Motivations for the Introduction of Australian Workplace Agreements

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Abstract

This article introduces a typology of the reasons underlying the decision of employers to pursue Australian Workplace Agreements (AWAs), drawing on case-study findings and a review of secondary literature and case law. Three key reasons are identified: to foster positive employee relations; to avoid the influence of unions in the workplace; and, to reduce labour costs. These reasons appear somewhat at odds with the rhetoric surrounding the 1996 federal legislation that introduced AWAs, which stressed the expansion of choice for both employers and employees. The article uses the typology in order to develop a discussion of the varied types of AWAs. Despite the apparent lack of choice for employees in relation to whether their employment is covered by an AWA, it is contended that not all AWAs are used for purposes that are detrimental to employees. However, given the increasing evidence of instances where AWAs are providing detrimental outcomes for employees, there is a clear need for legislative reform of the AWA provisions.

Introduction

Debate surrounding individualisation of the employment relationship has long been polarised between those who believe in the adequacy of the free market, supplemented by limited government controls (Hayek 1948; Epstein 1983; 1984; Brook 1990; Moore 1998), and those who suggest that the power imbalance between employers and employees is such that the market cannot be relied upon to produce socially acceptable outcomes (Webb & Webb 1911; Commons 1931). The former view drove the reforms introduced by the Howard government in the *Workplace Relations Act 1996*. In particular, the Act opened the way for the emergence of a new form of individualism into the Australian industrial relations landscape – Australian Workplace Agreements (AWAs). The rationale for the legislation was cloaked in the rhetoric of increased choice for employees as well as employers. This rhetoric remains a feature of debate around AWAs, seen recently in attempts to extend these agreements into the tertiary education sector (Mitchell 2003).

Drawing from unpublished case study research (van Barneveld forthcoming) and evidence from the literature, this paper argues that despite the rhetoric of choice, AWAs are primarily a tool for employers, rather than a tool used to the benefit of both parties to the employment relationship. Previous typologies have been developed from analysis of the content of AWAs rather than looking at why the agreements were first introduced. However the analysis in this article starts from the dynamics underlying their introduction into the workplace. Three key reasons are identified: to foster positive employee relations; to avoid the influence of unions in the workplace; and to reduce labour costs.

The article begins by reviewing the legislation facilitating AWAs, including the objectives of the *Workplace Relations Act 1996*, and the requirements for concluding an agreement. The subsequent three sections draw from the literature and case-study research, to support the assertion that there are three key reasons for employer use of these individual contracts, with an expansion of *employee* choice rarely featuring in the equation. The article concludes that, to date, evidence suggests that the use of AWAs has been for reasons contrary to the 'choice' rhetoric used by the Government to support their introduction of the *Workplace Relations Act 1996*. Should AWAs remain a feature of Australian industrial relations, the legislative provisions need to be reformed to better meet the stated policy objectives of fairness and choice.

Purpose of AWAs

The changes to Australia's industrial relations system introduced by the *Workplace Relations Act 1996* were purported to have benefits for both employees and employers. For example, in the second reading of the *Workplace Relations and Other Legislation Amendment Bill 1996*, it was stated that the proposed legislation aimed to simplify industrial relations processes and to 'empower' individual employers and employees. Individual employers and employees would be able design arrangements to:

> ...first, suit their competitive circumstances and customer requirements so that their enterprise has the best chance of achieving high productivity and prospering; and, second, (design arrangements which) are best tailored to employee needs – enabling more innovative work styles and working patterns that balance ...work and family responsibilities more effectively (Reith 1996a: 1305).

These aims would be realised, in part, by permitting a new form of agreement making, which would allow 'agreements to be reached directly between an employer and his or her employee(s)' (Reith 1996a). These agreements were called Australian Workplace Agreements (AWAs) and they were seen as the centrepiece of the legislation (McDermott 1997; Creighton & Stewart 2000).

AWAs are agreements between an employer and an individual employee dealing with matters pertaining to their employment relationship. They are made under Part VID

of the *Workplace Relations Act 1996* (Cth) and may be collectively negotiated, but must be signed individually.

The Act prescribes several mandatory inclusions, and specifies the periods of time that new and existing employees must have the agreement before it is signed (s.170VPA). AWAs are not allowed to include provisions that prohibit or restrict disclosure of the details of an AWA by either party to the agreement (s.170VG(2)). Nonetheless, AWAs are secret documents, with a possibility of strict penalties of up to six months imprisonment where an entrusted person discloses the identity of parties to an AWA (s.170WHB(1)). An employer cannot terminate the employment of an employee because the employee refuses to 'negotiate in connection with, make, sign, extend, vary, or terminate an AWA' (s.170WE(1)).

Proposed AWAs are assessed against a No Disadvantage Test (NDT), which is administered by the Office of the Employment Advocate (OEA). The OEA's assessment is made by comparing the conditions of the proposed agreement with those of a relevant or designated award (s.170XA). Where the OEA has concerns that the NDT is not met, these can be resolved either through a written undertaking by the employer or, alternatively, the AWA can be referred to the Australian Industrial Relations Commission (AIRC) for determination (s.170VPE). Approximately eight percent of AWAs approved between 1997 and 2001 were approved with undertakings, while 90 percent were approved without changes. Less than one percent of AWAs lodged with the OEA had their approval refused (Department of Employment and Workplace Relations [DEWR] 2002:152).

In relation to those agreements that are referred to the AIRC, the legislation provides that the Commission must approve an AWA if it is satisfied that it has passed the NDT (s. 170VPG(2)). An AWA that fails the NDT may yet be approved, as the AIRC is required to approve the agreement if the Commission considers that it is not contrary to the public interest to approve the AWA. At the conclusion of s. 170VPG(4) a legislative note identifies that an example of a case where the Commission may be satisfied that approving the AWA is not contrary to the public interest is where the making of the AWA is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, a business or part of a business.

AWAs: a tool for employers not employees?

Despite the rhetoric of choice surrounding the introduction of the *Workplace Relations Act 1996* it was clear, early on, that the initiation of AWAs would be driven by business, with the literature speculating 'that in the overwhelming majority of cases, the initiative in relation to the decision to enter into AWAs will rest with the employer' (Creighton & Stewart 2000:178). This focus on employer use of AWAs was apparent when the Howard government stated that the introduction of AWAs was intended to afford small and medium sized *employers* with greater flexibility in employment, with little consideration of the corresponding flexibility which may be gained by employees (Hansard 21/11/1996; Reith 1997; Coalition Policy Statement 1998). In his second reading speech, AWAs were

described by the then Minister for Workplace Relations, Peter Reith, as 'having an emphasis on "flexibility and self regulation', un-vetted by a third party and confidential"' (Rubinstein 1998:55). The attractiveness of AWAs to employers was further emphasised by a paper anonymously released by a senior figure in Reith's Department which stated that:

> ...the essential property of AWAs is that they render legal, agreements which undercut award minima. Thus the coherent regulatory floor for terms and conditions of employment in the Australian labour market is (in law) made optional, and corporate strategy founded on securing cut-price labour relative to competitors is effectively legitimated. (Anon 1998:22)

The available evidence confirms that AWAs are introduced into the workplace by employers not employees. Examples of AWAs being employee-driven are virtually non-existent. Only one example is found in the literature – that of AWAs being negotiated by a group of highly skilled employees in a public sector workplace (van Barneveld 1999). Little evidence exists to help explain why employees are not using AWAs. However, possible reasons include a preference for collective bargaining among workers, a lack of bargaining power, complicated legislative requirements, a lack of skills/knowledge, and a perception that the initiation of bargaining wages and conditions is the role of management (Moir 1996; Malcomson 1998; Brown et al. 1998).

Unpublished case studies conducted by van Barneveld (forthcoming) suggest that AWAs are introduced by employers for a range of reasons. These reasons include: to introduce workplace flexibility perceived to be unattainable through the collective bargaining process; to improve payroll processing and reduce fluctuations in labour costs through the use of annualised salaries and loaded rates of pay; to foster closer ties between management and employees; to pay out accrued employee entitlements; to formalise existing conditions of employment without third party intervention; and specifically to eliminate or reduce the role of unions at the workplace. Broadly speaking, these reasons all focus on using AWAs to achieve outcomes for the *organisation*. They can be distilled into three *key* reasons:

- to foster employer/employee relations;
- to avoid or eliminate union presence at the workplace; and
- to reduce labour costs.

The remainder of this article develops the discussion in terms of the three key reasons listed above as to why employers use individual arrangements. These three categories are more specific than those currently invoked in the literature, which often simply refers to AWAs as reflecting either 'hard' or 'soft' Human Resource Management (HRM) practices, with the implication that the former is 'bad' and the latter 'good'.

Reasons Employers Are Using Individual Contracts

Fostering Employer/Employee Relations

The literature on AWAs, and individual contracts more broadly, often refers to evidence of employers who practice a 'hard' HRM approach (Roan et al 2000; Whitehouse 2001; Mitchell & Fetter 2003). In this approach workers are seen as:

> ...resources to be squeezed and disposed of as business requirements dictate. More importantly, the interests of workers and their wellbeing are of no significance in themselves. (Guest 1999: 6; Head 1998: 5)

Though the focus has generally been on the 'hard' dimension, a small, but growing portion of the literature suggests that some individual agreements are made by employers who genuinely want to foster positive relations with employees (Gollan 2000; 2001). In this context, the use of individual employment arrangements enables parties to the employment relationship to strike mutually beneficial terms and conditions and take 'direct responsibility for forming and maintaining their relationship, thereby enhancing communication, cooperation and trust' (Moir 1996:358). Policies associated with 'soft' HRM include '...employee information sharing programs, flexible job design programs, employee training programs, and targeted, validated selection practices on firm performance' (Lewin 1994: 408).

In his study of individual arrangements, Wooden (2000) concludes that workplaces using individual agreements could be characterised as having a high level of commitment, teamwork, information sharing, and employee involvement in the decision making process. Likewise, in his survey conducted for the OEA, Gollan finds some evidence of the 'positive' employer use of AWAs including the involvement of employees in determining the content of their agreements. Gollan (2000) found that before commencing the drafting of AWAs, 65 percent of employers had held discussions with employees. Where discussions were held after the AWAs had been drafted, in 59 percent of cases, these discussions led to changes being made to the content of the AWAs. Gollan suggests that these figures demonstrate that 'in the vast majority of organisations' employees exercise some influence over the content of their AWAs. It has been argued that these findings refute the suggestion that AWAs are representative of a 'hard' HRM approach (Hamberger 2002: 8–9). However, the argument about the significance of these survey results remains open. This survey has been criticised as presenting the perspective of employers who '...may have an interest in overstating the extent of discussions held with employees over AWAs' (van Barneveld & Waring 2002: 112–13). Further, there is no information provided about the type and quality of changes employees achieved as a result of discussions with their employer. Van Barneveld and Waring also note that Gollan does not include the number of employees at each workplace who were involved in 'discussions' nor does the survey

investigate the quality of such discussions or the degree to which actual 'bargaining' took place (2002: 113). Nevertheless, irrespective of the validity of these criticisms, the data provide evidence that at least some employers are using AWAs for 'positive' purposes.

In 2001, Gollan conducted a second survey for the OEA which provided insights into the perceptions of AWA employees. The survey collected data from a random sample of AWA and non-AWA employees across all industries and occupations. At large workplaces, AWA employees were found to have a more positive perception of management than a random sample of employees whose employment arrangements were unknown (interestingly, the opposite was found in small workplaces where AWA employees at small workplaces were less likely to have a more positive perception of management than the employees whose conditions were unknown). Drawing from the Gollan research, the Employment Advocate claimed that AWA employees were more likely than the random sample to report that changes in work had made balancing work and life easier over the previous two years, and slightly less likely to suggest that changes in work had made this balance more difficult to achieve (Hamberger 2002: 12). Additionally, the Gollan survey found that 'AWA employees were more likely than random sample employees to believe that management could be trusted, does its best to get on with employees, and gives them a say in how things are run' (Hamberger 2001: 4; van Barneveld & Waring 2002). In late 2003, Peetz reanalysed the Gollan survey data. He concluded that '...a close analysis of the dataset suggests the favourable findings regarding AWAs ...had at least as much to do with the way the survey was analysed as with any sampling problems'. Peetz conceded that some employees do fare well under AWAs; 'those with strong individual market power, those who employers wish to put onto generous AWAs to avoid union identification' (2004: 380).

Adding weight to Gollan's argument that some AWAs have been used to foster employer/employee relations, a study of two samples of AWAs suggests that while early agreements demonstrated a 'hard' HRM approach, more recent agreements contain content of a more sophisticated nature. In their study of AWAs approved to the end of 1999, Mitchell and Fetter (2003: 312) found that 'a substantial number' were single-issue agreements, which were '...simple in construction, and sought to achieve only a limited objective such as the liberalisation of ordinary hours of work'. In contrast, they found that of the AWAs approved to the end of June 2001, a growing but small proportion (five percent) 'had a clear vision of a "new" type of employment system developed around the idea of the "high trust", "high performance" workplace' (2003: 313). However, considering the small proportion of such agreements, it is not surprising that Mitchell and Fetter concluded that 'the AWA process is not, at the moment producing in any systematic way, employment systems which correspond to the "high trust" or "high performance work system" model' (2003: 317).

It may be that the higher proportion of more complex AWAs identified by Mitchell and Fetter developed around the idea of the 'high trust', 'high performance' workplace reflects the increasing maturity of the AWA system. Mitchell and Fetter's finding that

AWAs are becoming increasingly sophisticated may reflect an easing of initial uncertainty about the use and impact of AWAs, where employers were testing their value as an instrument to regulate the employment relationship. Consistent with the findings of Mitchell and Fetter, it is possible that the parties are now more comfortable with AWAs as a regulatory mechanism, with second-generation agreements being utilised to accomplish broader and more focused goals, but the evidence remains minimal.

Avoiding Unions

The discussion in the previous section suggested that some employers utilise individual contracts to foster closer ties with individual employees. Nevertheless, in many cases there seems to be surprisingly little that is 'individual' about individual agreements.

Several authors argue that an underlying purpose of the *Workplace Relations Act 1996* was to weaken the union movement by making it easier for employers to avoid union negotiations, and so encouraging fragmentation, removing union preference clauses, diverting union resources, and threatening their financial viability (Lee & Peetz 1998: 5; McCallum 2002; Peetz 2002a; 2002b). Before winning office in 1996, John Howard stated that '...the goals of meaningful reform, more jobs and higher wages, cannot be achieved unless the union monopoly over the bargaining process in our industrial relations system is dismantled' (Howard 1996). However, the Minister, Peter Reith, in his second reading speech, stated that 'the government is not anti-union, and our legislation is not an attack on unions' (Reith 1996a). Although the Act contains provisions requiring employers to recognise the bargaining status of unions, in practice, union collective bargaining in Australia is voluntary since there is no mandatory provision *requiring* employers to bargain with the relevant union (Rubinstein 1998: 53; McCallum 2002: 9–10). The 'agency' role for unions represents a clear move away from their status as party principals in industrial relations. It is not surprising therefore that AWAs have been perceived as a key mechanism that enables employers to avoid collective union negotiations. The use of AWAs to circumvent collective negotiations (Arsovska & van Barneveld 2001; Mitchell & Fetter 2003), in turn raises general concerns that a lack of bargaining power will result in lower outcomes for AWA employees compared with the outcomes which can be achieved through collective negotiation.

British research has found that for firms aiming to deunionise, there is little point in differentiated contracts since the aim is '...the decline in influence of collective bargaining as a result of the partial or complete derecognition of trade unions' (Brown et al. 1998: 58). In Australia, as in Britain, the use of individual contracts has in some cases been accompanied by anti-union sentiment from employers. Case-study evidence highlights the non-union management style of *some* AWA employers. For example, one of the five case studies contracted by the OEA found that the introduction of AWAs in a particular workplace was to avoid roping in to a union pattern bargain in the construction industry (Australian Centre for Industrial Relations, Research and Training [ACIRRT] 1999a).

Similarly, Waring's case studies (2000) show that employers in the Australian coal industry attempted to individualise employment relations by means of AWAs in order to weaken, or even wholly displace unions at the workplace (van Barneveld & Waring 2002: 114). In four unpublished case studies of AWAs in the hospitality industry, van Barneveld (forthcoming) found that three of the hospitality organisations used AWAs either to reduce the influence of the union or, in the cases of two greenfield sites, to avoid union involvement completely. Of course, it is difficult to broaden these case study findings beyond the industries in which they were conducted. This remains an area for further research.

Peetz (2002b) uses data from surveys, case studies and court cases to conclude that union avoidance is a key incentive for many employers to introduce individual employment arrangements. The higher incidence of individual arrangements in unionised industries led Peetz to argue that individual contracts such as AWAs, are not being used simply to fill '...the space left by union absence, but are performing an active function in creating that space' (2002b: 377–8). Commenting on this research, van Barneveld and Waring note that 'more detailed research of firms with AWAs is required to confirm this hypothesis but the weight of evidence currently available suggests that this is a reasonable conclusion to draw' (2002: 115).

Evidence from case law also confirms the use of AWAs to avoid union involvement at the workplace. It must be noted, however, that it is difficult to deduce from various cases an employer's reasoning for adopting AWAs to regulate the employment relationship. This is because the cases tend to examine factual situations and interpret the specific circumstances of a case within the context of the legislation. Another difficulty associated with case law material is the fact that recognition by an employer that the introduction or pursuit of AWAs was for the purposes of union avoidance may constitute a breach of the freedom of association provisions of the *Workplace Relations Act 1996* (Cth). Therefore, interpretation of the case law material requires one to draw implications and assumptions from the factual evidence presented. With these caveats in mind, several cases provide excellent examples of AWAs being used by employers to avoid union involvement at the workplace.

While principally concerned with the question of interlocutory relief, the decision of Nicholson J, in *Millan v Burswood Resort (Management) Pty Ltd*, is significant in demonstrating the intent of the employer in pursuing AWAs. During the proceedings it was revealed that in a direct letter to employees the employer company had claimed that 'it is our belief that the use of AWAs will permit those employees who want the pay rise they voted for to receive it, without further interference from third parties'.

While the *Burswood Resort* case is a clear example of an employer utilising AWAs in order to by-pass union negotiations, the use of AWAs in this manner is not always as transparent. In some instances employers are not as explicit, for example when collective agreement negotiations become frustrated and the employer introduces an AWA as a 'bargaining' tool for the purposes of avoiding the influence of the union in the workplace

(Arsovska & van Barneveld 2001).

In *Joy Manufacturing Co Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*, the employer and union commenced negotiating a collective agreement. This process became frustrated and the company resorted to the pursuit of individual agreements in the form of AWAs. In this instance Munro J noted that while there is no express obligation in the Act for parties to bargain in good faith, '...there is a more or less explicit duty to genuinely try to reach an agreement with other negotiating parties' [para.54]. His Honour held that throughout the collective negotiations, and later in pursuing AWAs, the company had not realised its 'implicit' duty to genuinely try to reach agreement. The employer's failure was held to be manifest in the cessation of 'bilateral communication with the union'; the switch at a crucial stage of negotiations from one negotiating party represented by the unions to four separate groups of employees for the purpose of making AWAs; the length of a three month lockout; and conduct which indicated that the company's position '...was adverse to recognition of the employees' choice of unions as their bargaining agents' [para.55]. Justice Munro observed that '...despite the Act affording employees the choice in who represents them in a bargaining period, an employer who initiates a bargaining period may, and often will, be attempting also to assert his or her choice of employee bargaining unit and negotiating party' [para.58]. This conduct is not prohibited under the Act, but, the fact that there is no prohibition on one party attempting to assert their choice on the other party does not stop this type of conduct '...from being found to be unfair: to be bargaining in bad faith; or perhaps even, to be the action of an employer not genuinely trying to reach agreement' [para.59].

Some of the AWA literature implies that the use of AWAs to avoid collective union negotiations is unfair. This use of AWAs does not imply that the *content* of the AWAs themselves are deleterious for employees; rather, it is the *process* which is contrary to the rhetoric of 'choice'. There are examples where individual contracts have been offered to employees that contain significantly higher terms and conditions than the relevant award or enterprise agreement. The concern, however, is that while employers may offer excellent terms and conditions to entice workers away from the collective stream, these exceptional conditions may be reduced when the contract is renegotiated (Alternative Law Journal [ALJ] Editorial Committee 1998: 52).

Reducing Labour Costs

Some authors argue that individual contracts may improve organisational efficiency through the increased flexibility that is achieved by determining wages and conditions of employment with individual employees (Epstein 1983; 1984; Brook 1990; Evans 1996; Wilson 1997; MacPherson 1998; Henderson 2000). In the Australian context, the focus appears to be on reducing labour costs rather than improving organisational efficiency. Labour costs are reduced by using AWAs to introduce combinations of changes not permissible under the centralised award system. It is possible, for example, to use both

AWAs and awards to introduce annualised salaries where the employee is no longer entitled to penalty rates outside ordinary hours of work. The difference between AWAs and awards, however, is that with AWAs, annualised salaries can be combined with open-ended hours provisions. This may lead to significant savings in labour costs and is something unions would generally not support being included in an award (van Barneveld & Arsovska 2001).

During the debate over the *Workplace Relations Bill*, the Minister for Workplace Relations implied that AWAs would not be used as a cost cutting tool. He rejected the suggestion that conditions could be reduced in second-round negotiations:

> I think some people take the view that at the end of an agreement it would suit employers and provide them with greater leverage if the starting position for the next agreement represents less terms and conditions than what people have got under the (expired) agreement. Well, quite frankly, I don't think that is the real world. By and large, for most people, they work on the basis that the agreement that they've got sets a basis for their future negotiations, not a much lower standard. (Reith 1996b)

While cost cutting was not a direct aim of the Act, it seems clear that AWAs are indeed being introduced by some employers for this purpose. Evidence of cost cutting AWAs is associated in the literature with agreements which contain limited detail, often addressing only flexibility in hours of work and remuneration (Cole, Callus & van Barneveld 2001; Mitchell & Fetter 2003). In their review, Cole et al. claim that 18 percent of AWAs adopted a 'minimalist' approach, and '...have a clear and limited change agenda involving changes to working hours'. Additionally, approximately a quarter of AWAs simply contained information about wages, hours and limited detail on basic conditions of employment such as parental leave, performance pay, and redundancy (Cole et al. 2001: 6). Cole et al. conclude that 'it is reasonable to assume that the initiative for introducing AWAs invariably comes from management wishing to introduce changes requiring the alteration of provisions in existing award or certified agreements'. It has been argued that AWAs which contain limited detail reflect an organisation's focus on the bottom line, and they may be evidence of a single-minded pursuit by employers of cost cutting measures. One concern with annualised hours arrangements introduced through AWAs is that a focus on wages and hours, combined with the open-ended nature of hours provisions (ACIRRT 1999b), gives management the prerogative to require employees to longer work hours than are compensated for in their annualised salary. This increase in unpaid overtime has a direct impact on the organisation's bottom line.

Although Cole et al. focused on the deleterious nature of AWA content, it is important not to ignore their finding that the approach to making agreements was complex, ranging from 'the simple and focussed, even instrumental approach, to one that seems quite strategic and far reaching' (2001: 15). In other words, despite the minimal content of some AWAs, Cole et al. also note some evidence of employers using AWAs to foster employee

relations by trading increased workplace flexibility for employee benefits such as 'consultative provisions, OHS, maternity and paternity leave, training, wage increases, hours and redundancy' provisions (2001: 15).

The cost cutting nature of some AWAs is highlighted by those agreements that are referred to the Australian Industrial Relations Commission (AIRC) by the OEA. Just under one percent, or 1 763 of AWAs approved between 1997 and 2001 were referred by the OEA and then subsequently approved by the Commission (DEWR 2002: 150). Several of these agreements contained provisions for remuneration significantly lower than the award rate (Bray & Waring 1998). The content of these agreements and their effect on employees is largely unknown since the Commission is not obliged to publish any determination in relation to the approval of an AWA, and if such a decision is published, the Commission must ensure the identity of the parties is not disclosed. To date, around a dozen decisions of the Commission have been published, with the Commission advising that decisions are only published if they set a precedent.

All of the decisions published by the Commission highlight cases of AWAs being used for cost-cutting purposes. However, it must be noted that cases which are referred to the Commission often reflect the 'worst' examples of employers using AWAs for a purpose detrimental to employees. Given the small proportion of AWAs which are referred to the Commission, it must be acknowledged that they do not provide an indication of AWA use more generally. The first decision was that of Deputy President Duncan [DP] (as he was then) in *Australian Workplace Agreements*, AIRC Print 5472, (26 September 1997). In that instance the Deputy President acknowledged that the proposed AWAs could lead to a decline in the living standards of the relevant employees. This included a lack of several key award provisions such as call-back allowance, public holidays which fall within periods of annual leave, and the fixing and changing of rosters. In approving the AWAs, Duncan DP stated that the AWAs 'are the result of a crisis and designed to meet that and... ...the agreements are not expressed to be long term'.

In the second published case, *Australian Workplace Agreements*, AIRC Print Q7881, (23 October 1998), AWAs that had comprehensively failed the no disadvantage test were again approved by the Commission. The meat industry AWAs did not pass on possible award wage increases to employees, the tally system introduced in the AWAs was disadvantageous compared to the award, and the use of the tally system to calculate benefits such as long service leave was detrimental to AWA employees. In approving the AWAs Duncan DP commented that the lower than award wages provided in the AWAs was offset by regularity of work, by the fact that the employer had stated that the business would not reopen without the 'economic benefits' available through AWAs, and there was a need for the enterprise in the local area.

In *Australian Workplace Agreements*, AIRC Print PR904659, (25 May 2001), Senior Deputy President Duncan [SDP] approved an AWA which paid $7,000 less per annum than the award. In approving the AWA according to the public interest test, the Senior Deputy President commented that even though the employee did not avail himself of the

accommodation provided by the employer, this could still be used in the calculation of the NDT. This highlights a crucial problem with the application of the NDT: that sometimes benefits are included which are not accessed by employees. In this case, the free accommodation was not accessed by the employee yet was used in the calculation to push the AWA closer to the level prescribed by the NDT. Another example might be the provision of a drink or meal that the employee cannot eat for dietary or religious reasons, yet it is included in order for the agreement to pass the test. This inclusion of non-accessed entitlements is one way AWAs could be used by employers to cut costs.

Other employers who have tried to use AWAs to lower labour costs have had their agreements rejected by the Commission. For example, one AWA referred to the Commission had a difference of $1 800 between it and the award, with the employer arguing that the NDT 'calculation ignores the fact that the overtime component in the work pattern can be compensated under the AWA by time off in lieu'. This situation was considered in *Australian Workplace Agreements*, AIRC Print 9659, (1 October 1999) and the then Deputy President Duncan held that this overtime work was not regular and could not be taken into account in the calculation, with the result that the AWA failed the NDT. Duncan DP outlined that the public interest test was a balancing exercise and it took into account financial considerations and community benefits. There was nothing in the AWA that balanced the failure of the NDT, and therefore the AWA was rejected.

A number of cases before the Federal Court also highlight the cost cutting purposes for which AWAs are used. In *ALHMWU v Cranbourne RSL Sub-Branch Inc*, Ryan J was presented with the scenario where the award entitlement to overtime was perceived by the employer as an 'uneconomic liability'. That concern led the employer to pursue an AWA that provided the 'flexibility' to have employees work beyond the rostered end of the shift 'until required' or 'until closing' without attracting award penalty rates. A more recent decision was that of Ryan J in *Canturi v Sita Coaches*. While principally focused upon the question of duress, the case involved an instance where an employer claimed that he could not afford to pay the award overtime rate of $24 per hour when he could pay overtime to employees who had signed an AWA at $14 per hour.

Conclusion

The introduction of AWAs in Australia was accompanied by rhetoric that heralded a range of benefits for both employers and employees. According to the Howard government, the purpose of AWAs was to provide employees as well as employers with increased choice and the ability to negotiate individually, without the constraints of a third party. In introducing AWAs, the Government stressed that the benefits would be two-sided, reiterating that the changes introduced by the Act were not a veiled attack on the union movement. Despite this, the evidence suggests that AWAs have become predominantly a tool for *employers*, used for the three key reasons outlined above: to foster employer/employee relations, avoid unions; and to reduce labour costs.

Some authors suggest that at least some individual agreements are made by employers who genuinely want to foster positive relations with employees. These may be examples of employers using individual arrangements as the legislation intended – to suit competitive circumstances as well as enable terms and conditions to be tailored to employee needs. This remains an area where further research is required.

In spite of evidence that a small proportion of AWAs are being used as the legislation intended, the evidence cited by most researchers suggests that that AWAs have been more successful in achieving unspoken aims of deunionisation and labour cost cutting. The weight of this evidence draws into question the design of the AWA provisions of the Act.

It would be simplistic to suggest that the AWA requirements be amended to enshrine in the approval process a check on the reasons AWAs are being introduced, particularly considering that information contained in the statutory declarations submitted by employers to the OEA about their AWAs can be incorrect. However, without public scrutiny of agreements or a check on why AWAs are being used, and considering the current lack of an effective policing body, there is no guarantee that AWAs will be used in line with the stated objectives of legislation – to provide benefits to *both* parties to the employment relationship. It is possible that advocates of AWAs would argue that amendments to the legislation to increase controls on the use of AWAs would damage the integrity of the AWA provisions. This was certainly the argument made in Queensland when amendments were made to the legislation relating to Queensland Workplace Agreements, individual contracts that mirrored the federal AWA provisions.

Should legislative amendments not be an option, then serious consideration needs to be given to whether AWAs serve a constructive purpose in Australian industrial relations, particularly given that nearly seven years after their enactment, they only determine the wages and conditions of approximately two percent of the Australian workforce.

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