‘Deregulation’ of Labour Relations in Australia: Toward Command and Control

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The Coalition Government and various business groups continue to argue that the need for more labour market ‘deregulation’ or ‘reform’ justifies further changes to Australia’s labour relations system. However, one of its more recent legislative initiatives, the Building and Construction Industry Improvement Bill 2003 *(Cth) (the BCII Bill), appears on its face to be inconsistent with the rhetoric of deregulation. Using a decentred understanding of regulation drawn from scholarship in regulatory studies, this paper compares the BCII Bill with the federal labour relations system governed by the* Workplace Relations Act 1996 *(Cth) and its predecessors. The findings presented in this paper suggest that the regulatory framework proposed in the BCII Bill represents a highly centralised and legally prescriptive model of ‘command and control’ regulation. In comparison, notwithstanding its extensive legal framework, the federal labour relations system has historically been a relatively decentralised and participatory regulatory model.*

1. Introduction

The misnomer ‘labour market deregulation’ continues to dominate political debates over the future of labour law in Australia. The phrase is widely used to describe the ideal of removing laws which protect labour rights and entitlements, in order to allow business more ‘flexibility’ in labour relations. This ideal is based on two related assumptions. First, that the Australian federal labour relations system has historically been a highly state-interventionist, centralised, and juridified model of business regulation based on a ‘paternalistic’ objective of protecting workers and their trade unions from the operation of market forces. Second, that Australian business will be more productive and able to compete more effectively in the global marketplace once deregulation allows labour relations to become more decentralised and de-collectivised.

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In reality, there is no such thing as 'deregulation' of labour markets to the extent that this suggests the ultimate removal of all labour market regulation. Labour markets are both constituted and regulated by the state and private actors on the basis of a number of different and contested policy priorities. The rhetoric of labour market deregulation often masks extensive legal re-regulation and juridification of social and economic systems or spheres to suit prevailing political objectives. This rhetoric is based on a rather narrow definition of 'regulation' and its purposes when it comes to the exchange of labour in the economy. The inaccuracy of the term is highlighted by the inconsistency between the Howard Coalition Government's labour market deregulation rhetoric, and its extensive use of prescriptive law to 're-regulate' labour relations to, among other things, reduce the power of the AIRC and trade unions. [1]

The Howard Coalition Government's determination to have the Parliament pass a radical piece of legislation, the *Building and Construction Industry Improvement Bill* 2003 (the BCII Bill), provides a further example of this inconsistency between rhetoric and reality. Although the BCII Bill initially failed in the Senate in 2004, in early March 2005, the government reintroduced to Parliament aspects of the 2003 Bill dealing with 'unlawful industrial action' on a retrospective basis.[2] The Minister for Workplace Relations has indicated that the Government intends to move amendments to the 2005 Bill to implement the remaining elements of the 2003 Bill.[3] These amendments are likely to be moved after July 2005 when the Coalition assumes its Senate majority, and is expected to pass a raft of legislative labour market 'reforms'. The discussion in this paper is based on the 2003 version of the BCII Bill.

[1] See, for example, R Mitchell, 'Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia' (1998) 14 *International Journal of Comparative Labor Law and Industrial Relations* 113; A Forsyth, 'Outside Intervention or Necessary Evil: The Howard Government's Approach to Industrial Relations Regulation' (CCH Industrial Law News, Issue 1, 29 January 2004).

[2] *Building and Construction Industry Improvement Bill* 2005 (Cth) (the 2005 Bill). See M Shaw, 'Back-dated laws target building union deals', *The Age*, March 2, 2005. Although the 2003 BCII Bill failed to pass the Senate in 2004, a compromise was reached with the minor parties in the Senate involving amendments to the *Workplace Relations Act* 1996 (Cth)(the WR Act) by the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* (Cth).

[3] See the Hon Kevin Andrews MHR, Minister for Workplace Relations, Second Reading Speech, *Building and Construction Industry Improvement Bill 2005*, House of Representatives Official Hansard, 9 March 2005, 7.

It is my view that the BCII Bill is particularly significant as an example of the gap between the rhetoric and reality of labour market deregulation. It provides an opportunity to examine some of the assumptions that have been made about the model of regulation represented by the Australian labour relations system, and to juxtapose this model against the BCII Bill's approach.

In order to conduct this examination and comparison, I draw upon aspects of the field of regulatory studies to develop a wider definition of 'regulation' than the one underpinning the labour market 'deregulation' perspective. By examining labour law systems using a more 'decentred' understanding of regulation developed by regulatory scholars,[4] account may be taken of the regulatory complexity of labour relations systems in a capitalist democracy. This may enable labour lawyers with a genuine interest in reconciling the goals of productivity and employment growth with social equity and justice to get beyond the narrow confines of the 'regulation versus deregulation' debate and to engage in a more constructive dialogue about the future of labour law.

It is my contention that the BCII Bill, if passed, will impose a highly prescriptive, legalistic model of regulation of industrial relations on the construction industry based on very narrow and questionable policy justifications. Such a re-regulation is, on its face, inconsistent with the Coalition's 'deregulation' policy rhetoric.[5] Further, it is inconsistent with an enormous amount of empirical research and scholarship suggesting that this approach to regulation can be problematic.

In stark contrast to the framework of the BCII Bill, the collective labour relations system in Australia has historically been a relatively 'decentred' regulatory model. Viewed in the context of the wider debate over the role of the welfare-capitalist state in the context of globalisation, the Australian labour relations system is in fact a far cry from the regulatory model normally despised by those espousing the

[4] For an exposition of the decentred understanding of regulation, see J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 *Current Legal Problems* 103, and J Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1.

[5] Others have made similar observations. See, for example, Forsyth, 'Outside Intervention or Necessary Evil? The Howard Government's Approach to Industrial Relations Regulation', above n 1.

'deregulation' thesis on the grounds that labour markets are 'over-regulated'. Although the Australian system has been characterised as heavily centralised and legally prescriptive, in many ways it was ahead of its time as a regulatory model, given the push for less state regulation and more private ordering that has occurred over the last three decades.

In the next part of this paper, I will explain the nature of a decentred understanding of regulation. This understanding is subsequently applied to the federal labour relations system. The fourth section is a description and analysis of the regulatory character of the BCII Bill. The final two sections compare and contrast the regulatory objectives and characteristics of the BCII Bill and the federal system as a whole.

2. Regulatory Studies and Labour Law

The field of regulatory studies facilitates examination of regulatory objectives and the design and implementation of regulatory regimes in the field of labour law.[6] This burgeoning body of scholarship has been a feature of analysis in areas of study relevant to labour, such as occupational health and safety.[7] However, it has only recently been explored in relation to the field of labour law itself.[8]

The descriptor 'regulatory studies' encompasses a broad field of academic discourse that has sought to make sense of the role of the state and law in the context of changes to capitalist democracies. It is first necessary to observe that regulatory studies embraces a number of different ideologies and perspectives on the relationship

[6] For a comprehensive overview of the field of scholarship known as regulatory studies, or regulatory theory, see: Introduction, R Baldwin, C Scott and C Hood, *A Reader on Regulation* (1998) and Black, 'Critical Reflections on Regulation', above n 4.

[7] See, for example, R Johnstone and N Gunningham, *Regulating Workplace Safety: Systems and Sanctions* (1999). There have also been efforts to explore the usefulness of aspects of regulatory theory to the study of industrial relations: see, for example, B Dabscheck, 'Theories of Regulation and Industrial Relations' (1981) 23 *Journal of Industrial Relations* 430.

[8] For a discussion of the relevance and utility of the application of regulatory studies to labour law, see C Arup, 'Labour Law as Regulation: Promise and Pitfalls' (2001) 14 *Australian Journal of Labour Law* 229; J Murray, 'Book Review - Searching for a New Map for Labour Law' (2003) 16 *Australian Journal of Labour* Law 123; and R Johnstone and R Mitchell, 'Regulating Work', in C Parker, C Scott, N Lacey, and J Braithwaite (eds), *Regulating Law* (2004); The application of regulatory studies to labour law has also been explored in Britain - see H Collins, P Davies and R Rideout (eds) *Legal Regulation of the Employment Relation* (2001).

between the state, law and society. For example, historically, the interest of scholars in the topic of regulation can, at least in part, be traced to the 'economic theory of regulation' developed by the so-called 'Chicago School' in the late 1960s and early 1970s.[9] This perspective, drawing on neo-liberal economic theory, sought to explain the economic and social difficulties confronting welfare capitalist states following the end of the post-war boom as a function of excessive state intervention in markets. The solution to these difficulties proposed by the economic theory of regulation was to remove or reduce state regulation of markets, or 'deregulation'.[10]

One of the prime targets of those advocating deregulation is the so-called 'command and control' model of regulation. Regulation under this model consists of governmental standards or rules (commands), backed by coercive penalties or sanctions, which require specified behaviour of persons external to government in order to prevent social harm.[11] Its strength lies in the capacity of law to impose fixed standards and to prohibit activity not conforming to those standards. The rules or standards imposed by law may compel persons to engage in specific conduct, such as practices that will minimise the impact of an industry on the natural environment.[12] Alternatively rules may be used to prohibit conduct deemed not to be in the public interest, such as unsafe work practices in the context of occupational health and safety

[9] Terence Daintith has also suggested that the adoption of the de-regulatory agenda by the Carter and Reagan administrations in the United States, and by the Thatcher Government in the United Kingdom, allowed the 'vocabulary and conceptual apparatus of "regulation" to become popular outside the USA: T Daintith, 'A Regulatory Space Agency?' (1989) 9 *Oxford Journal of Legal Studies* 534 at 535.

[10] As noted in the introduction to this paper, labour law has been one of the primary targets of the overregulation thesis, as protective regulation of labour relations through law was perceived to be a major object of interventionist state policy, and thus of legal regulation. Some examples of scholarship advocating labour market deregulation in Australia include: R Blandy and J Sloan, *The Dynamic Benefits of Labour Market Deregulation* (1986); P Brook, *Freedom at Work: The Case for Reforming Labour Law in New Zealand* (1990). For an extreme example, see D Moore, *The Case for Further Deregulation of the Labour Market*, Paper prepared for Labour Ministers' Council, Commonwealth of Australia, November 1998.

[11] For further discussion of 'command and control' regulation, see R Baldwin, 'After Command and Control', in K Hawkins (ed) *The Human Face of Law: Essays in Honour of Donald Harris* (1997).

[12] See generally N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (1998); K Hawkins, *Environment and Enforcement* (1984); B Hutter, *Compliance, Regulation and Environment* (1997).

regulation.[13] Legislation often delegates the task of making and enforcing regulatory rules to administrative agencies, or 'regulators'.[14]

In fact, criticism of the command and control model is not confined to the economic theory of regulation. Several studies, many conducted by socio-legal scholars, have questioned the effectiveness and legitimacy of traditional legal and bureaucratic models of governance such as the command and control model, although not necessarily accepting that 'deregulation' or 'delegalisation' are effective counter-strategies.[15] It is debateable whether complete deregulation of markets is in fact possible. In reality, there is no such thing as an autonomous, self-regulating market. All markets are constructed and constituted through a regulatory process of one sort or another. [16] To many regulatory scholars, rather than advocating the removal of the state and law from economic and social spheres, the challenge is instead to identify and analyse the alternative forms and uses of law in the modern welfare state.[17]

The debate over deregulation provoked by neo-liberal economic theory thus spawned a number of different theories which, as Collins has observed, 'share an agenda for analysing the relation between law and society'.[18] As indicated earlier, this wider field

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[13] See, for example, Gunningham and Johnstone, *Regulating Workplace Safety*, above n 7.

[14] See generally J Black, *Rules and Regulators* (1997). Alternatively, this model of regulation may take the form of statutory commands enforced throught the courts by criminal prosecutions or civil actions by governments or private plaintiffs.

[15] Collins makes this observation while reviewing regulatory theory in H Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in Collins, Davies, and Rideout, *Legal Regulation of the Employment Relation*, above n 8, p 4. For critiques of the effectiveness of legal regulation which do not necessarily embrace the economic theory of regulation, see, for example, R Breyer, *Regulation and its Reform* (1982); E Bardach and RA Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982); I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

[16] The dichotomy between a self-ordering market (no regulation), and regulatory intervention by government which must necessarily restrict, impede or control market forces in the public interest, is rejected by scholars who suggest that there is no such thing as a natural or pre-ordained self-ordering market. See C Shearing, 'A Constitutive Conception of Regulation', in P Grabosky and J Braithwaite (eds), *Business Regulation and Australia's Future* (1993), 70-73.

[17] Although concerned about 'juridification', or an expansion in detailed legal regulation of the social and economic system, legal scholars such as Daintith, Teubner and others have argued that the involvement of the state and law is not necessarily a negative or restrictive influence on economic and social life. For example, Teubner has argued that the presentation of the problem of juridification as simply meaning 'too much regulation' places excessively narrow limits on the debate over the function of law in the welfare state: G Teubner (ed), *Dilemmas of Law in the Welfare State* (1986), 3.

[18] Collins, 'Justifications and Techniques of Legal Regulation', above n 15, 3.

of scholarship in regulation studies includes a number of different conceptions of its subject. Many of these see command and control regulation as only one of a number of different forms of legal and non-legal regulation historically used by the state. Instead of pursuing the minimal state advocated by neo-classical economists, many theorists have argued that scholars and policymakers must acknowledge systems of 'reflexive' or 'responsive' regulation, which seek to maintain the state's capacity to fulfill social programs and welfare objectives while avoiding the sometimes harmful effects of direct, detailed regulatory interventions.[19]

Many of these perspectives adopt a broader understanding of 'regulation' than the one which most lawyers would have of that term (which would probably be based on the definition of command and control regulation I proffered earlier). Adopting a deeper understanding of what constitutes regulation can serve two important purposes (among many potential uses). It can help to map otherwise complex regulatory systems or regimes by identifying the presence and/or characteristics of a number of different elements, including but not limited to law, and it can also provide a number of different criteria or values by which such systems can be evaluated.

The Decentred Understanding of Regulation

In this paper, I propose to draw upon a version of the 'decentred' understanding of regulation developed by respected regulatory scholar Julia Black, from the London School of Economics. Having said this, I acknowledge that my use of this term is far more simplistic and functional than the one espoused by Black herself.

Black's decentred understanding of regulation is built on a definition of regulation as 'the intentional activity of attempting to control, order or influence the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes', which may involve a variety of different regulatory mechanisms, techniques or instruments.[20]

[19] P Vincent-Jones, 'The Regulation of Contractualisation in Quasi-Markets for Public Services' [1999] *Public Law* 303 at 304. See also R Cotterrell, 'Feasible Regulation for Democracy and Social Justice' (1988) 15 *Journal of Law and Society* 5; and Ayres and Braithwaite, above n 15.

[20] Black, 'Critical Reflections on Regulation', above n 4, 26.

The decentred understanding of regulation goes beyond the definition of regulation as rules, backed by sanctions. At the heart of decentred understandings of regulation is an acknowledgement that any given 'regulatory space'[21] is filled by contested policy objectives or rationales, a variety of regulators and regulated actors, and a range of different regulatory techniques or systems.

In short, this definition acknowledges that within any given regulatory space, the state is not the only actor with power to influence actions of others within that space. It recognises that:

> Regulation is a two-way, or three or four-way process, between all those involved in the regulatory process, and particularly between regulator and regulatee in the implementation of regulation.[22]

Black explains that the 'hallmarks' of 'decentred' regulatory strategies or techniques adopted by the state and other actors 'are that they are hybrid (combining governmental and non-governmental actors), multi-faceted (using a number of different strategies simultaneously or sequentially), and they are indirect'.[23] Thus state regulation co-exists, and often conflicts or collides with co-regulation and self-regulation within a given regulatory space.[24]

This decentred model can be contrasted with the centred, unilateral and legalistic character of many 'command and control' regimes.[25] This is not to say that command and control regulation is necessarily 'bad', only that there are other forms of regulation which may prove more effective at achieving public policy objectives in a given social context. Other forms of regulation might also be better at encompassing other important values, such as the fostering of participatory democracy on behalf of groups with relatively little economic or political power.

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[21] The concept of 'regulatory space' was developed by L Hancher and M Moran, 'Organising Regulatory Space', in L Hancher and M Moran (eds), *Capitalism, Culture, and Economic Regulation* (1989) 275.

[22] Black, 'Critical Reflections on Regulation', above n 4, 7.

[23] Ibid, 8-9.

[24] The notion of 'regulatory collision' is explored in Shearing, above n 16.

[25] Black, 'Critical Reflections on Regulation', above n 4, 3.

One of the key responses to the finding that command and control regimes are often ineffective is a proposal that alternative institutional structures and procedures be developed. It is intended that these alternative structures will facilitate participation of interested parties in regulatory regimes, thus improving the chances of effective regulation.[26] As Black puts it, the push for more responsive or reflexive regulation represents 'a call for regulation to shift from the imposition of laws which command substantive ends … to indirect strategies in which those ends are induced, not commanded'.[27] This does not mean that the aim of regulating substantive ends disappear. Many advocates of responsive regulation have, in fact, emphasised the importance of retaining both institutional structures which regulate substantive ends, and sanctions for enforcing those ends as the apex of an 'enforcement pyramid' necessary to ensure that other techniques are effective.[28] However, according to this approach, recognition should also be given to the diverse array of regulatory techniques or instruments that may be used to achieve change:

> 'Those means can include economic instruments, such as taxes or subsidies, the exploitation of existing conflicts and tensions, adjusting them so that they achieve a desirable balance, the deployment of the informational and governance capacities of organizations, or … the design of the decision processes of organizations so as to ensure internal democratization and external responsiveness'.[29]

Finally, by applying the lens of regulatory studies to a specific 'regulatory space',[30] it is easier to recognise that in any one regulatory regime there may be several policy objectives or concerns competing for priority in both the design and implementation of regulation.[31]

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[26] J Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597 at 597-598. Decentred or responsive regulation is thought to improve the effectiveness of regulatory regimes by making them more inclusive of interested actors, and encouraging dialogue and debate between those actors – a form of deliberative democracy.

[27] Ibid, 598.

[28] The notion of an 'enforcement pyramid' was developed by Ayres and Braithwaite, above n15.

[29] Black, 'Proceduralizing Regulation: Part I', above n 26, 598. For a general discussion of the various regulatory instruments or techniques used by the state, see T Daintith,'Techniques of Government', in J Jowell and D Oliver (eds), *The Changing Constitution* (3rd ed) (1994).

[30] The metaphor of a regulatory lens is used by Parker, Scott, Lacey, and Braithwaite, *Regulating Law* above n 8.

[31] See, for example, Arup, 'Labour Law as Regulation: Promise and Pitfalls', above n 8, at 236.

This decentred understanding of regulation does not detract from the possibility that a system may be shaped by state objectives and regulatory techniques or structures. It simply recognises that the state is not the only powerful actor within a particular 'regulatory space'; although, importantly, it may be the only one which can legitimately use force and make binding laws. Nor does it deny that each actor brings different values or priorities to this regulatory space, for example: the state (maintenance of democratic structures and protection of the 'public interest'); private commercial actors (profit motive and satisfaction of shareholders); and trade unions or private not-for profit organisations (effective representation and social justice values).

In addition to its capacity to map a regulatory space, decentred conceptions of regulation also identify a number of different perspectives from which regulatory regimes can be evaluated. This recognises that although economists might approach a regulatory regime from the perspective of economic efficiency or 'value for money' (a popular and well-known set of evaluation criteria), there are many other values that have been identified as important concerns in the evaluation of regulation. For example, although *effectiveness* is obviously an important criterion for any regulatory regime, this might be assessed on the basis that it has successfully altered behaviour to achieve valued social justice outcomes, notwithstanding the economic cost. Alternatively, it may be concluded that a regulatory structure is effective on the basis that 'it works at balancing the objectives in tension, it explores ways to reconcile them or to adjust the mix as circumstances and expectations change', [32] instead of evaluating the effectiveness of regulation on the basis of its success in achieving a particular goal or goals. Regulation can also be evaluated in terms of its potential for increasing participatory democracy as a way of improving the effectiveness of a regulatory regime at achieving desired behavioural change and stated policy outcomes.

A decentred approach to regulation allows the investigator to go beyond the public/private distinction present in conventional legal analysis. It helps us accept that

[32] Ibid, 236 (footnote omitted). For further discussion of the potential for regulatory systems to balance competing objectives and institutions, see C Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38.

there are a number of different centres of power within any regulatory space commanding different resources. There is potential for regulatory systems to bring those centres into balance by providing or facilitating countervailing powers which prevent abuse of power. By perceiving of regulation as more than top-down prescription of social norms, there is an opportunity to facilitate participative democracy by fostering a role for state, business and other institutions in civil society which can produce productive outcomes.[33]

It has also been suggested that *accountability* is another important criterion by which to evaluate regulatory regimes. Accountability is another concept with many definitions, however regulatory scholars generally adopt a wider definition of accountability than, for example, the legal model of public accountability favoured by administrative lawyers.[34] The involvement or inclusion of interested and affected actors within regulatory regimes can also act as an accountability mechanism, whereby the various actors within a regulatory regime are empowered to be responsible for the various outcomes valued by the regulatory regime, and to hold each other accountable to those values.[35]

Regulatory studies thus provides a standpoint from which to identify and explore the nature of different forms of regulation, the interests they protect, and their impact, rather than assuming that only certain types of legal regulation count as 'regulation'. It is a critical approach that facilitates both the deconstruction of rhetoric which masks the true purpose of regulatory agendas, and the evaluation of regulatory regimes from a range of different perspectives. How might these ideas and concepts be useful to the examination and analysis of labour law, and specifically collective labour relations systems?

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[33] Braithwaite has argued that 'the richer and more plural a separation of powers in a polity, the less we have to rely on narrow, formal, strongly punitive regulation targeted on the beneficiaries of abuse of power': J Braithwaite, 'On Speaking Softly and Carrying Big Sticks' (1997) *University of Toronto Law Journal*, at 341.

[34] See, for example, Scott, above n32.

[35] For a fuller exploration of the capacity of regulated actors to contribute to accountability within a regulatory regime, see J Braithwaite, 'Accountability in the New Regulatory State' (1999) 58 *Australian Journal of Public Administration* 90, and Scott, above n 32. Braithwaite argues that it is wrong to assume that such ideas are necessarily a drag on economic efficiency: at 91.

Decentred regulatory analysis can be usefully employed to map the terrain of the increasingly complex regulatory environment maintained by labour law. For example, private law, such as contract, can be seen as a form of legal regulation either standing alongside or competing with statutory regulation in any given regulatory sphere.[36] Johnstone and Mitchell have previously explored the salience of such an approach to labour law, which is underpinned by the employment contract, yet with an extensive statutory overlay.[37] A regulatory perspective can also increase the extent to which private law is seen as a tool for furtherance of the public good, however that may be defined.

It is also important to recognise that decentred conceptions of regulation allow lawyers to conceive of regulation as being 'more than law'. This may assist labour lawyers to acknowledge that even the state, for example, regulates through legal and non-legal instruments and techniques. Like socio-legal studies, emphasis is placed on the 'law in action' rather than the 'law in books'. The approach facilitates exploration of the interaction or 'responsiveness' between legal and non-legal forms of regulation in the context of labour relations systems.

Regulatory analysis can increase the transparency of competing values and norms within a given regulatory context. Furthermore, it is important to recognise that regulatory regimes may have certain unintended consequences, notwithstanding their stated objectives.[38] For example, although functioning to offset inequalities in the employment relationship, in so doing labour law has normalised the subordinate employment relationship, and played a significant role in the construction of the (often inequitable) labour markets within which labour regulation takes place. The regulatory approach may therefore provide a further opportunity 'to ask more serious

[36] See, for example, Parker, Scott, Lacey, and Braithwaite, *Regulating Law*, above n 8, especially the chapter by Johnstone and Mitchell, 'Regulating Work', 101-121.

[37] Johnstone and Mitchell, 'Regulating Work', above n 8.

[38] P Gahan and R Mitchell, 'The Limits of Labour Law and the Necessity of Interdisciplinary Analysis', in R Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995).

questions about the role which law plays in the creation, maintenance and perpetuation of economic inequality'.[39]

The adoption of such an approach is an alternative to the lawyer's traditional focus on identification and classification of legal rules and the maintenance of legal fictions such as the contract of employment. This broader perspective may help to focus attention on what is more important: the competing or conflicting values underpinning regulation, and how they might be reconciled within a regulatory system. These values may include social objectives such as addressing social and economic equality. They may also encompass democratic values such as the enhancement of social and economic participation.

All in all, the decentred understanding of regulation puts the notion of 'labour market deregulation' (and regulation) in a much different light than traditional analytical approaches.[40]

3. The Federal Labour Relations System: A Regulatory Perspective

Given that the centenary of the *Conciliation and Arbitration Act 1904* (Cth) was recently celebrated[41] (or denigrated, if one is sympathetic to the views of the HR Nicholls Society), it is an appropriate time to reflect on the nature of the federal collective labour relations system established by that legislation, and to ascertain what regulatory studies might add to our understanding of this system.

The portrait of the Australian labour relations system painted by those who argue for 'labour market deregulation' is a landscape dominated by the objective of protecting overly generous terms and conditions and powerful trade unions through prescriptive legal regulation, at the expense of a productive and competitive economy. The

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[39] H Glasbeek, 'EI Sykes and the Significance of Law' (1998) 11 *Australian Journal of Labour Law* 24 at 41.

[40] This has been recognised by scholars in related fields: J Buchanan and R Callus, 'Efficiency and Equity at Work: The Need for Labour Market Regulation in Australia' (1993) 35 *Journal of Industrial Relations* 515.

[41] See, for example, J Isaac and S Macintyre (eds), *The New Province for Law and Order: 100 Years of Conciliation and Arbitration* (2004).

landscape also includes a significant escarpment, the Australian Industrial Relations Commission (AIRC), portrayed as a centralised, 'interventionist' state institution that has been 'captured' by trade unions and 'lily-livered' employers.

Using the regulatory perspective I have set out in the previous section, I provide a different interpretation of this landscape. I will confine my analysis to the federal collective labour relations system represented presently by the *Workplace Relations Act 1996* (Cth) (WR Act) and its predecessors, the *Industrial Relations Act 1988* (Cth) (IR Act) and the *Conciliation and Arbitration Act 1904* (Cth)(C&A Act), although the paper will focus on the system as it operated prior to 1996 when it was partially dismantled by the WR Act.[42] What follows is a very brief and simplified overview of the main features of the Australian labour relations system as they evolved prior to 1996. I then analyse this system on the basis of the three questions derived from the regulatory perspective outlined above:

(1) what regulatory institutions and actors occupied this regulatory space?;
(2) what regulatory objectives can be identified?; and
(3) what regulatory techniques were used in the pursuance of these objectives?

The federal conciliation and arbitration system established by the C&A Act remained largely intact until the late 1980s. This system consisted of a number of key elements: a government appointed, but notionally independent tribunal, with compulsory powers to settle disputes by setting terms and conditions of employment, and the capacity to ban or limit direct action by the parties to disputes; and provision for registration of trade unions, thus affording unions legal recognition, but also subjecting them to state regulation of their internal affairs.[43]

[42] It is acknowledged that there are a number of other regulatory frameworks that might be considered part of the Australian labour law system, including state systems, and industry specific regulatory regimes which existed at certain historical junctures, such as the Coal Industry Tribunal. The paper will also ignore aspects of the WR Act, and other legislation, providing for individual legal rights of action, such as in relation to unfair dismissals.

[43] Mitchell, 'Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia', above n 1. See also WB Creighton, WJ Ford and RJ Mitchell, *Labour Law: Text and Materials* (1993), 11-13.

The principal objective behind the establishment of this system was the achievement of industrial peace.[44] The fact that the system was based upon a particular regulatory model – conciliation and arbitration of industrial disputes by a tribunal – can be explained by the fact that this model was the only one given express recognition by the Australian Constitution.[45] The incorporation of this model into the Constitution was the result of an historical political compromise between liberals and the political representatives of labour reached in the 1890s concerning the appropriate response to various challenges facing the Australian colonies in that decade.[46]

The conciliation and arbitration system was originally conceived as a default mechanism that would come into operation in the event that collective bargaining between trade unions and employers, or employer associations, broke down. This default mechanism was intended to ensure that industrial disputes did not descend into debilitating strikes and lockouts.[47] Over time, the system came to safeguard the welfare of a large number of workers through the tribunal's acceptance of the concept of 'the fair and reasonable wage' as part of its award-making powers, and the extension of this principle to various industries through the so-called 'paper dispute' process. Thus, most 'disputes' lodged with the tribunal, which by the 1960s was known as the Conciliation and Arbitration Commission, were essentially artificial disputes initiated by trade unions to invoke the commission's award-making jurisdiction.

The historical evolution of the system into an instrument of macro-economic policy-making raised the ire of the labour market deregulationists mentioned earlier in this paper. By the 1980s, the system had become a 'centralised wage-fixing model' at its most formal level. Test cases were heard by the commission, and the standards

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[44] Although the intentions of those responsible for the introduction of arbitration were far more complex than this statement suggests. For an historical overview of the reasons behind the establishment of arbitration, see S Macintyre and R Mitchell, 'Introduction', in S Macintyre and R Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration* (1989).

[45] B Creighton, 'One Hundred Years of the Conciliation and Arbitration Power' (2000) 24 *Melbourne University Law Review* 839.

[46] See further S Macintyre, 'Neither Capital nor Labour', in Macintyre and Mitchell, *Foundations of Arbitration*, above n 44.

[47] Ibid.

established by these decisions were then passed on by the commission to all workers covered by awards through the award-making process.

During the 1980s, changes were introduced to the system to give more formal recognition to the importance of productivity and competitiveness in industry and also less centralised bargaining locations. The Accord reached between the ACTU and the Hawke Labor Government set parameters within which unions were expected to operate when negotiating with employers and participating in conciliation and arbitration. Centralised bargaining and key rule-making institutions such as the commission were retained. However, their role was reconceived to promote objectives such as productivity and efficiency in order to facilitate employment growth. Under successive Accords, workers generally received a first-tier wage increase based on an assessment of inflationary pressures. So-called 'second-tier' increases were conditional on the achievement of productivity offsets including both award restructuring and alterations in work practices.

This was achieved with few if any changes to the existing legislative and institutional framework. However, it did involve some decentralisation of authority for a range of different issues that were taken away from the tribunal (after 1988, the Australian Industrial Relations Commission (AIRC)), and given to employers and trade unions and workers at enterprise level. [48]

The decentralisation process was taken a step further in the early 1990s, first by the Labor Government pressuring the AIRC into adopting an enterprise bargaining principle in the 1991 National Wage Case.[49] Further change was introduced in 1993, when the *Industrial Relations Act 1988* was amended to establish a legal framework for enterprise bargaining.[50] The AIRC was required to certify 'enterprise agreements' so long as the agreement passed a 'no disadvantage test' when compared to the relevant award. As part of the introduction of enterprise bargaining, the amended

[48] An excellent overview of the introduction of enterprise bargaining in the late 1980s and early 1990s can be found in ACIRRT, *Australia at Work: Just Managing?* (1999), Chapter 2. See also RJ Mitchell and M Rimmer, 'Labour Law, Deregulation and Flexibility in Australian Industrial Relations' (1990) 12 *Comparative Labor Law Journal* 1.

[49] (1991) 39 IR 127.

[50] ACIRRT, *Australia at Work*, above n 48.

legislation also provided a limited freedom for workers to take industrial action in support of their enterprise bargaining position.

It is important to note that changes continued the process of what has been characterised as 'managed decentralism', whereby decentralisation was controlled and a balance maintained between the achievement of 'flexibility' and employment protection and security.[51] Under the 1993 changes, the AIRC maintained a supervisory role through its certification function, while employment security provisions were strengthened.

This period of managed or controlled decentralism concluded with the election of the Howard Coalition Government in 1996. The incoming Government made it clear that it was keen to assist employers to escape the collective system. It sought to achieve this with the passage of the WR Act, which among other things reduced the scope of awards and introduced Australian Workplace Agreements (AWAs), a stream of individualised employment agreements that once registered, operate to exclude collective instruments.

This is terrain that has been well travelled by labour lawyers and other commentators over the years. What can regulatory studies add to this terrain?

* * *

The Australian labour relations system represents a quite distinctive regulatory model, especially when compared to command and control systems. Within the 'regulatory space' of the Australian labour relations system, it is possible to identify several different actors or 'regulators' – the state, employers and employer associations, and trade unions (as well as employees); a variety of regulatory characteristics and instruments (not confined to the use of law to command substantive ends); and a number of different, and often conflicting, regulatory purposes.

[51] The term 'managed decentralism' was coined by McDonald and Rimmer: T McDonald and M Rimmer, 'Award Structure and the Second Tier' (1988) 14 *Australian Bulletin of Labour* 469. See further Mitchell and Rimmer, 'Labour Law, Deregulation and Flexibility in Australian Industrial Relations', above n 48.

Clearly, the role of the state within the Australian labour law system can be contrasted with more hierarchical regulatory models. A distinction can be drawn between the functions and powers of the government within the system, and those of the tribunal established to oversee the system. Although the Australian system was established by the state through formal legislation, the role of the Commonwealth Government has largely been limited to an arms-length participant. This is primarily because of the limited scope of the Commonwealth's constitutional power to regulate industrial relations.

As Breen Creighton has observed, the role of government in the Australian labour law system has traditionally consisted of three key aspects:[52] it has provided the legislative and administrative framework within which the system functioned; it has been an active participant in the system as representative of the public interest, mostly by appearing in major test cases; and it is an employer upon whom outcomes of the system are binding in essentially the same manner as other employers. Creighton notes that the state's role as an employer can be differentiated from private sector actors because it has been expected to act as a 'model' for other employers.

Because of the nature of the state's role in the Australian labour relations system, it has lacked some of the regulatory techniques present in other regulatory spaces. For example, although the state does use financial incentives to promote employment and encourage desired industrial relations practices, it does so through separate regulatory regimes, such as industry policy and public procurement programs.[53] However, as will be explained shortly, it has included several other aspects of 'decentred' regulation.

The tribunal can be characterised as the state's regulator within the system, operating through a regulatory model based on dispute resolution through mediation or 'conciliation' and then, if necessary, arbitration. Although it ultimately had the capacity to set wages and conditions in a wide range of industries and callings through

[52] B Creighton, 'The Role of the State in Regulating Employment Relations: an Australian Perspective' (1997) 2 *Flinders Journal of Law Reform* 103, at 114-115.

[53] See, for example, C Baragwanath and J Howe, *Corporate Welfare: Public Accountability for Industry Assistance*, The Australia Institute, Discussion Paper No 34 (2000).

the exercise of rule-making powers, its jurisdiction was more limited than modern regulators such as, for instance, the Australian Competition and Consumer Commission, if only because of the limitations it imposed on itself. For example, the tribunal has never sought to pursue its original mandate of using conciliation and arbitration to *prevent* industrial disputes.

The critics of the system, who portray the Commission as a 'top-down', inflexible regulator of wages and conditions through the exercise of compulsory powers ignore the complexity of the Commission's role.[54] The function of the Commission's powers within the system was succinctly summarised by Justice HB Higgins way back in the 1920s (when the Commission was, of course, a Court):

> But it ought to be more generally understood that the Court has no power to award, to make a compulsory award, except so far as it cannot secure agreement between the contending parties. Its first duty is to try to conciliate, to get an agreement… But without the power to award in the final resort, there often could be no agreement procured. A few unreasonable employers could hold up a fair settlement, could indeed hold up the whole industry. … The ideal of the Court is to secure regulations such as would be fitting for a fair collective agreement; and the power to award is held by the Court in reserve, as a whip over a horse'.[55]

In practice, this is an accurate portrayal of the system in operation, in that the compulsory powers of the Commission were often used as a last resort when voluntary collective bargaining, and then conciliation, failed. These powers represent the apex of a regulatory 'enforcement pyramid', without which the balancing of the interests of employees with little or no bargaining power against the profit-maximisation imperative of employers could not have been achieved.[56]

Those who have argued that the system represented a centralised and inflexible model have focused on the Commission's powers of compulsory arbitration, ignoring the fact that even before formal recognition of enterprise bargaining, informal collective

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[54] For a discussion of the AIRC's functions which acknowledges this complexity, see JE Isaac, 'The Arbitration Commission: Prime Mover or Facilitator?' (1989) 31 *Journal of Industrial Relations* 407.

[55] HB Higgins, 'Industrial Arbitration', an address delivered in the Chapter House of St Paul's Cathedral, Melbourne on 22nd March 1926, and reprinted in (2001) 27 *Australian Bulletin of Labour* 177 at 187.

[56] For an explanation of the 'regulatory pyramid' and the importance of having penalties and sanctions at its apex, see Ayres and Braithwaite, *Responsive Regulation*, above n 15.

bargaining, sometimes at enterprise level, was widespread in some industries.[57] Thus 'co-regulation' by employers and trade unions, with the Commission and the government in the background, has always been an aspect of the labour relations system.[58]

Moreover, codes of conduct and company HR policy manuals applicable at an intra-firm level often express, and sometimes exceed, the requirements set down through collective labour law. These documents, which normally apply to the firm's employees as a collective (as distinct from individual contracts) and are thus somewhat similar to collective instruments, have always been an aspect of labour relations in Australia. The Australian system has therefore encompassed a form of 'self-regulation' consistent with its overall goals and purposes within its regulatory framework.[59]

From the perspective of regulatory studies the Australian system can be characterised as being a tripartite, relatively participatory regulatory system. The system has also relied on a number of decentred regulatory techniques, such as the facilitation of 'co-regulation' and even self-regulation. Notwithstanding the presence of these techniques, law was an important instrument in the achievement of this model.[60] The legal and administrative framework established by legislation gave the representatives of both capital and labour a right to participate and to a certain extent self-regulate and co-regulate within the system. The effectiveness of the system in achieving this may be attributed to the legal protection afforded to trade unions which, in the absence of state protection, may have struggled for recognition. The state thus provided the regulatory framework necessary to allow unions to exercise countervailing power against the power of capital, backed by the state tribunal.

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[57] Creighton, 'One Hundred Years of the Conciliation and Arbitration Power', above n45, 847-848.

[58] For an extensive and scholarly definition and analysis of the terms 'co-regulation' and 'self-regulation', see Black, 'Decentring Regulation', above n 4.

[59] The importance of striking a balance between 'external' and 'internal' regulation in order to better achieve both increased productivity and improved equity has long been recognised by scholars in related fields. See, for example, Buchanan and Callus, 'Efficiency and Equity at Work', above n 40.

[60] One issue that has been extensively canvassed elsewhere is the interaction between the collective system and the contract of employment, itself the regulatory instrument upon which the collective system is based: Johnstone and Mitchell, 'Regulating Work', above n 8.

However, the AIRC was also empowered to prevent abuse of power by trade unions where capital was not able to prevent this without state assistance.

The protection afforded to trade unions is an important aspect of the democratic character of the system. This is because trade unions are deliberative forums in themselves (a point which is not widely recognised in the labour law literature), and contribute to industrial or employee democracy by representing marginalised workers. They have also contributed to management practices within the enterprise, in some instances by developing national strategies to address business productivity and competitiveness.[61] Moreover, through their role in the labour law system (and otherwise), trade unions help to keep government accountable to the wider social values of egalitarianism and redistributive justice that underpin the protective goals of the system. As well as helping individual workers overcome the frequently imbalanced power relationship with their employers, trade unions counterbalance the power of vested corporate business interests to influence government decision-making in relation to labour relations.

An example of trade unions performing this function is provided by a description of the process by which awards and enterprise agreements are generally enforced within the system. Although legal sanctions against industrial action and enforcement of awards and agreements have always been part of the formal system, in the main the formal state institutions of this system have not been active or effective in enforcing these sanctions.[62] Notwithstanding the existence of government agencies such as the Arbitration Inspectorate charged with the function of performing this role, the process of enforcement of the terms of awards and agreements has largely been overseen by trade unions.[63] The role of actors other than the state in enforcing the system underlines the salience of the decentred understanding of regulation to a study of the Australian labour law system.

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[61] For example, Australian Council of Trade Unions and Trade Development Commission, *Australia Reconstructed: ACTU/TDC Mission to Western Europe* (1987).

[62] B Creighton, 'Enforcement in the Federal Industrial Relations System: an Australian Paradox' (1991) 4 *Australian Journal of Labour Law* 197.

[63] Prior to the establishment of the Arbitration Inspectorate in the mid-1930s, trade unions were effectively the only institution which enforced the system on behalf of workers: L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (1994), 145-164.

Finally, notwithstanding those who have attacked the overly protective nature of the labour relations system, it is possible to identify a number of different and often competing regulatory objectives in the operation of the system. Traditional labour law analysis maintained that the objective of safeguarding the welfare of workers was paramount in terms of the state's role in the system. Although this protective goal was certainly an important motivation for the establishment and development of conciliation and arbitration, it was always tempered by the dictates of the capitalist economic system.[64] Labour law scholars have come to recognise that under the arbitration system, the objective of safeguarding the welfare of Australian employees has, from time to time, has been balanced with competing policy concerns, such as the promotion of business productivity and competitiveness.[65]

Regulatory analysis gives this 'contested terrain' perspective greater clarity. Certainly trade unions have always had as their primary objective the enhancement of the working conditions of their members. But employers had other goals based on profit maximisation, and the related objectives of productivity and competitiveness. The state, represented by both the government and the tribunal, varied in its approach to reconciling these competing considerations depending upon a range of factors, including the political persuasion of governments, and prevailing social and economic conditions.

[64] R Mitchell, J Murray and A O'Donnell, 'Labour Law and the New Social Settlement', *Growth No 49*, Committee for Economic Development in Australia (2001). For a more extensive historical perspective on labour regulation and the various policy considerations underpinning it, see Johnstone and Mitchell, 'Regulating Work', above n 8.

[65] C Arup, J Howe, R Mitchell, A O'Donnell and J Tham, 'Employment Protection and Employment Promotion: The Contested Terrain of Australian Labour Law' in M Biagi (ed) *Job Creation and Labour Law: From Protection Towards Pro-action* (2000), 109-115. Historically, it was always intended that arbitration would balance social protection with the maintenance of managerial prerogative and 'capacity to pay': Macintyre and Mitchell, 'Introduction', *Foundations of Arbitration*, above n 44.

4. Regulating the Construction Industry – the BCII Bill 2003

> 'It is as though 7% of the national workforce is being sent into quarantine, or at least to undergo some form of collective punishment for failing to meet unspecified productivity goals.[66]

The BCII Bill was prepared in response to the recommendations of the Cole Royal Commission into the Building and Construction Industry, which reported to the Commonwealth Government in March 2003.[67] One of the stated motivations for the establishment of the Royal Commission was the importance of the industry to the Australian economy, and the need to improve the productivity of the industry. Although its terms of reference were directed toward a range of issues and practices affecting productivity in the building and construction industry, the calling of a Royal Commission was widely considered to be a politically motivated strategy aimed at weakening unions representing workers in that industry.[68] Most of the terms of reference, and as a result the recommendations of the Royal Commissioner, were focused on the alleged existence of unlawful practice and conduct, fraud, corruption and anti-competitive conduct in the industry.

Commissioner Cole identified the need for 'structural change' as a necessary precondition for achieving higher productivity. According to Commissioner Cole, this structural change was needed in four areas: prohibition of 'pattern bargaining'; a clearer definition of what constituted 'unlawful industrial action' and more effective sanctions against the perpetrators of unlawful action; resolving industrial action as a result of the application of law rather than industrial muscle; and the establishment of an independent regulator to ensure that industry-specific laws were enforced.[69]

It is therefore not surprising that the overriding theme of the Government's rhetoric in

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[66] Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole - The Future of the Construction Industry: Confrontation or Cooperation?* (2004) (Senate Committee Report), p 51.

[67] See *Royal Commission into the Building and Construction Industry: Final Report*, Volumes 1-22 (2003).

[68] The Senate Employment, Workplace Relations and Education References Committee has observed that this was at least in part because no particular issue or dispute in the industry prompted the inquiry: Senate Committee Report, above n 66, 35.

[69] *Royal Commission into the Building and Construction Industry: Final Report*, Volume 1, 4.

introducing the BCII Bill was 'compliance and enforcement'; or more specifically, improving compliance with the law in the building and construction industry through enforcement of the law by a new regulator, the Australian Building and Construction Commissioner (ABC Commissioner).[70] It must be noted that should the BCII Bill become legislation, it would not replace the WR Act as the primary regulatory framework for the construction industry. Rather, the government has argued that if enacted, the BCII Bill would 'strengthen' and extend the provisions of the WR Act.

A key element of the BCII Bill is the establishment of the office of the ABC Commissioner, with broad powers and functions 'designed to achieve lasting cultural change' in the building and construction industry.[71] These functions included:[72]

> i) monitoring and promoting appropriate standards of conduct by building industry participants (including compliance with the WR Act, a Building Code, and the BCII Act);
>
> ii) investigating suspected contraventions by building industry participants of the BCII Act, the WR Act or any industrial relations agreement;
>
> iii) instituting or intervening in proceedings in accordance with the BCII Act, and providing representation to building industry participants who become party to a proceeding to the BCII Act;
>
> iv) disseminating information about its role and the legislation, and any other functions conferred on it by the legislature.

It is envisaged by the Government that the ABC Commissioner would rely on a range of sources to fulfil its role - including the police, the Australian Tax Office, the ACCC, industry bodies and unions - and would act as an industry 'watchdog'.[73] The ABC Commissioner would have broad coverage of the industry through a very wide definition of 'building work' that was included in the legislation. However, while the

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[70] The Hon Kevin Andrews MHR, Minister for Employment and Workplace Relations, Second Reading Speech to the *Building and Construction Industry Improvement Bill 2003*, House of Representatives Official Hansard, 6 November 2003.

[71] Department of Employment and Workplace Relations (DEWR), *Reforming the Building and Construction Industry: Summary of the Building and Construction Industry Improvement Bill*, 6 November 2003.

[72] Section 12, *Building and Construction Industry Improvement Bill 2003* (Cth).

[73] DEWR, *Summary of the Building and Construction Industry Improvement Bill*, above n 71.

ABC Commissioner's jurisdiction is purported to cover the actions of *all* participants in the Construction industry, it appears that most of the legislative authority for the Commissioner in the BCII Bill relates to the actions of employee representatives rather than employers. Some aspects of this legislative focus will be discussed below.

The functions outlined above would be supported by far-reaching powers conferred on the ABC Commissioner and Australian Building and Construction Inspectors (ABC Inspectors) to obtain information and documentation 'relevant to an investigation', including the power to compel persons with information to attend before the ABC Commissioner to answer questions. [74] ABC Inspectors would also have the power to enter premises for 'compliance purposes'.

In addition to the specific powers outlined above, the BCII Bill would give the Federal Minister for Workplace Relations extensive power to influence the operation of the regulatory system to be established by the legislation, if enacted. For example, the BCII Bill empowers the Federal Minister to give directions to the ABC Commissioner regarding the manner in which the Commissioner is to exercise the powers or perform the functions of the Commissioner under the Bill.[75] The Federal Minister would also be permitted to issue a code of practice for the building industry (to be known as the 'Building Code'), with no indication as to whether or not the Building Code would have to be brought before Parliament. Nor does the Bill suggest that the Minister would be obliged to consult with relevant industry participants before issuing or amending the Building Code.

The BCII Bill also contains numerous provisions designed to extend the regulation of the WR Act to suit the Coalition's policy priorities. For example, although the Coalition shied away from giving the ABC Commissioner direct involvement in the setting of terms and conditions of employment in the industry, the Bill seeks to reduce the number of 'allowable award matters' in the context of the construction industry.[76]

[74] Part 2, Divisions 1 and 2, BCII Bill.

[75] Section 13, BCII Bill.

[76] Section 51, BCII Bill. Since the 2004 federal election, the Government has indicated it will seek to amend the WR Act to reduce the number of allowable award matters, something it was not able to achieve before gaining a majority in the Senate.

It also seeks to restrict trade union access to building sites by tightening up the rules governing 'right of entry' in the industry.[77]

The most intrusive legal controls in the Bill, however, are reserved for industrial action taken by unions and their members in the industry. The Bill bans 'unlawful industrial action', defined extremely widely to include any action that is 'industrially-motivated' with an adverse effect on any company in the construction industry, not limited to the employer of workers taking the action.[78] Legal industrial action is defined as 'protected action' under the WR Act. However, the BCII Bill would subject it to further constraints, including a requirement that any action be approved by secret ballot, a 14 day maximum period of action, to be followed by a mandatory 21 day 'cooling off' period.[79] The detailed prescriptions for the secret ballot are in themselves likely to make legal industrial action highly problematic.

Finally, the Bill included a number of sanctions that could be imposed upon unions and union officials who breached the provisions of the Bill, including those provisions pertaining to the powers of the ABC Commissioner to obtain information and documentation. For example, a person failing to comply with a formal notice to appear before the ABC Commissioner would be guilty of a criminal offence with a penalty of imprisonment for 6 months.[80] The Bill also included significant financial penalties which would apply to trade unions found to have engaged in 'unlawful industrial action'.[81]

As indicated in the introduction to this paper, the Bill failed to pass the Senate as it was constituted prior to the most recent federal election. A compromise was reached with the Australian Democrats whereby an alternative Bill was passed, the *Workplace Relations Amendment (Codifying Contempt Offences) Act* 2004 (Cth). This legislation achieved some of the aims of the BCII Bill by giving the existing Building Industry Task Force (BITF), which the Government set up immediately following the Cole

[77] Chapter 9, BCII Bill.

[78] Ss 72-73, BCII Bill.

[79] Part 3, Division 1 of BCII Bill – 'Exceptions to Protected Action'.

[80] Section 230(6), BCII Bill.

[81] Section 227, BCII Bill.

Royal Commission, similar investigative powers as would have been given to the ABC Commissioner. The Act also included similar sanctions against persons refusing to co-operate with the BITF, while increasing the sanctions available under the WR Act against unions and union officials in all industries.[82]

Now that the Government has won a majority in the Senate and has reintroduced aspects of the original Bill into Parliament, it has indicated its intention to push the remaining features of the 2003 BCII Bill through Parliament after July 2005. It is possible that some of the Bill's provisions will no longer be necessary, such as the restrictions on allowable award matters and the requirement for secret ballots before the taking of industrial action, because these are changes that are likely to be introduced more generally through amendments to the WR Act. However, there is no reason to expect that the basic 'footprint' of the BCII Bill of 2003 will be any different when the Government completes its legislative agenda.[83]

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Subjecting the BCII Bill to regulatory analysis, it is clear that the Bill represents a command and control model of regulation: it is a piece of legislation designed to secure a relatively narrow range of objectives by setting extremely prescriptive rules, overseen by a state regulator with wide powers including investigation and enforcement, with severe penalties for non-compliance.

The BCII Bill must be seen in the context of Coalition policies on workplace relations and various attempts to extend the 'reforms' achieved in the WR Act. This Bill followed any number of attempts by the Government to achieve a more legalistic and sanctions-based industrial relations environment. It is by far the most comprehensive and radical of recent legislative initiatives.

When compared with the various regulatory goals and objectives balanced by the labour relations system, the BCII Bill is based on a much narrower, Government-

[82] See *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* (Cth).

[83] This is confirmed by the Minister in his Second Reading Speech to the 2005 Bill: above n 3.

initiated policy rationale. The stated objective of improving efficiency and 'fairness' in the building and construction industry must be viewed in light of the propensity of the Government to be disingenuous with the titles of its bills in the industrial relations arena.[84] The legislation is essentially aimed at closer legal regulation and oversight of particular aspects of the building and construction industry, in order to curb the industrial power of the unions representing workers in the industry. The Government hopes that this new regulatory regime will lead to improved productivity in the industry.

Because it is based on the assumption that there is widespread corruption and unlawfulness which is impeding productivity and competition in the construction industry, the BCII Bill is largely focused on restricting trade union activities in that industry. Critics have observed that the issues confronting the construction industry are complex and diverse, and are not confined to industrial relations issues.[85] These issues are not addressed in the legislation, although this is not to say that the ABC Commissioner could not take such issues into account when exercising his or her wide discretionary powers.

So what of the role of the ABC Commissioner? The Bill would establish a regulator with wide and far-reaching powers, not to resolve disputes, but to monitor compliance with mainly prescriptive laws and to impose penalties and sanctions for breach of those laws. It is important to note that a potentially significant role was also reserved for the Federal Minister for Workplace Relations, given that the legislation would give the Minister express power to direct the ABC Commissioner (thus calling into question the ABC Commissioner's 'independence'), and the potential for the 'Building Code' to be a powerful regulatory tool in itself.

The Government made no secret of its intention to use both the BCII Bill and the Building Code to improve 'law enforcement' in the industry by imposing quite prescriptive rules concerning the activities of trade unions and building contractors in

[84] A Forsyth, 'What's in a Name? The Coalition Government's Third Term Agenda in Industrial Relations', Address to the Inaugural Forum of the Australian Labour Law Association, Tasmanian Chapter, 28 April 2003.

[85] See, for example, Senate Committee Report, above n 66, 3.

the industry in order to narrow the scope for lawful industrial behaviour.[86] The use of prescriptive rules to alter behaviour or secure compliance with stated policy objectives is one of the most common features of command and control regulation. The command and control aspects of this regime are all features of the Bill that have been subject to extensive criticism. For example, a number of submissions to the Senate Committee Report into the BCII Bill[87] criticised the Bill for being so heavily reliant on prescriptive rules as the basis for the regulatory regime it sought to establish.[88]

The lack of accountability of the ABC Commissioner for the exercise of the extensive powers granted by the BCII Bill is another feature of the Bill that has been criticised. For example, the Australian Council of Trade Unions noted the absence of any provision for judicial oversight of the ABC Commissioner, although this does not necessarily mean that the ABC Commissioner would not be subject to judicial review.[89] However, the Bill certainly lacks any provision for merits review of key exercise of power by an independent tribunal.

5. Labour Regulation and the Significance of the BCII Bill

It was not intended that the BCII Bill replace the existing labour relations system, but rather to sit alongside that system and to vary its operation in the context of the building and construction industry. However, it is possible to draw a number of significant conclusions from the (albeit brief) examination and comparison conducted in this paper. The first is that the BCII Bill appears to adopt a model of regulation with no consideration for some of the insights into the effectiveness or responsiveness of regulatory regimes provided by regulatory studies; second, if enacted the BCII Bill

[86] See, for example, the Minister's Second Reading Speech to the BCII Bill, above n 70.

[87] Senate Committee Report, above n 66.

[88] See, for example, by Professor Ron McCallum, Submission to Senate Employment, Workplace Relations and Education References Committee Building and Construction Industry, Submission No 60; Joint Submission of Australian States and Territories, Submission No 28. For a full list of submissions, see Appendix 1, ibid.

[89] Australian Council of Trade Unions, Submission to the Senate Employment, Workplace Relations and Education References Committee, Building and Construction Industry Inquiry, December 2003, at 7.

will be a disturbing precedent for the future of state regulation of labour relations in Australia.

Regulatory analysis of these two models indicates that the Government seems to be moving in the reverse direction to empirically-based research into the development of effective regulatory regimes.[90] This may be occurring in spite of the Coalition's intended outcome, the achievement of further 'flexibilities' in labour relations.

The BCII Bill is in essence a very basic form of 'command and control' regulation. As discussed earlier in this chapter, command and control regulation has been criticized as a mode of regulation by various studies that have focused on the capacity of rules and criminal sanctions to successfully secure compliance with the public interest within particular policy contexts.[91] It has been found to have a number of inherent weaknesses, including a tendency towards unnecessarily complex rules, and overly prescriptive, legalistic and inflexible design and implementation which has undermined compliance. Thus, even if such a model was to be evaluated solely on its capacity to achieve a more economically efficient building and construction industry, then there is a great deal of evidence to suggest that it would have been unsuccessful.

Based on the preceding regulatory analysis, the tripartite nature of the Australian labour relations system can be contrasted with the more bureaucratic, top-down approach of the BCII Bill. In many respects, the symbolic nature of such a regime raises even more concerns than does the stated rationale for the implementation of the system. For example, the use of prescriptive rules to limit the capacity of union members in the building and construction industry to take legitimate industrial action is a further restriction on the already narrow 'right to strike' recognised in Australia. The emphasis on compliance and enforcement in the BCII Bill makes an interesting

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[90] For an introduction to this research, see generally J Braithwaite and C Parker, 'Conclusion', in Parker, Scott, Lacey and Braithwaite, *Regulating Law*, above n 8, 284-287.

[91] Breyer, *Regulation and its Reform*; Ayres and Braithwaite, *Responsive Regulation*, above n15; Bardach and Kagan, *Going by the Book*, above n 15. For a general discussion of some major theories as to why command and control regulation has been unsuccessful, see R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999), 36-39, and C Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002), 8-12. Notwithstanding this criticism, in many instances command and control regulation has been, and remains, an effective means of government policy implementation – both on its own, and in underpinning other types of regulatory instruments. For some examples, see Gunningham and Grabosky, *Smart Regulation*, above n 12, 47-50.

contrast to the historic weakness in the enforcement of award provisions, a weakness which the Coalition has failed to address during its term in office.

A comparison of the institutional functions of the 'regulators' also reveals differences in regulatory approach that are significant: in one case a tribunal given power to resolve disputes through conciliation backed by compulsory arbitration, in the other a Commissioner with wide, coercive powers of investigation and prosecution, supported by a bureaucratic structure. It is argued that the status and functions of tribunals such as the Commission suggests greater independence from government than a Commissioner, notwithstanding that both stand within the administrative arm of government under the separation of powers enshrined in the Australian Constitution.

A significant element of the Coalition's criticism of the existing labour law system has been the presence of 'third parties' interfering in labour market transactions. However, it is difficult to see how the ABC Commissioner could not itself be classified as a third party, interfering in labour market transactions for very different policy reasons to those attributed to the AIRC and trade unions, and in a far less democratic manner.[92] For example, the ACTU observed in its submission to the Senate Committee that the BCII Bill:

> 'is predicated on the assumption that there is the need for an external third party to interfere in the relations between an employer and its employees, presumably on behalf of the employer, but irrespective of the wishes of the employer, and irrespective of the issues which have led to the taking of industrial action'.[93]

There is one further observation I want to make about the significance of the BCII Bill as a regulatory model in the arena of labour relations. This concerns the message that the BCII Bill sends about the values that are important in the context of industrial relations. Although the BCII Bill is intended to sit alongside the existing labour law system, the Bill de-values the legitimate function of labour law in providing people dependent upon their labour for a living with some level of protection against being

[92] Forsyth, 'Outside Intervention or Necessary Evil', above n 1.

[93] ACTU Submission to Senate Employment, Workplace Relations and Education References Committee, above n 89, Para 118, 19.

treated as a commodity. It does so by favouring and legitimising an extremely hierarchical regulatory model based on a very narrow policy analysis of what contributes to business productivity and competitiveness. The Bill also serves to reinforce ideological assumptions about what is important in terms of labour regulation, in this case, the extent of alleged corruption in trade union practices. This undermines labour protection and participation as regulatory goals and de-legitimises the involvement of trade unions (as representative bodies) in labour regulation.

One of the advantages of regulatory analysis is that it reminds us that any given regulatory space is in fact a contested site where different actors engage in a struggle for dominance. Labour relations is certainly no exception. At present, it is clear that in this space, one set of regulatory actors has the upper hand. An interesting question, which I will not attempt to answer in this paper, is what might be done by those who want to regulate differently in this space?

In summary, it is arguable that arbitration was an effective regulatory system in terms of its capacity to effectively balance a number of competing objectives and institutions and adjust to changing circumstances and expectations.[94] However, there is no doubt it also suffered from a number of shortcomings that must be taken into account in thinking about future regulation. One is obviously the limitations of a system based largely on an adversarial model. This model may struggle to recognise more cooperative workplace strategies and alternative models of labour participation and consultation in business decision-making. Various proposals have been extensively discussed elsewhere, and there is not space to re-visit such proposals in this paper.[95] However, there is potential for these alternative proposals to be reconceived and revitalised through regulatory analysis. It is also increasingly obvious that any re-conception of labour relations regulation must encompass the relationship between the labour law system and the regulatory structure of the wider labour market or it is likely that it will be ineffective.[96]

[94] Arup, 'Labour Law as Regulation: Promises and Pitfalls', above n 8, 236.

[95] See, for example, PJ Gollan and G Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy*, Labor Essays 2003 (2003).

[96] Arup, 'Labour Law as Regulation: Promises and Pitfalls', above n 8, 236.

It is not proposed that the federal labour relations system prior to 1996 was somehow a perfect model that has been corrupted by subsequent amendments. Rather, as a regulatory system, it has a number of important features that have been devalued since 1996 as the Coalition sought to replace a pluralistic regulatory model with a more legalistic, hierarchical regulatory system. This system is based on an alliance between the state and business built on values such as economic efficiency and competition. This last ideal is reflected in the design of the BCII Bill. The regulatory model represented by that Bill does not recognise the capacity of a pluralistic labour relations system to balance conflict over social and economic objectives and values within a framework which promotes democratic participation by citizens, without impeding economic efficiency and international competitiveness.

6. Conclusions

In 1993, Richard Mitchell and Richard Naughton speculated on the survival of compulsory arbitration into the 21st Century. Their cautious crystal ball gazing concluded that Australia 'was on the verge of a major policy redirection in industrial relations institutions and practices', but they declined to predict the demise of arbitration.[97] We know now that Mitchell and Naughton were quite accurate in their prediction - compulsory arbitration survives into the 21st century as an aspect of the Australian labour relations system, albeit in a much less vibrant state than a decade ago. In one sense, however, as Chris Arup has so insightfully observed, the attacks on the uniquely Australian labour relations system that have occurred since 1996 have released labour law scholars from the narrow debate about the merits of compulsory arbitration that constrained Mitchell and Naughton all those years ago. As Arup puts it, '[t]he attack on arbitration is both a symptom of the problematics of regulation and an opportunity to think, creatively and pluralistically, about suitable strategies'.[98]

Unfortunately, as a regulatory model the BCII Bill (and many of the further changes to labour regulation proposed by the Government) represents the polar opposite to the ideal espoused by Arup – it is neither creative nor pluralistic. Nor does it represent

[97] R Mitchell and R Naughton, 'Australian Compulsory Arbitration: Will it Survive into the Twenty-First Century?' (1993) *Osgoode Hall Law Journal* 265 at 292.

[98] Arup, 'Labour Law as Regulation: Promises and Pitfalls', above n 8, 236.

labour market deregulation. Selectively regulating industries to decrease the power of relatively effective trade unions represents an unfortunate attack on participatory democracy, and is a strategy which is unlikely to achieve genuine, sustainable improvements in productivity.