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of Bargaining

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Industrial Tribunals and the Regulation of Bargaining

Andrew Frazer*

This chapter seeks to apply 'new' regulation theory to industrial tribunals, in particular the functions and powers of the Australian Industrial Relations Commission (AIRC) in relation to enterprise bargaining and the making of collective workplace agreements. In a conventional economic sense, industrial tribunals have always been regulatory agencies, with their awards operating as labour standards setting minimum pay and conditions. Since the 1990s, though, the major work and impact of industrial tribunals has changed from making awards to the facilitation and approval of agreements as part of the process of labour market "deregulation." As (at the time of final revision of this paper) it now appears that any powers of the AIRC to supervise agreement-making will shortly and finally be abolished, we are in a position to review the particular approach adopted for the regulation of workplace bargaining over the last decade. If industrial tribunals will no longer have a regulatory role to play in the setting of conditions by agreements, the opportunity also arises for us to consider what new type of institution might now be appropriate for the inevitable regulation which occurs within the labour market.

The industrial tribunals which have been so central a feature of Australian labour relations for more than a century, appear in many ways to be unlike conventional regulatory agencies. As quasi-judicial bodies, the tribunals have been to only a limited extent driven by policy objectives. They have remained heavily influenced by legal norms (both formal rules and informal values) which are not necessarily outcome-oriented. The organisational character of legal tribunals makes them weak and dependent regulators. Their traditional method of resolving disputes, on an individual basis as brought before them (and usually reactively rather than proactively), is at odds with the steering and monitoring functions of a regulatory agency. Even tribunals with specific enforcement powers are dependent on other officials to carry out their orders, relying heavily on their authority to instil customary obedience. The AIRC, as a result of the *Boilermakers* doctrine, has no power to enforce its own orders.¹

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¹ *R v Kirby; ex p Boilermakers' Society of Australia* (1956) 94 Commonwealth Law Reports 254.

These factors have often led industrial tribunals to be seen (particularly by their members) as not truly regulatory agencies at all. In decades past this view was often expressed as a distinction between a judicial tribunal guided by values, and a legislative body focussed on goals. In recent times, the tribunals' focus on mediation and dispute resolution has led them to be appear more as sites of negotiation than directive agencies. The federal tribunal in particular has attempted to exercise a co-ordinating and steering function at crucial periods; but at most times in most situations it has behaved more as a resolver of disputes or a facilitator. A reluctance to consider the tribunals as regulators (in other than their economic standard-setting role in framing wages and conditions) has been aided by the idea of regulation as the work of a strong steering and enforcement body which we now identify as "command-and-control" regulation. A broader approach to regulation, however, will allow us to examine the part played by tribunals in the regulation of all aspects of labour relations, including the conduct of relations between parties engaged in bargaining and the making of agreements.

Institutionalism and Regulation

Although regulation has traditionally been associated with state activity, in the 'new regulation' theory it has been broadened to include all systematic attempts by social actors, both 'public' and 'private', to affect behaviour according to pre-determined aims or desired outcomes.² Much of the new regulation scholarship is founded on an institutionalist approach, one which recognises social processes as influenced by a wide range of regulatory influences (the 'web of regulation'). These include not merely organisations exerting formal legal and economic power, but informal norms based on values and social roles or expectations, as well as cognitively internalised patterns of thought based on what is practicable, normal or natural.³ It is on such informal social institutions that new regulatory techniques, such as industry self-regulation, are based. The institutionalist approach allows us to step outside the discourse of regulation and deregulation, and to focus instead on the social patterns and networks which surround actors, both 'public' and 'private'.

The signal feature of the new regulatory state is its use of techniques of meta-regulation: the regulation of regulation. State regulatory agencies are less in-

² Black, J, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" (2001) 54 *Current Legal Problems* at 142.

³ Parker C and Braithwaite J, "Regulation" in Cane P and Tushnet M (eds), *The Oxford Handbook of Legal Studies* (Oxford UP, Oxford, 2003) p 136. On institutionalist approaches to regulation, see Baldwin R and Cave M, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford UP, Oxford, 1999) pp 30-31. On the variety of regulatory techniques, see the paper by Peter Gahan in this volume.

volved in direct control over outcomes and now become concerned with overseeing the formulation of procedural standards by private actors: it is the process of (self-)regulation which is regulated.⁴ State agencies are less involved in directly ensuring individual compliance through techniques such as inspection and licensing; they now engage in distanced monitoring of self-reported compliance with standards. Meta-regulation involves increased emphasis on the state's use of "legal underpinning for indirect control over internal normative systems".⁵

A more distanced regulation must rely on more formal and juridically-based techniques of monitoring and compliance, rather than informal norms like trust and professional standards. Paradoxically, then, and despite the claims of deregulationists, meta-regulation generally leads to greater formality in the state's involvement in regulation, and often results in an increase in intervention by 'foreign' agencies. What is often happening is a change in techniques: different mechanisms are used to regulate, and often by different agencies.⁶ There is a change in the regulatory object, composition, form and motive: of what to regulate, in what manner, and why. In many ways it has resulted in a much more pervasive and complex web of rules, with much more detailed and invasive procedural and monitoring requirements. According to Bronwen Morgan, what makes meta-regulators different from more traditional agencies like government departments or quangos, is their combination of attributes: not only are they autonomous and often deliberately divorced from political influence, with technical expertise (usually economics), specific regulatory roles and often wide investigatory powers, but they increasingly have the ability to make legally binding decisions or rules.⁷ This description is not very far removed from the attributes traditionally identified as possessed by Australian industrial tribunals.

Meta-regulation implies regulatory pluralism — as "new modalities of pluralized and decentralized regulation" evolve in the shift from the control-oriented welfare state to the steering of private-public partnerships.⁸ Regulation broadens out to become the whole network of formed and layered relations between actors, each attempting to influence the others. Such a conception leads to a focus on regulatory space. Originally proposed by Hancher and Moore in 1989, regulatory space is an analytical construct designed to move beyond a command-based view of regulation as limited to government regulators and private 'regulatees'.

4 Morgan B, "The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality" (2003) 12 *Social & Legal Studies* at 490.

5 Scott C, "Regulation in the age of governance: the rise of the post-regulatory state" in Jordana J and Levi-Faur D (eds), *The Politics of Regulation: Examining Regulatory Institutions and Instruments in the Governance Age* (Edward Elgar, Cheltenham, 2004) p 168.

6 Majone G, "The Rise of the Regulatory State in Europe" in Baldwin R, Scott C and Hood C (eds), *A Reader on Regulation* (Oxford UP, Oxford, 1998) pp 195, 212.

7 Morgan, *op cit*, p 490.

8 Parker and Braithwaite, *op cit*, p 129.

Hancher and Moore noted that large private organisations are frequently active participants in regulatory processes, influencing the range of issues considered appropriate for regulation and the techniques used to regulate. Regulation has become a common space, which is defined by “the range of regulatory issues subject to public decision” within a *regulatory arena*. Regulation is the outcome of a struggle between the active participants (the *regulatory community*) operating in a particular arena. The allocation of an issue to a particular arena is largely a matter of “customary assumptions and organisational routine.”⁹ More recently, Colin Scott has used the concept of regulatory space to highlight the modern condition of regulation as dispersed and fragmented. Authority to regulate is dispersed among numerous value systems, extending beyond legal systems based in property and rights to include wealth, information and the ability to act effectively (through organisational ability and strategic co-ordination). Regulation is fragmented among a range of different actors, each exerting influence in particular areas.¹⁰

Regulation, then, is the sum total of numerous intersecting and conflicting interests and value systems, each modifying or attenuating the others. In the field of labour relations, the challenge is to see public agencies like industrial tribunals not as regulatory engines acting on others, but as actors in a regulatory space interacting with others (even being regulated by them) at several levels (legal, organisational, cultural).

The Enterprise Bargaining Regime and its Regulatory Space

The changes to industrial regulation in Australia have been so substantial over the last fifteen years that we can talk of a new regulatory regime. There has been created a distinct regulatory arena, that of bargaining (or more accurately agreement-making), which sets the tone of labour market regulation. Agreements are now the dominant method by which wages and conditions are determined; and even for the substantial minority of workers who remain under awards the nature of regulation has shifted in tone. The federal *Workplace Relations Act 1996* (WRA) contains several legal structures and processes for agreement making which formalise this regime of enterprise bargaining. Far from being synonymous with collective bargaining, it is compatible with a range of individual agreement types; indeed the current regime of enterprise bargaining is associated genealogically and ideologically with individualisation and the reduction of union involvement as direct participants in workplace governance.

⁹ Hancher L and Moran M, “Organizing Regulatory Space” in Hancher L and Moran M (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press, Oxford, 1989) pp 277-8.

¹⁰ Scott C, “Analysing Regulatory Space: Fragmented Resources and Institutional Design” [2001] *Public Law* at 333.

In Australia there has long been a significant number of informal collective agreements which, though often reduced to writing, are unenforceable at law. To these we may add the 'sweetheart deals', tacit arrangements and above-award payments which can become widespread and entrenched by custom. It is one of the objects of the enterprise bargaining regime to displace such informal means of regulation with formal ones, while shifting control into the internal regulatory processes of the corporation. Altogether the enterprise bargaining regime involves limiting the level, the scope and the coverage of workplace regulation by restricting formal institutions and norms external to the employing organisation.¹¹

With the shift to a bargaining regime, legal norms have become more constitutive in function, providing the means by which parties may produce a legally recognised and enforceable agreement, without however creating institutional pathways or normative rules which address how bargaining actually takes place, or attempting to equalise the relative power of the parties in order to establish the terms on which it takes place. The enterprise bargaining regime thus relies heavily on informal institutions along with rules which limit certain kinds of action (particularly industrial action by unions). The informal institutions tend to reinforce asymmetries between negotiating parties, thus favouring the employer. Employers have alternatives to negotiation, such as unilaterally introducing change through managerial prerogative and individual contracts, while unions must rely on bargaining: for them, industrial action is not an alternative to negotiation but a tactic in the bargaining process.¹²

The AIRC and the Institutions of Bargaining

The development of enterprise bargaining at the federal level since 1991 has involved a shift from a public basis for legally enforceable agreements to a private one, and part of this shift has been a steady and deliberate erosion of the AIRC's functions. Before 1991, the commission could refuse to certify an agreement if it considered the terms to be contrary to the public interest. This approach reflected the status of awards as public regulatory standards, and the AIRC as both determiner and guardian of those standards. While certified agreements were not required to conform to the commission's wage-fixing principles and standard award conditions, any inconsistencies were scrutinised closely and the commis-

¹¹ Bray M and Waring P, "'Complexity' and 'Congruence' in Australian Labour Regulation" (2005) 47 *Journal of Industrial Relations* at 2; Bray M and Waring P, "The Rhetoric and Reality of Bargaining Structures Under the Howard Government" (1998) 9 *Labour and Industry* at 62, 77.

¹² Fells R, "A Critical Examination of the Process of Workplace Negotiation" (1998) 9 *Labour and Industry* at 41.

sion exercised a high level of discretion.¹³ However when the federal government announced that it would introduce amendments designed to facilitate a shift towards enterprise bargaining, the commission was forced to accept a reduction in its control, announcing in its October 1991 wage decision that it would approve agreements which merely implemented its efficiency principles.

As part of its new supervisory role, the commission declared that from now on it would refrain from using arbitral powers to resolve disputes over the conduct of bargaining, leaving such issues to conciliation or to negotiation between the parties.¹⁴ This approach was enshrined in the 1992 amendments and by the *Industrial Relations Reform Act* the following year. From this time the AIRC was required to approve single-enterprise agreements which satisfied an overall “no disadvantage” test when compared with awards (although retention of a limited public interest component within the no disadvantage test still allowed the commission some discretion to consider community standards in deciding whether to approve agreements).¹⁵ Under the Reform Act, the AIRC was given power to oversee the bargaining process, although its power was only facilitative and could not be used to enforce bargaining in good faith.¹⁶

The regulatory regime under the WRA largely continued the institutions of bargaining which are inherited from the early 1990s, while developing further the private rationale for agreement-making. Because of previous concerns at the AIRC’s ‘obstruction’ of enterprise bargaining by using the public interest test, the legislation is deliberately drafted to minimise any activist investigative role by the commission in the certification process. Now the commission *must* certify an agreement unless satisfied that the statutory requirements have *not* been met; the presumption is in favour of compliance and the commission’s discretion is closely hedged by the legislation.¹⁷ The adoption of the global “no disadvantage” test has involved a shrinking of public regulatory space, as fewer trade-offs against award standards are amenable to external scrutiny. And the eschewing of any activist role for the AIRC in the facilitation of bargaining has ensured that its influence over social actors, even at an informal level, is marginal.

¹³ *Industrial Relations Act 1988*, ss. 112, 115(4); *February 1989 Review* (1989) 27 Industrial Reports 196.

¹⁴ *National Wage Case, October 1991* (1991) 39 Industrial Reports 127.

¹⁵ *Industrial Relations Act 1988-92* s. 134E(2); *Industrial Relations Act 1988-93* s.170MC(2); *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 Industrial Reports 212 at 232.

¹⁶ *Industrial Relations Act 1988-93* Pt VIB Div 5, especially s. 170QK; *Appeal by Public Sector Union (ABC Case)*, Print L4605; *Asahi Diamond Industrial Australia Pty Ltd v Automotive Food Metals and Engineering Union* (1995) 59 Industrial Reports 385 at 421-8.

¹⁷ WRA s. 170LT(1); *Re Appeal by Council of Holmesglen Institute of TAFE* (1998) 83 Industrial Reports 172.

In an institutionalist sense, the AIRC now exerts a regulatory influence primarily by maintaining pathways through which other actors may interact but which are not mandatory (the bargaining process), and by acting as a gateway for the formalisation and legal validity of agreements (the certification process). Through its decisions during certification proceedings, it operates as a source of formal norms for observance by the parties. However, as these norms are only relevant to certification, the commission is able to exert only limited influence on the parties who use other, informal, options.

Here I will sketch the formal institutions created by the legislation, focusing on the capacity of the commission to influence (regulate) the interactions between bargaining parties, either directly or in a constitutive way.¹⁸

Bargaining parties

The AIRC has little involvement in supervising the constitution of bargaining parties as in most cases agreements are made between an employer corporation (in relation to a single business or project), and the employees (or at least a majority of them) subject to the proposed agreement. Where bargaining involves unions directly, the AIRC has played an indirect role through its supervision of the status of registered organisations. In practice this is a formality as no new unions have been created for years, although amalgamations sometimes still occur. The AIRC is also involved in determining which unions may make an agreement over a particular business; through regulation of the union's eligibility rules, it can affect whether a union is "entitled to represent the industrial interests" of particular employees and is therefore eligible to make an agreement covering them.¹⁹

The Agreement

Agreements are limited in their subject-matter. The WRA establishes rules about which types of matters are capable of being included in an agreement, as well as nominating matters which must be included (dispute resolution procedures) and which must not be included (provisions deemed to contravene freedom of association, provisions inconsistent with the statutory minimum conditions, or ones with discriminatory effect).²⁰ These requirements and restrictions come into play at the certification stage, when the AIRC must be satisfied that they have

¹⁸ This section of the paper is based on the study of over 80 decisions by the AIRC in relation to bargaining (mostly certification applications), as well as a separate database of applications for termination or suspension of bargaining periods. For reasons of space, footnote references to specific decisions have been kept to a minimum.

¹⁹ *Workplace Relations Act 1996* (Cth) (henceforth WRA) s. 170LJ(1)(b).

²⁰ WRA ss. 170LT(8), 170LU.

been met before the agreement can be granted legal status. They are highly prescriptive and give neither the parties nor the commission discretion to consider or adapt the terms in their industrial context.

The general restriction, that the contents of the agreement must be “about matters pertaining to the relationship” between the employer and employees subject to the agreement (s. 170LI), has been the subject of extensive litigation in recent years. The High Court decision in *Electrolux*²¹ confirmed that each matter in the agreement must pertain to the employment relationship, but there is still no clear test for determining which matters satisfy the requirement. Although vague, the rule is rigid: there is no discretion for either the parties or the commission, and finding that a matter in an agreement does not pertain to the employment relationship requires the commission to refuse to certify the agreement. By comparison with a holistic approach which considered the relevance of the agreement in its totality, the strict or narrow approach which now prevails limits the scope for co-operative regulation by the parties and for flexibility by the commission in approving agreements.²²

Bargaining period

Although the bargaining period is a common feature of bargaining, it is not a necessary feature of agreement making under the federal system. While the Act contemplates that a party may initiate negotiations by notifying other proposed parties and the commission of their intention to seek a certified agreement (s. 170MI), it is not a prerequisite to the making or certification of an agreement. Its main purpose is to allow for protected industrial action by the parties. A bargaining period is therefore most likely to be initiated by unions: an employer can always commence agreement-making directly with employees without notifying a bargaining period, and once a union-notified bargaining period commences the employer can also engage in protected action. As the commission cannot arbitrate during a bargaining period (s. 170N), this may provide impetus to the parties to negotiate; although again this is more likely to affect unions, which have no other recourse to achieve their aims if the employer is not willing to bargain.

The AIRC clearly plays a direct regulatory role in the suspension or termination of bargaining periods (s.170MW). When the WRA was first passed, it was assumed

²¹ *Electrolux Home Products Pty Limited v Australian Workers' Union* [2004] HCA 40.

²² The holistic approach to the ‘matters pertaining’ issue (now discredited by *Electrolux*) was justified as a matter of freedom for the bargaining parties: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Unilever Australia Ltd*, PR940027, 31/10/03 at [165]-[168]; *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Ltd* [2002] FCAFC 199 at [99]-[101].

that such applications would be used to stifle industrial action, but it seems that they are often being used to bring matters before the commission. There has been an average of 76 applications annually, of which only about 18 are actually decided: the large majority are withdrawn or settled. Of those cases which are determined there is a success rate of about 60 percent. Unions are responsible for initiating 22.5 percent of concluded cases. Industrial action is the basis of the action in less than half of decided cases. Bargaining conduct and compliance comprise nearly one-quarter of cases, the main ground being that the respondent did not genuinely try to reach an agreement. Applications are frequently sought together with dispute orders under s. 127.²³ While the commission is limited by the legislation to specific grounds for suspending or terminating a bargaining period, most of the decisions are made by reference to broad considerations, with the public interest emerging as a significant factor. The AIRC engages in conciliation in many cases after the bargaining period has been terminated, although relatively few matters go on to arbitration.

Within the space of the bargaining period, certain forms of industrial action are insulated from legal retaliation. Industrial action outside this space is not protected by any immunity and is considered illegitimate.²⁴ It is then subject to suppression by the courts using their broad injunctive powers to restrain commission of industrial torts and secondary boycotts. The protection is only available in relation to making agreements under the Act: immunity is not provided for action supporting claims which cannot be included in a certified agreement.²⁵

Unprotected action may also be regulated by the AIRC's power to issue dispute orders, which in many ways function like former bans clauses to prohibit specific action. Such orders are generally observed by unions without recourse to injunctions from the Federal Court. Applications for dispute orders have become a means of bringing matters before the commission, supplementing the conventional dispute notification process. Indirectly then, the commission has become involved in the regulation of disputes: even when there is a bargaining period in place and a dispute order is not available, notification of the matter brings the commission into the picture, enabling it to exercise at least its conciliation function.

²³ This is preliminary information derived from a database of 142 decisions by the AIRC on s.170MW, currently being analysed by the author. Over 24% of cases concerned the anomalous ground of paid rates applications.

²⁴ *National Workforce Pty Ltd v Australian Manufacturing Workers Union* [1998] 3 VR 265.

²⁵ *Electrolux* per Gleeson CJ at [25]; Gummow, Hayne and Heydon JJ at [156]; *Wesfarmers Premier Coal Ltd v Automotive Food Metals Engineering, Printing and Kindred Industries Union (No 2)* (2004) 138 Industrial Reports 362.

Facilitation of bargaining: Conciliation powers

While the Act precludes the AIRC from arbitrating during a bargaining period, it does allow the commission to use its normal conciliation powers, which the commission from the start has recognised as allowing it to make recommendations or directions to parties “to promote the efficient conduct of negotiations.”²⁶ Increasingly this power has been used to regulate the parties’ conduct in bargaining (or avoiding it). Ever since the Reform Act introduced the bargaining period regime in 1993, members of the commission have been wary of becoming closely enmeshed in disputes over recognition and bargaining conduct. In the *Asahi* Case the commission laid down the principle that, even though the Reform Act recognised a duty to bargain in good faith and gave the commission powers to ensure that they did so, the commission could not actually order parties to negotiate: at best it could only order them to meet and confer.²⁷ After that, the commission’s role in hard-fought bargaining disputes, particularly contests over union recognition, faded away.

The way for a more activist regulatory role in the bargaining process came with the full bench *Telstra* decision in 2000 that the AIRC’s powers to issue directions and orders are not confined to arbitration, although it was not determined how far those powers could go in conciliation.²⁸ In decisions since then, the commission has frequently made recommendations as part of conciliation proceedings, sometimes acting after being notified of the initiation of a bargaining period. In a few cases the commission has issued orders designed to aid progress in stalled bargaining, particularly ordering a secret ballot of employees to determine which type of agreement they preferred.

The high point came with *Sensis*, a classic case of the employer refusing to negotiate with the union and instead seeking an agreement directly with its employees. In its bargaining period notice, the union requested the AIRC to facilitate making an agreement by use of its conciliation powers: specifically it requested that union officers be allowed to attend and assist employee representatives in negotiation meetings with management. The commissioner at first instance held that the WRA recognises a duty to bargain in good faith and thus allows the AIRC to make procedural orders to promote fair bargaining, although it could not affect the substantive issues between the parties.²⁹ The decision was

²⁶ WRA ss. 170N, 170NA; *Safety Net Review - Wages, April 1997*, Print P1997, 22/4/97.

²⁷ *Asahi Diamond Industrial Australia Pty Ltd v Automotive Food Metals and Engineering Union*, Print L9800, 1/3/95; *Industrial Relations Act 1988-93*, s. 170QK(2)(a).

²⁸ *Community and Public Sector Union v Telstra Corporation Ltd*, Print S7179, 20/6/00 at [21].

²⁹ *Community and Public Sector Union v Sensis Pty Ltd: Supplementary Decision*, PR930269, 10/4/03. A decision had previously been made ordering a secret ballot on the basis that the employer had not bargained in good faith: *Australian Rail, Tram and Bus Industry Union v Great Southern Railways/Serco*, PR908235, 28/8/01.

upheld on appeal by a full bench, though not on the basis of a duty of fair bargaining. The AIRC's power derived from its function of facilitating the making and certification of agreements:

It follows from these provisions that the power to issue directions should be exercised so as to give primacy to the object of ensuring the primary responsibility for determination of terms and conditions rests with employers and employees at the workplace or enterprise level and that the choice of the form of agreement is a matter for them. The Commission's role is facilitative. In carrying out that role it should remain neutral about the form of agreement while attempting to protect the rights of each party. It is a part of the scheme that employees who so choose may be represented in negotiations by their union. Any directions the Commission makes should protect that right. The Act also provides that an employer may seek to make an agreement directly with its employees. In making directions the Commission should also protect that right. The power to make directions should not be exercised so as to pre-empt the right of either party to seek the type of agreement which it prefers.³⁰

Further, based on the commission's duty to act according to equity and good conscience, it could issue directions "which preserve the rights of all parties to pursue the type of agreement they prefer" and generally "to ensure a fair process is adopted".³¹ In the subsequent *Tenix Solutions* case, involving another stand-off concerning the type of agreement and a refusal by the employer to negotiate with the union, the union sought a ballot of employees to ascertain their preferred form of agreement. The ballot was ordered on the basis that fair and effective agreement-making is facilitated by both the parties and the commission being appraised of the views of the employees concerned; however an interim order restraining the company from pursuing AWAs was stayed on appeal as this would impair the employer's own bargaining rights.³²

It seems now that the AIRC may order a party to: provide information, clarify its position, conduct a ballot, recognise employee representation by a union or other person, and attend negotiation meetings or conciliation conferences chaired by the commission. Although the facilitative function is limited and cannot impinge on the bargaining rights of parties, its development is significant because other statutory avenues (such as claims of duress or coercive industrial action) have been ineffective in addressing employer strategies of non-recognition and the undermining of collective conditions.³³

³⁰ *Community and Public Sector Union v Sensis Pty Ltd* (2003) 128 Industrial Reports 92 at [25].

³¹ *Ibid* at [26]-[27]; affirmed in *Sensis Pty Ltd v Members of the Full Bench of the Industrial Relations Commission* [2005] FCAFC 74.

³² *Australian Municipal, Administrative, Clerical and Services Union v Tenix Solutions Pty Ltd*, PR954451, 17/12/04; *Australian Municipal, Administrative, Clerical and Services Union v Tenix Solutions Pty Ltd*, PR954698, 24/12/04.

³³ *WRA ss. 170WG, 170NC, Burnie Port Corporation Pty Ltd v Maritime Union of Australia* (2000) 97 Federal Court Reports 186; see Lee M, "Crafting Remedies for Bad Faith Bargaining, Coercion and Duress: 'Relative Ethical Flexibility' in the Twenty-first Century" (2005) 18 *Australian Journal of Labour Law* at 46, 48, 52.

Agreement-making process

In keeping with the legislation's focus on agreement making and validity rather than bargaining *per se*, the bargaining process itself is relatively unregulated by formal rules. Those rules which exist are imposed as part of the requirements for certification; as a consequence the AIRC has little sway in bargaining which is not concluded successfully with a formal agreement. The commission's involvement is likely to be after the event; it has not usually influenced bargaining in 'real time.'

The certification requirements associated with the agreement-making process are concerned with provision of information, the right to representation, and ensuring real consent by a majority of employees.³⁴ Agreements made between an employer and employees directly are subjected to the greatest level of regulation. In such cases the employer initiating an agreement must give at least 14 days' notice to the employees affected of the intention to make an agreement. The employees must be given "ready access" to the proposed agreement and reasonable steps taken to have its terms explained to them "in ways which are appropriate having regard to their circumstances and needs."³⁵ The employer must also notify employees of their right to be represented by a union and, if this right is taken up, provide the appointed union with "a reasonable opportunity to meet and confer about the proposed agreement"; it is a penalty offence to coerce an employee not to make such a representation request.³⁶ In numerous recent decisions the commission has strongly emphasised that employers must provide this information in a way which does not detract from the employees' right to representation.³⁷ Agreements made between employers and unions require only that employees be given access to the agreement and an explanation of its terms; the other safeguards are presumably met by the involvement of a union as a party.³⁸

Bargaining is also regulated in a formal way through invocation of the freedom of association provisions. The WRA made it an offence for any person to take or threaten any action (including industrial action) with the intent to coerce another into making an agreement although this does not apply to protected action within the bargaining period. This anti-coercion rule addresses the issue of real consent in bargaining.³⁹ Like other provisions in the WRA dealing with the proc-

³⁴ See Ross I and Trew J, *Informed Consent to Agreement Making under the Workplace Relations Act 1996 (Cth)*, Working Paper 68, Australian Centre for Industrial Relations Research and Training, Sydney, June 2001.

³⁵ WRA ss.170LK, 170LT(7).

³⁶ WRA ss. 170LT(9); 170NC(3).

³⁷ *Re TTI Stone Pty Ltd Certified Agreement 2001-2004*, PR921381, 16/8/02.

³⁸ WRA ss.170LJ(3), 170LR.

³⁹ WRA s.170NC; *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109

ess of agreement-making, it might be regarded as an instance of indirect or meta-regulation. However, as it is enforced not by a mediatory body like the commission but through a formal adversarial process in the Federal Court (with penal and injunctive remedies), it does not provide an effective means for creating or restoring a positive bargaining environment. It is more likely to be used to attack or forestall the tactics of adversaries: it was one basis of the ‘anti-suit suit’ injunction by unions in response to employer tactics to shut down union industrial action through common law remedies.⁴⁰ The anti-coercion provision has most often been prosecuted by the Employment Advocate in campaigns against unions; although its successes have been limited, the act of prosecution has itself had a regulatory impact. As another prohibition on industrial action the anti-coercion rule also serves to channel action into the regulatory structure of the bargaining period.

All agreements must be approved by a valid majority of “the persons employed at the time whose employment will be subject to the agreement.”⁴¹ Although the legislation specifically states that the agreement must be *genuinely* made or approved by the employees, there are no requirements for the actual approval process. The view that genuine approval implies requirements of informed consent and absence of coercion was established under the previous legislation,⁴² and this approach has been continued. Commission members generally favour a secret ballot, but other methods — including signing a circulated copy, tele-voting and a show of hands — have been approved provided no coercion is apparent. However if a ballot is used, deficiencies in its conduct or the eligibility to vote will mean that the agreement was not genuinely approved by a valid majority.⁴³

Certification

The certification hearing is the primary regulatory arena for bargaining. Deficiencies in rule-observance are most likely to come to light in an application which is opposed by a union: either a union seeking to block an employer’s agreement with its employees, or a union challenging a deal between an employer and a rival union. Deficiencies occasionally emerge from the evidence

Federal Court Reports 378; *National Union of Workers v Qenos* (2001) 108 Federal Court Reports 90.

⁴⁰ de Felice V, “Stopping or Preventing Industrial Action in Australia” (2000) 24 *Melbourne University Law Review* at 336.

⁴¹ WRA ss.170LJ(2), 170LR(1), 170LT(6).

⁴² *Re Toys'R'Us (Australia) Pty Ltd Enterprise Flexibility Agreement 1994*, Print L9066, 3/2/99; *VHA Trading Company v Australian Services Union*, Print N9390, 7/3/97.

⁴³ WRA s.170LT(5), (6); *Coles Supermarkets Australia Pty Ltd v Shop, Distributive and Allied Employees Association*, Print T2319, 19/10/00 at [14]; *Re Endeavour Petroleum Pty Ltd Certified Agreement 2004*, PR957131, 8/4/05 at [68].

produced to support compliance with the statutory requirements, indicating either lack of close attention to (understanding of) the procedural rules, or attempts to squeeze through employer-initiated arrangements which are essentially inconsistent with the formal legal institution of consensual enterprise agreements. For example, in one recent case the employer argued that only employees who were made an offer to work under a certified agreement were covered by the agreement and therefore eligible to vote; the argument was rejected (on appeal) as fundamentally confusing the statutory agreement institution and its process with that for individual contracts.⁴⁴ This was at least an upfront ‘creative’ attempt to mould the bargaining institution; other cases have more closely resembled fraud. Before his retirement, one of the most experienced commission members, Munro J, warned on the basis of direct experience that “it is not rare to find proposed agreements that approximate to shams,” and to confirm the need to scrutinise applications closely.⁴⁵

Tribunal jurisprudence has established that the commission approaches its scrutiny in applications for certification in two stages. The first stage is concerned with validity, determining whether the agreement conforms to the institution of the certified agreement established by the Act. The second stage addresses compliance with the statutory requirements for certification: both the substantive content of the agreement and the procedural rules for its making which legitimate the bargaining regime.⁴⁶ By placing some matters at the higher level of validity and therefore ostensibly beyond its discretion, the commission has gained some leeway in the certification process. While agreements which do not satisfy the certification requirements can be approved subject to undertakings by the parties (designed to remedy defects by bringing performance of the agreement into conformity with the statutory tests), this procedure cannot cure an agreement which is considered to suffer from statutory invalidity.⁴⁷

In a significant step the AIRC has begun to characterise the statute-imposed requirements for certification as providing important rights to parties during the bargaining process. The commission has taken a strict approach to the requirements for the agreement-making process under 170LK, considering that they are necessary to underpin the statutory object of “fair and effective agreement-

⁴⁴ *Re Energy Developments Limited and Employees Of The Company Certified Agreement 2002* (2003) 121 Industrial Reports 274.

⁴⁵ *Re Moncreiff Fabrications Labour Services Pty Ltd Certified Agreement* (2002) 124 Industrial Reports 47 at [11].

⁴⁶ *Re Grocon Pty Ltd Enterprise Agreement (Victoria)*, Print PR927672, 12/2/03; *Re Energy Developments Limited and Employees of the Company Certified Agreement 2002*, PR928057, 21/2/03 at [30]-[31].

⁴⁷ WRA s. 170LV; *Re SJ Weir Pty Ltd*, PR 947609, 7/6/04 ; *Re KL Ballantyne & National Union of Workers (Laverton Site) Agreement 2004*, PR952656, 22/10/04 at [250]-[255].

making.”⁴⁸ Even an apparently purely technical provision, such as the one requiring employers to give 14 days’ notice to employees before the making of the agreement, is considered a bargaining right because it allows employees to invoke their union’s involvement in negotiations.⁴⁹ If employees are given less than the statutory period to examine the agreement, the commission has (mostly) taken the view that the deficiency is irremediable, even if the shortfall is only one day and is the result of miscalculation.⁵⁰

This procedural rights approach is clearest in relation to the requirement that the employee be informed of their ability to be represented by a union in negotiations. Initially this was considered in several decisions as simply involving the provision of information, and therefore requiring only substantial compliance. In most of the recent decisions the representation notice has been regarded as an important bargaining safeguard, with its terms needing to be strictly performed. However there are significant differences of approach between commission members on the degree of exactness required (particularly for the wording of the representation notice) and the amount of discretion available in determining whether to certify an agreement. In an attempt to relax the strict compliance approach while retaining a rights perspective, a full bench led by the president of the commission has said that the wording of the legislation does not have to be reproduced exactly, while confirming the need for close correspondence to the statutory requirement.⁵¹ The differences in approach among commission members are founded on whether the statutory requirements embody bargaining rights which must be strenuously upheld. Ultimately such differences come down to the role of the commission as a regulator: whether the commission should be more concerned with facilitating autonomy or fairness in agreement-making.

The main focus in AIRC certification proceedings is a substantive one: whether the agreement satisfies the no disadvantage test. This involves an essentially subjective assessment whether the terms of the agreement as a whole are less favourable to the employee than those of a relevant award, based on documents prepared by the applicant. There is no established procedure by which the comparison is made, and the forensic thoroughness of the investigation have varied markedly. Despite the workload involved, the commission has maintained inde-

⁴⁸ WRA s. 3(e); *Re Mobile Food Vans Enterprise Agreement 1998*, Print R4468, 6/5/99; *Australian Liquor, Hospitality and Miscellaneous Workers Union v Mirvac Hotels Pty Ltd t/as Sebel of Sydney*, Print R6247, 24/6/99.

⁴⁹ *Re Egan Bros Plumbing & Building Services Pty Ltd Enterprise Agreement (2000)* 101 Industrial Reports 429 at 433; contra *Re Blockbuster Manning & Leeming Certified Agreement 2003*, PR940464, 13/11/03.

⁵⁰ *Shop, Distributive and Allied Employees Association v White's Discounts Pty Ltd (2003)* 128 Industrial Reports 68.

⁵¹ *Re Austral Construction Pty Ltd*, PR943994, 24/2/04.

pendent scrutiny of each agreement (while moving towards a less formal approach based on documents rather than oral hearings). This is quite unlike the process used for AWAs by the Office of Employment Advocate, which has embraced licensed self-regulation, compliance mechanisms and targeted inspection: meaning that a substantial proportion of agreements are not examined individually.⁵²

Private Arbitration of Agreements

The shrinking of the commission's direct regulatory function has to some extent been offset by the development of its 'private arbitration' jurisdiction. A significant feature of bargaining under the WRA has been the willingness of parties to give the commission responsibility for settling disputes arising under the agreement. Referrals to the AIRC in accordance with dispute settlement provisions in agreements increased at a steady rate since the 1996 Act was introduced, more than doubling in the last five years.

In the large majority of cases, the donation has been in broad and unspecific terms, leaving it to the commission itself to determine its powers and procedures. Commission members have taken the view that a general donative clause allows the commission to exercise all of its statutory arbitration powers during private arbitrations.⁵³ Furthermore, AIRC members have generally taken a liberal approach in determining whether a dispute is "over the application of the agreement" and thus capable of being settled by the commission.⁵⁴ The difference in status does, however, provide significant restrictions: when acting as private arbitrators, commission members are constrained by the terms of the agreement made by the parties and cannot create completely new obligations. Decisions also show that commission members are mindful of their role as facilitators of the parties' intentions rather than as autonomous regulators.

⁵² Mitchell R et al, *Protecting the Worker's Interest in Enterprise Bargaining: The 'No Disadvantage Test' in the Australian Federal Industrial Jurisdiction - Final Report* (Workplace Innovation Unit, Industrial Relations Victoria, Melbourne, 2004) pp 24, 28.

⁵³ Decisions made after the High Court's *Private Arbitration Case* displace the earlier view that a positive donation of statutory powers was required in the agreement: eg *Qantas Flight Catering Ltd v Australian Municipal, Administrative, Clerical and Services Union NSW and ACT (Services) Branch* (2003) 128 Industrial Reports 72.

⁵⁴ WRA s. 170LW; *Automotive, Food, Metals, Engineering, Printing And Kindred Industries Union v Holden Ltd* (2003) 128 Industrial Reports 101 at [46]; *Shop, Distributive and Allied Employees Association v Big W Discount Department Stores*, PR924554, 12/11/02 at [23].

Conclusion: The Australian Industrial Relations Commission as a Meta-Regulator

As a tribunal, the AIRC is a distinctive type of organisation. It is large, complex, bureaucratic, legalistic and diffusely-structured. Its 46 full-time members act with a high degree of autonomy, and there is limited co-ordination of policy. Even the mechanism of appeals to a full bench does not provide uniformity in approach, and there have been significant disagreements of principle within the commission concerning its functions and powers in relation to bargaining. The AIRC is constrained not only by its organisational nature, but by numerous complex legal norms: principally the Act itself, but also the decisions of courts. As it operates within a contested political space, it is regularly subjected to political pressures. It is constrained in a general way by the expectations and strategic actions of parties; and the need to maintain relevance and legitimacy (a battle which it now seems to have lost).

While traditionally the AIRC has acted as a direct regulator in setting minimum conditions through awards, in the arena of bargaining the commission functions as a meta-regulator, influencing the conduct of interactions between bargaining parties. A meta-regulator is concerned less with the detailed management of outcomes and more with overseeing the general terms by which parties will regulate their conduct. The regulation involved is procedural, setting the terms on which the objectives of regulation may be met by the parties own strategies. Optimally, this should involve not only shaping the institutional pathways for regulatory compliance by parties (facilitation), but also promoting the will and culture for compliance within and between organisations (motivation), and providing the means for scrutiny and improvement (accountability). All are necessary for effective self- or co-regulation.⁵⁵ In the context of labour regulation, procedural standards do not directly establish the conditions and conduct of working relationships, but provide a supporting framework for the negotiation of such relationships.⁵⁶

However the AIRC is a weak meta-regulator within the regulatory arena of labour market bargaining. It has not determined the bargaining environment, or even supervised conduct in any close or active way. Rather the total pattern of its interactions (past decisions, attitudes of commission members, and expectations of them held by other actors) together with the structure of formal legal rules provided by the Act, influences the bargaining parties in relation to a number of

⁵⁵ Parker C, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge UP, Cambridge, 2002) pp 245-7.

⁵⁶ Deakin S and Wilkinson F, "Labour Law and Economic Theory: A Reappraisal" in Collins H, Davies P and Rideout R (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International, London, 2000) p 32.

strategic choices, such as whether to bargain, when, with whom, and how. These decisions are affected by the history of Commission interventions: what is doing as well as what it is not doing but leaving to others, whether because it is considered to be beyond the commission's powers or legitimate area of operation. Even in a formal sense the AIRC's meta-regulatory functions vary: in terms of their self-acting effect they may be strong (orders granting or withdrawing rights, eg order to confer or hold ballot, termination of bargaining period), or may be weak (recommendations, conciliation, facilitation). Its primary functions are the approval of standards made by the parties, and attempting to assist in resolution of blockages in the bargaining process through facilitation of agreement-making, together with limited monitoring through the certification of agreements. Its ability to monitor and regulate the bargaining process is limited by formal norms (the limits recognised in *Sensis*) and the commission has no enforcement powers. By contrast, other social actors may act through informal institutions or even outside them.

Despite its weak and limited powers in the bargaining and certification processes, the AIRC has extended its functions by formulating its role in terms of protecting the statute-derived bargaining rights of parties. There is some continuity here with the commission's traditional values based on fairness and industrial justice. Recently, it has also maintained relevance by developing its facilitative and private arbitration functions. It has been able to do this because of the trust which has continued to be held in it by many of the bargaining actors.⁵⁷

The use of certification as a regulatory tool was the result of a hybrid system of awards and agreements. The purpose of the certification regime for agreements was to ensure that there was no derogation from the public award standard without prior scrutiny by an independent responsible body. In order to limit the degree of intervention, successive amendments shifted the standard from a "public interest" test to the "no disadvantage" based on the calculus of private interests. Some regulatory space was still to be found in the procedural requirements for certification - particularly regarding the provision of information to employees, because it was here that any idea of free and informed consent was founded. Regulation by the AIRC on this basis has appeared to critics to be pedantic intermeddling, but contained some important safeguards.

The federal government's 'WorkChoices' reforms will remove virtually all of these regulatory waypoints, from the AIRC's scrutiny of agreements in the certification process, to the application of the no-disadvantage standard. The changes, described as making the agreement-making process more 'streamlined', will result in a shrinking of public regulatory space. Approval of collective

⁵⁷ Forbes-Mewett H, Griffin G and McKenzie D, "The Australian Industrial Relations Commission: Adapting or Dying?" (2003) 11 *International Journal of Employment Studies* 1.

agreements will in future be handled by the Office of the Employment Advocate, using an administrative lodgment process similar to the processing of AWAs. Agreements will come into effect on lodgment, and approval will be based on statutory declarations provided by the employer. If the Employment Advocate's current procedures are any guide, monitoring of compliance will become routinised and independent scrutiny is likely to be exceptional. Some of the procedural requirements will remain, such as valid majority approval for collective agreements, and the duty to provide information to employees about their rights in the process (now to be satisfied by a standard statement authored by the Employment Advocate). However there will be no effective means of enforcement. Private arbitration by the AIRC will be allowed, but parties will have to list precisely the powers which they wish to confer, which will limit the effectiveness of the commission's involvement.

Instead of meta-regulation by scrutiny of procedural norms, the reforms propose a shift to direct regulation using the traditional policing method of complaint-based prosecution, with the prospect of court-imposed financial penalties for violation of the procedural requirements or for bargaining conduct subsequently found to have been coercive or misleading. Enforcement will become part of a compliance regime operated by the Office of Workplace Services (the successor to the former arbitration inspectorate), which will use education and assistance to promote observance of the Act, along with inspections and prosecutions in response to individual complaints.⁵⁸ While this appears to be embracing 'new regulation' techniques, the concentration of compliance in a government agency with no sanctions other than prosecution, and the removal of procedural mechanisms such as certification (which uses consequences-based enforcement by denial of legal validity), are a return to traditional methods of direct regulation.

The regulatory spectrum is not limited to a choice between a weak meta-regulator with limited powers, and command-based enforcement which is likely to be illusory. We might contrast these alternatives with other models of far more successful regulatory agencies, such as the Australian Competition and Consumer Commission, which are able to work in a proactive and effective manner through a variety of formal and informal regulatory techniques. In the field of labour relations, a model of a kind is provided by New Zealand under the *Employment Relations Act 2000*, where judicially-based institutions have been made a secondary resort. Instead, the overwhelming source of institutional regulation is through a code of bargaining practice and the Employment Relations Authority, a body which is investigative rather than judicial in nature. It is much more

⁵⁸ Australian Government, *WorkChoices: A New Workplace Relations System*, (released 6 October 2005). pp 19-21, 43. On recent restructuring and reduction in support for OWS, see the paper by Margaret Lee in this volume. Unions will retain the power to prosecute breaches of agreements, but in most cases only on behalf of individual members, as they will no longer be able to become parties to collective agreements negotiated directly with employees.

akin to the model of independent public agency which is now common in many regulatory arenas: an active, flexible and responsive meta-regulator, geared towards mediation but possessing a substantial array of escalating powers in reserve.