'COMPLEXITY' AND 'CONGRUENCE' IN AUSTRALIAN LABOUR REGULATION

MARK BRAY AND PETER WARING*

It is asserted that much of the literature on changing labour regulation in Australia only provides a partial analysis of recent tends. In particular, it is contended that researchers have neglected issues of complexity and congruence in the regulatory structure. In this paper we define these important dimensions of labour regulations, demonstrate their importance and attempt to explain how their omission arises from the theoretical and methodological foundations of previous research. We conclude by advocating the inclusion of these concepts in future research.

INTRODUCTION

Labour regulation can be defined as 'the totality of processes and norms by which actors and institutions, at different levels, contribute to the determination of the conditions of work and employment' (Murray *et al.* 2000: 246). The structure of labour regulation has been central to political and industrial relations debates over recent years in Australia and overseas and there can be little doubt that these debates (and the underlying power struggles of which they were a part) have resulted in major changes in the structure of regulation. The rise of enterprise bargaining, the shrinking coverage and narrowing scope of awards, and the growth of individual contracting are some key examples of these changes.

These recent empirical changes in labour regulation have, justifiably, received considerable attention from researchers, who have contributed greatly to our understanding—we now know much more about trends in regulatory structures in Australian enterprises and industries, while some of the more ambitious researchers have offered broader pictures of national trends (e.g. Morehead *et al.* 1997; ACIRRT 1999; Wooden 2000). We believe, however, that the analysis offered so far is incomplete; indeed, it misses some very important dimensions of recent changes in Australian labour regulation. Furthermore, we argue that these omissions are largely due to the theoretical and methodological assumptions of most researchers.

In an attempt to resolve some of these problems, we seek to adapt—and go beyond—a framework derived from the literature on 'bargaining structures' (see, for example, Clegg 1976; Sisson 1987, Plowman 1988; Bray 1993; Bray & Waring 1998). We consider this literature to be a valuable, albeit flawed, attempt to develop descriptive taxonomies that bring a degree of analytical order to the 'multiplicity of rules and norms' that comprise the empirical detail of labour regulation (Murray *et al.* 2000). Our main argument is that despite its value,

*Newcastle Business School and Employment Studies Centre, University of Newcastle, University Drive, Callaghan, NSW 2308, Australia. Email: Mark.Bray@newcastle.edu.au

the bargaining structures literature needs to be extended to include three key 'dimensions' of the recent changes in Australia's regulatory structure—namely, the layering of regulation, parallel regulation and the congruence of regulation.

The argument unfolds, first, through a brief review of the recent trends in Australia. In the present review we focus on each of the three neglected dimensions of regulation, using them to shed light on what we consider to be important empirical developments in Australia. We also attempt to use this empirical story to define the concepts and to illustrate their analytic value. Having demonstrated the significance of these dimensions of regulation, we then reflect on the existing Australian literature and ask why these important concepts have remained largely obscured. Finally, we attempt to draw together the main threads of the argument and briefly speculate on the type of research that is needed to more thoroughly explore these three dimensions of regulation.

THREE NEGLECTED ASPECTS OF RECENT REGULATORY STRUCTURES IN AUSTRALIA

The structure of labour regulation in Australia at the beginning of the 21st century is remarkably different to that of the 1980s and 1990s, let alone that of earlier decades. During the 1990s, legislative change at both state and federal levels introduced much greater diversity in labour regulation. Employers (and, more controversially, employees) gained access to a wider range of regulatory instruments from which to choose (McCallum 1997). In particular, non-union collective bargaining and individual contracting attained legal sanction in ways that had not existed previously. At the same time, older forms of regulation—like awards and certified collective agreements—continued, albeit in new guises.

The emergence of these new forms, the changes in the old and much about their impact on the pattern of regulation have been widely investigated. However, this analysis has focused on just some well known and commonly accepted aspects of 'bargaining' (rather than regulation) to the neglect of others. For example, the rapid adoption of enterprise bargaining, the declining importance of earlier awards, which were often industry-wide in coverage, and the emergence of individual contracting have provided a strong focus on the 'decentralisation' of the Australian system—that is, the changing *level* of bargaining (Bray & Waring 1998). The decline in union membership and the spread of new regulatory instruments, such as non-union collective bargaining and individual contracting, have been associated by some commentators with the changing *coverage* of bargaining in Australia (Bray & Waring 1998) and interpreted by others as evidence of a trend towards the '*deregulation*' of the Australian labour market, even if that promise has not yet been completely realised (Moore 1998; Campbell & Brosnan 1999; Wooden 2000). To a lesser degree, and partially overlapping with what has already been discussed, there has been some analysis of the changing *status* of bargaining, in terms of the new statutory sanctioning of non-union and individual contracting (Bray & Waring 1998), and of the changing *scope* of bargaining, in terms of the narrowing range of issues that have been subject to bargaining and the corresponding increasing number of issues left to managerial prerogative.

We assert that beyond these well known and accepted dimensions of regulation, there are three aspects of the changing forms of regulation that have not been clearly identified nor properly studied. The first two (namely, the 'layering' of regulation and 'parallel' regulation) together constitute the 'complexity' of regulation; the third is the 'congruence' of regulation. We are not claiming to have 'discovered' these issues nor are we suggesting that others have not mentioned them in empirical discussions. Rather, we believe that they remain theoretically disguised and empirically neglected.

Horizontal complexity: The layering of regulation

A less well-recognised aspect of recent legislative and institutional changes was what we call the 'layering' of regulation. By this we mean that the new regulatory instruments did not fully replace the old, but rather they were built on top of the old—thereby creating a series of regulatory instruments each of which has some role in determining the rules governing the employment relationship. More broadly, layering can occur when the regulation of different aspects of (or issues in) the employment relationship are determined by different regulatory instruments or where the one issue is regulated by more than one instrument.

The layering of regulation is hardly new in Australia. The traditional award system provided legally binding minimum wages and working conditions that were often supplemented by other regulatory forms (see Yerbury & Isaac 1971). 'Over-award payments'—whether the result of collective bargaining, individual contracting or managerial unilateralism—provided employees with wages in excess of the award minima (Hancock 1985: 193–99; Plowman 1986: 23–9). Similarly, employees and their unions often won non-wage concessions from employers that represented improvements beyond those contained in awards. Alternatively, the limited scope of awards meant that some aspects of the employment relationship—like superannuation or the allocation of labour or the introduction of technological change—could not be included in awards and therefore had to be regulated by alternative instruments, if employees were to be involved in jointly deciding these issues, or by managerial prerogative (Ludeke 1991).

During the late 1980s, the Australian Industrial Relations Commission followed wages policies that McDonald & Rimmer (1989) called 'managed decentralism' because they involved wage increases being negotiated at two levels: general increases for all employees determined centrally by the Commission, with additional increases being available to parties who negotiated productivity improvements at more decentralised levels like the workplace or industry. The layering effect here was well recognised in the term 'two-tier' that was used to describe the first of these wage systems.

The new regulatory instruments introduced during the 1990s gave further formality to this layering of labour regulation. For example, in an effort to legitimise the introduction of statutorily recognised individual contracts, the Howard federal government extended the application of the 'no disadvantage test' to its Australian Workplace Agreements (AWAs). Under this test, the outcomes of bargaining (whether contained in certified collective agreements or individual AWAs) could

not receive legal sanction unless they delivered to employees wages and working conditions that were, as a package, no worse than those employees would have received under their former award or a relevant designated award (see section 170XA, WRA 1996). The application of this no-disadvantage test may have been fairly subjective in many cases and the comparison between the benchmark award and the agreement was often flawed (see Waring and Lewer 2001), but it remains clear evidence of the close and direct link between new and old regulatory instruments.

Second, under the WRA 1996, unless otherwise specified in the certified agreement, AWAs could only be offered either when there was no certified agreement in place or when the certified agreement's nominal expiry date had passed. However, the terms of a certified agreement could explicitly permit the offer of AWAs to some or all employees, and this indeed occurred. Typically, the result was that some employees remained on the certified agreement while others had their employment governed by a mix of AWA and certified agreements provisions. In this way, the operation of one regulatory instrument (i.e. the AWA) is contingent upon another regulatory instrument (namely, the certified collective agreement).

Third, under the WRA (section 89A), it was specified that awards could only include 20 'allowable matters', most of which were basic terms and conditions of employment, such as rates of pay, hours of work, forms of leave, dispute-settling procedures and allowances. Consequently, all awards were 'simplified' by purging all matters that were not allowable (Ostenfeld & Lewer 2003). The rationale used by the Howard government to justify this 'award simplification' was that non-allowable matters removed from awards would be reproduced in enterprise agreements, but this time in forms that were appropriate to the circumstances of the enterprise rather than the 'one-size-fits-all' form in which they appeared in awards (see Bray & Waring 1998: 72–4). Again, reform was undertaken on the assumption of a relationship between regulatory instruments.

Fourth and perhaps most important, the new legislative provisions at the federal level in recent years rarely insisted that one industrial instrument automatically or comprehensively excluded another. For example, while the terms of a certified agreement might replace the corresponding provisions of the previous award, the agreement may not have addressed all the provisions of the award and those not specifically mentioned would continue to have legal effect. Typically, such certified agreements instructed the reader to refer to the terms and conditions of the agreement *in conjunction with* the award. Alternatively, a 'second-generation' collective agreement may refer to a provision or work arrangement in a 'first-generation' agreement that was previously negotiated to cover the same employees. Moreover, many certified agreements contained clauses which expressly stated that, 'where the agreement is silent, the award [or an earlier certified agreement] will continue to have effect'. Similarly, an AWA might only replace a small number of provisions of an award or collective agreement, leaving the remaining provisions intact. Thus, an agreement may not automatically replace *in its entirety* the award or, indeed, earlier generations of agreement. Rather, both the agreement and the award (or the two agreements) regulated different aspects of the employment relationship. In other words, the effect of these linking clauses was to create

a 'regulatory inter-dependence' where the legal underpinning of the employment relationship was not contained in a single convention but rather in a complicated web of inter-connected rules—that is, *regulatory layering*.

This layering effect—in which new regulatory instruments frequently become supplements to, rather than substitutes for, older regulatory instruments—has been recognised in some empirical research and in policy debates in Australia. For example, the statutory reports submitted to parliament by the responsible department (originally, the Commonwealth Department of Industrial Relations, more recently the Department of Employment and Workplace Relations) have included data on what are deemed 'comprehensive' agreements, which were defined as those agreements that completely replaced previous agreements or awards. As shown in Table 1, these agreements represent only a small fraction of all federally certified collective agreements, meaning that the vast majority of collective agreements are not comprehensive. The obvious corollary is that most collective agreements rely on awards or previous agreements to regulate many aspects of the employment relationship.

In federal policy debates, the layering effect associated with the failure of enterprise agreements to replace awards has been highlighted by critics of the older regulatory regimes in Australia and its causes have been considered as a sign of 'industrial recalcitrance' or a lack of willingness by the parties to completely reinvent their industrial relations. This view was implicitly, if not explicitly, put by former Prime Minister Paul Keating in his now famous 1993 speech to the Institute of Corporate Directors, in which he urged employers to ensure that agreements became full substitutes for awards, rather than mere add-ons (see Dabscheck 1995: 109).

Beyond the federal jurisdiction, there are many other examples of the layering of regulation in Australia. For many employees or many enterprises, different aspects of the employment relationship are regulated by different regulatory instruments. The mix between industrial and legislative sources of regulation is a good example—awards may regulate wages and basic working conditions, but statutes may regulate annual holidays or long service leave or compulsory

Table 1 *Comprehensive agreements and employee coverage, 1997–2001*

Year	Agreements		Employees	
	Number	All agreements (%)	Number	All agreements (%)
1997	126	2	70 023	10
1998	539	8	85 231	9
1999	521	8	84 825	13
2000	375	5	99 075	14
2001	533	8	110 745	14

Source: DEWR, Agreement Making in Australia under the *Workplace Relations Act 1998* and *1999*, p. 26, and Agreement Making in Australia under the *Workplace Relations Act 2000* and *2001*, p. 105.

superannuation payments (see Baird & Burgess 2003). Similarly, some aspects of the employment relationship may be regulated by federal awards or laws, while others for the same employees are regulated by state awards or laws (some of the complexities created by the dual regulation of sex discrimination are well illustrated by Charlesworth 2003). In this way, the origin of the layering lies in the Australian constitution and the overlapping industrial relations jurisdictions that it allows.

Vertical complexity: Parallel regulation

A second aspect of the recent regulatory trends in Australia that has impacted on regulatory complexity but which has remained obscured is 'parallel regulation'. By this we mean that the employment relationships of different groups of employees within the same workplace, enterprise or industry are regulated by different—and potentially contradictory—instruments. As a result, there can be several different regulatory regimes operating in parallel within the same enterprise or industry.

Again, parallel regulation is far from new in Australia and has been the subject of considerable policy debate and empirical investigation. For example, 'multi-unionism' is often associated with parallel regulation because different unions recruit different occupational groups within workplaces and seek to regulate wages and working conditions in separate collective agreements or awards. Historical (and mostly case study) research on union organisation at the shop floor recognised well the occupational structure of Australian unions and the consequent multi-unionism within workplaces. These studies also explored the role of joint-union shop committees in overcoming inter-union difficulties within the workplace (e.g. Rimmer *et al.* 1986). With the exception of research on award structures conducted by Plowman and Rimmer in the late 1980s (Rimmer 1989; Plowman & Rimmer 1992), however, these analyses rarely focused upon the implications of multi-unionism for regulatory structures and they were mostly descriptive, failing to develop theoretical categories or systematic explanations.

Some survey research has also explored multi-unionism. The Australian Workplace Industrial Relations Survey (AWIRS), for example, gathered data on the number of unions operating within Australian workplaces, finding that multi-unionism increased with workplace size (Callus *et al.* 1991: 49–51) and acknowledging that:

> The existence of more than one union at a workplace raises a number of issues. Where these unions represent distinct groups of employees this may lead to complexities in negotiations and bargaining. (Callus *et al.* 1991: 118)

Follow-up survey data were obtained in AWIRS95 that showed *inter alia* decreases in the average number of unions per workplace in the five years since the previous survey, especially among the larger workplaces (see Morehead *et al.* 1997: 146–9). AWIRS95 also produced some intriguing data on the declining average number of awards per workplace between 1990 and 1995, along with some data on the incidence of different types of regulatory instruments in workplaces (Morehead

et al. 1997: 205–20). Again, however, analysis of these regulatory complexities was not deepened by later research and their theoretical implications for the study of regulatory structures were rarely exposed.

The complexities associated with 'parallel regulation', however, have been highlighted by employers in policy debates. Indeed, it could be argued that the difficulties posed for employers by multi-unionism and consequent parallel regulation were central imperatives driving the vociferous (and highly effective) campaign for 'enterprise-based bargaining units' by the Business Council of Australia (BCA) in the mid-to-late 1980s. A central theme of the BCA's three reports during the late 1980s was the inefficiencies arising from existing occupationally based union structures and the inappropriateness of centralised wage determination processes embedded in the existing conciliation and arbitration system (e.g. BCA 1989). Their solution—namely fewer unions and bargaining units based on the single enterprise—sought both to avoid external influences on the enterprise, such as industry-wide awards, and at least to reduce the fragmentation of bargaining units within the enterprise created by multi-unionism.

Interestingly, despite its importance in the employers' policy agenda, little of the research or the policy debate subsequently conducted on the impact of the changing recent regulatory changes in Australia has focused directly on whether the proposed solutions to the problems of multi-unionism and inappropriate bargaining units (or what we call parallel regulation) have actually succeeded. It is well known, for example, that there were many amalgamations between unions in the 1990s, reducing the total number of unions and presumably contributing to the decreased number of unions per workplace identified by the AWIRS95 (Dabscheck 1995: Chapter 5). The emphasis in the research, however, has been on the ACTU's amalgamation campaign (motivated by quite different concerns to those of the BCA) and the costs and benefits for the unions rather than on the impact of union amalgamations on workplace bargaining structures (for example, Davis 1999; Wooden 1999). Similarly, there has been little attention in the enterprise bargaining literature devoted to the incidence or effectiveness of 'one-union-per-workplace' collective bargaining or 'single-table' (but multi-union) collective bargaining arrangements (one recent exception is Jackson 2003). In other words, there has been little systematic research to determine whether the reforms of the 1990s reduced this form of vertical complexity.

Parallel regulation, however, is not necessarily or solely associated with multi-unionism. It is common, for example, for the employment relationships of managers (or 'salaried' employees) of an enterprise to be regulated differently from workers (or 'waged' employees). Similarly, the emergence of individual contracting in Australia has been associated with a trend in many companies for only some occupational groups within the enterprise to be offered individual contracts, while others remain on collective agreements or awards.

Also, different occupational groups within an enterprise may be subject to regulation from different sources (see Morehead *et al.* 1997: 222–9). For example, some employees within a single enterprise or industry may be covered by state awards while others are covered by federal awards. This can lead to differences in both procedural and substantive rules:

> The parallel operation of different tribunals and state legislation often leads to confusion and uncertainty about the rights of employers and employees. (Hancock 1985: 267)

Some quantification of this was produced by the AWIRS surveys, which found that 22 per cent of workplaces with more than 20 employees were covered by both federal and state awards in 1990 and 18 per cent in 1995 (Morehead *et al.* 1997: 209).

Again, recent policy developments have to some degree focused on solutions to problems caused by these types of parallel regulation. For example, after discussing the previous attempts to better coordinate the activities of state and federal tribunals, the Hancock Report made recommendations (which found their way into the Industrial Relations Act of 1988) that allowed joint sittings and joint appointments in an attempt to reduce conflict caused by the state-federal overlap (Hancock 1985). These reforms are well known, but again, there has been little research exploring their success, or otherwise, as solutions to the 'problem' of parallel regulation.

The congruence of regulation

The congruence of labour regulation refers to the 'fit' between different regulatory instruments, or between rules that come from different sources. The concept of congruence is vital because neither 'horizontal' complexity nor 'vertical' complexity is necessarily 'good' or 'bad' in itself. Indeed, some complexity is almost inevitable and highly complex regulatory regimes can be perfectly satisfactory for all parties to labour regulation. Rather, complexity in labour regulation is usually only considered a 'problem' (most often meaning that it is a source of excessive industrial conflict or inefficiencies or high and uncontrolled labour costs) when the different instruments of regulation do not 'fit together' comfortably.

Historically, in Australia, for example, award wages were for decades determined by a combination of a 'basic wage' that was received by all employees plus a 'margin' or 'secondary wage' that was designed to reward wage earners for their special skills or onerous working conditions. So long as these two wage components were determined rationally, predictably and separately according to different criteria, the system worked well—they were 'congruent'. During the 1960s, however, this wage system broke down because of inconsistent decisions by the tribunals and an increasing tendency to make basic and secondary wage decisions on the same criteria. The solution adopted by the then Commonwealth Conciliation and Arbitration Commission was the 'total wage' (for a good summary, see Plowman 1986).

Similarly, over-award payments were for many years considered an acceptable—indeed, desirable—form of wage flexibility; they provided a mechanism by which employers could reward individual employee performance or address labour shortages or accommodate collective pressure from trade unions—all outside the supervision of the arbitration tribunals. Again, provided the relationship between award wages and over-award payments remained clear and accepted, there was no 'problem'. During the 1950s and 1960s, however, in the context of a

very tight labour market, Australian unions became adept at 'flow-ons' and 'leap-frogging' by which wage leaders used militant tactics in collective bargaining to win increased over-award payments and these were then used within the Conciliation and Arbitration Commission as evidence for increases in award wages, which then prompted militant unions to maintain their relativities by pursuing further over-award payments. The resulting 'wage spiral'—which might be called a particular form of 'incongruence'—was considered a major problem by employers and governments (see, for example, Hancock 1985: 193–9; and Plowman 1986: 23–9). Subsequently, the arbitration tribunals attempted to bring over-awards within their jurisdiction and, in some industries, 'paid-rate' awards were introduced in an attempt to fold over-awards into award wage rates, but the problem was not resolved—congruence was not restored—until the weakening of the labour market in the second half of the 1970s and the development by the arbitration tribunals of more effective wage policies during the 1980s.

Moving from horizontal to vertical complexities, parallel regulation is often considered a perfectly normal and desirable pattern of labour regulation—provided the parallel regulatory regimes are congruent! However, when they become incongruent, they produce 'problems'. A prime example of such problems for management were the demarcation disputes between unions within an enterprise—disputes that are produced by either inconsistent or overlapping union membership rules or by unclear (and contestable) rules over the allocation of work between members of different unions. Similarly, multi-unionism can lead to considerable disruption within workplaces and uncontrolled wage increases if different occupational groups pursue wage increases and embark on industrial action at different times. Many types of fragmented (and incongruent) bargaining structures were common in Australia, especially in large workplaces, during the 1960s and 1970s (Hancock 1985: 613–21; BCA 1989: 65–6). The extent to which recent reforms have resolved this 'problem' has rarely been the subject of subsequent research.

WEAKNESSES IN THE PREVIOUS RESEARCH ON REGULATORY STRUCTURES IN AUSTRALIA

The previous section identified and defined the three neglected dimensions of labour regulation (namely, the layering of regulation, parallel regulation and congruence in regulation) and provided some selected Australian examples. This section reflects on the considerable research that has so far been conducted on the patterns of labour regulation in Australia over the last decade or so and tries to explain why these apparently obvious concepts have not been more thoroughly discussed and investigated. The main theme is not that the previous research lacks value—far from it—but rather that some of its theoretical assumptions and its research methodologies have conspired to obscure the important dimensions of regulation that we wish to highlight.

Inadequate conceptualisation

Much of the existing Australian research on regulatory structures has been highly descriptive, mostly adopting uncritically legal and/or 'commonsense' definitions

of the regulatory instruments. The main aims of this research appear to have been to account for the origins of the different regulatory instruments, to explore their political and legal manifestations and to identify the trends in the incidence of those types of regulation. For example, in the literature on enterprise bargaining there have been many case studies that have traced the emergence of this form of regulation, the strategies of employers and unions and the outcomes for work practices in a particular company or industry (see, for example, the case studies reported in Mortimer *et al.* 1996; Burgess & Macdonald 2003).

On the other hand, moving away from case studies, there have been many more quantitative studies that have focused mostly on the incidence of different regulatory instruments and the substantive content of the rules contained in those regulatory instruments. The data used in these studies has come from either extensive databases of all, or a significant proportion of all, agreements or from surveys of employers, unions or employees. The most successful of the databases are ADAM, maintained by ACIRRT at the University of Sydney; the Workplace Agreements Database, maintained by the Department of Employment and Workplace Relations; and Australian Workplace Agreements Management System, maintained by the Office of the Employment Advocate. The largest and most influential of the surveys have included AWIRS (Callus *et al.* 1991) and AWIRS95 (Morehead *et al.* 1997); various surveys commissioned by the federal department; questions about the methods of determining pay that were included as part of biannual Labour Force surveys conducted by the Australian Bureau of Statistics (ABS, Employee Earnings and Hours, Cat. No. 6315.0); two surveys of AWAs—one of employers and one of employees—commissioned by the Office of the Employment Advocate (see DEWR 2002: Chapter 5); and a large survey conducted by NILS (see Wooden 2000).

We are not claiming that the research reported above is misguided or worthless—far from it. Rather, we are arguing that the previous research has neglected the three important aspects of regulatory structures in which we are interested because of the failure of many of these studies to go beyond the legal or commonsense to more conceptual definitions of the regulatory instruments they are investigating or to acknowledge the 'inter-connectedness' between the regulatory instruments. One result has been a degree of conceptual confusion. Macdonald *et al.* (2001) made this point very clearly when they correctly criticised many Australian studies for not clearly defining 'enterprise bargaining' and in particular for conflating individual contracts with 'bargaining'. Another result has been an inability (or unwillingness) to compare case studies and thereby build generalisations or to use the surveys to extend theory building.

In committing these errors, the recent Australian literature has failed to advance earlier ideas developed by Rimmer and his colleagues in the late 1980s and early 1990s. McDonald & Rimmer (1989) sought to analyse the development of 'managed decentralism' using the concept of 'award structures'. Plowman & Rimmer (1992) explained the peculiarly complex structure of Australian awards by reference to the failure of employers to intervene and arrest the regulatory ambitions of Australia's mostly occupationally based unions. However, despite the many insights of these early efforts, they (unfortunately) did not guide later

research during the 1990s and subsequently. Furthermore, their use of the term 'award structure' reflected too much the unique experience of Australian regulation and focused excessive attention on awards, as opposed to other regulatory instruments and the relationships between different regulatory instruments. By seeking to locate awards and the different types of regulatory instruments within a larger theoretical framework, which is readily applicable beyond Australia, we hope to encourage more holistic research that generates greater generalisation and theory building.

Inappropriate units of analysis and a lack of holism

A second flaw in the literature is that much of the recent Australian research has focused upon the different regulatory instruments individually and in isolation. By concentrating on the instrument as the unit of analysis, the research particularly neglects the 'layering' of regulation described above and rarely acknowledges—or, more accurately, fails to directly investigate—the *relationship between different regulatory instruments.*

This problem is apparent in many case studies (e.g. Campling 1998; Burgess 1994), but it is even more obvious in the quantitative studies of the incidence of agreements or the content of agreements. Enterprise bargaining, for example, is often investigated through detailed content analysis of enterprise agreements, identifying the incidence and wording of agreement provisions on particular issues, like wage increases (Heiler *et al.* 1999) or family-friendly issues (Whitehouse 2001). Frequently, these studies have gathered their (easily accessible) data from the databases or surveys mentioned above. Such studies often result in research outcomes that overstate or under-estimate the incidence and effect of certain provisions in agreements. For instance, Whitehouse (2001), in an otherwise useful examination of family-friendly provisions in agreements, derives her data from a search of the ADAM database seeking 'any reference to family-friendly provisions in enterprise agreements'. She then calculates the frequencies of 'hits' and explores in more detail the content of the 'family-friendly' clauses she unearthed. The problem here is that this approach excludes 'linking provisions' in AWAs and certified agreements that provide a regulatory bridge to awards, earlier certified agreements or internal policies that may contain family-friendly provisions. To some extent, Whitehouse (2001: 7) correctly acknowledges this limitation when discussing the finding that newer certified agreements and AWAs are less likely to contain family-friendly provisions, which she explains by suggesting the possibility of 'subsequent generations of agreements not fully displacing their predecessors'.

The form and impact of individual contracts (such as, Australian Workplace Agreements) are similarly explored through the analysis of AWAs in isolation of any links they may have with other industrial instruments. The most obvious example is the OEA's formal reports to parliament, where its own database is simply mined to produce descriptive statistics on the incidence of agreements and of different types of clauses in agreements (see, for example, DEWR 2002: Chapters 5 and 6). Other studies of AWAs, however, largely repeat this method (see Van Barneveld & Arsovoska 2001).

Another good example of this approach—and of the problems it causes—is the analysis recently provided by the Australian Bureau of Statistics based on additional questions attached to its bi-annual survey of earnings and hours (Australian Bureau of Statistics 2000). The survey aimed to uncover the 'methods of setting pay' and asked respondents to nominate the one method among several alternatives that best described the process of pay setting—the question allowed only a single response, thereby providing no opportunity to acknowledge more than one method of setting pay. For example, if award wages were supplemented by individual over-award payments, the response was recorded as 'unregistered individual agreement'. The result was a massive 38.2% of employees being reported as having their pay determined by 'unregistered individual agreements'—a result considered unrealistic by some commentators (Macdonald *et al.* 2001; Waring & Lewer 2001). The cause of the problem was that the survey failed to acknowledge the complex relationship that often exists between different forms of regulation.

Another way of describing this methodological problem is to say that the existing research lacks holism. The reality is that most individual employment relationships, or most regulatory regimes in individual enterprises or industries, involve a combination of rules from a wide range of different sources and analysis of just one source will inevitably oversimplify the situation and thereby obscure the complex reality. This suggests that the more satisfactory unit of analysis, which has a greater chance of capturing the complex reality of regulation, is the individual contract of employment or regulatory regime of the enterprise or the industry rather than the regulatory instrument.

Again, this failing defies the lessons of earlier research that correctly, if incompletely, identified the complexity of labour regulation. Rimmer (1989), for example, first drew the distinction between 'comprehensive' and 'fragmentary' enterprise awards, the former providing 'a distinctive and comprehensive framework of regulation, compared to the latter that 'apply one or two enterprise variations to industry standards'.

Only recently have isolated exceptions to the dominant research approach emerged to explore the relationship between regulatory instruments. Waring and Barry (2001), for example, used the coal industry to investigate the extent to which 'control issues' that had been eliminated from industry-wide awards through the award simplification process (such as union right of entry, preference to unionists, use of contractors and seniority) had been reproduced at the workplace level through enterprise agreements. These initial efforts, however, have been fledgling and some of these studies suffer from other flaws identified below. There is, then, a need for far more research that directly addresses the relationship between different regulatory instruments within Australian workplaces.

Formal provisions versus actual practice

The third problem is that much of the existing research focuses almost exclusively on the formal provisions of written regulatory instruments, like certified collective agreements or statutory individual contracts, rather than the actual practices that these provisions represent. This type of research produces a picture of labour

regulation that is at best incomplete and at worst misleading because there is often a big gap between what is written in formal agreements and what actually happens at a workplace level.

This gap between formal regulation and actual practice hardly needs to be dwelt upon because it is widely understood. Clearly, written documents must be concise and they rarely even attempt to codify all the rules that operate in the workplace. The interpretation of written agreements often leads to new rules that supplement or even substantially change the original wording. Custom and practice almost invariably creates a vast web of rules within the workplace that can either supplement or supplant formal agreements. Management often seeks to develop managerial policies in areas where it fears that unions may seize on a regulatory vacuum. These well known social phenomena are central to the complexity of labour regulation and research that excludes them by focusing only on formal regulation is doomed to produce partial analysis.

CONCLUSIONS AND FUTURE RESEARCH

We hope that our main argument is now clear. We believe there are three dimensions of labour regulation that are central to the practice of labour regulation in Australia: the layering of regulation, parallel regulation and the congruity of regulation. These dimensions of labour regulation are 'out there' in workplaces, they have been the subject of public policy debate and they have been the subject of some empirical research. And yet, despite their apparent importance, they have not been integrated into theoretical frameworks, like the 'bargaining structures' literature, and we believe this has reduced the amount and the quality of research on these phenomena.

This argument, however, is mostly abstract and it makes many assumptions and sweeping statements that need to be investigated empirically. More particularly, the identification of the descriptive categories we discuss is only the first step in a deeper analysis that must not only explore the reasons why different patterns of labour regulation arise in particular empirical situations, but also canvass the consequences of different forms of labour regulation for the different sides of the employment relationship.

The logic of our argument is that future empirical research must be different from most of the research that has been conducted so far. Specifically, we suggest that future research should follow the following principles. First, the research must be theoretically informed. Rather than accepting the legal and/or commonsense definitions of the different regulatory forms, researchers should learn the lesson offered by Macdonald *et al.* (2001) from research to research on enterprise bargaining and develop clearer definitions that are derived from theory.

Second, the unit of analysis in future research should be the individual employment relationship or the structure of regulation within the whole enterprise or the industry rather than the individual instrument of regulation. This type of research will necessarily increase the consciousness of the inter-relationship between different forms of regulation and encourage more holistic analysis that will better capture the complexity of labour regulation.

Third, future research should focus on actual regulatory practices rather than just the formal provisions written in enterprise agreements or individual contracts. This is not to say that the content of written agreements is unimportant—this would be absurd. Rather, the research task is to go beyond these formal provisions and better understand their role in the larger pattern of labour regulation.

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