an 'industrial dispute,' the AIRC is obliged to settle such disputes.<sup>12</sup> It initially attempts to do so through conciliation.<sup>13</sup> If unsuccessful, it then proceeds to arbitration.<sup>14</sup>

The order made by the AIRC upon the completion of arbitration is known as an award. After being made, an award binds the parties to the industrial dispute with the force of subordinate

---

<sup>4</sup> W. B. Creighton, W. J. Ford and R. J. Mitchell, *Labour Law: Text and Materials* (1993, 2nd ed) 698.

<sup>5</sup> Ronald McCallum, 'Collective Labour Law, Citizenship and the Future' (1998) 22(1) *Melbourne University Law Review* 42, 58.

<sup>6</sup> *Commonwealth of Australia Constitution Act 1900* s 51(20)

<sup>7</sup> *Commonwealth of Australia Constitution Act 1900* s 51(29).

<sup>8</sup> See generally Andrew Stewart, 'Federal Labour Law and New Uses for the Corporations Power' (2001) 14(2) *Australian Journal of Labour Law* 145-168.

<sup>9</sup> *Workplace Relations Act* s 170KA and Schedule 14.

<sup>10</sup> For further discussion on the compulsory conciliation and arbitration system as contained in the *Workplace Relations Act*, see Marilyn Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62, 65-79.

<sup>11</sup> *Workplace Relations Act* s 4. There is a strong argument that Section 51(35) of the Australian Constitution allows the AIRC to conciliate and arbitrate with respect to disputes between employers and non-employees, for instance, between employers and independent contractors: Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (2000, 3rd ed) 80.

<sup>12</sup> *Workplace Relations Act* s 89.

<sup>13</sup> *Ibid* ss 100 & 102.

<sup>14</sup> *Ibid* s 104.

legislation.<sup>15</sup> The effect of this is that the award will operate as a floor of minimum employment conditions as between the parties, typically the employer/s and the trade union/s. So, for example, if an employer contracts to hire a worker at a wage lower than the award rate, this contractual provision will be void because of illegality<sup>16</sup> and the worker will have recourse to statutory avenues to recover award wages.<sup>17</sup> As a floor, a federal award does not generally prevent the making of contracts providing for conditions superior to those contained in such awards or those dealing with matters not covered by the award.<sup>18</sup>

It should be noted that the *Workplace Relations Act* imposes restrictions upon the matters that can be included in an award.<sup>19</sup> Generally, the subject matter of an award is restricted to twenty allowable award matters. These include rates of pay and leave entitlements.<sup>20</sup> Moreover, the AIRC must exercise its award-making power so that awards act as a 'safety net of fair minimum wages and conditions of employment.'<sup>21</sup>

Notwithstanding these content-restrictions, a typical award will still cover a wide range of employment conditions. For example, a key federal award, the Hospitality Industry award contains clauses dealing with classifications and wage rates, hours of work, leave entitlements and procedures to avoid industrial dispute.<sup>22</sup>

Apart from these content-restrictions, the AIRC's power to make awards is subject to further limitations. Importantly, when parties are engaged in formal negotiations for an enterprise agreement under the Act, the AIRC, while able to employ its conciliation powers, is precluded from arbitrating on matters at issue.<sup>23</sup>

Despite the various restrictions that presently apply to the federal award system, awards still remain an important source of labour regulation with 20.5% of the Australian workforce having the main part of their pay set by an award.<sup>24</sup>

### C. Statutory agreements

The various restrictions on the AIRC's award-making powers were deliberately imposed to encourage regulation by statutory agreements.<sup>25</sup> There are three types of such agreements: enterprise agreements preventing or settling industrial disputes ('industrial dispute' enterprise agreements); enterprise agreements involving corporations<sup>26</sup> ('corporations' enterprise agreements') and statutory individual agreements known as Australian Workplace Agreements ('AWAs').<sup>27</sup>

These agreements can only be made in specific circumstances. These circumstances, firstly, reflect the constitutional bases of these agreements. The making of 'industrial dispute' enterprise agreements, as its name suggests, is contingent on the existence of an 'industrial

---

<sup>15</sup> Ibid s 149.

<sup>16</sup> *Kilminster v Sun Newspapers Ltd* (1931) 45 CLR 284.

<sup>17</sup> *Workplace Relations Act* s 179.

<sup>18</sup> This is unless the award states that no further agreements should be made.

<sup>19</sup> Previously, the restrictions on the subject matter of an award were largely constitutional, see Creighton *et al*, above n 4, Chapters 14-8.

<sup>20</sup> *Workplace Relations Act* s 89A. It should be noted that the Act makes provision for the AIRC to include non-allowable award matters in 'exceptional matters' awards: *ibid* s 89A(7).

<sup>21</sup> This is the combined effect of ss 3(d)(ii), 88A(b) & 88B(1) of the *Workplace Relations Act*.

<sup>22</sup> Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998 [AW783479].

<sup>23</sup> *Workplace Relations Act* s 170N. Curiously, there is no equivalent prohibition with respect to formal negotiations for an AWA.

<sup>24</sup> Australian Bureau of Statistics, *Employee Earnings and Hours, Australia* (Cat. No. 6306.0, March 2003). It should be noted that this figure does not distinguish between state and federal awards.

<sup>25</sup> See *Workplace Relations Act* s 3(d)(i).

<sup>26</sup> Enterprise agreements are described as certified agreements in the Act.

<sup>27</sup> While AWAs can be collectively negotiated (s 170VE of the *Workplace Relations Act*), they are designed to be, and in reality are, individually completed. For a brief discussion of employers' choices of agreements under the Act, see Ron McCallum, 'Individuals and Agreement-Making: The Legal Options' in Australian Centre for Industrial Relations Research and Training (ACIRRT), *New Rights and Remedies for Individual Employees: Implications for Employers and Unions: 5th Annual Labour Law Conference Proceedings* (1997) 3, 6-7.

dispute.<sup>28</sup> On the other hand, the making of ‘corporations’ enterprise agreements and AWAs largely<sup>29</sup> depend on the employer being a constitutional corporation.<sup>30</sup>

These agreements also differ on the level of the agreement and the necessity for trade union involvement. The first-two mentioned agreements are pitched at the enterprise level<sup>31</sup> whereas AWAs exist at the level of an individual employee. It is only enterprise agreements settling industrial disputes which require trade union involvement. The other agreements allow but do not necessitate such involvement.

Some general observations can be made about these agreements. They are confined to employers and employees. Moreover, the *Workplace Relations Act* formalises the process of negotiating such agreements by laying down the required procedures for employees’ approval of the agreements<sup>32</sup> and providing limited protection for industrial action including lock-outs.<sup>33</sup>

The completion of an agreement by the parties does not immediately result in the agreement taking effect.<sup>34</sup> That occurs only when the agreement is certified or approved.<sup>35</sup> The central requirement for certification and approval is the ‘no- disadvantage’ test. This test is passed if the agreement does not, on the whole, compare unfavourably with the terms and conditions of the relevant award.<sup>36</sup> It is important to note that this test does *not* protect employees from statutory agreements which are less favourable than their *existing* conditions which could be governed by common law contracts, collective agreements *as well as* awards.

The body which certifies enterprise agreements is the AIRC<sup>37</sup> whereas the primary body in the approval of AWAs is the Employment Advocate. When the Employment Advocate has concerns whether the no-disadvantage test is satisfied by a proposed AWA, he or she is required to refer the proposed AWA to the AIRC for approval.<sup>38</sup>

Once certified or approved, all the agreements will prevail over any award to the extent of any inconsistency.<sup>39</sup> Generally, an AWA prevails over any enterprise agreement which is made after the making of the AWA.<sup>40</sup> In other respects, these agreements have the force of awards.<sup>41</sup>

These agreements vary in terms of their importance as sources of labour regulation. AWAs

---

<sup>28</sup> *Workplace Relations Act* ss 170LN-LP. This requirement is to bring the agreements within Section 51(35) of the Australian Constitution.

<sup>29</sup> The *Workplace Relations Act* does rely upon other constitutional head of powers with respect to enterprise agreements involving corporations and AWAs, for instance, the head of power found in Section 51(1) with respect to ‘(t)rade and commerce with other countries, and among the States’. This is reflected in section 170VC(d)-(f) (AWAs).

<sup>30</sup> *Workplace Relations Act* s 170LI (enterprise agreements involving corporations) and s 170VC (AWAs). This brings the making of such agreements within the scope of Section 51(20) of the Commonwealth Constitution, the corporations power. Strictly speaking, Section 51(20) of the Commonwealth Constitution does not confer power on the Commonwealth legislature to regulate all corporations. It is only power with respect to ‘trading, financial and foreign corporations,’ see further W J Ford, ‘Reconstructing Australian Labour Law: A Constitutional Perspective’ (1997) 10(1) *Australian Journal of Labour Law* 20-30.

<sup>31</sup> See *Workplace Relations Act* s 170LI (enterprise agreements involving corporations); s 170LO (‘industrial dispute’ enterprise agreements) and s 170VF (AWAs) of the Act.

<sup>32</sup> Such procedures are most relevant to ‘industrial dispute’ enterprise agreements (ibid s 170LR) and enterprise agreements involving corporations (ibid s 170LJ-LK).

<sup>33</sup> See Division 8 of Part VIB (enterprise agreements) and Division of Part VID (AWAs) of the Act.

<sup>34</sup> For enterprise agreements, agreement by a valid majority of the employees to be covered by the agreement is sufficient to represent agreement on the employees’ side (ibid ss 170LJ(2); 170LK(1) & 170LR(1)). A ‘valid majority’ is usually a majority of the employees who cast a vote in the poll deciding whether to support a proposed enterprise agreement (ibid s 170LE).

<sup>35</sup> For a discussion of the certification process of these agreements, see Marilyn Pittard, ‘Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements’ (1997) 10 *Australian Journal of Labour Law* 62, 83-4 and Richard Naughton, ‘New Approaches in the Vetting of Agreements’ in ACIRRT, above n 27, 18-23.

<sup>36</sup> *Workplace Relations Act* s 170XA.

<sup>37</sup> Ibid ss 170LT-LW.

<sup>38</sup> Ibid s 170VPB.

<sup>39</sup> Ibid s 170LY (enterprise agreements) and § 170VQ(1) (AWAs).

<sup>40</sup> Ibid s 170VQ(6).

<sup>41</sup> *Workplace Relations Act* ss 170M-MA (enterprise agreements) and 170VT(1) (AWAs).

are relatively unimportant with only 1.4% of all employees are covered by AWAs.<sup>42</sup> 36.1% of the Australian workforce, however, have the main part of their pay set by registered collective agreements.<sup>43</sup>

#### D. Legislative minimum conditions

Unlike federal awards, legislative minimum conditions are generally non-derogable with no provision for either an employer or a worker to contract or opt out of such regulation. The relative strictness of such regulation is due in no small part to the fact that federal labour legislation is sparse in terms of minimum working conditions.

This is apparent from a brief survey of the provisions of the *Workplace Relations Act*. The key minimum conditions under this Act are:

- entitlement to unpaid parental leave;
- protection against unfair and unlawful dismissals; and
- provisions promoting freedom of association.

Under this Act, workers are entitled to 12 months of unpaid parental leave if they meet various conditions of eligibility. There are two key conditions. First, a worker must be an employee who is neither a casual nor seasonal employee. Second, the worker must have had 12 months' of continuous service with her or his employer.<sup>44</sup>

The Act also provides for some protection with respect to termination of employment at the initiative of the employer.<sup>45</sup> Such protection can be broadly divided into two categories: the right to remedies in relation to unfair dismissals and, secondly, unlawful dismissals.<sup>46</sup>

With respect to the former, the Act generally confers rights on certain categories of employees to apply to the AIRC and/or a court for compensation and other orders<sup>47</sup> on the ground that his or her termination of employment was 'harsh, unjust or unreasonable.'<sup>48</sup>

The unlawful dismissal provisions differ in form from those relating to unfair dismissals in that they are cast in terms of prohibitions; infringement of which would give rise to unlawfulness as well as remedies on the part of the aggrieved party. The most significant of these statutory provisions is that proscribing an employer from terminating the employment of an employee for a prohibited reason.<sup>49</sup> Prohibited reasons include the employee's trade union membership, race, sex, sexual preference and disability.<sup>50</sup> Another proscription prevents an employer from terminating the employment of an employee in breach of AIRC orders which give effect to Articles 12 and 13 of the Termination of Employment Convention.<sup>51</sup>

Not all employees have a right to seek a remedy in relation to unfair and unlawful

---

<sup>42</sup> Mark Wooden, *Industrial Relations Reform in Australia: Causes, Consequences and Prospects*, Inaugural Lecture, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, 14 August 2000 as cited in Anthony Forsyth, *Re-regulatory Tendencies in Australian and New Zealand Labour Law* (2001) 7.

<sup>43</sup> Australian Bureau of Statistics, *Employee Earnings and Hours, Australia* (Cat. No. 6306.0, March 2003). It should be noted that this figure does not distinguish between registered collective agreements made under federal or state statutes.

<sup>44</sup> *Workplace Relations Act* Schedule 14.

<sup>45</sup> While the Act typically uses the phrase 'termination of employment,' it is defined to mean termination of employment at the initiative of the employer: *ibid* s 170CD(1). This has been held to occur when an employer's action results directly or consequentially in the termination of employment: *Pawel v. AIRC* (1999) 94 FCR 231, 237-8 (adopting *Mohazab v. Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 with respect to the *Workplace Relations Act*. For a discussion of these entitlements, see Anna Chapman, 'Termination of Employment Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 89 and Creighton and Stewart, above n 9, 313-20, 324-29.

<sup>46</sup> For use of a similar distinction between harsh, unjust or unreasonable dismissals and unlawful terminations, see Chapman, above n 45, 91.

<sup>47</sup> The regime governing the enforcement of these rights is complex and will not be discussed in this article. For discussions of this issue, see *ibid* 104-11.

<sup>48</sup> *Workplace Relations Act* Subdivision B, Division 3 of Part VIA.

<sup>49</sup> *Ibid* Subdivision C, Division 3 of Part VIA.

<sup>50</sup> *Ibid* s 170CK(2).

<sup>51</sup> *Ibid* s 170CN.

dismissals.<sup>52</sup> Moreover, access to the unfair and unlawful dismissal provisions differ. Subject to restrictions imposed by regulations discussed below, the classes of employees which can access unfair dismissal provisions are limited to:

- Commonwealth public sector employees;
- Territory employees;
- employees employed by constitutional corporations;<sup>53</sup>
- employees who are engaged in interstate transport industries and are covered by an award, enterprise agreement or AWA; and
- employees who have applied to the AIRC with respect to unlawful terminations.<sup>54</sup>

In contrast with the provisions relating to unfair dismissals, all employees have access to the unlawful dismissal provisions.<sup>55</sup> This again is subject to restrictions on access imposed by regulations.

The *Workplace Relations Regulations*<sup>56</sup> exclude certain classes of employees from accessing both the unfair and unlawful dismissal provisions. The excluded classes include employees:

- engaged on fixed-term contracts;<sup>57</sup>
- engaged on task-based contracts;
- engaged on a casual basis for a short period;<sup>58</sup> as well as
- not covered by an award, enterprise agreement or AWA whose remuneration is more than \$71,200 per year.<sup>59</sup>

The third set of minimum conditions provided by the *Workplace Relations Act* is contained in Part XA which is headed 'Freedom of Association.'<sup>60</sup> This Part essentially makes it an offence for employers, employees and trades unions to engage in various conduct, described as 'prohibited conduct,' for 'prohibited reasons.' For instance, it is an offence for employers to refuse to employ or otherwise prejudice workers, whether they be employees or independent contractors, on the ground of them failing to be members of a trade union.<sup>61</sup> This Part also makes it illegal for an employer to induce employees or independent contractors to cease being officers or members of a trade union.<sup>62</sup>

Apart from the minimum working conditions prescribed by the *Workplace Relations Act*, the other set of legislative minimum conditions worthy of mention are those contained in federal anti-discrimination statutes.<sup>63</sup> These statutes apply generally to both employees and independent

---

<sup>52</sup> The unfair and unlawful dismissal provisions are confined to the termination of employment of an 'employee.' It is usually believed that the meaning of 'employee' in this context is identical to the common law meaning of 'employee,' see, for instance, Creighton and Stewart, above n 11, 313-8. The Full Federal Court has, however, recently interpreted the term 'employee' in equivalent provisions of the *Industrial Relations Act 1988* (Cth) as being broader than the common law meaning of the term: *Konrad v Victoria Police* (1999) 165 ALR 23, 51-2 per Finkelstein J (with whom Ryan and North JJ agreed on this point).

<sup>53</sup> The restriction of coverage to those employed by corporations results from the use of the corporations power, s 51(20) of the Australian Constitution, to support the unfair dismissal provisions. For a detailed discussion of this issue, see Ford, above n 30, 24.

<sup>54</sup> *Workplace Relations Act* ss 170CB(1), (2).

<sup>55</sup> *Ibid* s 170CB(3).

<sup>56</sup> *Ibid* s 170CC.

<sup>57</sup> See, generally, Russell Blackford, 'Unfair Dismissal Law and the Termination of Contracts for Specified Periods' (1999) 12 *Australian Journal of Labour Law* 217.

<sup>58</sup> *Workplace Relations Regulations* (Cth) reg 30B. This regulation also defines being engaged 'for a short period.'

<sup>59</sup> This figure applies only in relation to the 2000/2001 financial year. The applicable figure is adjusted annually according to changes in average weekly earnings: *ibid* regs 30BB & 30BF.

<sup>60</sup> See generally Richard Naughton, 'Sailing into Uncharted Seas: The Role of Unions Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 112.

<sup>61</sup> *Workplace Relations Act* s 298K(1).

<sup>62</sup> *Ibid* s 298M.

<sup>63</sup> *Racial Discrimination Act 1975* (Cth) (covers race, colour, descent, national or ethnic origin); *Sex Discrimination Act 1984* (Cth) (covers sex, marital status, pregnancy or potential pregnancy, dismissal on the ground of family responsibilities); *Human Rights and Equal Opportunity Commission 1986* (Cth) (provides for conciliation in relation to a list of grounds: age, medical record, criminal record, impairment and disability, marital status, nationality, sexual preference, trade union activity); *Disability Discrimination Act 1992* (Cth) (covers disability).

contractors.<sup>64</sup> The grounds covered under the different statutory schemes include race, ethnicity, national origin, sex, marital status, family responsibilities, disability, sexual preference, age and trade union activity. The concept of discrimination is defined in the Australian legislation as including a concept of direct discrimination (disparate treatment) and indirect discrimination (disparate impact).<sup>65</sup>

These statutes contain a number of exemptions to the prohibition on direct and indirect discrimination. Where an exemption is applicable, it takes effect to exonerate otherwise unlawful discriminatory behaviour. The range and scope of exemptions differs from Act to Act. The provisions containing exemptions are numerous and include:

- unjustifiable hardship in relation to claims of discrimination on the ground of disability;
- steps taken in order to comply with other legislation; and
- the religious practices of religious bodies.<sup>66</sup>

In addition to the provisions relating to direct and indirect discrimination, the *Sex Discrimination Act 1984* (Cth) prohibits sexual harassment in workplaces. Sexual harassment is defined in the legislation in terms of an unwelcome sexual advance or request for sexual favours, or other unwelcome conduct of a sexual nature, that a reasonable person would anticipate, in those circumstances, would offend, humiliate or intimidate the person harassed.<sup>67</sup> The exemptions noted in the previous paragraphs are not applicable in relation to issues of sexual harassment in workplaces.

## **E. Common law contracts of employment**

These contracts are a long-standing type of individual agreements that were not displaced by the federal award system. Indeed, it formed the ‘cornerstone of the system.’<sup>68</sup> It was so in two ways. The contract of employment ‘triggered’ the system.<sup>69</sup> Put simply, such a contract was required before the award system and other sources of labour regulation came into play.<sup>70</sup>

More important for this paper is the second way in which these contracts figured in Australian labour regulation. They determined working conditions through their terms. Such terms can be expressly agreed upon by the parties. Importantly, these contracts also contained standardised terms implied by the courts. Some of these terms confer significant power on the employer. For instance, every employee is under an implied duty to obey the lawful and reasonable orders of his or her employer.<sup>71</sup> Others impose obligations on the employer like the duty of an employer to exercise reasonable care in providing a safe working environment.<sup>72</sup>

---

<sup>64</sup> The definitions of employment in most of the statutes are defined to include a ‘contract for services.’ This phrase means a non-employee type relationship. See, for example, *Racial Discrimination Act 1975* (Cth) s 3(2) definition of employment; *Sex Discrimination Act 1984* (Cth) s 4(1) definition of employment; *Human Rights and Equal Opportunity Commission Act 1986* (Cth) 3(1) definition of discrimination; *Disability Discrimination Act 1992* (Cth) s 4(1) definition of employment.

<sup>65</sup> Direct discrimination is based on a model of equality that aims for equal (same) treatment. Direct discrimination is defined to mean less favourable treatment on the grounds of an attribute. Indirect discrimination arises where a requirement, practice or policy that exists in a workplace has the effect of substantially disadvantaging a group of employees identified by a protected ground in circumstances in which it is not reasonable to impose the requirement. Indirect discrimination provides a framework from which to challenge dominant norms in workplaces where it can be shown that they substantially disadvantage a segment of the workforce. This model is based on an ideal of substantive equality. See generally Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992) 3-8.

<sup>66</sup> See generally, Chris Ronalds, *Discrimination Law and Practice* (1998) Chapter 11.

<sup>67</sup> See for example, *Sex Discrimination Act 1984* s 28A.

<sup>68</sup> Breen Creighton and Richard Mitchell, ‘The Contract of Employment in Australian Labour Law’ in Lammy Betten (ed), *The Employment Contract in Transforming Labour Relations* (1995) 129, 136.

<sup>69</sup> Breen Creighton, ‘Reforming the Contract of Employment’ in Andrew Frazer, Ron McCallum and Paul Ronfeldt (eds), *Individual Contracts and Workplace Relations* (1998) 77, 81.

<sup>70</sup> For more detailed discussion of how the contract of employment forms the touchstone of Australian labour law, see Joo-Cheong Tham, *The Scope of Australian Labour Law and the Regulatory Challenges posed by Self and Casual Employment*, paper presented to the Japan Institute for Labour Policy and Training’s International Seminar on Comparative Labour Law, 9-10 March 2004.

<sup>71</sup> *R v Darling Island Stevedore & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601, 621-2.

<sup>72</sup> See, for example, *Wright v TNT Management Pty Ltd* (1989) 85 ALR 442, 449-50.

Because the contract of employment is the touchstone of Australian labour regulation, such contracts will *necessarily* co-exist with other forms of labour regulation. In this, a worker must generally be an employee before s/he can be covered by a federal award or statutory agreement.<sup>73</sup>

The presence of other forms of labour regulation does not preclude the contract of employment supplying terms of the working arrangement. For instance, such a contract can provide for conditions superior to those found in the award or statutory agreement so long as the latter does not explicitly prohibit the provision of more generous conditions. Further, the implied terms of the contract of employment still perform an important role. It is settled that such terms remain in force unless expressly circumscribed or ousted. For instance, an award that regulates the exercise of managerial prerogative in certain areas still leaves intact the implied duty of an employee to obey the lawful and reasonable orders of the employer in unregulated areas. In the event of inconsistency between the terms of the contract and the award or the statutory agreement/s, however, the latter prevails to the extent of the inconsistency.

Lastly, it should be noted that contracts of employment are *increasingly* important as a source of labour regulation in terms of its coverage of workers.<sup>74</sup> Wooden has argued that the proportion of non-managerial employees whose working conditions are determined by individual agreements has increased from 12% in 1995 to 15% in 1998.<sup>75</sup> According to the same commentator, the overwhelming majority of such agreements in 1998 were common law contracts of employment.<sup>76</sup>

The increasing importance of contracts of employment is hardly a benign development for workers. First, the law of contract presumes parties to be bargaining on an equal footing. It is this presumption which leads to a significant degree of agnosticism concerning the substantive fairness of the terms of the contract of employment.<sup>77</sup> Such equality, however, is usually chimerical in the labour market where the worker bargains with the employer which is more often than not a corporation. As Higgins J, the second President of the Conciliation and Arbitration Court, put it, 'the power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse to labour.'<sup>78</sup> In the context of the labour market, the formal equality presumed by the contract of employment paves the way for unequal terms.

At the same time, the contract of employment is also a direct source of unequal terms. So much so that one commentator has questioned whether the contract of employment is, in substance, a contract.<sup>79</sup> As noted above, this type of contract contains standardised terms implied by the courts. The point to be made is that these implied terms arm employers with significant managerial prerogative largely through the implied duty of obedience which applies to employees.<sup>80</sup>

---

<sup>73</sup> For a more detailed discussion, see Tham, above n 70.

<sup>74</sup> These contracts are also increasingly important in terms of their effect on working conditions, see text below n 95.

<sup>75</sup> Mark Wooden, *The Transformation of Australian Industrial Relations* (2000) 76. See Stephen Deery and Janet Walsh, 'The Character of Individualised Employment Arrangements in Australia: A Model of "Hard" HRM' in Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion: An International Study* (1999) 115-29; Amanda Roan, Tom Bramble and George Lafferty, 'Australian Workplace Agreements in Practice: The 'Hard' and 'Soft' Dimensions' (2001) 43(4) *Journal of Industrial Relations* 387-401 and Richard Mitchell and Joel Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45(3) *Journal of Industrial Relations* 292-325 for characteristics of such agreements.

<sup>76</sup> Wooden, above n 75, 88.

<sup>77</sup> see Barry Leon, Barry Reiter and Cheryl Waldrum, 'Fairness Issues in Employment Contracts' (1993) 6 *Journal of Contract Law* 191.

<sup>78</sup> *Federated Engine-Drivers and Firemen's Association of Australia v Broken Hill Proprietary Company Limited* (1911) 5 CAR 9, 27.

<sup>79</sup> I.T.Smith, 'Is Employment Properly Analysed in terms of a Contract?' (1975) 6 *New Zealand Universities Law Review* 341.

<sup>80</sup> *R v Darling Island Stevedore & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601, 621-2.

### III. RECENT TRENDS IN THE ‘DEREGULATION’ OF AUSTRALIAN LABOUR LAW

As noted above, the Coalition government was elected to office proposing further ‘deregulation’ of Australian labour law. The key legislative vehicle for its platform has been the *Workplace Relations Act*. This part will canvass the ‘deregulatory’ changes ushered in by the *Workplace Relations Act*.<sup>81</sup> This is followed by a discussion of how the government’s agenda has stalled since the passage of this Act with most of its legislative proposals failing to make the statute books.

Both sections proceed upon a specific understanding of the term, ‘deregulation’ or ‘deregulationist agenda’ as the author prefers to call it.<sup>82</sup> The agenda is clearly not aimed at either the absence of regulation/law<sup>83</sup> or necessarily less regulation/law.<sup>84</sup> The deregulationist agenda is, in fact, a proposal for different kind of labour law. In this, the agenda possesses two separate facets, the *decentralisation* and *decollectivisation* of labour regulation.

The agenda, firstly, seeks to *decentralise* the primary locus of the determination of working conditions. In the Australian labour law framework, this has meant shifting the power to determine working conditions away from the federal award system. This power has been increasingly transferred to the level of the enterprise, in the case of enterprise bargaining, and, at the extreme, to the level of the individual employer and worker. In the latter, decentralisation encompasses the *individualisation* of employment relations.

In Buchanan and Callus’ view, decentralisation can be seen then as a shift from regulation external to the workplace to that internal to the workplace.<sup>85</sup> While this characterisation is broadly accurate, it does omit the role of a crucial form of external regulation, namely, the common law. The common law through the contract of employment provides the legal framework for individual employment relations. As has been noted above, the character and content of the contract of employment, far from providing a neutral vehicle of the parties’ agreement, buttresses the power of employers.<sup>86</sup>

The second facet of the deregulationist agenda is *decollectivisation* in the sense of reducing the capacity of workers to collectively organise and represent their interests. Decollectivisation can assume various forms. For instance, it can mean the reduction of institutional support for unions. Alternatively, it can mean the imposition of further restrictions on unions and their capacity to engage in collective action through, for example, constraints on industrial action.

#### A. The deregulationist agenda enacted by the Workplace Relations Act

##### 1. Decentralisation

A key aim of the *Workplace Relations Act* was to decentralise labour regulation.<sup>87</sup> It did so by simultaneously reducing the role of the federal award system and promoting the use of statutory agreements.

The most significant changes effected by this Act in this respect relate to the AIRC’s award-making powers. For example, the promotion of agreement making especially at the enterprise level gained further priority with the AIRC being required to place heavier weight on this objective when exercising its award-making powers.<sup>88</sup> More importantly, the Act imposed far-reaching restrictions by generally confining the subject matter of awards to 20 allowable award

---

<sup>81</sup> For a more detailed examination, see Joo-Cheong Tham, ‘Deregulation of Australian labour law: Some recent trends and tensions’ (2002) 44(11) *Japanese Journal of Labour Studies* 60-78.

<sup>82</sup> This term is also used in John Buchanan and Ron Callus, ‘Efficiency and Equity at Work: The Need for Labour Market Regulation in Australia’ (1993) 35 *Journal of Industrial Relations* 515, 516.

<sup>83</sup> Richard Mitchell and Malcolm Rimmer, ‘Labour Law, Deregulation, and Flexibility in Australian Industrial Relations’ (1990) 12 *Comparative Labor Law Journal* 1, 1 and Buchanan and Callus, above n 80, 515-6.

<sup>84</sup> Mitchell, above n 1, 127.

<sup>85</sup> Buchanan and Callus, above n 82, 516.

<sup>86</sup> See discussion above n 80.

<sup>87</sup> Section 3(b) of the Act stipulates that one of the purposes of the Act is to ensure that ‘the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level.’

<sup>88</sup> This is effected through ss 3(b), (c) and 88A(d) of the Act.

matters.<sup>89</sup> This was a radical departure from the position prior to the passage of the Act when the limitations that applied to the AIRC's award-making powers largely stemmed from constitutional restrictions.

The Act also actively sought to individualise employment relations<sup>90</sup> through the introduction of AWAs. The most significant feature of AWAs is that once approved, they prevail over awards and State laws and, in certain circumstances, certified agreements.<sup>91</sup> So, for the first time, since the advent of the federal award system, an individual agreement can oust federal awards and certain legislative protection.

The Act also decentralised labour regulation by weakening statutory protection against unfair and unlawful dismissals. Under the previous legislation, the *Industrial Relations Act 1988* (Cth) ('*Industrial Relations Act*'), an employee could access such protection unless excluded by regulation. The *Workplace Relations Act*, on the other hand, introduced another set of disentitling provisions by stipulating that only certain groups had a *prima facie* entitlement to apply for unfair dismissal.<sup>92</sup> It also added two further circumstances when regulations could exclude employees. Under this Act, regulations could be made excluding employees:

- whose terms of employment contain special arrangements providing particular protection in respect to the termination of employment; and
- in relation to whom the application of the unfair dismissal provisions would cause substantial problems either because of their particular conditions of employment or the size or nature of the undertakings in which they are employed.<sup>93</sup>

The decentralisation of Australian labour regulation, through a reduction of the role of the federal award system and the weakening of protection against unfair and unlawful dismissals, necessarily means that common law contracts of employment are increasingly important as a source of labour regulation.

Such contracts assume greater significance as the floor of awards becomes more porous. Accordingly, the stripping of awards to 20 allowable award matters invariably means that working conditions are increasingly determined by the contract of employment. Further, the erosion of statutory protection against unfair and unlawful dismissals means that the employer's power to terminate the employment of workers at common law is increasingly untrammelled. This is of serious concern because this common law power has had little regard for the fairness or reasonableness of terminations of employment. Generally, a termination would be lawful at common law if reasonable notice was provided even though the termination could be motivated by capricious reasons.<sup>94</sup>

## 2. Decollectivisation

The following discussion will consider how the *Workplace Relations Act* has decollectivised Australian labour law by weakening union security measures and increasing restrictions on industrial action.

### (a) Union security measures

Union security measures refer to various devices aimed at protecting trade unions. Pre-*Workplace Relations Act*, trade unions were supported in various ways by the federal award system. First, the system itself, through its compulsion, necessitated employer recognition of trade unions. Further, award clauses provided for preference for unionists in relation to hiring

---

<sup>89</sup> *Workplace Relations Act* s 89A(2).

<sup>90</sup> See generally Stephen Deery and Richard Mitchell (eds), *Employment Relations, Individualisation and Union Exclusion: An International Study* (2000).

<sup>91</sup> *Workplace Relations Act* ss 170VQ-R. See generally Ronald C McCallum, 'Australian Workplace Agreements - An Analysis' (1997) 10 *Australian Journal of Labour Law* 50-61 and Andrew Stewart, 'The Legal Framework for Individual Employment Agreements in Australia' in Stephen Deery and Richard Mitchell, *Employment Relations: Individualisation and Union Exclusion: An International Study* (1999) 18-47.

<sup>92</sup> See text above nn 53-5.

<sup>93</sup> *Ibid* s 170CC(1)(d) & (e). See also Chapman, above n 45.

<sup>94</sup> Creighton and Stewart, above n 9, 297.

and promotion ('preference clauses'). Awards along with legislative provisions<sup>95</sup> also conferred the right on trade unions to enter and inspect employers' premises and records ('right of entry').<sup>96</sup>

Many of these measures were either removed or severely diluted under the *Workplace Relations Act*. Union security has been most affected by the existence of non-union bargaining streams, namely, 'corporations' agreements and AWAs, and the confining of awards to 20 allowable matters. In a further blow to union security, rights of entry do not appear on the list of allowable matters with the consequence that unions have to rely solely on the statutory rights of entry that are narrower in scope than those previously found in awards.<sup>97</sup>

The Act also introduced a series of provisions relating to freedom of *non-association*. Under the *Industrial Relations Act*, there were provisions protecting union membership. The *Workplace Relations Act*, while preserving these provisions in substance, introduced provisions relating to non-union membership.<sup>98</sup> Part XA also voids any award or certified agreement which requires or permits conduct which would breach the Part.<sup>99</sup> This has the effect of voiding preference clauses.

#### (b) Restrictions on industrial action

As stated in the Introduction, the federal award system has been hostile towards industrial action. According to the historical rationale of this system, its availability ruled out the need for industrial action. As Higgins J put it, 'the new province of law and order' ushered in by the system would replace 'the rude and barbarous process of strike and lockout.'<sup>100</sup> Accordingly, industrial action was deemed illegal in various ways.<sup>101</sup>

The *Industrial Relations Reform Act 1993* (Cth), enacted by the ALP government, represented a critical change in the law relating to industrial action. This Act which was aimed at accelerating the spread of enterprise bargaining also introduced a limited right to strike into Australian labour law. It did this by conferring immunity from the above sanctions on certain types of industrial action, that is, industrial action engaged in for the purpose of enterprise bargaining. Such action is referred to as 'protected action' under the Act.<sup>102</sup>

The *Workplace Relations Act* preserves the existence of this immunity. It has, however, reduced the scope of its protection in one important respect. Under the *Industrial Relations Act*, employers were prohibited from dismissing or otherwise prejudicing employees on the ground of such employees engaging in industrial action in relation to an industrial dispute which had been notified to the AIRC or found to have exist by the AIRC. The present prohibition, however, only applies in relation to 'protected action'; action which is subject to various statutory requirements.<sup>103</sup>

The *Workplace Relations Act* also ushered in other changes that render industrial action more difficult for workers. For instance, it lays down a prohibition on workers receiving wages during industrial action which travelled beyond the common law prohibition.<sup>104</sup> Further, section

---

<sup>95</sup> W.J.Ford, 'Being There: Changing Union Rights of Entry Under Federal Industrial Law' (2000) 13 *Australian Journal of Labour Law* 1, 2-3.

<sup>96</sup> On union security measures, see generally Phillipa Weeks, *Trade Union Security Law* (1995).

<sup>97</sup> See Ford, above n 95.

<sup>98</sup> Naughton, above n 60.

<sup>99</sup> *Ibid* s 298Y.

<sup>100</sup> H.B.Higgins, 'A New Province for Law and Order' (1915) 29 *Harvard Law Review* 13, 14.

<sup>101</sup> For instance, industrial action by workers was invariably a breach of contract entitling their employer to dismiss them. Further, the collective nature of industrial action typically rendered it tortious: see K D Ewing, 'The Right to Strike in Australia' (1989) 2 *Australian Journal of Labour Law* 18. Both the criminal law and the conciliation and arbitration system also provided for additional sanctions, see respectively Creighton, Ford and Mitchell, above n 4, 1146-58 and Breen Creighton, 'Enforcement in the Federal Industrial Relations System: an Australian Paradox' (1991) 4 *Australian Journal of Labour Law* 197.

<sup>102</sup> See Iain Ross, 'Bargaining in the Federal System' in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining: Trades Unions and the Law* (1995) 36-40.

<sup>103</sup> *Workplace Relations Act* s 170 MU. See Greg McCarry, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 133, 140.

<sup>104</sup> McCarry, above n 103, 149-52.

127 of the Act conferred a power on the AIRC to issue orders to stop or prohibit industrial action.<sup>105</sup> These orders, often referred to as section 127 orders, while issued by the AIRC, are enforced by the Federal Court principally through injunctions.<sup>106</sup>

## **B. The stalling of the deregulationist agenda post-Workplace Relations Act**

Since the passage of the *Workplace Relations Act*, the Coalition government has had little success in further decentralising or decollectivising Australian labour law. As the discussion below will demonstrate, most of its subsequent legislative proposals have faltered in the face of a hostile Senate, the upper house of the federal Parliament, which is controlled by the ALP Opposition and minor parties.

### **1. Decentralisation**

The so-called ‘second wave’ of the Coalition government’s deregulationist agenda was contained in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (‘MOJO Bill’).

This Bill proposed relatively minor changes to the role of the AIRC. They encompassed the removal of several allowable award matters like skill-based career paths and tallies.<sup>107</sup> Similarly, it proposed procedural changes to the unfair dismissal regime.<sup>108</sup>

On the other hand, the Bill proposed significant changes in relation to AWAs. These included:

- removing the AIRC completely from the process of approving AWAs;
- removing the right of employees to engage in protected industrial action when negotiating AWAs; and
- stipulating that AWAs prevail over statutory enterprise agreements in all circumstances; and
- allowing AWAs to take effect upon signing (prior to approval).<sup>109</sup>

The MOJO Bill was, however, rejected by the Senate. In response, the Coalition government has adopted a two-fold strategy. It has jettisoned some of the changes contained in the MOJO Bill. As with the other proposed changes, it has divided them into separate Bills.

This change in approach has to date only yielded very partial success. What arguably is the government’s most significant legislative win is the statutory exclusion of another group of employees from the federal unfair dismissal regime, namely, employees who are serving a ‘qualifying period of employment.’ Such a period is defined to be three months unless otherwise agreed by the employee and employer.<sup>110</sup> The government has also succeeded with other minor changes, for instance, the removal of tallies as an allowable award matter.<sup>111</sup>

Many of the government proposals have, in the meanwhile, been circulating around the parliamentary chambers. These include amendments that:

- AWAs take effect upon signing;<sup>112</sup>
- employees employed in businesses which engage fewer than 20 employees be excluded from the federal unfair dismissal regime;<sup>113</sup> and
- various matters be excised from the AIRC’s award-making jurisdiction, for example, skill-based career paths and long service leave.<sup>114</sup>

---

<sup>105</sup> Ibid s 127(1). See Breen Creighton, ‘Section 127 of the Workplace Relations Act and the Regulation of Industrial Conflict’ in Richard Naughton (ed), *The Workplace Relations Act in Operation: Eight Case Studies* (1998) 49-54.

<sup>106</sup> Ibid ss 127(6) & (7).

<sup>107</sup> MOJO Bill, Schedule 6.

<sup>108</sup> MOJO Bill, Schedule 7.

<sup>109</sup> MOJO Bill, Schedule 9.

<sup>110</sup> *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth).

<sup>111</sup> *Workplace Relations Amendment (Tallies) Act 2001* (Cth).

<sup>112</sup> Workplace Relations Amendment (Simplifying Agreement-making) Bill 2002 (Cth).

<sup>113</sup> Workplace Relations Amendment (Fair Dismissal) Bill 2002 (Cth). See Marilyn Pittard, ‘Unfair Dismissal Laws: The Problems of Application in Small Business’ (2002) 15 *Australian Journal of Labour Law* 154-69. Other changes to the federal unfair dismissal scheme are contained in the Workplace Relations Amendment (Termination of Employment) Bill 2002 [No 2] (Cth)

<sup>114</sup> Workplace Relations Amendment (Award Simplification) Bill 2002 (Cth).

## 2. Decollectivisation

The MOJO Bill proposed further decollectivisation of the Australian labour law in various ways. It proposed increased restrictions on the statutory rights of entry.<sup>115</sup> Further, it sought to amplify the scope of the freedom of non-association provisions to prohibit union encouragement clauses, bargaining fees and indirect pressure to join unions.<sup>116</sup>

The MOJO Bill also proposed additional restrictions on industrial action. It proposed to install secret ballots as a pre-requisite for 'protected action.' If passed, the Bill would have made a secret ballot mandatory for 'protected action' with the holding of such ballots accompanied by detailed notices stipulating the nature and timing of industrial action. Further, industrial action only became 'protected' if a majority of eligible employees voted in the ballot with the majority of votes in favour of the industrial action.<sup>117</sup>

In comparison, the *Workplace Relations Act* presently requires that such action be duly authorised by the committee of management of the relevant union or by a person conferred such authority by the committee.<sup>118</sup> Further, the AIRC may order a secret ballot in relation to impending or probable industrial action if it is satisfied that ascertainment of the attitudes of union members might prevent such industrial action.<sup>119</sup> Once such a ballot is ordered, majority approval is required for such action to be 'protected.'<sup>120</sup>

The second set of proposals restricting industrial action in the MOJO Bill related to section 127. It proposed to reduce the discretion conferred upon the AIRC in relation to section 127 orders by requiring such orders to be issued whenever the AIRC found industrial action which was not 'protected.' Moreover, the Bill permitted affected parties to seek enforcement of these orders in State courts.<sup>121</sup>

The defeat of the MOJO Bill at the hands of the Senate has led the Coalition government to water down its proposals. For example, while it is persisting with secret ballots as a pre-requisite for 'protected action,' it has diluted some of the attendant requirements. For instance, the present proposal only requires 40 per cent of eligible employees to participate in the ballot. Further, 'protected action' can be taken within 30 days of the declaration of the ballot result and is not restricted to any specified date.<sup>122</sup> Similarly, the present set of proposals relating to section 127 is relatively modest. If passed, they would confer on the AIRC the power to issue interim orders as well as require the AIRC hear section 127 applications within 48 hours and.<sup>123</sup>

## IV. CONCLUSION

Australian labour law is founded upon a thin layer of constitutional provisions. Three sources of labour regulation have been enacted upon this thin layer. The federal award system, while no longer as central as it has been in the past, remains a key source of labour regulation. The second source of regulation is that which occurs through various forms of bargaining. There is individual bargaining through common law contracts of employment and AWAs as well bargaining through statutory enterprise agreements. This type of regulation has filled the gaps left by the erosion of the federal award system. Thirdly, there is a sparse set of legislative minimum conditions.

The deregulationist changes ushered in by the *Workplace Relations Act* changed the relationship between these various sources of regulation by elevating regulation through bargaining, sidelining the federal award system as well as weakening legislative protection.

---

<sup>115</sup> MOJO Bill, Schedule 13.

<sup>116</sup> Ibid Schedule 14.

<sup>117</sup> MOJO Bill Schedule 12.

<sup>118</sup> Ibid s 170MR.

<sup>119</sup> Ibid s 135(2).

<sup>120</sup> Ibid s 170MQ(2).

<sup>121</sup> MOJO Bill, Schedule 11.

<sup>122</sup> Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 (Cth).

<sup>123</sup> Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002 (Cth).

Since the passage of this Act, however, the mix between these sources of regulation has been relatively stable with the Coalition government's deregulationist agenda stalling.