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## **Individualism and Collectivism in Agreement-Making under Australian Labour Law**

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# Individualism and Collectivism in Agreement-Making under Australian Labour Law

## Abstract

Australia, in common with many other industrialised countries in the 1990s, has experienced a shift towards individualism in labour law and labour market regulation. This has been part of a wider change as governments have opened up domestic markets to international competition, while rethinking the protections provided by the welfare state. Business has demanded deregulation of all kinds but particularly in the labour market, with the aim of achieving greater flexibility and efficiency in the utilisation of labour. The debate over the reform of industrial relations institutions and processes in Australia has been conducted in terms of 'enterprise bargaining', a diffuse term which means (depending on the position of the speaker) either collective bargaining involving national unions but with outcomes tailored to specific workplaces, or firm-specific bargaining by internal enterprise-based parties with minimal involvement from 'external' bodies such as unions. During the last decade the debate has moved from an assumption of collective bargaining with union involvement, to the view that agreements should be primarily individual in nature. Legislation has mirrored this debate, with increasing emphasis being given to individual agreements. Hence the legal relationship between collective and individual agreements is of major importance in contemporary Australian labour law.

## Keywords

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# Australia

## Individualism and Collectivism in Agreement-Making under Australian Labour Law

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### Biography

Dr Andrew Frazer is a Senior Lecturer in the Faculty of Law at the University of Wollongong, Australia, where he teaches in the fields of employment and labour relations law. He has published widely on the history of Australian compulsory arbitration systems, trade union law, and recent developments in labour law.

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# Individualism and Collectivism in Agreement-Making under Australian Labour Law

Andrew Frazer

## *Introduction: compulsory arbitration, collective agreements and individual contracts*

Australia, in common with many other industrialised countries in the 1990s, has experienced a shift towards individualism in labour law and labour market regulation. This has been part of a wider change as governments have opened up domestic markets to international competition, while rethinking the protections provided by the welfare state. Business has demanded deregulation of all kinds but particularly in the labour market, with the aim of achieving greater flexibility and efficiency in the utilisation of labour.

The debate over the reform of industrial relations institutions and processes in Australia has been conducted in terms of 'enterprise bargaining', a diffuse term which means (depending on the position of the speaker) either collective bargaining involving national unions but with outcomes tailored to specific workplaces, or firm-specific bargaining by internal enterprise-based parties with minimal involvement from 'external' bodies such as unions. During the last decade the debate has moved from an assumption of collective bargaining with union involvement, to the view that agreements should be primarily individual in nature. Legislation has mirrored this debate, with increasing emphasis being given to individual agreements. Hence the legal relationship between collective and individual agreements is of major importance in contemporary Australian labour law.

In order to understand any labour law system in a comparative context, it has been said that one must adopt a functional and historical approach, paying regard

to the values, history and culture of the country being explained.<sup>1</sup> In the Australian context, discussion of industrial relations is necessarily framed by the long history of compulsory conciliation and arbitration systems. The shift towards enterprise bargaining and individual agreements involves a fundamental change in the traditional approach to industrial regulation under the Australian Federal and State industrial relations systems.

Compulsory arbitration was developed in response to a series of 'Great Strikes' during the early 1890s. In these disputes employers responded to the growth of trade union power by refusing to recognise unions or bargain with them. The employers' stance was supported by the common law which made collective industrial action by employees a criminal offence or at the least a compensable civil wrong. State-sponsored compulsory conciliation and arbitration was introduced a century ago with the aim of preventing or settling such disputes. Its primary aim was the encouragement of collective bargaining, either by making agreements or by reaching conciliated (mediated) settlements.

The original aims of the Federal arbitration legislation were to prevent strikes and lockouts, to provide for conciliation 'with a view to amicable agreement between the parties' or, in default of that, to settle disputes by an 'equitable award' after compulsory arbitration.<sup>2</sup> The original framers of compulsory arbitration believed that collective groups of employers and employees would naturally tend to settle their differences by conciliation and agreement, and most likely on an industry-wide basis. The very existence of formal and compulsory mechanisms for conciliation and arbitration would induce parties 'to make as between themselves agreements in regard to the conduct of the particular trade or business in which they are engaged. Then this Act will bind them.'<sup>3</sup>

The adoption of this system meant that unions did not need to gain recognition from employers. Under compulsory arbitration, unions were recognised by the state. As long as they were registered under the arbitration system they could notify a dispute with an employer (or employer association) and thereby invoke the compulsory processes of conciliation and arbitration. Ultimately a union could seek to have the tribunal impose an award on the employer which gave the union and its members both substantive and procedural rights. Registered unions were also able to make enforceable collective agreements with employers.

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<sup>1</sup> Johannes Schregle, 'Explaining Labour Law and Labour Relations to Foreigners: Some Reflections about International Comparison' in J.R. Bellace and M.G. Rood, eds, *Labour Law at the Crossroads: Changing Employment Relationships*, The Hague, Kluwer, 1997, pp. 161, 163.

<sup>2</sup> *Commonwealth Conciliation and Arbitration Act 1904*, s. 2.

<sup>3</sup> A. Deakin, Second Reading Speech, Conciliation and Arbitration Bill, *Commonwealth Parliamentary Debates*, vol. 15, 30 July 1903, p. 2861.

The method chosen for making agreements legally enforceable was different from that used in many other systems. Rather than treating collective agreements as contracts, the arbitration system gave unions a special though limited legal status, enabling them to enter into particular kinds of agreements regulated by statute and supervised by tribunals separate from the ordinary courts.<sup>4</sup> Thus awards and agreements were not fully integrated into the legal system as occurred in many European countries.<sup>5</sup> Breach of an industrial agreement was not a breach of contract entitling the innocent party to compensatory damages but, like breach of an award, a contravention of a statutory obligation resulting in a penalty similar in nature to a fine. In practice, though, it has also been common for parties to obtain an injunctive order compelling the other party to observe the award or agreement.

The upshot of the particular historical circumstances in which the compulsory arbitration system was developed, which determined the particular legal form for bargaining and regulation, is that individual and collective labour agreements have been quite different in their juridical nature and form. The contract of employment, a creature of the common law, has remained notionally part of the private law of contract (though resort to the civil courts in employment disputes has been rare until recently). Collective agreements registered under the arbitration system are part of the public law since they are regulated by statute and (especially in recent times) their contents subject to approval by a tribunal with responsibility to act in the public interest. Those collective agreements not registered under this system remain unrecognised by the legal system and are only enforceable by industrial action.

Different forms of regulation have accommodated periods of decentralised collective bargaining across the twentieth century. Enterprise specific awards and registered industrial agreements have been common means of recognising bargaining within a centralised system controlled to varying degrees by the Federal arbitration tribunal (now known as the Australian Industrial Relations Commission). After the abandonment of the universal needs-based 'basic wage' concept in 1967 the Federal industrial relations system has in practice operated a three-tier structure for wage fixation, involving national wage cases, industry

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<sup>4</sup> Andrew Frazer, 'Australian Labour Relations: the Influence of Law and Government' in Jim Hagan and Andrew Wells, eds, *Industrial Relations in Australia and Japan*, Sydney, Allen & Unwin, 1994, pp. 126-7.

<sup>5</sup> See G. Bamber, E. Cordova and P. Sheldon, 'Collective Bargaining' in R. Blanpain and C. Engels, eds, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 6th rev edn, The Hague, Kluwer, 1998, p. 407; John P. Windmuller, 'Comparative Study of Methods and Practices' in John P. Windmuller, ed, *Collective Bargaining in Industrialised Market Economies: A Reappraisal*, Geneva, ILO, 1987, p. 136.

awards and agreements, and over-award agreements.<sup>6</sup> In practice informal (and legally unenforceable) over-award agreements determined the real wage rates in many skilled trades and industries from the 1950s to the 1980s. Often collective agreements were enshrined in consent awards made by the various tribunals, and most awards were at least partly the result of negotiation.<sup>7</sup> The result has been ‘a peculiar hybrid of quasi-collective bargaining.’<sup>8</sup>

Awards continue to play an important role in determining employment conditions, despite attempts by governments to promote decentralised collective bargaining. Since enterprise bargaining was introduced in the early 1990s, collective agreements have tended to supplement rather than replace the traditional award system, relying on existing awards to set many terms while providing ‘add-on’ conditions suited to particular workplace. Only 14 percent of all employees covered by Federal certified agreements have their employment terms comprehensively covered by them; the remainder continue to be regulated by a combination of awards and agreements. However awards are being replaced by agreements at an increasing rate.<sup>9</sup>

Although industrial relations legislation in Australia allows for legal recognition of collective agreements through certification or registration under the arbitration system, unregistered agreements remain common in practice. A survey in 1995 reported that unregistered agreements occurred in 40 percent of workplaces which had a written collective agreement. Subsequent studies indicate that unregistered agreements are more likely to exist at either small or very large

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<sup>6</sup> Braham Dabscheck, ‘The Arbitration System Since 1967’ in Stephen Bell and Brian Head, eds, *State, Economy and Public Policy in Australia*, Melbourne, Oxford University Press, 1994, pp. 144, 147, quoting *National Wage Case 1974* (1974) 157 CAR 293 at 301; see also Robert Macklin, Miles Goodwin and Jim Docherty, ‘Workplace Bargaining Structures and Process in Australia’ in David Peetz, Alison Preston and Jim Docherty, eds, *Workplace Bargaining in the International Context*, Canberra, Department of Industrial Relations, 1992.

<sup>7</sup> In the early 1970s, consent awards constituted around 70 percent of all Federal awards made, and if certified agreements are added to the picture, non-arbitrated settlements constituted over three-quarters of all settlements by award or agreement within the formal arbitration system at this time: D. Yerbury, ‘Collective Negotiations, Wage Indexation and the Return to Arbitration’ in G.W. Ford, J.M. Hearn and R.D. Lansbury, eds, *Australian Labour Relations: Readings*, 3rd edn, Melbourne, Macmillan, 1980, p. 464. It has been claimed that 25 percent of all Federal awards in the late 1980s were entirely the product of collective negotiation, while most of the content of the remainder was the result of agreement: W.B. Creighton, W.J. Ford and R.J. Mitchell, *Labour Law: Text and Materials*, 2nd edn, Sydney, Law Book Co, 1993, p. 860.

<sup>8</sup> D. Yerbury and J. E. Isaac, ‘Recent Trends in Collective Bargaining in Australia,’ *International Labour Review*, vol. 110, 1971, pp. 421–452; see Greg J. Bamber and Edward M. Davis, ‘Australia’ in Miriam Rothman, Dennis, R. Briscoe and Raoul C. D. Nacamulli, eds, *Industrial Relations Around the World*, Berlin, Walter de Gruyter, 1993, p. 18.

<sup>9</sup> Department of Employment Workplace Relations and Small Business, *Agreement making in Australia under the Workplace Relations Act 2000 and 2001*, Canberra, 2002, p. 105; Mark Wooden, *The Transformation of Australian Industrial Relations*, Sydney, Federation Press, 2000, p. 42.

establishments, and to supplement registered agreements or awards which remained the main form of regulation. The incidence of unregistered collective agreements actually seems to be increasing.<sup>10</sup>

## *I Collective labour agreements as one of the pillars of contemporary labour relations*

### *1. Democracy and collective labour agreements*

While there has been frequent debate concerning the need for a bill of rights in Australia, the written constitutions of the Commonwealth of Australia and of the constituent States are machinery documents which contain few recognised individual rights. There is no constitutional charter of labour rights, or relevant human rights. Australian common law (unwritten law made by courts) does not recognise any right to associate for industrial purposes or to engage in collective bargaining; indeed, many of the principles underlying contract and tort liability are antithetical to collective action.<sup>11</sup> In 1973 Australia ratified the core ILO Conventions 87 and 98 on freedom of association and the right to organise and bargain collectively (though it has not ratified Convention 154 on Collective Bargaining). These labour standards do not have legally binding status in Australian domestic law. However courts and tribunals have on occasion referred to them in their decisions. The *Industrial Relations Reform Act* of 1993 increased the impact of international standards on Australian labour law in the Federal jurisdiction. One of the Act's specific objects was 'ensuring that labour standards meet Australia's international obligations.'<sup>12</sup> Although international labour norms were not directly enacted by the legislation, notions of collective bargaining (including a limited right to strike) were introduced.

Many of these reforms were dismantled with the introduction of the *Workplace Relations Act* in 1996, which does not rely on international labour standards. This Act is designed to give equal weight to individual and collective bargaining, and to reduce the rights of unions in negotiation and agreement-making. Since then several attempts have been made by the current Federal government to pass

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<sup>10</sup> Department of Industrial Relations, Annual Report 1995: Enterprise Bargaining in Australia, Canberra, AGPS, 1996, p. 25; Wooden, *The Transformation of Australian Industrial Relations*, op. cit., p. 60-62; Richard Hall and Kristin van Brneveld, *Working It Out? Why Employers Choose the Agreements they Do – A Survey*, Australian Centre for Industrial Relations Research and Training, Working Paper 63, 2000, table 1, p. 23 ([www.econ.usyd.edu.au/acirrt/pubs/wp.htm](http://www.econ.usyd.edu.au/acirrt/pubs/wp.htm)).

<sup>11</sup> See Breen Creighton and Andrew Stewart, *Labour Law: An Introduction*, 3rd edn, Sydney, Federation Press, 2000, pp. 397, 402-408; *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211.

<sup>12</sup> *Industrial Relations Act 1988-93*, s. 3(b)(ii).

legislation which further limits the use of industrial action by unions in negotiations for an agreement, and to restrict the use of industry-wide collective bargaining.

Official recognition of collective bargaining has relied on the rights of registered unions to make agreements or seek awards under the conciliation and arbitration system. Because of this, the democratic foundations of collective bargaining in Australia have been indirect. Firstly, collective bargaining has (to varying degrees over time) operated under the conciliation and arbitration system. This system is supervised by an independent quasi-judicial tribunal created under public statute and subject to general control through legislation made by democratically elected governments.<sup>13</sup> Secondly, trade unions registered under the arbitration system are subject to regulation by the tribunals to ensure their democratic control. Their rules, management and elections are controlled to an unusually high degree.<sup>14</sup>

Under the traditional compulsory arbitration system, collective agreements were formalised in a number of ways. An agreement could be submitted to the industrial tribunal for certification, in which case it became binding on the parties to it by statutory force. Until recently, certified agreements had the same legal status as awards. Alternatively, an agreement could be presented to the tribunal for adoption as a consent award. In both cases, the agreement or award had to be approved by the tribunal, which was required to act in the public interest.<sup>15</sup>

Until recently, binding industrial agreements could only be made between an employer (or employer association) and a registered union. Strictly speaking, the agreement (like an award) was only binding on members of the union that was a party to it. In the 1990s both the Federal and State jurisdictions have introduced amendments extending enterprise bargaining to non-unionised workers by allowing an employer to make an agreement with its employees, provided a majority of them consent. However such an agreement remains a collective form

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<sup>13</sup> Andrew Frazer, 'Parliament and the Industrial Power' in Geoffrey Lindell and Robert Bennett, eds, *Parliament, Powers and Processes: The Vision in Hindsight*, Sydney, Federation Press, 2001.

<sup>14</sup> R.C. McCallum, 'Federal Controls Upon Trade Unions: The Australian Enigma' in D. Rawson and C. Fisher, eds, *Changing Industrial Law*, Sydney, Croom Helm, 1984; Andrew Frazer, 'Trade Unions under Compulsory Arbitration and Enterprise Bargaining: An Historical Perspective' in Paul Ronfeldt and Ron McCallum, eds, *Enterprise Bargaining, Trade Unions and the Law*, Sydney, Federation Press, 1995, pp. 56-60.

<sup>15</sup> *Industrial Relations Act 1988*, ss. 90, 115(4); see Joseph E. Isaac and Ronald C. McCallum, 'The Neutral and Public Interests in Resolving Disputes in Australia', *Comparative Labor Law Journal*, vol. 13, 1992, p. 380-409; John Benson, Gerard Griffin and Graham Smith, 'The Public Interest and the Industrial Relations Act 1988', *Public Law Review*, vol. 3, 1992, pp. 113-126.

of regulation distinct from an individual contract. The agreement is binding on all the employees concerned whether or not they agreed to it individually.<sup>16</sup>

In its *Bell Bay Case* of December 1994, the Australian Industrial Relations Commission restated the tenet that the Australian industrial relations system is founded on collective processes of dispute resolution and regulation, in which trade unions play a primary role:

The establishment of conditions of employment at an enterprise level through a system of individual contracts between a company and each of its employees is one at variance with our system of industrial relations, a system which, since its inception, has been based upon collective processes as the means of providing terms and conditions of employment at the workplace. The present [Industrial Relations] Act is based on a system of collective regulation in which registered organisations of employers and employees acting as parties principal are an integral part of the collective processes which operate under the Act.<sup>17</sup>

Since then the picture has changed dramatically. Now, under the Federal and some State systems, the power and role of unions to engage in collective bargaining have been diminished, while the position of individual agreement-making has been elevated. The Federal Liberal-National Government, introducing its 1996 reforms, explained that the aim was 'to restore the focus of the system on ... employees and employers at the workplace and enterprise level.' It was made clear that the aim was to exclude the automatic involvement of unions in the regulatory process, including the making of agreements. The Government said that the legislation

does not discriminate in favour of one form of agreement over another — collective or individual, union or non-union. These are matters for decision by employers and employees, according to their own circumstances and their own perception of how their interests are best served.<sup>18</sup>

Reflecting this apparent choice between individual and collective agreements, the object of the Federal *Workplace Relations Act 1996* is stated as being 'to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia' by, among other means:

- 'ensuring 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;

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<sup>16</sup> *Workplace Relations Act 1996*, s. 170M. Similar provisions exist under the NSW system: *Industrial Relations Act 1996*, s. 31(5).

<sup>17</sup> *Re Aluminium Industry (Comalco Bell Bay Companies) Award 1983* (1994) 56 IR 403 at 442.

<sup>18</sup> P. Reith, Second Reading Speech, *House of Representatives Weekly Hansard*, 23 May 1996, pp. 1295, 1300.

- enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and
- providing the means for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards.<sup>19</sup>

The Labor Government had already introduced legislation in 1992-93 which attempted to force parties into particular forms of bargaining. These changes reduced the role of the Industrial Relations Commission as an independent scrutineer acting in the public interest. Bargaining was now designed to be focussed on the level of the particular enterprise or plant. The purpose of these changes was to 'entrench enterprise bargaining as the very hallmark of Australia's industrial system.'<sup>20</sup> However the process was still highly regulated through legislation and was intended by the government to remain collective in focus, relying on the existing industry-based union structure. The union registration system means that in practice only one union can cover an occupation. Since the 1980s unions have amalgamated into a small number of large industry-based unions, which have generally been granted near-exclusive state recognition as the collective bargaining parties in their industry.

This pattern of representation and bargaining has been diminished to a limited extent by the statutory creation of a different 'stream' of non-union agreements concluded between a corporate employer and the mass of employees at a workplace. These non-union agreements were originally introduced by the Labor government in 1993 as a means of extending enterprise bargaining to the unorganised workforce. Such an agreement, drawn up by an employer and approved by a majority of employees at a workplace, became binding on all existing and future employees once it was certified by the Commission as satisfying a number of statutory tests. This form of 'collective' agreement has been given greater prominence by the *Workplace Relations Act 1996*.

Despite these legislative changes, however, unions remain strongly involved in agreement-making. The vast majority of Federal certified agreements are made between a corporate employer and a registered union. While agreements made directly with employees have increased steadily since their introduction, they still only account for 9 percent of employees covered by the Federal bargaining

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<sup>19</sup> *Workplace Relations Act 1996*, s. 3(b)-(d).

<sup>20</sup> L. Brereton, Second Reading Speech, Industrial Relations Reform Bill, *House of Representatives Weekly Hansard*, 28 October 1993, p. 2779.

system. While the number of such agreements is increasing, they are covering smaller numbers of workers on average.<sup>21</sup>

There is no mandatory process for bargaining under the Federal system. A certified agreement must be approved by a valid majority of employees subject to it (ie a simple majority of those actually voting). While the legislation contemplates that approval may be by ballot, this is not mandatory. There are several provisions designed to achieve informed consent in the approval process. The employees must be given access to a copy of the agreement, and it must be explained to the employees who will be subject to it. This must be done in a way which takes account of their particular circumstances and needs. The legislation specifically mentions women, persons from a non-English speaking background, and young people as having special needs.<sup>22</sup> Ultimately, the employees must have 'genuinely approved' the agreement. This requirement has been interpreted as requiring genuine consent which was 'informed and uncoerced.'<sup>23</sup> The agreement cannot be certified unless the Commission is satisfied that it was genuinely approved.

There are legislative provisions which are supposed to protect free bargaining. Persons are prohibited from using action, including industrial action, with the intent to coerce another person to agree to the making or variation of a certified agreement. Similar protections against coercion or harassment also exist under the State systems.<sup>24</sup> Once an agreement comes into operation, the ability of the parties to engage in industrial action is limited. During the contemplated life of the certified agreement (no more than three years), the parties must not engage in industrial action in support of claims against the other party in respect of employees covered by the agreement. Industrial action is defined very widely to include any restriction on the normal performance of work. If the dominant purpose of the industrial action is to pursue claims made or contemplated by a party to the agreement, the action may be prohibited by an injunction of the Federal Court.<sup>25</sup>

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<sup>21</sup> Department of Employment Workplace Relations and Small Business, *Agreement making in Australia under the Workplace Relations Act 1998 and 1999*, Canberra, 2000, pp. 23, 25–6; *Agreement making in Australia under the Workplace Relations Act 2000 and 2001*, Canberra, 2002, pp. 57–8.

<sup>22</sup> *Workplace Relations Act 1996*, ss. 170LJ(3), 170LK(3), 170LR(2), 170LT(7).

<sup>23</sup> *Workplace Relations Act 1996*, s. 170LT(5) – (6); Ian Ross and John Trew, *Informed Consent in Agreement Making under the Workplace Relations Act*, Australian Centre for Industrial Relations Research and Training, Working Paper 68, 2001, p. 6 ([www.econ.usyd.edu.au/acirrt/pubs/wp.htm](http://www.econ.usyd.edu.au/acirrt/pubs/wp.htm)).

<sup>24</sup> *Workplace Relations Act 1996*, s. 170NC. *Industrial and Employee Relations Act 1994 (SA)*, s. 225 makes it an offence to harass an employee or apply improper pressure to induce them to enter into an enterprise agreement or the variation of one.

<sup>25</sup> *Workplace Relations Act 1996*, s. 170MN.

The 1996 amendments introduced a new form of *individual* statutory labour agreement, the Australian Workplace Agreement (AWA). Such agreements were originally intended to operate as a form of individual contract reproducing some (though not necessarily all) the express terms of the contract of employment. AWAs were given statutory form and recognition in order to allow individual parties to override some of the terms of certified agreements made on a collective basis. For the first time under the Federal system, therefore, individual agreements were given statutory recognition. The government explained that the purpose of introducing this kind of agreement was to promote flexibility and self-regulation through individual agreements while retaining some regulatory protections (in the form of minimum employment conditions and sanctions against illegitimate bargaining tactics).<sup>26</sup>

An Australian Workplace Agreement is a written agreement made between an employer and employee 'that deals with matters pertaining to' their employment relationship. It may be made when there is an existing employment relationship, as well as before the employment has commenced.<sup>27</sup> There has been a steady increase in the incidence of such agreements, although only about 13,000 employees (1.7 percent of the workforce) are covered by them. While they were intended to benefit small employers in particular, four-fifths are made by organisations with more than 100 employees, and they are increasingly used by large employers, who have traditionally been covered by the award system. They are most common in retail, transport, and service industries.<sup>28</sup>

Australian Workplace Agreements are subject to few legislative restrictions concerning their contents. They must incorporate a procedure for resolving disputes arising under them, and must include certain clauses prohibiting discrimination. The terms of the AWA, as a total package, must not disadvantage the employee by comparison with a relevant award.<sup>29</sup> Before coming into effect, they must be approved by an independent official, rather than by the industrial relations tribunal, as is the case with collective agreements. Similar individual agreements exist under the Queensland and Western Australian State systems. In both States, however, recent amendments now require individual statutory agreements to be approved by the industrial relations tribunal, and only after it has satisfied a series of statutory safeguards to protect freedom of choice. In

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<sup>26</sup> P. Reith, Second Reading Speech, Workplace Relations Bill, *House of Representatives Weekly Hansard*, 23 May 1996, p. 1300.

<sup>27</sup> *Workplace Relations Act 1996*, s. 170VF.

<sup>28</sup> Department of Employment Workplace Relations and Small Business, *Agreement making in Australia under the Workplace Relations Act 2000 and 2001*, Canberra, 2002, pp. 150, 156.

<sup>29</sup> *Workplace Relations Act 1996*, ss. 170VPB, 170VG & 170VPG.

Western Australia an individual statutory agreement can no longer be made while a statutory collective agreement continues to cover the employee concerned.<sup>30</sup>

The last decade has seen a substantial increase in the proportion of the workforce covered by either collective or individual agreements, and a corresponding decline in the importance of the award system. Currently about 44 percent of employees are covered by awards, while 42 percent are paid under certified or similar registered collective agreements and 14 percent are paid under individual contracts or agreements (ie not covered by awards).<sup>31</sup>

## ***2. Market economy and collective labour agreements***

The establishment of compulsory arbitration was closely associated with protection of domestic industries from international competition by the use of tariffs and bounties. The Federal Labor government (1983-96) dramatically reversed this situation by opening up the Australian economy to greater international competition in the mid-1980s, floating the Australian dollar, deregulating the financial sector, winding back industry protection, restructuring (and subsequently privatising) government monopolies and relaxing many government controls. These changes were made in response to a perceived economic crisis. By the mid-1980s Australia was facing a host of economic problems: a declining balance of payments, depreciating currency, low productive investment, persistently high inflation, and a worsening public deficit. An unemployment rate of around 10 percent seemed to have become entrenched. International market forces were seen to be demanding major structural reforms to the economy, not least of which were fundamental changes to the labour market and the regulation of industrial relations.

The demand for labour market reform was championed by proponents of individualist neo-liberalism (in Australia described, often disparagingly, as economic rationalists). They advanced a deregulationist approach as a means of solving Australia's economic problems by abolishing the 'rigidities' which were thought to be impeding greater efficiency. The term 'enterprise bargaining' was

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<sup>30</sup> *Industrial Relations Act 1999* (Qld), ss. 193, 203, 273; *Labour Relations Reform Act 2002* (WA), amending the *Industrial Relations Act 1979*. The recent Western Australian legislation phases out the individual 'workplace agreements' introduced in 1993, but still allows for individual 'employer-employee agreements' which are similar in conception to (collective) industrial agreements.

<sup>31</sup> Department of Employment Workplace Relations and Small Business, *Award and Agreement Coverage Survey 1999*, July 2000 ([www.dewrsb.gov.au/workplacelrelations/publications/aacoverage](http://www.dewrsb.gov.au/workplacelrelations/publications/aacoverage)). Of those covered by awards, half were paid at the award rate and half paid above the award, including payment by unregistered agreement.

used by employer groups, particularly the Business Council of Australia (representing large employers), to advocate a shift in focus towards workplace-based co-operation in achieving improvements to productivity. While enterprise bargaining was originally assumed to be collective in nature, in later years employers increasingly called for individual agreements to allow them to completely 'opt out' of the existing award system.

In fact considerable flexibility had already been achieved in the award system by the late 1980s. The Australian Industrial Relations Commission adopted a succession of principles in its National Wage Cases from 1986 to 1989 which were designed to achieve micro-economic reform at the workplace level. The principles were directed towards improving training and skilling, promoting industrial restructuring and efficiency, increasing flexibility in the use of labour, reducing conflicts and promoting consultation. Awards were modernised and simplified. Unions gained significant rights of consultation and participation in the restructuring process. These principles assumed lesser significance with the shift to enterprise bargaining, as the Commission could no longer scrutinise agreements to ensure that they met national objectives. The shift to an enterprise bargaining system has meant the end of codetermination and managed regulation of industry policy.

### ***3. Collective labour agreements as an instrument of negotiated social policy***

Industrial relations has tended to be divorced from social policy in Australia, with relatively little dialogue between industrial and social policy partners. This separation has been reinforced by the highly institutionalised nature of industrial relations, which has left industrial relations policy largely to be administered by arbitration tribunals independent from government. Although one of the two principal political parties, the Australian Labor Party (ALP), was originally formed to advance the trade union movement's goals politically and remains closely linked to the union movement, the industrial and political wings of the labour movement have remained separate in the formulation and implementation of policy.

The clearest, and most unusual, case of the convergence of industrial and social policy took place with the Accord between the ALP and the Australian Council of Trade Unions (ACTU) which was signed in 1983. The original Accord was an agreement on prices and incomes policy which was designed to maintain living standards by improving national productivity. One of the chief means of achieving these goals was through centralised regulation of wages by the compulsory arbitration system. The new ALP government led by former ACTU

president Bob Hawke took power with the union movement's commitment under the Accord not to pursue extra pay claims beyond those linked to productivity, in return for the government's promises to reform taxation and social welfare. Over the next few years, the government attempted to extend the Accord into a wide-ranging social compact involving employer and business organisations, the social services sector and community groups, through a series of summits and consultations. The inclusive approach taken by the government was frequently described as corporatist because of its attempt to 'lock in' non-government groups to defending and policing government policies among their constituencies.

Successive versions of the Accord were negotiated in the wake of Australia's economic problems, notably a declining balance of payments and weakening currency. The result, from 1987 onward, was a commitment to greater industrial restructuring and efficiency, achieved by reformed negotiated at the enterprise level by unions jointly operating as 'single bargaining units' at each workplace. However outcomes continued to be scrutinised by the Industrial Relations Commission. This was followed in the early 1990s by a willingness to reduce centralised controls on the bargaining process by limiting the Commission's role, and to extend the bargaining process to workplaces without a strong union presence by allowing the recognition of non-union collective agreements. The Accord thus produced fundamental changes to collective bargaining: in the legal framework and processes, as well as in the unions' commitment to bargaining and their expectations of outcomes.

This experiment in negotiated industrial and social policy ended with the election of a conservative government in 1996. Since then the avenues for formal consultation and dialogue have been dismantled.

#### ***4. Freedom to negotiate collective labour agreements as a principle of labour law***

The notions of freedom of association and the right to bargain collectively have been present implicitly in the compulsory arbitration system's prohibition of victimisation against union members and the recognition of the right of unions to participate in the making of agreements and awards. Yet the explicit recognition of the principle of the right to bargain has only occurred with the adoption of enterprise bargaining in the last decade.

The *Industrial Relations Reform Act* of 1993 recognised a right to bargain in two ways: by creating a limited right to strike; and by introducing a notion of good faith bargaining. Most of these provisions have been continued under the 1996 legislation. Industrial action was protected from legal liability under the common

law in most cases when the industrial action was taken during the notified 'bargaining period.' In order to initiate a bargaining period, an employer or union has to notify the other party of an intention to seek negotiations towards a certified agreement. During this period a bargaining party may notify their intention to engage in industrial action with 72 hours' notice: once notified, the intended action is protected from the industrial torts (which make virtually all forms of industrial action unlawful at common law and subject to prohibition by court orders under threat of a heavy fine).

Industrial action in support of bargaining is only protected if it was preceded by genuine attempts to negotiate, and notice was given by the union or employer involved. Once a certified agreement has been concluded, no industrial action is permitted over items which are the subject of the agreement during the stated period of its operation.<sup>32</sup>

The protected bargaining period may be terminated or suspended by the Industrial Relations Commission if it finds that a party is not genuinely trying to make an agreement.<sup>33</sup> The Commission can also intervene to restrain the use of industrial action in support of collective bargaining, by suspending or terminating a bargaining period on public interest grounds.<sup>34</sup> Once this occurs, the parties no longer have legally immunity for their industrial action. The use of this power has become relatively common in the last few years, with several strikes being terminated. In many cases a union was engaging in strike or picketing action because the employer refused to negotiate on a collective basis.

The 1993 reforms introduced the concept of good faith bargaining to an extent by providing that the Industrial Relations Commission could make orders for the purpose of 'ensuring that the parties negotiating an agreement do so in good faith.'<sup>35</sup> Although the powers of the Commission to intervene appeared to be extensive, the Commission itself held that its power was only facilitative: it could only order parties to meet and confer, but could not enforce parties to engage in

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<sup>32</sup> *Workplace Relations Act 1996*, ss. 170MO, 170MP, 170MN. However, issues which were covered by the agreement may be pursued by later industrial action: *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2002] FCA 61.

<sup>33</sup> *Industrial Relations Act 1988–93*, s. 170PO.

<sup>34</sup> The bargaining period could be suspended if the industrial action threatened to endanger the life, safety or welfare of the whole or part of the population, or threatened 'to cause significant damage to the Australian economy or an important part of it': *Industrial Relations Act 1988–93*, s. 170PO; *Workplace Relations Act 1996*, s. 170MW(3). If the bargaining period is suspended for this reason the Commission may proceed to arbitrate an award dealing with the matters directly at issue.

<sup>35</sup> *Industrial Relations Act 1988–93*, s. 170QK.

good faith bargaining.<sup>36</sup> This view was based on the Commission's understanding that to order a party to negotiate necessarily meant ordering that party to make concessions, which was an unwarranted intrusion into the bargaining process. The Commission's power to supervise bargaining has been significantly reduced under the 1996 amendments.

The *Workplace Relations Act 1996* has made several changes to collective bargaining rights. For the first time it has introduced provisions explicitly protecting freedom of association (equally protecting the right to join a trade union and the right not to join). Compulsory arbitration legislation has always contained provisions to protect union members from victimisation or discrimination by employers. These were extended in the 1996 Act to encompass discrimination on the grounds of non-membership as well.

At the same time, the Act has deliberately reduced the power and role of unions in the agreement-making process. The reduction of the role of unions in bargaining is consonant with one of the aims of the *Workplace Relations Act*, which is to expand possibilities for non-union and individual agreements. Under the previous legislation, before a certified agreement could be approved, all relevant unions were required to be given an opportunity to be a party to the agreement and the Commission be satisfied that the agreement was in the interests of the employees concerned.<sup>37</sup> This requirement has not been repeated in the current legislation. It now seems well-established that the 1996 Act 'does not accord preference or priority to one form of agreement over another.'<sup>38</sup> Employers have therefore tended to assume that the current Federal Act allows them to choose not only the type of agreement they can make, but the parties with whom they wish to negotiate.

The current Act allows an employer to make an agreement with one or more organisations of employees, provided each such organisation has at least one member employed at the workplace and is entitled (by its eligibility rule, which is approved by the Commission) to represent the industrial interests of the employees concerned. There is no requirement that every organisation with

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<sup>36</sup> *Appeal by Public Sector Union (ABC Case)* (1994) AILR 372, Print L4605; *Asahi Diamond Industrial Australia Pty Ltd v Automotive Food Metals and Engineering Union* (1995) 59 IR 385 at 421–8, Print L9800.

<sup>37</sup> *Industrial Relations Act 1988–93*, s. 170MC(1)(g), (4). Otherwise, a certified agreement had to include as parties all registered unions which were party to an award covering the workplace.

<sup>38</sup> *Australian Meat Industry Employes' Union v Peerless Holdings Pty Ltd* [2000] FCA 1047 at para 20 per Finn J.

members at the workplace must be included in an agreement (see also III.3 below).<sup>39</sup>

In trying to assert the right to bargain collectively, unions have tried to rely on the freedom of association provisions of the *Workplace Relations Act*. Two provisions in particular have been asserted as providing a right to bargain collectively. Firstly there is a protection against discrimination on the ground that an employee is covered by an award or agreement. Section 298K says that an employer must not dismiss an employee, injure their employment or prejudicially alter their position because (or partly because) the employee 'is entitled to the benefit of an industrial instrument.' This section was given a wide application by the High Court in the *Patrick Case*, so that the freedom of association protection includes less tangible advantages such as job security, provided the change is real and substantial rather than merely hypothetical.<sup>40</sup> Thus an employer's decision to make an agreement with some but not all unions might be a violation of the freedom of association provisions because it prejudicially alters the position of those employees who belong to the excluded organisation.<sup>41</sup> However section 298K does seem to require that the injury by the employer be an intentional act directed to particular individual employees. This requirement is sufficient to exclude many management decisions involving a broad class of employees from the application of the section, because it cannot be shown that the decision had a discriminatory motivation.<sup>42</sup>

A second support for the right to bargain may be found in the protections against victimisation on the basis of union membership. Section 298K prohibits prejudicial treatment against an employee because they are an officer, delegate or member of an industrial association (a trade union, whether registered or not). The same section also prohibits prejudicial treatment on the basis of union non-membership. In addition, section 298M prohibits an employer to induce an employee 'whether by threats or promises or otherwise' to stop being an officer or member of an industrial association.

It now seems clear that the freedom of association provisions protect only an individual's right to belong (or not belong) to a union; it does not extend to the

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<sup>39</sup> *Workplace Relations Act 1996*, s. 170LJ, also s. 170LO; *In the Matter of CSL Enterprise Agreement 1999*, AIRC, 5 June 2000, Print S6754 at para 17.

<sup>40</sup> *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 18; see also *Community and Public Sector Union v Telstra Corporation Ltd* [2001] FCA 267 at paras 16–17; 107 FCR 93 at 100

<sup>41</sup> *Professional Officers' Association (Victoria) v CSL Ltd* [2001] FCA 628 at para 29.

<sup>42</sup> *BHP Iron Ore Pty Ltd v Australian Workers' Union* [2000] FCA 430 at para 35; 171 ALR 680 at 689; see *National Union of Workers v Qenos Pty Ltd* [2001] FCA 178 at paras 118, 122.

union's right to bargain collectively as an incident of union membership. Although there seems to be a strong correlation between an employer's encouragement of individual agreement and a decline in union membership at particular workplaces, the Federal Court has declined to extend the freedom of association provisions to situations where an employer favours individual over collective agreements. In the recent *BHP Case* involving open-cut iron-ore mine workers in the Pilbara region of Western Australia, the Federal Court held that the offering of individual agreements with better employment conditions than the collective agreement was not intended to induce employees to cease union membership contrary to section 298M.<sup>43</sup> The issue is a matter of proving intention. If a union can show that by offering individual agreements, the employer intended to induce employees to give up their union membership, a breach of the freedom of association provisions will be established.<sup>44</sup> This approach indicates a narrow and restrictive interpretation of the protections afforded by the Act.<sup>45</sup> However it is an approach which is consonant with the objects of the 1996 legislation and the intentions of its framers. Unlike its predecessor, which was based on collective representation and the encouragement of unions, the current Federal legislation is neutral on both these issues. But in adopting a neutral stance, the legislation implicitly and effectively encourages both individualism and union exclusion.

The Federal legislation also contains protections against illegitimate tactics in relation to bargaining for an Australian Workplace Agreement. A person must not use duress against an employer or employee in connection with an AWA. This has been interpreted as indicating a legislative policy that such agreements 'should be negotiated and concluded openly and freely at arm's length without outside interference.'<sup>46</sup> To threaten an existing employee with dismissal or to refuse to deal with them unless they sign an AWA would be clear examples of duress in this context. Likewise to threaten to reduce an employee's hours of work unless

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<sup>43</sup> *BHP Iron Ore Pty Ltd v Australian Workers' Union* [2000] FCA 430 at par 78; 171 ALR 680 at 700; *Australian Workers' Union v BHP Iron Ore Pty Ltd* [2001] FCA 3 at paras 220, 240. Interestingly, the State industrial tribunal subsequently made an enterprise-specific award to resolve this dispute. The employer was required to respect the union's bargaining rights: *BHP Iron Ore Award*, Western Australian Industrial Relations Commission in Court Session, [2001] WAIRC 04082, 2 November 2001; further reasons [2002] WAIRC 05009, 13 March 2002.

<sup>44</sup> *Finance Sector Union v Commonwealth Bank of Australia* [2000] FCA 1372 at para 51.

<sup>45</sup> Sarah Richardson, 'Freedom of Association and the Meaning of Membership: An Analysis of the BHP Cases', *Sydney Law Review*, vol. 22, 2000, pp. 435–450; David Noakes and Andrew Cardell-Ree, 'Individual Contracts and the Freedom to Associate', *Australian Journal of Labour Law*, vol. 14, 2001, p. 94.

<sup>46</sup> *Workplace Relations Act 1996*, s. 170WH; *Schanka v Employment National (Administration) Pty Ltd* [2000] FCA 202 para 24; 170 ALR 42 at 48.

they signed an AWA would also contravene the section.<sup>47</sup> Duress thus includes a range of unconscionable conduct or illegitimate pressure.<sup>48</sup> Although the Act allows an employer to engage in a lockout to induce employees to sign AWAs (provided the requirements for industrial action during an protected bargaining period are complied with), this could amount to duress if combined with other factors.<sup>49</sup>

In the *Burnie Port Corporation Case*, the judge held that for an employer to insist that prospective employees be hired under an AWA did not by itself constitute duress.<sup>50</sup> An employer's insistence that new employees sign an AWA does not contravene the freedom of association provisions of the Act. These provisions prohibit an employer from discriminating against an employer on the basis of the employee's entitlements under an award or agreement, but they do not cover the employer's insistence on a particular mode of industrial regulation for prospective employees. The legislation gives the employer the right to choose under which form of industrial regulation it will engage new employees. The appeal court confirmed this view, saying that

The legislature has not expressed any preference in the Act in favour of one form of industrial regulation over another. Rather, as is stated in s 3(c), one of the principal objects of the Act is to enable employers and employees to choose the most appropriate form of agreement for their particular circumstances.

In the circumstances we are unable to discern any legislative policy or intent that an employer be prevented from offering to a prospective employee one form of industrial regulation under the Act rather than another. Put another way, we do not discern a legislative policy or intent in respect of the anti-discrimination provisions ... that it is the prospective employee, rather than the employer, who is to be entitled to choose the mode of industrial regulation under the Act that is to apply to his or her employment, where more than one form of such regulation is available in the prospective employer's workplace.<sup>51</sup>

The ILO's Committee of Experts had previously concluded that the current Federal legislation, by clearly giving primacy to individual relations, does not

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<sup>47</sup> *Maritime Union of Australia v Geraldton Port Authority* [1999] FCA 899 at para 368; *ALHMWU v Cranbourne RSL Sub-Branch Inc* [1999] FCA 1425.

<sup>48</sup> *Australian Services Union v Electrix Pty Ltd* [1999] FCA 211; *Maritime Union of Australia v Burnie Port Corporation Pty Ltd* [2000] FCA 1189; *Schanka v Employment National (Administration) Pty Ltd* [2001] FCA 579.

<sup>49</sup> *AMIEU v O'Connor* (2000) 179 ALR 25 at 41.

<sup>50</sup> *Maritime Union of Australia v Burnie Port Corporation Pty Ltd* [2000] FCA 1189 at paras 71–2. In *Schanka v Employment National (Administration) Pty Ltd* [2001] FCA 579 an employer's insistence that existing employees sign AWAs was held to constitute duress unless the employees continued to have 'scope, in a real sense, to negotiate or bargain about entering an AWA or not.'

<sup>51</sup> *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* [2000] FCA 1768 at paras 27–28.

promote collective bargaining as required under Article 4 of Convention 98. Also, in giving preference to enterprise-level bargaining, the Federal legislation does not allow the parties to choose the level of bargaining. The Committee also decided that the Western Australian system, by giving preference to individual agreements, 'does not create a system whereby collective bargaining is effectively promoted.'<sup>52</sup> This criticism has been used by the recently-elected Labor government in Western Australia to support its legislative reforms, which are designed to give primacy to collective bargaining. These reforms began to operate in September 2002.<sup>53</sup>

## *II Legal mechanisms for shaping the content of the employment contract via collective agreement*

Because the compulsory arbitration system was installed as an alternative to the existing common law, employment contracts and collective agreements remain separate forms of legal regulation. Each operates without necessarily referring to the other (although an award or industrial agreement presupposes the existence of an employment relationship which is created by a contract of employment). Whether the contents of a collective agreement are incorporated into an individual employment agreement is a question of ordinary contract law.

Rights under collective instruments such as awards and certified agreements are separate and distinct in nature from those contained in individual contracts of employment.<sup>54</sup> Until recently, collective agreements have enjoyed precisely the same legal status as awards. An industrial agreement registered under one of the industrial relations systems is not a contract but a creature of statute. As such, it only has legal validity if it satisfies the statutory requirements, which usually require certification or approval by an industrial tribunal. For example, the New South Wales legislation makes it clear that an enterprise agreement 'does not have any effect' unless it is approved by that State's Industrial Relations Commission. A certified agreement made under the Federal system 'comes into operation when it is certified,' but not otherwise.<sup>55</sup>

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<sup>52</sup> International Labour Conference, 86th Session 1998, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(1A), p. 223-4, 226; reiterated in International Labour Conference, 88th Session 2000, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(1A), p. 223.

<sup>53</sup> Mr Kobelke, *Western Australian Parliamentary Debates*, 19 February 2002, p. 7512; *Labour Relations Reform Act 2002* (WA).

<sup>54</sup> *True v Amalgamated Collieries of WA Ltd* (1939) 62 CLR 451 at 455 (Privy Council); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 420.

<sup>55</sup> *Industrial Relations Act 1996* (NSW), s. 32; *Workplace Relations Act 1996*, s. 170LX.

## ***1. Normative Mechanism***

Normative clauses in collective agreements are those which set required contents of individual employment contracts, operating as 'substantive legislative provisions' which provide 'standards of protection to individual employees.' Contractual clauses create rights and duties for the bargaining parties.<sup>56</sup> Normative regulation of the contents of employment contracts has not been a feature of Australian labour law. In some areas of the law (eg trade practices and consumer protection), legislation prescribes the minimum terms of certain contracts. Such terms are regarded as being implied by statute into the contract. However in labour law, legislation has supplemented the common law of employment by creating obligations separate to those arising under the employment contract.<sup>57</sup> This is in accordance with the accepted notion that employment conditions arising under statute, award or industrial agreement are of a different nature to those deriving from the employment contract.

Certified agreements and Australian Workplace Agreements under the Federal system are required by legislation to contain provisions dealing with a range of matters, such as providing a procedure for dispute resolution.<sup>58</sup> However these remain terms of the certified agreement and are not incorporated into individual employment contracts, even though individual employees may be entitled to obtain benefits under the agreement.

In some jurisdictions the relevant industrial tribunal is empowered to review a contract involving the performance of work if the contract is found to be unfair or against the public interest. This power originated in New South Wales to prevent the avoidance of award regulation by parties creating a non-employment relationship (such as independent contractor).<sup>59</sup> The power has grown since then to embrace a wide range of situations involving injustice or unconscionability. The tribunal has power to vary the contract, declare it wholly or partially void, make consequential restitutionary orders, and issue orders to prevent the making of

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<sup>56</sup> See G. Bamber, E. Cordova and P. Sheldon, 'Collective Bargaining' in R. Blanpain and C. Engels, eds, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, op. cit., p. 425.

<sup>57</sup> Thus the employer is liable at common law for negligently caused injuries to the employee, but workers compensation legislation, since its inception in New South Wales in 1926, creates statutory liability in addition to the common law. Other statutory rights, such as annual and long service leave, are similarly imposed directly by legislation rather than through the employment contract.

<sup>58</sup> *Workplace Relations Act 1996*, ss. 170LT(8); 170VG.

<sup>59</sup> *Industrial Arbitration Act 1940* (NSW), s. 88F (inserted 1959).

future such contracts.<sup>60</sup> The terms of a relevant award would be a major source for determining what standards of fairness should be applied to the relationship. It is not clear whether a collective agreement would also be considered in the same way; unlike an award, it is not made in contemplation of the public interest. An individual contract which violated the letter or spirit of a collective agreement could be subject to review for unfairness, particularly if the employee were induced to act to their detriment in reliance on the collective agreement, or if the employer would otherwise benefit at the expense of the employee. The tribunal would also be likely to give effect to the parties' understanding of how an individual agreement was supposed to operate.

If an agreement is registered, it gains force of law under the industrial relations legislation, just like an award. This raises the possibility that the legislation might alter the terms of an individual employment contract by directly incorporating the terms of the award or agreement into the contract. In Australia, the issue has arisen mostly in relation to awards, but the principle would be the same for other industrial instruments, such as certified agreements.

In several decisions in the 1980s, courts held that a provision of an award had become incorporated into an individual contract of employment, either by becoming an implied term or by independent operation of law.<sup>61</sup> For a time, this notion was thought to create new individual rights and remedies, although the development was criticised by academic writers as inconsistent with principles of industrial and contract law. In *Byrne v Australian Airlines* the High Court decisively rejected this approach and reasserted the separateness of awards and contracts as forms of legal regulation. The court held that there was no basis for saying that the award term had been 'imported' into the contract by operation of the industrial statute.<sup>62</sup> Thus an award or certified agreement cannot by itself directly alter the contents of an individual employment contract.

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<sup>60</sup> *Industrial Relations Act 1996* (NSW), ss. 106–107; *Industrial Relations Act 1999* (Qld), s. 276. Lesser powers in relation to independent contractors only are given to the Federal Commission under the *Workplace Relations Act 1996*, ss. 127A–127C.

<sup>61</sup> *Gregory v Philip Morris* (1988) 80 ALR 455; *Wheeler v Philip Morris* (1989) 97 ALR 282; *Bostik Australia v Gorgevki (No 1)* (1992) 36 FCR 20; 41 IR 452; see Gregory J Tolhurst, 'Contractual Confusion and Industrial Illusion: A Contract Law Perspective on Awards, Collective Agreements and the Contract of Employment', *Australian Law Journal*, vol. 66, 1992, pp. 706–711, 715; John de Meyrick, 'The Interaction of Awards and Contracts', *Australian Journal of Labour Law*, vol. 8, 1995, pp. 11–23; Stuart Kollmorgen and Julian Riekert, 'Social Policy and Judicial Decision-making in Australian Employment Law' in Richard Mitchell, ed, *Redefining Labour Law*, Centre for Employment and Labour Relations Law, University of Melbourne, 1995, pp. 181–189.

<sup>62</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 420–21 per Brennan CJ, Dawson J and Toohey J; at 439 per McHugh and Gummow JJ.

## 2. Contractual Mechanism

Alternatively, the terms of a collective agreement might conceivably become part of an individual employment contract through the operation of principles of contract law. This might occur either by being express terms adopted explicitly by the contracting parties, or else as terms implied into the contract in some way. This could be the case whether or not the collective agreement was registered (or certified) under an industrial law system. In England, Kahn-Freund took the view that a collective agreement might be so well-accepted and acted upon in an industry as to become implied into every employment contract as 'crystallised custom.'<sup>63</sup> An extension of this idea, that an award could be implied by custom into employment contracts, was rejected by the High Court in *Byrne*, precisely because the award already operates independently by statutory force and so there is no need for it to become part of the contract.<sup>64</sup>

In *Byrne*, the High Court also cast doubt on the possibility that the terms of an award may become implied terms of the employment contract. The court applied the conventional contract law test for implying terms. Hence award terms will only become implied into the employment contract if they are 'necessary for the reasonable or effective operation' of such a contract in the particular circumstances.<sup>65</sup> In most circumstances it will not be necessary to imply the award into the contract for this reason, since the award already operates as an independent form of legal obligation:

In a system of industrial regulation where some, but not all, of the incidents of an employment relationship are determined by award, it is plainly unnecessary that the contract of employment should provide for those matters already covered by the award.... Neither from the point of view of the employer nor the employee is there any need to convert those statutory rights and obligations to contractual rights and obligations.<sup>66</sup>

The effect of *Byrne* is that if an industrial instrument has legal effect under statute there is no need to imply its contents into individual contracts. Unless the parties

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<sup>63</sup> O. Kahn-Freund, 'Legal Framework' in A. Flanders and H.A. Clegg, eds, *The System of Industrial Relations in Great Britain*, Oxford, Blackwell, 1954, p. 58; P. Davies and M.R. Freedland, *Kahn-Freund's Labour and the Law*, 3rd edn, London, Stevens, 1983, p. 282; cf K.W. Wedderburn, *The Worker and the Law*, 3rd edn, London, Sweet & Maxwell, 1986, p. 332.

<sup>64</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 429 per Brennan CJ, Dawson J and Toohey J; at 440-41 per McHugh and Gummow JJ. The difficulties of establishing that the award represented established custom, and that individual parties contracted on the basis of it, were recognised in *Turner v Australasian Coal and Shale Employees' Federation* (1984) 55 ALR 635 at 638-9.

<sup>65</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422, applying *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283; *Hawkins v Clayton* (1988) 164 CLR 539 at 573.

<sup>66</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 421 per Brennan CJ, Dawson J and Toohey J.

expressly adopted its contents, an award or industrial agreement would remain completely separate and distinct from the contract of employment.

Even unregistered collective agreements, which have no legal effect under arbitration legislation, will not usually create legal relations of a contractual kind. For example, in *Ryan v Textile Clothing and Footwear Union of Australia*<sup>67</sup> the Victorian Court of Appeal ruled that signed but unregistered agreements between a union and an employer were unenforceable at law. The agreements, which provided for redundancy benefits above those set by an award, were overwhelmingly endorsed by general meetings of unionists at the workplace but were never filed under either the Federal or State system. The claim that the agreements could be enforced by individual unionists was unanimously rejected by the Court. The terms of the agreements suggested that they were inherently collective in nature. However, the unregistered redundancy agreements were not legally binding contracts. The union had not provided valuable consideration, an essential element for a binding contract at common law. The agreements also failed to satisfy another requirement for a valid contract – the intention by both parties to create binding legal relations. The court held that the redundancy agreements were designed to have industrial rather than legal consequences and so could not be enforced by the courts.<sup>68</sup> The court made it clear that if the union wanted to make a collective agreement that was justiciable by the courts, it should either have registered the document under the relevant State or Federal system, or else have insisted on transforming it into an ordinary contract.<sup>69</sup>

One issue not settled by *Ryan* is whether the terms of an unregistered collective agreement may become implied terms of individual employment contracts. In *Byrne* it was settled that an award will not ordinarily be implied into a contract, but this was because the award has independent legal force. Since *Ryan* has confirmed that an unregistered agreement has no legal force, it should be more likely than an award to be considered part of an employment contract according to the reasoning in *Byrne*, provided that the contents of the agreement are necessary for the reasonable or effective operation of the employment contract.

While it is difficult to establish that the contents of an award or agreement should be *implied* into an employment contract, it may be possible to show that the terms

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<sup>67</sup> [1996] 2 VR 235; (1996) 66 IR 258; see Andrew Frazer, 'Major Tribunal Decisions in 1996', *Journal of Industrial Relations*, vol. 39, 1997, pp. 88–91; David Hildebrand, 'The Legal Status of Unregistered Collective Agreements', *Australian Journal of Labour Law*, vol. 9, 1996, pp. 177–181.

<sup>68</sup> [1996] 2 VR 235 at 273, 251.

<sup>69</sup> Justice Brooking's analysis of American decisions on collective agreements suggests that he would have treated a definite promise by the union as sufficient consideration, although he might equally have declared the agreement void because he did not consider that the parties intended to create legal relations: [1996] 2 VR 235 at 244–249.

of a collective agreement have been *expressly incorporated* into the contract, providing the contract reveals a mutual intention by the parties to be bound by the collective agreement. There have been some decisions in recent years which have held that the reference to an award or industrial agreement in a written employment contract was sufficient to expressly incorporate its terms into the contract.<sup>70</sup> Because it is a matter of express contractual incorporation, it is irrelevant whether the employee was a member of the union which negotiated the industrial agreement: what matters is whether, on the facts, the parties intended the terms of the agreement to be included in the employment contract. It is possible for an employment contract to refer to an industrial instrument such as an award or agreement without incorporating its contents into the contract. Merely to refer to the award in an employment contract or other information is not sufficient to incorporate it into the contract.<sup>71</sup> Whether the award terms have become part of the contract is a matter of determining the presumed intention of the individual parties.

There seems to be an increasing willingness by judges to accept the express contractual adoption of the terms of industrial instruments. In the most recent case an unregistered collective agreement between an employer and a union was found to have been incorporated into an employee's contract of employment because it had been included in the company's policies and procedures manual.<sup>72</sup> Because the employee had agreed to abide by the terms of this manual, the agreement became part of the employment contract.

The introduction of individual statutory agreements, such as Australian Workplace Agreements, has complicated the picture. While such agreements are statutory in their origin and effect, they differ from the hitherto existing forms of industrial instrument, awards and certified agreements, which are collective in nature. As agreements between determinate individuals, AWAs are like contracts. A number of legal questions about such agreements are likely to arise in future, questions which are not resolved by the legislation creating them and which are difficult to answer by resort to traditional contract principles.

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<sup>70</sup> *Honeyman v Nhill Hospital* [1994] 1 VR 138; *Ajax Cooke Ltd t/a Ajax Spurway Fasteners v Nugent* [1994] AILR 232

<sup>71</sup> *BHP Iron Ore Pty Ltd v Australian Workers' Union* [2000] FCA 430 at para 82, 85; 171 ALR 680 at 701.

<sup>72</sup> *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889. North J (at para 107) held that the employee's undertaking to abide by the company's policies was made in response to the company's offer to abide by the Manual, while Mansfield J (at para 151) considered that the contents of the Manual were 'entirely apt to be treated as expressing mutually enforceable obligations; they are clear, precise, direct and mainly deal with matters which one might expect to be encompassed within a particular employment contract.'

### ***3. Replacement of terms of the contract of employment by provisions of a collective agreement***

The foregoing analysis shows that it is very unlikely under Australian law that a collective agreement could directly alter the terms of individual employment contract unless the individual contracting parties expressly agree. Where the employment contract expressly incorporates the terms of a certified agreement, the contents of the contract may change when the agreement is varied, provided that the contract states that the agreement applies as varied from time to time.

The nature of both awards and certified agreements as statutory in force and effect means that it is always possible for them to override existing terms of individual employment contracts. However an AWA or similar individual statutory agreement is immune to change by a collective agreement. An AWA excludes the operation of an award or agreement made under a State system, as well as Federal certified agreements made after the AWA comes into effect, and overrides most other State laws.<sup>73</sup>

An unusual situation arose in the relationship between workplace agreements and employment contracts under the Western Australian system. When individual statutory workplace agreements were introduced in that State in 1993, it was contemplated that registered individual workplace agreements could be a statute-endorsed replacement for employment contracts. While an individual or collective agreement did not displace the contract of employment, it had legal effect as if it formed part of the contract and in spite of any contractual term. This meant that a workplace agreement with a group of employees could not only override an individual contract but could furnish terms to that contract regardless of the intentions of the individual parties. Amendments made in 2002 replaced this workplace agreements scheme with one which reinstates the traditional primacy of collective agreements and awards. However individual statutory agreements can still be made and, once their term expires, their contents become part of the employment contract. The new arrangements thus continue to give contractual status to individual statutory agreements.<sup>74</sup>

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<sup>73</sup> *Workplace Relations Act 1996*, ss. 170VQ, 170VR.

<sup>74</sup> *Industrial Relations Act 1979*, s. 97UT, as amended by *Labour Relations Reform Act 2002* (WA).

### *III Factors determining the regulatory power of collective labour agreements towards the employment contract*

#### *1. Collective agreements and deregulation*

In the Australian context, collective agreements have traditionally been concluded within a highly regulated framework supervised by arbitration tribunals with power to veto bargaining outcomes. The formal adoption of enterprise bargaining by legislation in the 1990s has been a means of creating a more decentralised and deregulated system by moving away from the principal form of state regulation, that of awards. This has been undertaken by allowing certified agreements to derogate from particular award conditions, provided that the terms of the agreement satisfied a 'no disadvantage' test by comparison with the award.

As we have seen, the increasing adoption of collective bargaining under the rubric of enterprise bargaining has been part of a wider deregulatory strategy undertaken by both social-democratic (Labor) and conservative (Liberal-National) governments, though for different purposes. In the case of Labor, it was assumed that deregulation of bargaining would maintain the power and gains of unions as parties in collective bargaining. Here the process has been aptly described as one of 'managed decentralism' followed by 'co-ordinated flexibility' rather than full deregulation.<sup>75</sup> For conservative governments, deregulation has been part of the ideologically-driven adoption of contract and market mechanisms, involving greater resort to individual bargaining and the reduction of union power. This approach involves a faith in 'contractualist regulation', rather than complete abandonment of regulatory mechanisms.<sup>76</sup>

When the Federal legislation was reformed in 1988 as the *Industrial Relations Act*, it contained explicit recognition of collective bargaining in the form of certified agreements and consent awards. However the Industrial Relations Commission could refuse to certify an agreement if it was considered to be contrary to the public interest test. While agreements were not required to conform to the Commission's wage-fixing principles and standard award conditions, any inconsistencies were scrutinised closely and the Commission exercised a high level of discretion.<sup>77</sup> The public interest requirement became regarded as excessively

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<sup>75</sup> Edward M. Davis and Russell D. Lansbury, 'Employment Relations in Australia', in Greg J. Bamber and Russell D. Lansbury, eds, *International and Comparative Employment Relations: A Study of Industrialised Market Economies*, revised edn, Sydney, Allen & Unwin, 1998, pp. 135-7.

<sup>76</sup> Braham Dabscheck, "'A felt need for increased efficiency'": Industrial relations at the end of the millennium', *Asia Pacific Journal of Human Resources*, vol. 39, 2001, p. 5.

<sup>77</sup> *Industrial Relations Act 1988*, ss. 112, 115(4); *February 1989 Review* (1989) 27 IR 196; *National Wage Case*, October 1991 (1991) 39 IR 127.

restrictive by critics of the arbitration system, adding to the demand for further deregulation (see I.2 above).

The leadership of the trade union movement originally supported enterprise bargaining in 1991 because the centralised wage-fixing system was producing unsatisfactory results.<sup>78</sup> By moving to workplace-specific bargaining it was thought that favourable wage outcomes could be achieved while still remaining within the Accord parameters by continuing to link wage gains to productivity increases. The shift to enterprise bargaining thus involved decentralization of labour regulation combined with partial deregulation.

The requirements for certification of agreements were reduced under legislation passed in 1992 and 1993. Agreements confined to a single enterprise were now required to contain certain provisions and to meet a 'no disadvantage' test. The test could be satisfied even if the agreement undercut award conditions, provided the Commission considered that the agreement as a whole was not contrary to the public interest. The continuation of a public interest component (though in an attenuated form) still allowed the Commission to consider community standards in deciding whether to approve agreements.<sup>79</sup>

The Commission's discretion to veto agreements was criticised by key business groups as creating unnecessary restrictions on the parties' flexibility in bargaining. The 1996 legislation has further deregulated the requirements for certification of agreements. Now an agreement must be certified by the Commission so long as it does not result 'on balance, in a reduction in the overall terms and conditions of employment' provided by the relevant award.<sup>80</sup> This allows parties to 'trade off' award conditions provided that employees are not worse off overall. The public interest component of the test has been completely removed, reducing considerably the Commission's independent discretion. The same test must be met by individual Australian Workplace Agreements (AWAs).

## ***2. Statutory limits of the scope of collective labour agreements***

There are very few matters which are prevented from being included in certified or registered agreements. Agreements cannot discriminate on various grounds,

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<sup>78</sup> Braham Dabscheck, *The Struggle for Australian Industrial Relations*, Melbourne, Oxford U.P., 1995, ch. 3; Chris Briggs, 'Australian Exceptionalism: The Role of Trade Unions in the Emergence of Enterprise Bargaining', *Journal of Industrial Relations*, vol. 43, 2001, pp. 27-43.

<sup>79</sup> *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 IR 212 at 232.

<sup>80</sup> *Workplace Relations Act 1996*, s. 170XA(2).

such as race, sex, disability etc. A certified agreement under the Federal system cannot breach the freedom of association provisions of the Act, which prohibits compulsory union membership or preference to unionists. As the result of unions obtaining agreements which included union preference, an amendment was included in 1997 stating that the Commission must not register any agreement which permits conduct in contravention of the freedom of association provisions.<sup>81</sup>

Other than these restrictions, a Federal certified agreement must be 'about matters pertaining to the relationship between' an employer and its employees. For constitutional reasons, a similar requirement has long existed in relation to Federal awards; it has been interpreted as limiting awards to 'industrial matters' which would, for example, exclude political or social issues which are not directly industrial. Matters which are only consequentially industrial, such as shop closing hours or the deduction of union membership dues, would be excluded.<sup>82</sup> This requirement might also exclude matters which are purely collective in nature and do not directly affect the relationship of employer and employee as such. The most recent controversy over this requirement has involved demands by unions that employers should deduct 'bargaining fees' from the pay of non-members to cover the union's costs of negotiating and obtaining a certified agreement, which benefits both unionists and non-unionists. At the time of writing there was considerable disagreement over whether such a demand is sufficiently connected to the employer-employee relationship to enable it to be included in an agreement.<sup>83</sup>

All employees are capable of being covered by certified industrial agreements. All employees may also join and form trade unions which, by being registered under

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<sup>81</sup> *Workplace Relations Act 1996*, s. 170LU(2A).

<sup>82</sup> *Workplace Relations Act 1996*, s. 170LI; on the constitutional restriction see Creighton and Stewart, *Labour Law: An Introduction*, op. cit., pp. 76-81. While employee working hours are an industrial matter, shop trading times (which may involve the proprietor working alone) do not affect the employment relationship sufficiently directly: *R v Kelly; ex parte Victoria* (1950) 81 CLR 64 at 84. It has traditionally been held that the deduction of union dues is a matter of debtor and creditor rather than employer and employee: *R v Portus; ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353; *Re Alcan Australia Ltd; ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 86.

<sup>83</sup> In some cases the Industrial Relations Commission held that an agreement containing a 'bargaining agent' clause was capable of certification: *National Union of Workers; re Atlas Steels Metals Distribution Certified Agreement 2001-2003*, Australian Industrial Relations Commission, Full Bench, PR917092, 29 April 2002. But a different conclusion has been reached in decisions by single members of the Commission: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; re SGM Electrical Pty Ltd*, Australian Industrial Relations Commission, Hamilton DP, PR921937, 30 August 2002. The Federal Court has held that a demand for a 'bargaining agent' clause can be the subject of protected industrial action as part of the negotiation process: *Australian Metal Workers Union v Electrolux Home Products Pty Ltd* [2002] FCAFC 199. At the time of writing this decision was on appeal to the High Court of Australia.

the various arbitration systems, may participate in the making of awards and agreements. The arbitration system has always been premised on the relationship of employer and employee as defined under the common law. This is a constitutional requirement for the Federal system, and is reproduced in the State legislation. The courts in Australia use a multi-factor test for determining whether a worker is an employee. The worker's subjection to the control of the supposed employer is a key though not deciding factor, and a range of indicia are taken into account.<sup>84</sup> In recent years the courts seem more willing to rely on whether the worker was in reality engaged in a business on their own account, such that they bore the risks of profit and loss. The most recent decision of the High Court on the question asked whether the workers were 'running their own enterprise' among other factors. The court emphasised both the economic and organisational subordination of the workers, as well as their subjection to control, as indicative of an employer-employee relationship.<sup>85</sup>

By definition, independent contractors are excluded from agreements and awards, since they are not employees. Contractors have been a growing part of the workforce in the last decade, and now comprise 4-5 percent of the workforce.<sup>86</sup> The ability of parties to re-cast their employment relationship into an independent contractor one is an effective means of 'contracting out' of obligations under an award or certified agreement. The tests used by the courts provide some limits to this mechanism.

Apart from contractors, the only significant group of workers who are excluded from the formal collective bargaining processes are members of the defence forces, who are not employees. Armed forces personnel may however join unregistered industrial associations which make submissions to the Defence Force Remuneration Tribunal.<sup>87</sup>

### ***3. Exclusion of some employees' groups from a collective labour agreement as stipulated by its parties***

The current system of enterprise bargaining is designed to produce agreements which cover a whole business or undertaking rather than being restricted to

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<sup>84</sup> *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

<sup>85</sup> *Hollis v Vabu Pty Ltd* [2001] HCA 44 at paras 47-50; 181 ALR 263 at 277.

<sup>86</sup> Audrey Vandenheuvel and Mark Wooden, 'Self-Employed Contractors in Australia: How Many and Who Are They?', *Journal of Industrial Relations*, vol. 37, 1995, p. 272; Alison Morehead et al, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, Melbourne, Longman, 1997, p. 46.

<sup>87</sup> *Australia's Report under the International Covenant on Economic, Social and Cultural Rights 1990-1997*, Art. 8 ([www.austlii.edu.au/au/other/dfat/reports/icescr.html](http://www.austlii.edu.au/au/other/dfat/reports/icescr.html)).

specific occupations. Agreements are normally supposed to apply across a whole enterprise. Under both Federal and most State systems an agreement cannot be made with only part of a business unless the part is geographically or operationally distinct. Even then, the Commission must be satisfied that separation of part of the business is reasonable, considering the work performed by the employees and the relationships between the part to be covered and the rest of the business.<sup>88</sup> There must be clear characteristics which distinguish the part of the business from the remainder, justifying coverage under a separate agreement. Certification of the agreement must be refused if exclusion of some employees from coverage under the agreement is unfair in all the circumstances. It would, for example, be unfair to subject employees to different agreements if historically they have been regulated by the same award and the same occupational classification structure.<sup>89</sup> Agreements made between an employer and a registered union under Division 3 of the Federal Act may be limited to members of the particular union.<sup>90</sup>

When making a union-based agreement, the employer is not bound to include all relevant unions as parties. The Federal *Workplace Relations Act 1996* says that when negotiating an agreement, employers must not discriminate between employees because some of them are members of a particular union, or are members of a different union than other employees. It has been thought that an employer's refusal to negotiate with a particular union does not contravene either this requirement or the freedom of association provisions of the Act.<sup>91</sup> One judge, while not precluding the possibility that the Act could be contravened by selective negotiation, said that 'it is the rights of employees rather than unions themselves that the Act principally sets out in the relevant provisions to protect.'<sup>92</sup> In one

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<sup>88</sup> *Workplace Relations Act 1996*, ss. 170LB(3), 170LU(8); *Industrial Relations Act 1996* (NSW), s. 35(2); *Industrial Relations Act 1999* (Qld) s. 157(5); *Industrial and Employee Relations Act 1994* (SA), s. 79(3). A collective agreement under the Western Australian system may be made with only some of the employees at a workplace; there is no requirement that they be a distinct part of the business: *Workplace Agreements Act 1993* (WA), s. 9.

<sup>89</sup> *Appeal by Council of Holmesglen Institute of TAFE* (1998) 83 IR 172. Coverage by the same award indicates that the employees have an occupational community of interest. However managerial employees may be covered by a separate agreement if they are organisationally distinct: *Re Australian Taxation Office (Executive Level 2) Certified Agreement 1998*, AIRC Print R0953, 22 January 1999 (1999) 45 AILR 4-025.

<sup>90</sup> Only members of the signatory union are bound by such an agreement: *Workplace Relations Act 1996*, s. 170MA; *Re National Tertiary Education Industry Union; ex parte Quickenden* (1996) 140 ALR 385. However an agreement limited to union members could contravene the freedom of association provisions of the Act: see ss. 170LU(2A), 298L(1)(a).

<sup>91</sup> *Workplace Relations Act 1996*, s. 170NB; *Construction, Forestry, Mining and Energy Union v CSR Ltd t/as CSR Humes* [2000] FCA 1203 at para 54.

<sup>92</sup> *National Tertiary Education Union v University of Technology, Sydney* [2000] FCA 874 at para 17 per Madgwick J.

recent case, where an employer excluded a small breakaway union from negotiations with five other unions, it was held that this exclusion could constitute discrimination between members of different unions in the making of the agreement, contrary to the Act.<sup>93</sup>

#### ***4. Extension of a collective labour agreement by a public authority***

Unlike many European systems, there is no specific provision for extending the coverage of a collective agreement beyond the parties to it. Indeed, the introduction of enterprise bargaining was intended to prevent 'flow on' of benefits from one workplace to another. The impact of bargained terms is supposed to be limited to the enterprise. Hence the Federal arbitration tribunal is generally prohibited from including terms in an award that are based on a certified agreement.<sup>94</sup>

In the several State jurisdictions it is possible for the terms of an award (including a consent award embodying a collective agreement) to be made a common rule for all employees in a particular industry. In some States common rules are the normal type of award issued.<sup>95</sup> A common rule has force as an award, not as the term of a contract. It often happens that the terms of an agreement are adopted in an award which is made a common rule, but the extension to employees not involved in the original dispute is the result of the statutory legal effect of the award, not the agreement.

#### ***5. Limits imposed on a lower level collective labour agreement by a high level collective agreement***

The Australian systems have no formal hierarchy of national, regional, industry and workplace agreements. If anything, enterprise-level agreements tend to override ones made at the industry level. Also, since the demise of the Federal Labor government in 1996 there is no longer a national social compact such as the Accord voluntarily restricting union demands.

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<sup>93</sup> *Professional Officers' Association (Victoria) v CSL Ltd* [2001] FCA 628 at para 24.

<sup>94</sup> *Workplace Relations Act 1996*, s. 95.

<sup>95</sup> Under the Western Australian system, an industrial award applies throughout the industry and across the State unless otherwise stated: *Industrial Relations Act 1979* (WA), s. 37. In New South Wales an award 'is binding on all employees and employers to which it relates', and an award applying to a particular industry is 'taken to bind all employees and employers engaged in the industry': *Industrial Relations Act 1996* (NSW), s. 12.

Given that the focus of the new Federal regime is on encouraging enterprise-based bargaining, multi-employer agreements have been tightly circumscribed. While a number of employers may separately enter into the one agreement, such agreements have to be independently approved by each employer and a majority of employees at each workplace. In order to be approved, a multiple business agreement must be declared to be in the public interest by a full bench of the Commission. There are currently only 14 of these, covering 12,700 employees.<sup>96</sup>

Industry-wide agreements are no longer recognised as such under the Federal legislation, although attempts at industry bargaining have been made through bargaining strategies. The use of 'pattern-bargaining' by some powerful unions, particularly in manufacturing and construction, has resulted in a large number of agreements which are virtually identical in their terms; but overall such agreements only cover less than five percent of the workforce.<sup>97</sup> In other industries, unions have sought to achieve national industry-wide 'framework agreements' with employer associations to regulate the scope and timing of bargaining.

In practice many industries have operated under a series of agreements made at different levels. Most awards have been the result of agreement between collective parties at the industry level over many matters, with arbitration over the remaining unsettled issues. Awards have often contained specific provisions or schedules which apply only to particular workplaces, and which are the outcome of negotiation. In addition, much informal collective bargaining has taken place outside the arbitration system, resulting in 'above-award' pay and conditions which are legally unenforceable. Under the State systems, it has been traditional for many industries to be regulated by industry-wide awards, supplemented by enterprise-specific awards (largely consensual) and informal agreements.

A certified agreement or AWA must not in its overall terms result in the employee being disadvantaged by comparison with the award. In this regard collective agreements are subordinate to the minimum standards set by awards, although the 'no disadvantage' test is a global comparison of conditions which allows for 'trade off' of award benefits.

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<sup>96</sup> P. Reith, Second Reading Speech, *House of Representatives Weekly Hansard*, 23 May 1996, p. 1301; *Workplace Relations Act 1996*, ss. 170LQ, 170LO, 170LR, 170LC; Department of Employment Workplace Relations and Small Business, *Agreement making in Australia under the Workplace Relations Act 1998 and 1999*, Canberra, 2000, p. 23.

<sup>97</sup> Department of Employment Workplace Relations and Small Business, *Agreement making in Australia under the Workplace Relations Act 2000 and 2001*, Canberra, 2002, pp. 95-7.

#### *IV Regulation of collective labour agreements and freedom of parties to contract of employment*

As we have seen, rights under awards and employment contracts are separate and distinct in nature.<sup>98</sup> Award conditions have their legal source and operative effect in statute and function as independent rights independent of any agreement. A right or obligation under an award ‘does not depend upon any agreement of the parties express or implied, and may arise without their knowledge.’<sup>99</sup> However, unless a work relationship is one of employer and employee, which is created by a contract of employment, an award or other industrial instrument will not apply.<sup>100</sup> Because of the separateness of award (or registered collective agreement) and contract, a party may simultaneously have different rights under both in relation to the same subject-matter – although if there is a conflict the award provisions will prevail since they have statutory effect.<sup>101</sup>

Because of the separate legislative force of an award or certified agreement, parties cannot validly contract to receive less than their entitlements under such instruments.<sup>102</sup> Nor, because the legislation is for the public benefit, can parties waive their rights under an award. In the recent *Metropolitan Health Case*, an unregistered agreement reached between a hospital employer and a union allowed nurses to retain their existing positions without risk of transfer to another hospital, provided they agree to forego annual pay increments to which they were entitled under an award. In the event, proposed hospital amalgamations did not take place and so the risk of compulsory transfer did not arise. The nurses successfully sued to recover their award entitlements which were held not to have been given up by their consent to the trade-off arrangement under the unregistered agreement.<sup>103</sup>

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<sup>98</sup> *True v Amalgamated Collieries of WA Ltd* (1939) 62 CLR 451 at 455 (Privy Council); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 420.

<sup>99</sup> *Josephson v Walker* (1914) 18 CLR 691 at 696 per Griffiths CJ.

<sup>100</sup> *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 at 423 per Latham CJ.

<sup>101</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 444, explaining *True v Amalgamated Collieries of WA Ltd* (1939) 62 CLR 451.

<sup>102</sup> The *Industrial Relations Act 1979* (WA) s. 114 specifically states that any contract which purports to annul or vary an award or industrial agreement is void. In other jurisdictions, any such term in an agreement would be illegal and unenforceable under contract law principles.

<sup>103</sup> *Metropolitan Health Service Board v Australian Nursing Federation* [2000] FCA 784; 176 ALR 46. Two judges decided on the basis that it would be unjust to hold the employees to the agreement since the events on which it was based never transpired, and the employer did not suffer any detriment. One judge, French J, went further and considered that because an award operates with statutory force for the public benefit, the employees’ entitlements could not be waived or estopped: at paras 20–21; 176 ALR at 54. The other judges did not find it necessary to decide this point.

At the Federal level and in some States it is now possible for parties to make individual statutory agreements which 'contract out' of award conditions or the terms of registered collective agreements, but this is by legislative rather than contractual force. These systems have allowed for registered individual agreements to prevail over awards and, in some circumstances, collective agreements. Such agreements prevail by virtue of their statutory force, not because they are contracts. Under the Western Australian system which existed from 1993 until recently, an individual workplace agreement overrode an inconsistent collective agreement, although it still had to provide minimum employment conditions set by statute.<sup>104</sup> This scheme was replaced in 2002 with one which gives priority to registered industrial agreements, which are collective in nature. The recent reforms in Western Australia appear to have removed the ability to sign away rights under an award or collective agreement. Now, an individual agreement cannot be made while the employee concerned is covered by an industrial agreement.

During its operation, an Australian Workplace Agreement registered under the Federal system excludes the terms of any award which would otherwise govern the employment relationship. The award is effectively suspended for this period.<sup>105</sup> Over the period of its intended operation, an AWA excludes any certified agreement made after the AWA has come into existence. However an existing certified agreement prevails over an inconsistent AWA (provided the certified agreement has not reached its nominal expiry date).<sup>106</sup>

The other systems do not allow for individual agreements to undercut the terms of a collective agreement. An individual Queensland Workplace Agreement does not replace a collective certified agreement unless the collective agreement specifically allows it to do so.<sup>107</sup> The South Australian system provides that enterprise agreements prevail over both inconsistent awards and employment contracts, unless the employer and employee specifically agree that a term of the contract which is more beneficial to the employee will continue.<sup>108</sup>

Individual parties are usually free to contract for provisions more favourable to the employee.<sup>109</sup> Since most awards set minimum provisions, individual parties

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<sup>104</sup> *Workplace Agreements Act 1993* (WA), s. 10.

<sup>105</sup> *Workplace Relations Act 1996*, s. 170VQ; see *Community and Public Sector Union and Employment National Limited*, AIRC Dec 1163/98, Print Q6310, 15 September 1998.

<sup>106</sup> *Workplace Relations Act 1996*, s. 170VQ.

<sup>107</sup> *Industrial Relations Act 1999* (Qld), s. 213.

<sup>108</sup> *Industrial and Employee Relations Act 1994* (SA), s. 81.

<sup>109</sup> *Kilminster v Sun Newspapers* (1931) 46 CLR 284; *Wiseman v Professional Radio and Electronics Institute of Australasia* (1978) 20 ALR 545 at 572 per Keely J.

can usually agree to receive more than the entitlements set under an award. This would also be the position with a certified agreement, though this would depend on its wording. An employer would not usually be in breach of an agreement by paying an employee more than the rate set by the agreement.

### *V Prospects for collective labour agreements as a means of regulation of an employment contract*

In common with other industrialised countries, Australia has shown a shift in the centre of gravity of collective bargaining, away from a national and industry basis towards the company level, and a growth in the flexibility of bargaining processes.<sup>110</sup> Associated with this has been a reduced acceptance of collective bargaining among many employers. The existing systems of industrial relations legislation in Australia display a strong trend towards individualism in agreement-making, while facilitating the means for employers to exclude unions from bargaining. In several disputes in the mining sector, employers have been able to forestall union attempts to obtain a certified agreement while pursuing a policy of individualisation by placing as many employees on either individual workplace agreements or on 'staff' employment contracts.<sup>111</sup> Employers have been able to do this largely because the legislation does not require them to engage in collective bargaining or give priority to such bargaining, and does not give unions enforceable rights to bargain. Employers are able to choose whether and when to engage in individual or collective agreements.

Governments have responded to the demand for labour market deregulation by adopting less centralised forms of agreement-making. Several Australian jurisdictions have introduced new forms of statutory individual agreement. While conservative forces promoting such a change have preferred an individual contract model based on the common law, the historical legacy and public support for the arbitration system (with its connotations of fairness and impartial scrutiny) has forced them to adopt a hybrid statutory model. Thus Australian Workplace Agreements under the Federal system are conceptually contractual in formation, originating in an informal written agreement between employer and employee. However they are statutory in their effect, allowing them to override awards and certified agreements. Like certified agreements, they also require approval by a

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<sup>110</sup> Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford, U.P., 2001, p. 102; Rien Huiskamp, 'Collective Bargaining in Transition' in Joris Van Ruysseveldt, Rien Huiskamp and Jacques van Hoof, eds, *Comparative Industrial and Employment Relations*, London, Sage, 1995.

public authority and conformity to minimum conditions, using awards as the benchmark. Though statutory in legal force, AWAs are enforceable by essentially private law remedies (compensatory damages and the injunction to enforce performance) as well as by penalties in the nature of a fine, which are traditionally associated with breach of awards.<sup>112</sup> Other types of individual agreement introduced in the last decade under the State systems have been more solidly contractual in nature, following the approach taken by New Zealand's (now repealed) *Employment Contracts Act 1991*.

The reasons for the shift to individualism are manifold and complex. It is only partly the result of the decline in trade union membership and influence, although that has been dramatic. In 1976 Australia had one of the western world's highest rates of union membership, with 51 percent of the workforce enrolled. Since then union density has suffered an increasingly rapid slide, accelerating in the 1990s. In 1990 membership stood at 40.5 percent, but by 2001 only 24.5 percent of employees were members.<sup>113</sup>

Research by David Peetz indicates that the decline in unionism is due less to structural change in the labour market (from the secondary to the service sector) than the widespread strategic choice by management from the late 1980s to bypass or oppose collective worker representation. Peetz concludes that nearly three-quarters of the decline in union density during 1990-95 was due to changes in employer and state strategies, and that legislative change alone was responsible for nearly half the decline. In large part this shift was associated with the infusion of American management attitudes, which was also linked to the philosophical realignment of the state's attitude towards unions and collectivism in legislation.<sup>114</sup> The introduction of individual agreements is closely associated with management strategy, reflecting a preference for individualised 'hard' HRM employment relations. It has occurred most strongly at workplaces with a strong union presence, and is correlated with declining unionism at those workplaces.<sup>115</sup>

Other forms of collective worker representation have not developed to take the place of union-based bargaining. Industrial democracy was a brief enthusiasm

<sup>111</sup> Matt Moir, 'Individual and Collective Bargaining in Australian Labour Law: The CRA Weipa Case', *Sydney Law Review*, vol. 18, 1996, pp. 350-371. See also the BHP case discussed in I.4 above.

<sup>112</sup> *Workplace Relations Act 1996*, ss. 170VV, 170VW, 170VZ; Greg McCarry, 'From Industry to Enterprise From Award to Agreement: Federal Laws and Workplace Change in Australia' in Dennis R. Nolan, ed, *The Australiasian Labour Law Reforms*, Sydney, Federation Press, 1998, p. 68.

<sup>113</sup> Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, August 2001*, cat. 6310.0, p. 35.

<sup>114</sup> David Peetz, *Unions in a Contrary World: The Future of the Australian Trade Union Movement*, Melbourne, Cambridge University Press, 1998, pp. 97-102.

<sup>115</sup> Wooden, *The Transformation of Australian Industrial Relations*, op. cit., pp. 86, 121.

during the 1980s under the Federal Labour government, but has been little realised, apart from occupational health and safety where workplace consultation is often required under legislation. Attempts to encourage employee participation through the statutory mechanisms for negotiation of collective agreements have been unsuccessful.<sup>116</sup> There has been little enthusiasm for alternative representation methods, such as works councils among either employers or unions, although low-level consultative committees exist in some larger workplaces.<sup>117</sup>

The prospects for collective bargaining are significantly affected by the large component of 'atypical' labour in Australia. Part-time employment has accounted for virtually all the new jobs created in the 1990s. More and more employers are adopting a 'low-cost flexibility' approach to staffing, relying on casual and contract workers and hiving off responsibility for training. Casual employees now comprise one-quarter of the Australian workforce. They have little job security and do not receive annual or sick leave (but earn slightly higher hourly rates). Casual employees are not in theory excluded from bargaining and can certainly be covered not only by awards and agreements but (at least for long-term casual workers) by unfair dismissal legislation. But they have lower rates of unionisation and participation than permanent employees.<sup>118</sup>

The 'outsourcing' or 'contracting-out' of operations may also affect the operation of collective bargaining, apart from the impact of outsourcing on employee organisation. If a part of business operations is no longer conducted directly but is transferred to a new employer, existing collective agreement may no longer apply, especially where a peripheral or non-core part of a business is outsourced.<sup>119</sup> Similarly, if an employer contracts a business to provide 'overflow' services to

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<sup>116</sup> Richard Mitchell, Richard Naughton and Rolf Sorensen, 'The Law and Employee Participation – Evidence from the Federal Enterprise Agreements Process', *Journal of Industrial Relations*, vol. 39, 1997, pp. 196-217;

<sup>117</sup> Raymond Markey and Rosemary Reglar, 'Consultative Committees in the Australian Steel Industry' in Raymond Markey and Jacques Monat, eds, *Innovation and Employee Participation Through Works Councils: International Case Studies*, Aldershot, Avebury, 1997; Paul J. Gollan, Ray Markey and Iain Ross, *Additional Forms of Employee Representation in Australia*, Australian Centre for Industrial Relations Research and Training, Working Paper 64, 2001 ([www.econ.usyd.edu.au/acirrt/pubs/wp.htm](http://www.econ.usyd.edu.au/acirrt/pubs/wp.htm)).

<sup>118</sup> Australian Centre for Industrial Relations Research and Training, *Australia at Work*, Sydney, Prentice-Hall, 1999, pp. 136-9; Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership*, August 2001, cat. 6310.0.

<sup>119</sup> *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 176 ALR 205 at 209. Under the Federal labour law system, a new employer acquiring a business as a 'successor, assignee or transmittee' becomes bound by any relevant certified agreement which was binding on the former employer operating the business, providing the agreement remains relevant to the business: *Workplace Relations Act 1996*, s. 170MB.

supplement its existing operations, the contracting business will most likely not be bound by the main business's awards and agreements.<sup>120</sup>

The legislative changes in the 1990s have produced legal systems which are more geared towards collective bargaining than previously – but it is bargaining mainly at the enterprise level and without provision for union recognition or participation in good faith. Under the Federal system there is no promotion of collective bargaining in priority to individual agreements. In fact, the legal regimes introduced by conservative governments have been designed to promote individualisation and have permitted employers to exclude union bargaining.<sup>121</sup>

The trend towards statutory promotion of individualism in agreement making has been halted in the last few years by the election of Labor governments in the States. Changes of government have meant that the heavily contractualist regimes which were introduced in the early 1990s have now been replaced by approaches which are designed to promote collective bargaining. But in many cases it is collective bargaining without unions. Unions are no longer necessarily involved as parties, and agreements may be made with an unorganised group of workers, provided a majority of them consent. This is a very different kind of collective bargaining from that contemplated under international law or the traditional compulsory arbitration system. While harmonious and beneficial agreements can and have been made under this approach, the protection of employees' freedoms still ultimately depends on activism on the part of unions and independent scrutiny by state tribunals. The political polarisation of industrial relations policy means that whether bargaining is individualist or collectivist in orientation is now largely dependent on which of the two major parties happens to hold power for the time being. Undoubtedly, however, the focus of bargaining has shifted towards the workplace rather than the industry or national level, and in the process has become less reliant on trade unions.

Changing patterns of work have had a significant impact on traditional forms of collective representation and bargaining by unions, but employer strategies and the environment created by legislation have been crucial in the 1990s. In the absence of strong union representation, employment relations will continue the trend towards individual agreements (often informal) containing terms dictated

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<sup>120</sup> See *Stellar Call Centres Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2001] FCA 106; 103 IR 220.

<sup>121</sup> See Stephen Deery and Richard Mitchell, 'The Emergence of Individualisation and Union Exclusion as an Employment Relations Strategy', and Amanda Coulthard, 'The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion Under the Workplace Relations Act 1996 (Cth)' in Stephen Deery and Richard Mitchell, eds, *Employment Relations: Individualisation and Union Exclusion – An International Study*, Sydney, Federation Press, 1999.

by the employer, underpinned by increasingly outdated award provisions. The prospects for the development of truly collective bargaining in Australia will depend largely on the ability of the trade union movement to revitalise itself at the workplace level, and this will require the law to promote and legitimise collective forms of employee representation.