

FROM THE ARBITRATION SYSTEM TO THE *FAIR WORK ACT*: THE CHANGING APPROACH IN AUSTRALIA TO VOICE AND REPRESENTATION AT WORK

ABSTRACT

This article explores mechanisms for employee voice and representation at work by reference to five processes for making rules about the employment relationship: statutory regulation, delegated regulation, collective agreement-making, individual contracting, and managerial unilateralism. We look in particular at five labour law regimes that have operated in Australia: the traditional conciliation and arbitration system; the enterprise bargaining regime introduced in 1993; the *Workplace Relations Act* as it operated after 1996; the ‘Work Choices’ amendments that took effect in 2006; and the Fair Work legislation from 2009 onwards. Our analysis of those regimes suggests three main findings. First, the support for union forms of collective voice has declined, but the laws have also changed dramatically in the types of support offered for trade unions. Secondly, the diminishing legislative support for unions has not been counterbalanced by the development of alternative collective forms of employee voice. Thirdly, the individualisation of rule-making processes and employee voice has been a consistent trend in Australian labour law.

I INTRODUCTION

In analysing the profound changes to Australian labour law over the last two decades, we have argued elsewhere that it is valuable to focus on the mix of rule-making processes that have been promoted or discouraged by different regimes.¹ In this article, we adopt the same approach to shed light on changing forms of employee ‘voice’ and representation in Australia.

Our approach to employee voice is broadly consistent with the ‘discourse of labour relations’,² with an important modification. As in the mainstream industrial relations literature, we consider voice to be inextricably linked to the processes by which

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¹ See Mark Bray and Andrew Stewart, ‘What is Distinctive About the Fair Work Regime?’ (2013) 26 *Australian Journal of Labour Law* 20. Some passages in this article are taken directly from that piece.

² See especially, Alan Bogg and Tonia Novitz, ‘Investigating “Voice” at Work’ (2012) 33 *Comparative Labor Law and Policy Journal* 323, 326–32.

the rules of the employment relationship are created and enforced. Different rule-making processes require, or at least privilege, different mechanisms by which employees can contribute to rule making and enforcement, and thereby voice their concerns, represent their interests and defend their rights. The classic preoccupation of traditional labour relations analysis in the UK and USA, for example, is with the essential correspondence between collective bargaining and collective voice by employees through trade unions.³ Consequently, laws permitting or promoting collective bargaining as a rule-making process will necessarily facilitate the formation and recognition of trade unions.

Our approach differs from more traditional analyses, however, because we consciously incorporate a wider range of rule-making processes, and thereby a wider range of voice mechanisms. Rather than privileging trade unions and collective bargaining, as the traditional approach does, we identify five types of rule-making process that can be embodied within, or promoted by, different national labour law regimes: statutory regulation, delegated regulation, collective agreement-making, individual contracting, and managerial unilateralism. Key features of each of these types and the corresponding forms of employee voice are described in Table 1.

The voice mechanisms associated with these five forms of rule-making include, but go well beyond, the traditional collectivism of trade unions and collective bargaining. For example, the importance of political parties and the political (rather than industrial) activities of trade unions is recognised for statutory regulation. Collective agreement-making acknowledges the possibility of non-union forms of collective voice, rather than the single channel of trade unions. Individual forms of voice and management-initiated forms of employee consultation are associated with individual contracting and managerial unilateralism. This presents a more comprehensive framework that can be applied to characterise national labour law regimes, whether unions are strong or not.

Employing this broad approach, we trace the transformation of Australian labour law since the early 1990s through five main national regimes: the conciliation and arbitration system that had commenced in 1904; the enterprise bargaining regime introduced in 1993; the *Workplace Relations Act 1996* (Cth) as it operated after 1996 ('*Workplace Relations Act*'); the 'Work Choices' amendments that took effect in 2006; and the Fair Work legislation from 2009 onwards. As in other work that has utilised this approach,⁴ we concentrate on national labour laws that are generally applicable to private sector employees, setting aside (for reasons of space and convenience) both State and industry-specific regimes, as well as laws dealing with matters such as workplace safety, discrimination, and the like. The limits of space also mean that our account is selective, in that we cannot

³ Particularly relevant here is Clegg's seminal account of the impact of collective bargaining structures on the form and operation of trade unions: Hugh Clegg, *Trade Unionism Under Collective Bargaining: A Theory Based on Comparisons of Six Countries* (Blackwell, 1976).

⁴ Bray and Stewart, above n 1.

RULE-MAKING PROCESS	DESCRIPTION OF RULE-MAKING PROCESS	EMPLOYEE VOICE MECHANISM
Statutory regulation	The state directly determines through legislation the substantive rules of the employment relationship.	Since this is a political rule-making process, voice must be exercised politically. Individual mechanisms focus on voting in the election of political representatives, but collective mechanisms come through membership of political parties and politically-active interest groups, like trade unions. A key feature of much statutory regulation, however, is that it grants substantive legal rights to individual employees, which they often have to enforce themselves.
Delegated regulation	The legislature delegates to state agencies (such as independent tribunals) the prime responsibility for rule making.	Depends on the mode of operation of the agency in question, but individual voice is unlikely to have great effect, except in enforcement actions. Instead, collective voice comes through the role of organisations (mostly trade unions) in making submissions or participating in dispute resolution processes.
Collective agreement-making	Employers and groups of employees make the rules of the employment relationship through a process of bargaining or collective determination.	Depending on the model, employees may participate through a collective organisation (usually a trade union, but not always), and/or more directly (eg through being asked or required to vote to ratify an agreement).
Individual contracting	Individual employees make agreements directly with employers.	Employees participate as individuals by dealing directly with their employers and formally agreeing terms of employment. Collective organisations are logically not part of this process.
Managerial unilateralism	By default, employers can make rules by themselves, a prerogative which they exercise without sharing rule-making with others.	Employees participate as individuals by accepting the rules made by management or relinquishing employment. Management may choose to allow some form of employee input (such as through consultation committees or employee councils) but they are advisory only and operate at the discretion of management. Again, collective organisations that share decision-making power are logically not part of this process.

Table 1

discuss the implications of every rule-making process in each time period. Finally, for the purpose of the current exercise, our emphasis is on the nature and mix of rule-making processes for which the relevant regimes provide, rather than their use or outcomes in practice.

II THE CONCILIATION AND ARBITRATION SYSTEM

The system which dominated federal labour law in Australia for most of the 20th century placed a heavy emphasis on delegated regulation. The *Conciliation and Arbitration Act 1904* (Cth) and its replacement, the *Industrial Relations Act 1988* (Cth), were primarily based on the Commonwealth's power under s 51(xxxv) of the *Constitution* to legislate for the conciliation and arbitration of industrial disputes that extended beyond any one State. The legislation authorised tribunals such as the Court of Conciliation and Arbitration and its eventual successor, the Australian Industrial Relations Commission ('AIRC'), to prevent or settle disputes by making awards prescribing wages and other employment conditions for selected industries, occupations or enterprises. Direct statutory prescription of employment standards was rare, while collective agreement-making and individual agreement-making were permitted, but their form and content was deeply influenced by the tribunals. Managerial unilateralism waxed and waned according to the scope of delegated regulation, determined in turn by changing legislative provisions and court decisions.⁵

The conciliation and arbitration system had significant implications for employee voice, in that it privileged trade unions — and more especially *registered* unions — as a mechanism for collective voice.⁶ It is often observed that the tribunal system could not operate without unions and employer associations representing their constituents.⁷ As O'Connor J put it in *Jumbunna Coal Mine NL v Victorian Coal Miners Association*:⁸

if the judicial power of the Commonwealth is to be effectively exercised by way of conciliation and arbitration in the settlement of industrial disputes, it must be by bringing it to bear on representative bodies standing for groups of workmen.

This was reflected in the stated objects of the legislation. For example, both s 2(vi) of the 1904 Act and s 3(f) of the 1988 Act made it a priority to 'encourage the organisation of representative bodies of employers and employees'.

⁵ See Bray and Stewart, above n 1, 27–30.

⁶ As to the advantages of registration, see Committee of Review into Australian Industrial Relations Law and Systems, *Report* (1985) vol 2, 442–3. It was not unknown, however, for unregistered unions to participate in the arbitration system: see, eg, *R v Portus; Ex parte McNeil* (1961) 105 CLR 537.

⁷ See, eg, Andrew Frazer, 'Trade Unions Under Compulsory Arbitration and Enterprise Bargaining: An Historical Perspective' in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining: Trade Unions and the Law* (Federation Press, 1995) 52.

⁸ (1908) 6 CLR 309, 360.

While there was no *explicit* mechanism (of the type familiar in countries such as the US) for union recognition,⁹ unilateral access to conciliation and arbitration meant that any employer that refused to deal with a union could find itself summoned to a compulsory conference, effectively forcing it to the bargaining table. Importantly too, as the federal system evolved, unions came to be recognised not just as agents for their current members, but as ‘parties principal’ that could negotiate and seek award entitlements on behalf of any employees eligible to join them, rather than just their members.¹⁰ Hence unions could and did engage in disputes over wages and conditions at enterprises that might never see a single union member.¹¹

During this period, compulsory union membership arrangements were common, while ‘preference to union members’ clauses were inserted in many awards.¹² More broadly, awards were highly collectivist instruments. Indeed, they were virtually ‘owned’ by the registered organisations that were party to them, providing both trade unions and employer associations with enforceable collective rights and many opportunities to participate in award making and variation.¹³ This and other features of the conciliation and arbitration system encouraged high levels of union membership, but the unions tended towards a particular type. The fact that the federal system hinged on dealing with interstate industrial disputes, and that rule-making activity focused mostly on tribunal appearances, focused power within unions in the hands of full-time officials.¹⁴ In practice, it was virtually impossible for individual employees to participate in the rule-making processes contemplated by the arbitral legislation. The federal tribunal could deal with disputes involving the treatment of individual employees, but generally only if those disputes had some form of collective or ‘industrial’ dimension¹⁵ — and that was almost always supplied by the involvement of a union.

⁹ See Ben Aaron, ‘Union Security in Australia and the United States’ (1984) 6 *Comparative Labor Law* 415; Rae Cooper and Bradon Ellem, ‘“Less Than Zero”: Union Recognition and Bargaining Rights in Australia 1996–2007’ (2011) 52 *Labor History* 49.

¹⁰ See *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387.

¹¹ This was evident in the practice of unions seeking to ‘rope’ tens, hundreds or even thousands of small employers at a time into the coverage of an industry award: see Stephen Deery and David Plowman, *Australian Industrial Relations* (McGraw-Hill, 3rd ed, 1991) 384.

¹² See Phillipa Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (Federation Press, 1995).

¹³ See Mark Bray and Johanna Macneil, ‘Individualism, Collectivism and the Case of Awards in Australia’ (2011) 53 *Journal of Industrial Relations* 149, 155–7. See also Mark Bray and Johanna Macneil, ‘Individualism, Collectivism and Awards in the Australian Hospitality Industry’ (2012) 22 *Labour & Industry* 333, 342–6.

¹⁴ James Kuhn, ‘Why Pressure-Group Action by Australian Unions?’ (1952) 24 *Australian Quarterly* 61; David Peetz, Barbara Pocock and Chris Houghton, ‘Organisers’ Roles Transformed? Australian Union Organisers and Changing Union Strategy’ (2007) 49 *Journal of Industrial Relations* 151, 152–3.

¹⁵ See *R v Staples; Ex parte Australian Telecommunications Commission* (1980) 143 CLR 614; *Re Boyne Smelters Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees of Australia* (1993) 177 CLR 446, 454–5.

III THE SHIFT TO ENTERPRISE BARGAINING

The Keating Government's *Industrial Relations Reform Act 1993* (Cth) significantly reduced the role of delegated regulation through the industrial tribunals, in favour of a particular type of collective agreement-making. The new system encouraged the making of formal, enterprise-level agreements, with awards now treated as creating a 'safety net' of minimum conditions and the AIRC discouraged from arbitrating disputes that might be resolved through enterprise bargaining. The laws also gave unions immunity from civil liability for industrial action, at least during a sanctioned 'bargaining period' leading to a single-business agreement, creating effectively the first real 'right to strike' in the history of federal labour law.¹⁶ Direct statutory regulation remained modest, while individual agreement-making was still constrained because of the continuing restrictions imposed by awards on common law individual contracts. Managerial unilateralism narrowed somewhat, especially due to new laws against unfair dismissal; but the emphasis on enterprise bargaining gave businesses new opportunities to expand rule-making in workplaces and industries where unions were weak.¹⁷

The 1993 legislation had interesting consequences for the balance between collectivism and individualism in the system, and therefore for employee voice. The unfair dismissal provisions, for example, were important in giving individual employees the right to initiate a complaint, where previously they would have had to rely on a union notifying a dispute over their treatment.¹⁸

Similarly, while the promotion of collective agreement-making could be seen as encouraging employees to join trade unions, the 1993 legislation did not fully support unions as the collective mechanism for employee voice. Indeed, the end of compulsory arbitration meant an end to any guaranteed role for unions in rule making. They now had to negotiate with employers on a company-by-company basis, which severely stretched their resources and forced them to adopt new strategies focusing on an 'organising' rather than a 'servicing' model. This in turn encouraged a decentralisation of the locus of power within trade unions, increasing the opportunities for rank and file union members and especially workplace delegates to more directly exercise voice and participate in the negotiation of collective agreements.¹⁹

¹⁶ See Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) 77–8.

¹⁷ See Bray and Stewart, above n 1, 30–3; Australian Centre for Industrial Relations Research and Training, *Australia at Work* (Prentice Hall, 1999) ch 3. For a retrospective on the shift to enterprise bargaining in the early 1990s, see the various articles in (2012) 22(3) *Labour & Industry*.

¹⁸ For discussion of this change, which replicated earlier developments at State level, see Andrew Stewart, 'And (Industrial) Justice for All? Protecting Workers Against Unfair Dismissal' (1995) 1 *Flinders Journal of Law Reform* 85.

¹⁹ See David Peetz and Barbara Pocock, 'An Analysis of Workplace Representatives, Union Power and Democracy in Australia' (2009) 47 *British Journal of Industrial Relations* 623.

The legislation also brought reduced opportunities for union security, with new limitations on compulsory unionism that included a prohibition on workers being dismissed for non-membership. David Peetz argued that the legislation was part of a major ‘institutional break’, which weakened unions.²⁰ Similarly, Phillipa Weeks concluded that while the 1993 Act was not as anti-union as some State-level legislation at the time, it was nonetheless ‘undeniably contributing to the cultural, paradigmatic change — by reducing the role of arbitration, by admitting non-union parties to bargaining, and ... by weakening legal supports for union security and union recognition’.²¹

Most importantly perhaps, the 1993 legislation did not restrict collective agreement-making to union-negotiated instruments. An Enterprise Flexibility Agreement (‘EFA’) between an employer and its workers could be certified without a union being party to it, provided certain procedural conditions were met.²² These conditions were quite restrictive, and unions were given extensive rights to intervene, but it was the first time under federal law that such agreements could be certified and opened the door for non-union forms of employee voice. A striking innovation for EFAs was that each agreement required the approval of a majority of the employees concerned. By contrast, it was sufficient with union agreements that the affected employees had been ‘consulted’.²³ At this stage, therefore, unions could still be regarded as operating as general representatives of their employee ‘constituency’, rather than as agents for their existing members.

IV THE *WORKPLACE RELATIONS ACT*

In 1996, following the election of the first Howard Government, the *Industrial Relations Act 1988* (Cth) was amended and renamed the *Workplace Relations Act 1996* (Cth).²⁴ The new law continued the 1993 legislation’s approach of limited statutory regulation, but further reduced the role of delegated regulation. It retained a decentralised system of collective agreement-making, but with key new features that restricted (though by no means eliminated) the role of unions. The real priority, however, was the promotion of individual contracting and the expansion of managerial unilateralism.²⁵

A central part of the narrowing of delegated regulation came through limitations placed on the range of ‘allowable matters’ that awards could cover. These not only reduced their effect, but also led to the exclusion of any sense of collectivism, by

²⁰ David Peetz, *Unions in a Contrary World: The Future of the Australian Trade Union Movement* (Cambridge University Press, 1998) ch 5.

²¹ Weeks, above n 12, 200.

²² See Amanda Coulthard, ‘Non-Union Bargaining: Enterprise Flexibility Agreements’ (1996) 38 *Journal of Industrial Relations* 339.

²³ See Richard Naughton, ‘The New Bargaining Regime under the Industrial Relations Reform Act’ (1994) 7 *Australian Journal of Labour Law* 147, 153–5, 160–1.

²⁴ *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

²⁵ See Bray and Stewart, above n 1, 33–7.

rendering void key supports for unions and collective employee voice. Awards were transformed into codes of minimum standards for individual employees, the enforcement of which increasingly relied on action by government inspectors and individual employees rather than trade unions.²⁶

The new laws also restricted the influence of trade unions, with collective agreement-making now being permitted rather than promoted. The AIRC could no longer arbitrate over any matter related to the making of a collective agreement. This effectively allowed employers to refuse to recognise or bargain with unions. The only option for workers who wanted to bring a reluctant employer to the (collective) bargaining table was to use economic force, by taking ‘protected’ industrial action.²⁷

In addition, the *Workplace Relations Act’s* ‘freedom of association’ provisions did not just extend to non-unionists the full range of protection against victimisation that had long been enjoyed by union members and officials, but explicitly outlawed provisions (whether in awards or agreements) that sought to require union membership or even just create preferential treatment for unionists.²⁸ The rights of union officials to enter workplaces were codified in the Act and restricted in certain ways, where previously they had been dealt with by awards.²⁹ Finally, agreements could also deal only with matters ‘pertaining’ to the employment relationships they regulated, a formula that could be used to limit union bargaining agendas — although this was not so much a designed restriction as a hangover from the old statutory definition of ‘industrial dispute’, and its effect was not to be fully appreciated until the *Electrolux* litigation in the early 2000s.³⁰ All these provisions served — to greater and lesser extents — to discourage employees from joining unions and to reduce the effectiveness of unions in representing their members. Indeed for the first time in over 90 years, it was no longer an object of the federal statute to encourage representative organisations.

The greater role accorded to non-union collective agreements served a similar purpose. Certified agreements could now be made either with one or more unions, or with a group of employees, and *all* agreements had to be put to a vote of the affected employees (other than in the case of a ‘greenfields’ agreement negotiated with a union to cover a new site, prior to the engagement of a workforce). A range of procedural impediments to non-union agreements were removed and the capacity of unions to

²⁶ See Bray and Macneil, ‘Individualism, Collectivism and the Case of Awards in Australia’, above n 13, 158–60; Bray and Macneil, ‘Individualism, Collectivism and Awards in the Australian Hospitality Industry’, above n 13, 346–50.

²⁷ See Jenny Whittard et al, ‘Collective Bargaining Rights under the *Workplace Relations Act: The Boeing Dispute*’ (2007) 18(1) *Labour & Industry* 1; Cooper and Ellem, above n 9.

²⁸ See Colin Fenwick and John Howe, ‘Union Security After Work Choices’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 164, 174–7.

²⁹ *Ibid*, 170–1.

³⁰ See *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309; Jason Harris, ‘Federal Collective Bargaining after *Electrolux*’ (2006) 34 *Federal Law Review* 45.

intervene in such agreements or object to their approval was significantly restricted.³¹ These non-union agreements represented a challenge to unions,³² but they also raised questions about the process for making them. In theory, they could reflect or involve the operation of some form of non-union collective voice for employees. But unlike the position with individual agreements, as discussed below, the statute made no mention of non-unionised employees being able to appoint anyone to bargain on their behalf.³³ Furthermore, there was nothing to stop an employer simply drafting an agreement unilaterally and putting it to a vote of employees without any form of bargaining process.

Also highly significant was the introduction of statutory individual contracts that could exclude awards, in the form of Australian Workplace Agreements ('AWAs'). As the Minister responsible for the legislation explained, the new type of agreement was specifically designed to individualise voice by encouraging employees to deal directly with their employers:

The bill rejects the highly paternalistic presumption that has underpinned the industrial relations system in this country for too long – that employees are not only incapable of protecting their own interests, but even of understanding them, without the compulsory involvement of unions and industrial tribunals.³⁴

More specifically on individual contracting:

There will be no scope for uninvited union intervention to frustrate AWAs ... AWAs will assist in developing a common purpose between management and employees for the benefit of all.³⁵

This objective was reflected, among other ways, in provisions that allowed AWAs to override certified agreements.³⁶ Indeed, in the absence of any mechanism to force

³¹ See Amanda Coulthard, 'The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion under the *Workplace Relations Act 1996* (Cth)' in Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion — An International Study* (Federation Press, 1999) 48, 51–4.

³² See Rae Cooper and Chris Briggs, "'Trojan Horse" or "Vehicle for Organising"?: Non-Union Collective Agreement-Making and Trade Unions in Australia' (2009) 30 *Economic and Industrial Democracy* 93.

³³ In the case of a union member, the employer could be obliged to 'meet and confer' with the union: *Workplace Relations Act 1996* s 170LK(5). But this fell well short of an obligation to bargain.

³⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1996 (Peter Reith, Minister for Workplace Relations).

³⁵ Peter Reith, quoted in Mark Bray and Peter Waring, 'The Rhetoric and Reality of Bargaining Structures under the Howard Government' (1998) 9 *Labour & Industry* 61, 67.

³⁶ Though not in all circumstances: see Andrew Stewart, 'The Legal Framework for Individual Employment Agreements in Australia' in Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion — An International Study* (Federation Press, 1999) 18, 31.

union recognition, the *Workplace Relations Act* plainly now permitted employers to use either the threat or the reality of individual contracting to justify a refusal to engage in collective bargaining with unions.³⁷

Section 170LK of the *Workplace Relations Act* did allow employees to appoint ‘bargaining agents’ on their behalf, which employers could be required to ‘recognise’ in relation to a proposed AWA; and there was nothing to stop an employee appointing a union official to act for them. But otherwise, the legislation made no mention of any requirement for negotiation or bargaining, and indeed it seemed to be framed on the assumption that AWAs would generally be drawn up by management and simply presented to employees for their approval.³⁸ While employers were prohibited from using ‘duress’ to compel an employee to sign an agreement, this did not necessarily prevent an employer from offering a job on the condition that the applicant agree to an AWA, on a ‘take it or leave it’ basis.³⁹ So beyond government rhetoric about allowing employers and employees to deal more directly with each other, the legislative provisions said little about the *structures* (ie. voice mechanisms) or *processes* by which they would do this. Just as non-union collective ‘agreements’ could earn that appellation through the assent of a majority at a ballot, the only real test of the AWA process was the outcome — that is, the signing of the agreement by both sides.

V THE WORK CHOICES REFORMS

The complex and contentious ‘Work Choices’ legislation,⁴⁰ which amended the *Workplace Relations Act* with effect from March 2006, represents the high-water mark (at least to date) of Australian government efforts to decollectivise and individualise both the process of rule-making and the mechanisms of employee voice; although the full impact of the reforms was never felt because of their limited period of operation. Statutory regulation was expanded, but largely to replace in a highly circumscribed way the minimum standards that had historically been provided by awards. Awards lost much of their ‘safety net’ function, through the removal of the ‘no-disadvantage test’ that had prevented employers from negotiating or imposing workplace agreements that involved a net reduction in award entitlements. Individual contracting was the privileged rule-making process, while managerial unilateralism also expanded, especially because of a major narrowing in protection for employees from unfair dismissal. Collective agreement-making was further restricted.⁴¹

³⁷ Kristen van Barneveld and Ross Nassif, ‘Motivations for the Introduction of Australian Workplace Agreements’ (2003) 14(2) *Labour & Industry* 21. See also Whittard et al, above n 27; Cooper and Ellem, above n 9.

³⁸ See Margaret Lee, ‘Bargaining Structures Under the Workplace Relations Act’ in Margaret Lee and Peter Sheldon (eds), *Workplace Relations* (Butterworths, 1997) 29.

³⁹ See, eg, *Schanka v Employment National (Administration) Pty Ltd* (2000) 97 FCR 186, 193.

⁴⁰ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

⁴¹ See Bray and Stewart, above n 1, 37–41.

There were myriad ways in which the Work Choices laws worked against unions as a voice mechanism for employees. The almost complete undermining of delegated regulation meant that any support to unions provided by awards or the intervention of tribunals was virtually eliminated.⁴² The new provisions about collective agreement-making also went to considerable lengths to limit the effectiveness of unions.⁴³ A wide range of provisions typically sought by unions were designated as ‘prohibited content’ for workplace agreements, even where they satisfied the ‘matters pertaining’ requirement — including restrictions on the use of contract labour and rights of entry for union officials.⁴⁴ There were new restrictions on the taking of protected industrial action, including the need for a mandatory ballot of the workers concerned.⁴⁵ And unions lost their monopoly on the making of greenfields agreements, with s 330 of the amended Act permitting businesses to start new projects or enterprises with an ‘employer greenfields agreement’ in place — a wholly remarkable instrument, since it involved an employer striking a deal with itself!

This attack on unions was not, however, just an expanded set of restrictions preventing unions from performing effectively their traditional role. It also entailed a new conception of the nature of that role itself. Unions could be seen in the provisions of Work Choices not in their traditional role as ‘general representatives of workers’ but much more narrowly as the representatives or bargaining agents of individual trade union members.⁴⁶ This was not entirely new to the Work Choices regime — the notion of being a bargaining representative was, as we have seen, enshrined in the 1996 legislation in relation to both non-union collective agreements and AWAs.⁴⁷ It was also offset by the fact that unions could still, even under Work Choices, enter into collective agreements as ‘parties principal’. But the cumulative effect of the reforms was to move decisively away from the notion of unions having collective rights as organisations that were additional to and separate from the rights of individual employees or union members.

⁴² See Bray and Macneil, ‘Individualism, Collectivism and the Case of Awards in Australia’, above n 13, 158–60; Bray and Macneil, ‘Individualism, Collectivism and Awards in the Australian Hospitality Industry’, above n 13, 344–6.

⁴³ See Anthony Forsyth and Carolyn Sutherland, ‘From “Unchartered Sea” to the “Stormy Waters”’: How Will Trade Unions Fare Under Work Choices?’ (2006) 16 *Economic & Labour Relations Review* 215; Greg Patmore, ‘A Voice for Whom? Employee Representation and Labour Legislation in Australia’ (2006) 29 *University of New South Wales Law Journal* 8; Fenwick and Howe, above n 28, 171–4, 178.

⁴⁴ This effectively forced a revival in the use of unregistered agreements, as employers and unions sought to bypass these constraints: see Andrew Stewart and Joellen Riley, ‘Working Around Work Choices: Collective Bargaining and the Common Law’ (2007) 31 *Melbourne University Law Review* 903.

⁴⁵ See Graeme Orr and Suppiah Murugesan, ‘Mandatory Secret Ballots Before Employee Industrial Action’ (2007) 20 *Australian Journal of Labour Law* 272.

⁴⁶ Shae McCrystal, ‘Re-Imagining the Role of Trade Unions After Work Choices’ in Joellen Riley and Peter Sheldon (eds), *Remaking Australian Industrial Relations* (CCH Australia, 2008) 151.

⁴⁷ See above nn 33, 38–39.

VI VOICE AND REPRESENTATION UNDER THE *FAIR WORK ACT*

The *Fair Work Act 2009* (Cth) (*'Fair Work Act'*) seemed at first blush to establish a very different mix of rule-making processes to Work Choices — an unsurprising outcome given the rhetorical conflicts between the major political parties over labour legislation in the November 2007 election campaign. Statutory regulation expanded slightly and delegated regulation regained importance through both a renovated 'modern award' system and a greater role for the AIRC's replacement, a body originally known as Fair Work Australia ('FWA') but subsequently renamed the Fair Work Commission ('FWC').⁴⁸ Unfair dismissal protection was largely restored. Perhaps most importantly for present purposes, the Labor Government claimed that the laws would 'place collective bargaining at the enterprise level at the heart of the workplace relations system'.⁴⁹ Correspondingly, the roles of individual contracting and managerial unilateralism were seen to diminish. These changes seemed to offer significant implications for employee voice. The innovations can, however, easily be exaggerated, because there was more continuity with Work Choices than many political commentators were prepared to acknowledge.⁵⁰ This included maintaining an expanded use of the Commonwealth's power under s 51(xx) of the *Constitution* to regulate corporate employers, allowing federal regulation to override state industrial laws that had (prior to Work Choices) been able to operate in parallel with the federal arbitration system.⁵¹

The expansion of statutory regulation, through the determination by parliament of the National Employment Standards in pt 2-2 of the *Fair Work Act*, not only creates individual employment rights which are more difficult to change than those traditionally embodied in awards or collective agreements,⁵² but also has important implications for employee voice. Political action by employee representatives — presumably unions, but potentially non-union organisations as well — is now required to defend or vary these new substantive statutory rights. This can only place added pressure on the relationship between organised labour and its 'political wing', the ALP — especially during an era in which federal Labor governments have made a virtue of steering a middle course between the demands of unions and employer groups.⁵³

⁴⁸ See *Fair Work Amendment Act 2012* (Cth) sch 9, which took effect on 1 January 2013.

⁴⁹ Explanatory Memorandum, *Fair Work Bill 2008* (Cth) [r.186].

⁵⁰ See Bray and Stewart, above n 1, 41–7; Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009).

⁵¹ See Andrew Stewart, 'Testing the Boundaries: Towards a National System of Labour Regulation' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 19. As to the validity of using s 51(xx) in this way, see *New South Wales v Commonwealth* (2006) 229 CLR 1; Andrew Stewart and George Williams, *Work Choices: What the High Court Said* (Federation Press, 2007).

⁵² Ron McCallum, 'Legislated Standards: The Australian Approach' in Marian Baird, Keith Hancock and Joe Isaac (eds), *Work and Employment Relations: An Era of Change* (Federation Press, 2011) 6, 14.

⁵³ See, eg, Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3, 45–6.

The renovation of the award system under the Fair Work regime has also helped to restore the importance of minimum standards, most notably by reimposing the requirement that what are now called ‘enterprise agreements’ cannot involve an overall reduction in award entitlements. However, the modern award system for which pt 2-3 of the Act provides is a distinctly different creature to the federal and State award systems it has supplanted. There is, for example, no longer any link to the existence or threat of an industrial dispute. Interested parties are at liberty to apply to the FWC, for a variation to the terms of a modern award, or for the creation of a new award. But it is the FWC now that clearly ‘owns’ the award system and has responsibility for its maintenance, not the unions and employer associations that effectively used to bargain over award standards and be parties to awards under previous regimes. Unions and employer associations also potentially share influence with other interested parties which are not registered organisations.

Under div 3 of pt 2-3, the permissible content of awards is somewhat broader than under the previous legislation. For example, they can once again include provisions, previously excluded under the *Workplace Relations Act*, obliging employers to consult employees if they are going to introduce major workplace change.⁵⁴ These are modest supports for trade unions. On the other hand, many other of the Howard Government’s restrictions have been retained, and in particular modern awards contain little by way of collective rights for unions or their members. It is *employees* who receive the right to consultation and to a ‘representative’, if they so choose.⁵⁵

As for the FWC, despite having similarities to the AIRC (not least in terms of membership), it is in many ways a very different institution to its predecessor. In particular, while it may still choose to operate as a tribunal in discharging dispute resolution functions, it has the freedom under the legislation to make decisions in a range of other ways.⁵⁶ For example, and to reinforce what has been said above about the change in the nature of the award system, it has chosen to conduct the annual wage reviews required by pt 2-6 of the Act by calling for submissions and holding public workshops, rather than simply hearing arguments from governments, unions and employer associations. All submissions and transcripts are posted online, so that the community at large can both follow what is happening and indeed contribute to the process. The end result is an administrative ruling, not an order made to resolve a dispute.⁵⁷ A similar process has been used for the first modern award review, an interim two-yearly review required by item 6 of sch 5 to the *Fair Work (Transi-*

⁵⁴ See Mark Bray, ‘The Distinctiveness of Modern Awards’ in Marian Baird, Keith Hancock and Joe Isaac (eds), *Work and Employment Relations: An Era of Change* (Federation Press, 2011) 17, 25–6.

⁵⁵ See Bray and Macneil, ‘Individualism, Collectivism and the Case of Awards in Australia’, above n 13, 161–3; Bray and Macneil, ‘Individualism, Collectivism and Awards in the Australian Hospitality Industry’, above n 13, 344–6.

⁵⁶ See Andrew Stewart, ‘Fair Work Australia: The Commission Re-Born?’ (2011) 53 *Journal of Industrial Relations* 563.

⁵⁷ *Ibid* 572–3; see, eg, *Annual Wage Review 2012–13* [2013] FWCFB 4000 (3 June 2013).

tional Provisions and Consequential Amendments) Act 2009 (Cth).⁵⁸ Under this new regime, unions receive no special treatment, though they clearly remain influential ‘stakeholders’.

Importantly too, for both unions and the FWC, the general power to deal with industrial disputes that was a feature of the federal statute for over a century, until it was removed by Work Choices, has not been restored under the *Fair Work Act*. Except in the context of bargaining for a new enterprise agreement, and certain individual claims (most obviously unfair dismissal complaints), the FWC can generally only deal with a workplace dispute if the parties involved consent to it having that role.⁵⁹

As to Labor’s claim to have put collective bargaining back at the ‘heart’ of Australian labour law, there is certainly a renewed emphasis on collective agreement-making. This is reflected in the objects of the *Fair Work Act*, which speak of ‘achieving productivity and fairness through an emphasis on enterpriselevel collective bargaining’,⁶⁰ while affirming that ‘statutory individual employment agreements ... can never be part of a fair workplace relations system’.⁶¹ Again, however, there has been no attempt to restore any reference to encouraging representative organisations. Section 3(e) speaks only of ‘enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented’.

It is also important to draw a distinction between the *Fair Work Act*’s treatment of *agreement-making*, and its promotion or regulation of *bargaining*.⁶² Part 2-4 of the Act, which deals with enterprise agreements, is notable for dispensing with

⁵⁸ See Fair Work Commission, *Modern Awards Review 2012* (8 August 2013) <www.fwc.gov.au/index.cfm?pagename=awardReview2012>.

⁵⁹ See Joellen Riley, ‘From Industrial Arbitration to Workplace Mediation: Changing Approaches to Dispute Resolution’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009), 186; Louise Thornthwaite and Peter Sheldon, ‘Fair Work Australia: Employer Association Policies, Industrial Law and the Changing Role of the Tribunal’ (2011) 53 *Journal of Industrial Relations* 616; Therese MacDermott and Joellen Riley, ‘Alternative Dispute Resolution and Individual Workplace Rights: The Evolving Role of Fair Work Australia’ (2011) 53 *Journal of Industrial Relations* 718; Anthony Forsyth, ‘Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR’ (2012) 23 *International Journal of Human Resource Management* 476; Richard Naughton, ‘The Role of Fair Work Australia in Facilitating Collective Bargaining’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 68.

⁶⁰ *Fair Work Act* s 3(f).

⁶¹ *Ibid* s 3(c).

⁶² See further Peter Gahan and Andreas Pekarek, ‘Collective Bargaining and Agreement Making in Australia: Evolution of the Legislative Framework and Practice’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 21.

the distinction between union and non-union agreements that had been formally enshrined since 1993. With the sole exception of greenfields agreements, which can once again only be made with ‘relevant employee organisations’ (that is, registered unions), s 172 conceives all agreements as being made by one or more employers *and their employees*.⁶³ There is no longer any conception of a union being ‘party to’ a non-greenfields agreement, which is taken by s 182 to be ‘made’ only when a majority of the affected employees vote it up, not before. A union that has been a bargaining representative for at least one member may opt under s 183 to be formally ‘covered’ by such an agreement, which enhances its rights to enforce the agreement under pt 4-1 of the Act. But again, this option can only be exercised during the short period between employee assent and formal approval by the FWC.

The only real role of a trade union in relation to the making of a non-greenfields enterprise agreement, as far as the legislation is concerned, is indeed to be a ‘bargaining representative’ for employees. It is true that a registered union is presumed by s 176(1)(b) to represent each of its members. But even unionists are free under s 176(3) to appoint someone else to act for them, aside from another registered union that lacks the appropriate coverage under its eligibility rules.⁶⁴ This not only makes union voice more contingent, but reaffirms and indeed extends the option — first introduced, as we have seen, under the 1993 Act — for different types of employee voice, where union voice was historically the only option.

The Act does provide unions and other bargaining representatives with important tools to promote the conclusion of a single-enterprise agreement or to influence its content.⁶⁵ Besides taking protected industrial action, these include applying for a ‘majority support determination’, which may be granted where the FWC is satisfied that a majority of employees in a workplace group wish to make a collective agreement, and effectively

⁶³ By virtue of a recent amendment designed to preclude single-employee agreements, such an agreement must cover at least two employees (s 172(6)). Section 194(ba) also now provides that an enterprise agreement cannot allow an employee or employer to elect not to be covered by an agreement. Such ‘opt-out’ clauses had been held by FWA not to be consistent with the Act’s concept of a collective agreement, though only after a series of inconsistent rulings on the point: see *Construction, Forestry, Mining and Energy Union v Queensland Bulk Handling Pty Ltd* [2012] FWA 7551 (3 September 2012). The amendments were recommended by an independent review of the legislation commissioned by the Gillard Government: John Edwards, Ron McCallum and Michael Moore, ‘Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation’ (Legislation Review, Department of Education, Employment and Workplace Relations, 18 November 2012) 160–1, 168.

⁶⁴ By virtue of a recent amendment to s 176(3), the same restriction applies to an individual union official. This is to prevent officials from seeking in a ‘private’ capacity to represent workers who fall outside their union’s coverage: see, eg, *Technip Oceania Pty Ltd v Tracey* [2011] FWA 6551 (7 November 2011); Edwards et al, above n 63, 146.

⁶⁵ See generally Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012).

compels a reluctant employer to commence bargaining.⁶⁶ Where bargaining has been compelled in this way, or where an employer voluntarily commences negotiations, the FWC may also make a ‘bargaining order’ that requires compliance with a new set of ‘good faith bargaining’ requirements.⁶⁷ There are also various circumstances in which the FWC may terminate bargaining and arbitrate an outcome.⁶⁸

Despite the support these tools provide for collective agreement-making, however, there is nothing in the agreement-making provisions in pt 2-4 of the *Fair Work Act* that actually *requires* bargaining to take place or that guarantees any collective voice for employees in determining the content of an agreement. An employer can validly make an agreement simply by informing the relevant group of employees of their right to be represented, showing them a copy of a draft agreement and explaining its effect, and then persuading a majority to vote in favour.⁶⁹ The FWC must be satisfied that the employees have ‘genuinely’ agreed to the proposed terms, which may imply at least an *opportunity* to bargain.⁷⁰ But there is no general requirement in the Act to require an employer to have complied with its good faith bargaining obligations as a prerequisite for approval of an agreement.⁷¹

⁶⁶ See, eg, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Cochlear Ltd* [2009] FWA 125 (20 August 2009). For a review of this and other powers given to what is now the FWC in relation to bargaining disputes, see Anthony Forsyth et al, ‘Fair Work Australia’s Influence in the Enterprise Bargaining Process’, (Research Report, Fair Work Australia Research Partnership, 30 September 2012) <www.fwc.gov.au/documents/forsyth.pdf>.

⁶⁷ See, eg, *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576. For critical analysis of these provisions and their interpretation to date by the FWC, see Alex Bukarica and Andrew Dallas, *Good Faith Bargaining Under Australia’s Fair Work Act: Lessons from the Collective Bargaining Experience in Canada and New Zealand* (Federation Press, 2012).

⁶⁸ As in the case of the major bargaining disputes in 2011 at Qantas: see *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWA FB 7444 (31 October 2011); *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200; *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* [2012] FWA FB 236 (23 January 2012); *Transport Workers Union of Australia v Qantas Airways Ltd* [2012] FWA FB 6612 (8 August 2012); *Australian and International Pilots Association v Qantas Airways Ltd* [2013] FWC FB 317 (17 January 2013). For discussion of these disputes and the scope of the FWC’s powers of ‘last resort’ arbitration, see Anthony Forsyth and Andrew Stewart, ‘Of “Kamikazes” and “Mad Men”: The Fallout from the Qantas Industrial Dispute’ (2013) 36 *Melbourne University Law Review* 785.

⁶⁹ See *Fair Work Act 2009* (Cth) ss 173–174, 180, 181; Amanda Coulthard, ‘The Mechanics of Agreement Making under the *Fair Work Act 2009*: Promoting Good Faith Bargaining and Genuine Agreement’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 90.

⁷⁰ See *Fair Work Act 2009* (Cth) ss 186(2)(a), 188; Coulthard, above n 69, 102–3.

⁷¹ See *Appeal by Philmac Pty Ltd* [2011] FWA FB 2668 (5 May 2011); *Queensland Pre-Stressing Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWA 5026 (20 June 2012).

It is also notable that the permissible scope and content of collective agreement-making are still significantly constrained under the *Fair Work Act*, even if some previous restrictions have been lifted. For example, s 172(1) continues to require agreements, at least as a general rule, to deal only with matters pertaining to the relationships they regulate. It is true that the Howard Government's extended list of 'prohibited content' has been trimmed, so that agreements may once again deal with a number of matters of collective concern to employees and their unions.⁷² For example, it is once again permissible, as it was prior to Work Choices, for employers to commit to consult over any decision to outsource labour to an external firm, or to ensure that non-employed workers receive the same wages and conditions as employees performing the same jobs.⁷³ Section 205 indeed obliges *all* enterprise agreements to contain a term requiring the employer to consult its employees over any significant change that may affect them.

On the other hand, s 194 lists 'unlawful terms' which agreements cannot validly contain and which may prevent their approval by the FWC. Terms are unlawful if (among other things) they seek to broaden the rights granted by the legislation in relation to unfair dismissal, industrial action, or entry to workplaces by union officials;⁷⁴ if they involve unlawful discrimination on the grounds of race, gender, disability, age, and so on; or if they are 'objectionable', in the sense (as defined in s 12) of requiring or permitting conduct that would breach the 'general protections' in pt 3-1. These last provisions are effectively a rewrite of the *Workplace Relations Act* provisions on 'freedom of association', coercion, misrepresentation and other forms of inappropriate workplace conduct. They are notable for continuing to protect the right *not* to be a union member or participate in collective activities as strongly as the right to associate.

In effect then, as Rae Cooper, Bradon Ellem and Patricia Todd observe, collective bargaining under the *Fair Work Act* is treated as 'an individual right usually to be exercised by employees at the enterprise level, involving bargaining agents that are not necessarily unions' and where the roles of unions are 'not taken for granted, and indeed protected, as they were under arbitral system'.⁷⁵ As Colin Fenwick and

⁷² See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 305–11.

⁷³ See, eg, *Asurco Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWA FB 6180 (18 August 2010); *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339. By contrast, a *prohibition* on outsourcing is still not permitted: see, eg, *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2009] FWA FB 599 (12 October 2009).

⁷⁴ As to this last point, see, eg, *Re Australian Industry Group* [2010] FWA FB 4337 (11 June 2010). Rights of entry for union officials under the *Fair Work Act* have been broadened, compared to the *Workplace Relations Act*, but only in the sense that a union can no longer be 'locked out' of a workplace where it is not party to an applicable industrial instrument: see Creighton and Stewart, above n 72, 713.

⁷⁵ Rae Cooper, Bradon Ellem and Patricia Todd, 'Workers' Rights and Labour Legislation: Reviving Collective Bargaining in Australia' (Paper presented at International Labour and Employment Relations Association 16th World Congress, Philadelphia, 5 July 2012) 5.

John Howe concluded in 2009, in looking ahead to the introduction of the Fair Work legislation:

The changes [are] likely to make it easier for unions to carry out their central functions of representing workers and bargaining on their behalf and, to that extent, they will afford unions in the new system a greater measure of security than they have experienced in recent years. In many respects, however, unions will have to continue to work hard to ensure their own security. While the new provisions will give them more scope to do so lawfully, they still fall a very long way short of providing the level of support that characterised Australian labour law for most of the years since Federation.⁷⁶

As for the role of individual contracting under the *Fair Work Act*, it is true that there is no longer any provision for registered individual agreements that can displace the operation of modern awards or enterprise agreements.⁷⁷ But there are still several elements of the Fair Work regime which allow, if not encourage, individual contracting in a way that was not present in the 1993 legislation, let alone the old conciliation and arbitration system.

For example, div 3 of pt 2-9 of the *Fair Work Act* permits high-earning employees to agree that a modern award will not apply to them. More significantly, ss 144 and 202 require all modern awards and enterprise agreements to contain terms that permit the making of ‘individual flexibility arrangements’ (‘IFAs’) that vary the effect of specified terms in those instruments. The Act provides that an employee must voluntarily agree to any arrangement, be better off overall under its terms, and (for enterprise agreements) be able to terminate an IFA on no more than 28 days’ notice.⁷⁸ What the legislation again does not provide, either in relation to IFAs or ‘high income guarantees’, is that there be any process of negotiation or bargaining. Nor, in this instance, is there any provision for individual employees to be represented.

VII CONCLUSIONS

The point of departure for this paper is the assertion that insight into employee voice can be gained by analysing the nature of rule-making processes embodied — and often promoted — in national labour law regimes. Using a framework that

⁷⁶ Fenwick and Howe, above n 28, 185; and see also Rae Cooper and Bradon Ellem, ‘Getting to the Table? Fair Work, Unions and Collective Bargaining’ in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2012) 135.

⁷⁷ Although individual agreements made under the previous regime were not abolished. Hence for some years to come there will continue to be employees who are engaged under individual instruments that exclude them from the coverage of any collective agreement, unless they formally take action to terminate those instruments: see Creighton and Stewart, above n 72, 337–41.

⁷⁸ As to the adequacy of these and other safeguards in the legislation, which have been attacked by employer groups as making IFAs insufficiently ‘flexible’, see Edwards et al, above n 63, 105–10.

identifies five main rule-making processes, we have traced changes in Australia's national legislation since the early 1990s and sought to draw out their implications for employee voice.

The first major conclusion that can be drawn is that not only has the support for union forms of voice declined (a trend which has been called 'decollectivisation'), but the laws have also changed dramatically in the type of support that is offered. The conciliation and arbitration system that dominated Australian labour law for decades until the early 1990s was deeply collectivist, providing an array of supports for trade unions. The 1993 Labor legislation began to change this, but in contradictory ways. The promotion of collective agreement-making as the privileged rule-making process was close to the traditional support common in other countries, by mostly supporting unions representing employees in genuine collective bargaining. However, the highly decentralised nature of this bargaining affected the form and strength of unions, while the (still modest) facility for non-union collective agreements opened a door for subsequent attacks on unions. There was no acceptance of individual contracting, and delegated regulation (through awards and the role of the tribunals) continued to support unions, but the end of more direct supports for union membership and, ironically, the introduction of individualised forms of protection against unfair dismissal were also harbingers of the future.

The multi-faceted attacks on unions during the Howard government's terms of office are well known. Not only were new ways of avoiding union membership embraced, but the capacity of unions to effectively conduct collective bargaining with employers was restricted. As well, non-union and individualist rule-making processes were promoted not only as alternatives to union collective agreement making, but also as opportunities to undermine unions. The role of delegated regulation narrowed hugely, ensuring that awards and other aspects of tribunal operations were stripped of any support they offered to unions.

The place of unions under the Fair Work regime is far more ambiguous than many of its critics in the media and the business community might suggest. Far from giving unions their 'greatest increase in power in more than a century', as the chief executive of the Australian Mines and Metals Association has suggested,⁷⁹ the *Fair Work Act* represents at most a modest shift back towards collective agreement-making.

It is particularly interesting to compare the current approach to employee voice and representation with that adopted in Labor's previous attempt at labour regulation, the 1993 legislation. The Keating government's laws quite clearly privileged the role of trade unions, even if their overall influence was arguably less than it had been under the arbitral model. Only a registered union could make a certified agreement, and the union's assent was sufficient to bind all those (both members and non-members) for which it was purporting to act, with no provision for any employee vote — though employees did have to be consulted. While the 1993 legislation also provided for

⁷⁹ 'Unions Thrilled to See Back of Work Choices', *The Australian* (Sydney), 21 March 2009, 4.

non-union EFAs, the secondary nature of that ‘stream’ of agreement-making was apparent from the fact that additional requirements were imposed, and that unions could intervene to argue against their approval. Furthermore, the industrial dispute system continued to provide opportunities for unions both to influence the content of delegated regulation and to enhance their organisational security. The legislation accorded no formal role for individual employees to participate in rule-making, other than to vote on a proposed EFA.

If we fast forward to today, we find a very different approach. With the exception of greenfields agreements, unions no longer ‘make’ agreements — they are merely representatives (at least by default) for their members. In that capacity, they have no greater rights or protections than anyone else selected to be a bargaining representative, and they cannot prevent employers from going ‘over their heads’ to communicate directly with their members.⁸⁰ They can negotiate for various forms of support, such as employer-provided facilities or leave for union delegate training. But their capacity to bargain for any form of preferential treatment for their members is constrained by the ‘freedom of association’ provisions retained from the *Workplace Relations Act*, and it is unlawful to seek to broaden the statutory rights of entry for their officials. Finally, the expansion of statutory regulation under the *Fair Work Act* demands a different, and distinctly political, form of employee voice if these new individual employment rights are to be defended or varied.

The second main conclusion is that the diminishing legislative support for union forms of employee voice has not produced support for alternative non-union collective forms of employee voice. Despite the introduction of non-union collective agreements in 1993 and their growing importance over subsequent labour law regimes, there has been no attempt to specify or support collective mechanisms by which employees could contribute to the determination of these collective agreements that regulate their employment relationship. Rather, the process by which non-union collective agreements has gained legitimacy and legal effect — under governments of both political persuasions — has been a simple requirement for a ballot of affected employees. Under the *Fair Work Act*, as under previous statutes, there is no legal guarantee that ‘bargaining’ has actually taken place in the creation of these ‘agreements’ and no consideration of employee voice other than a specification that individual employees can self-nominate or nominate bargaining agents to bargain on their behalf.

Thirdly, the individualisation of rule-making processes and employee voice has been the dominant trend in Australian labour law. Statutory regulation and most features of delegated regulation have in fact become supports for individualism, establishing individual employment rights and promoting individual rule-making processes rather than the collective rights and processes they supported in the past. Even the

⁸⁰ See *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510 (5 May 2010); Rosalind Read, ‘Direct Dealing, Union Recognition and Good Faith Bargaining Under the *Fair Work Act 2009*’ (2012) 25 *Australian Journal of Labour Law* 130.

Fair Work Act's emphasis on collective agreement-making seems to support the individualisation of rule-making rather than the development of alternative forms of collectivism.

Again, this is apparent from comparing the current enterprise agreement provisions to those introduced in 1993. It is clear that, except in relation to greenfields agreements, individual employees have a far greater role than they previously did. Apart from the capacity to select a bargaining representative, they must have any proposed enterprise agreement explained to them by their employer, and they are guaranteed a vote before it can be approved, even where a union has effectively negotiated on their behalf. Furthermore, once an agreement is made, they are free to enter into an IFA that varies the terms of that instrument, even if only in some minor respect. Individual employees have a similar (and often broader) right to agree to vary the operation of a modern award — or indeed displace its operation altogether if they earn enough.

To many observers from overseas, not to mention those who grew up with the traditional model of Australian labour arbitration, this kind of emphasis on individual autonomy must look very odd. So too does the notion that employers can make 'collective' agreements without any element of bargaining or even representation. The current legislation clearly embodies a very distinctive approach to voice and representation at work — but one far removed from any traditional notion of collectivism.

