The Myth of Choice

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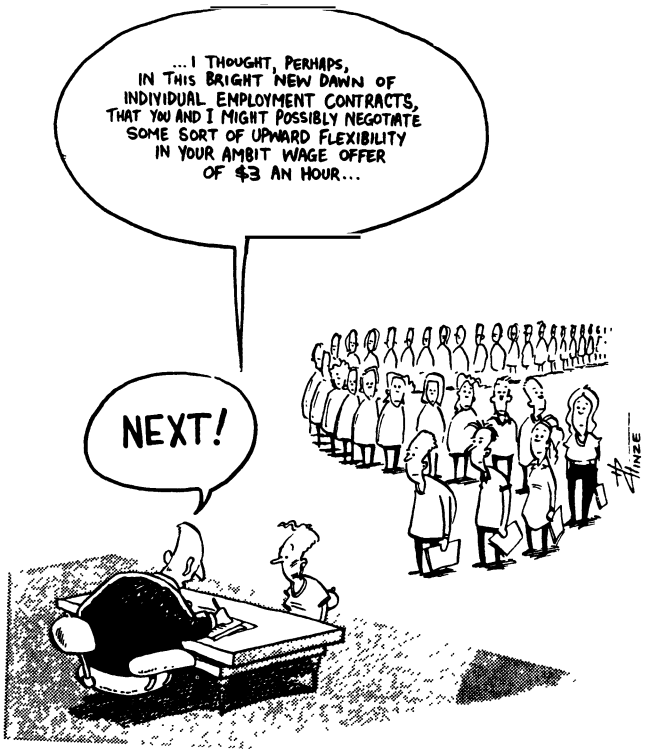
Vulnerable workers and the Workplace Relations Act 1996.



There are many ways to measure the success of a law. One is to assess how it protects the vulnerable.

The *Workplace Relations Act 1996* (the Act) is a major regulator of power in the workplace. It emphasises grassroots negotiation in preference to intervention by industrial tribunals. The Explanatory Memorandum to the Bill on which the Act was based[1] stressed the importance of giving employers and employees 'primary responsibility' for industrial relations and agreement making because:

> They are best placed to develop more co-operative, productive and competitive working arrangements. The industrial relations system needs to provide them with effective *choices* about the arrangements for the particular circumstances. The Act provides such *choice* as well as a fair go for all.[2] [emphasis added]

Choice is a recurring theme of the Act. But a formal invitation to choose between an award and an inferior 'agreement' is worthless to a migrant outworker who knows tomorrow's order will be cancelled unless she accepts a cut in conditions today. The quality of her choice and the genuiness of her agreement depend on the protective devices offered by the Act.

This article looks at the effect of the Act, in particular its emphasis on deregulation of the labour market, on groups of workers who might be broadly described as 'vulnerable'.

Vulnerable workers

In certain industries, where the nature of the work enhances the strategic position of the worker, or in those where there is an undersupply of labour, the form and content of the employment relationship may be a matter for genuine negotiation between employer and employee.

Generally, however, the balance of power in the workplace favours the employer. There are certain categories of worker who are particularly vulnerable and/or at risk. They include the low paid, the unskilled, part-timers, casuals, women, people from non-English speaking backgrounds, young people, migrants, older people, new starters, Aboriginal workers, workers from the Torres Strait Islands, workers with disabilities, lesbians, gay men, and workers in rural areas.

These and similar groups have difficulty finding employment and/or keeping it. They are also more likely to experience discrimination in the workplace. Now, they are expected to exert their influence in the workplace to:

> see themselves as part of the same team, working with management toward common goals rather than as members of opposing teams who need a whistle-blowing referee to sort them out.[3]

Confiscating the referee's whistle

The 'referee' is the Australian Industrial Relations Commission. The Commission is the primary industrial dispute-settling tribunal at federal

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level. Where a dispute is notified to the Commission or where the Commission becomes aware of a dispute, it must first try to foster a conciliated settlement between the parties and if that does not work, it can arbitrate to impose a binding resolution. Formerly, the Commission used its arbitral powers 'where necessary'.[4] Under the current Act, the Commission's arbitral powers are to be a 'last resort' in the settlement of disputes (s.89(a)(ii)).

It is to be expected that argument about whether arbitration is appropriate or not will now detract from the efficient resolution of disputes. A party with superior resources can easily use the 'last resort' argument to frustrate the Commission's operation by drawing out the conciliation phase unnecessarily and thus delaying arbitration. The consequences are potentially severe for vulnerable workers, who lack bargaining strength in the workplace and rely more heavily than others on the Commission's early intervention. A 'whistle-blowing referee' is precisely what they have relied on, until now.

Shrinking awards

Accompanying the constraint on the Commission's powers to arbitrate is a reduction in the Commission's award-making powers.

Awards have always been important to workers whose bargaining strength is poor. They stipulate enforceable employment conditions covering a wide range of matters. Under the amended Act, awards will be confined to 20 'allowable' award matters (s.89A). The complex process whereby awards must be gradually stripped back to the allowable matters has become known, somewhat incongruously, as 'award simplification'.[5]

There is no obvious logic behind the matters included or excluded in the list of allowable matters. According to the test case on this point,[6] non-allowable matters include the provision of first aid kits, toilet facilities, changing rooms and meal areas. Also in the non-allowable category are the employer's obligation to consult employees about organisational change likely to affect their employment, and the obligation on an employer to discuss potential redundancies with employees (including measures to mitigate adverse consequences).

Prior to the passage of the Bill, workers were assured that:

> Employees already covered by an award will remain under that award unless they choose to enter an agreement.[7]

But if the Act forbids the inclusion of certain matters in an award, there is only the illusion of choice. Employees faced with subtraction of award rights must decide whether to surrender their entitlements without complaint or to approach their employer in order to bargain for something which they should never have lost. For vulnerable workers, lost award rights are probably irretrievable.

Australian Workplace Agreements

The weakening of the Commission's role coincides with the introduction of a new regulatory mechanism which encourages negotiation of individual employment agreements, known as Australian Workplace Agreements. Australian Workplace Agreements enable an employer to negotiate directly for an individual agreement with an employee. An Australian Workplace Agreement can undercut an award which would otherwise apply, provided a test known as the 'no-disadvantage' test is satisfied. That test assesses whether an agreement disadvantages employees by resulting, on balance, in a reduction in their overall terms and conditions of employment under applicable awards or relevant laws (ss.170VPB, 170VPG, 170X–170XF).

An Australian Workplace Agreement prevails over an award and may displace a certified agreement in certain cases (ss.170LY, 170VQ). It may be negotiated through a bargaining agent, but the bargaining agent must be appointed by a written instrument, which must be given to the employer (s.170VK). Compare the award system, where a worker has the twin advantages of automatic union representation and preservation of anonymity. Although the Act provides that the employer must recognise a bargaining agent and must not apply duress in the bargaining process, there is no obligation on an employer to negotiate with the agent and duress is a limited concept.[8] The ultimate effect of the Australian Workplace Agreement system will be to isolate the individual worker. Also relevant to the phenomenon of worker isolation is a recent Report of the International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations, which concluded that the Act did not promote collective bargaining, as required by international convention.[9]

Adverse international comment about the system of Australian Workplace Agreements also appears in the August 1997 United Nations Report of the Committee on the Elimination of Discrimination Against Women, which noted with concern (para. 32):

> [T]hat the legislation on industrial relations providing for the negotiation of individual contracts between employer and employee may have a disproportionately negative impact on women. Part-time and casual workers, of which women formed a disproportionate share, are usually in a weaker position than other workers to negotiate favourable working conditions, in particular with regard to benefits.

The same comment could be made in relation to any vulnerable worker and Australian Workplace Agreements.

In any event, it is clear that the prohibition of duress is not intended to prevent an employer from offering potential employees employment on the basis that they enter into an Australian Workplace Agreement.[10]

In such a climate, it is optimistic to expect the bargaining process to be genuine.

A public officer known as the Employment Advocate[11] is entrusted, among other things, with the task of vetting proposed Agreements for disadvantage. Regrettably, the quality of the outcome will remain unknown because Australian Workplace Agreements (unlike awards and certified agreements) are not available for public scrutiny.

Safeguards

It must be acknowledged that the Act is not devoid of any reference to the interests of vulnerable workers. There are provisions, which are clearly designed as safeguards.

For example, there are references to the encouragement of discrimination-free workplaces (ss.3(j), 93, 93A, 170VG), provision is made for equal remuneration for work of equal value (ss.170 BA-170BI) and reference is made to the need to explain certified agreements to certain workers, such as women, young people and people from non-English speaking backgrounds, who may be considered to have special needs (s.170LT).

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- ensuring that primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and
- enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances.

On the other hand, the AIRC noted that approval would be contrary at least to the object in s.3(d)(I) which provides for

> wages and conditions of employment to be determined in so far as possible . . . upon a foundation of minimum standards.

The AIRC also observed the possibility of a decline in living standards, contrary to the object in s.3(a). However, the AIRC thought that these aspects could possibly be offset by increased security of employment and the fact that there was evidence that the agreements were the 'primary responsibility' of the parties at the workplace level (s.3(b)) and was, in practice, a form appropriate for particular circumstances (s.3(c)).

Having found that the objects of the legislation did not clearly indicate whether approval of the AWAs was not in the public interest, the AIRC noted evidence that clearly established there was a crisis in the business created by the direct intervention of a public authority. The AWAs under consideration were part of a strategy to deal with this crisis. The AIRC cited evidence that, in practice, not much work was done on Sundays and that management were of the view that weekend work was not good practice. The AWAs, having terms of one year, were also said to have a short term. In deciding to approve the AWAs on the balance of these factors, however, the AIRC observed that the approval was based on circumstances existing at the time, and that approval, even at the same site, may not be forthcoming in different circumstances.

Observations on the decision

Several significant issues arise from this decision. First, the no-disadvantage test must in effect be ignored if the employer can show that approval would not be contrary to the public interest. Given that a decision as to whether an AWA is not contrary to the public interest is a discretionary matter for the AIRC, there is a lack of precision in evaluating the probable outcome of any referred matter. This is especially so when the decisions are being made in a field like industrial relations, characterised by firmly held but completely conflicting views as to what measures will ultimately produce the better public benefit.

Second, in attempting to balance the benefit derived against the detriment to the public interest, the conflicting objects of the Act in s.3 only add to the general confusion. While some economic theories argue that driving down wages will promote employment, such a policy will not necessarily result in improved living standards. The answer is, as always, 'flexibility' does not necessarily result in fairness. The way the legislation has been framed and interpreted in relation to AWAs means that fairness has become a subordinate concern. It is also important to note that the unusual framing of the public interest test probably represents a lesser burden to those seeking to have AWAs approved than if the test was positively framed (then the test would be to show approval was actually in the public interest).

Conclusion

The no-disadvantage test is effectively unimportant as a test when the public interest is raised as an issue in the approval process. Confusion is also caused by the inherent subjectivity in judging what is not contrary to the public interest. This accentuates the lack of protection afforded to employees under the AWA process. Other measures impeding the right of employees to act on their own behalf include the narrowness of the protected industrial action period and the ability of employers to circumvent collective action through single, outcome concealed, bargaining. Another problem lies in the comparison with award minimums rather than those that might have been subsequently negotiated in successive rounds of enterprise agreements. Taken as a whole, AWAs cannot be viewed as a vehicle for achieving fair wage and conditions outcomes for Australian employees.

References

1. The Act's predecessor, the *Industrial Relations Act 1988* (Cth) had this as a requirement for Enterprise Flexibility Agreements in s.170ND(7).
2. Catanzariti, J. and Baragwanath, M., 'The Workplace Relations Act — A User Friendly Guide', Newsletter Information Services, Manly, 1997.

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But many of these measures were inserted following representations from concerned groups at a Senate Committee inquiry into the Bill on which the Act is based.[12] The unfortunate result is that they operate in a piecemeal fashion, unsupported by a coherent foundation. Even where the provisions formed part of the original scheme of regulation, they are insufficient to redress the difficulties introduced by other aspects of the Act. The likelihood is that such provisions will in time be seen as mere window dressing rather than a positive commitment to a balanced and fair system of regulation.

Conclusion

Formal options for choice are meaningless if the law of the jungle is simultaneously permitted to apply. If those who framed the Act really want to provide a 'fair go for all',[13] attention must be given to the substantive operation of the Act as well as to incidental protective devices. Strong bargaining parties will exert their influence whatever the system of regulation. For vulnerable workers, the danger is that the damage done through their isolation and erosion of their conditions will be irreparable.

References

1. The Workplace Relations and Other Legislation Amendment Bill 1996.
2. Outline to the Explanatory Memorandum.
3. 'A Competitive Australia', Address to the Committee for Melbourne by the Hon. John Howard MP, 18 July 1995.
4. Section 89(a)(ii) *Industrial Relations Act* 1988.
5. Award Simplification Decision, Print P7500, 23 December 1997, a decision of the Full Bench of the Commission.
6. Award Simplification Decision, above.
7. 'Better Pay for Better Work', the Federal Coalition's Industrial Relations Policy; February 1996.
8. See the discussion in Cartwright, J. *Unequal Bargaining*, Clarendon Press, 1991, Ch.7.
9. ILO, Report of the Committee of Experts, Convention No. 98, March 1997.
10. Explanatory Memorandum to s.170WG of the Act.
11. Part VIA, s.170VPB of the Act.
12. Refer the Senate Economics Reference Committee Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996, August 1996.
13. Outline to the Explanatory Memorandum.