Submission

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Inquiry into Workplace Agreements

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Senate Employment, Workplace Relations and Education Committee Inquiry into Workplace Agreements

Submission by Prof Andrew Stewart, School of Law, Flinders University

8 August 2005

The Committee will doubtless receive a range of submissions both as to the Federal Government's proposed changes to the present system for making workplace agreements,[1] and more generally as to the effects (both positive and negative) of the encouragement given over the past 15 years to formalised, enterprise-based bargaining.

Given time pressures, I will confine myself to some brief observations on four broad themes:

- the need to view agreement-making in its practical context;
- what we know about the content and use of Australian Workplace Agreements (AWAs) under the present provisions of Part VID of the *Workplace Relations Act* 1996;
- concerns as to the way in which the Office of the Employment Advocate (OEA) has (or has not) been discharging its functions in relation to AWAs; and
- the problem of unnecessary complexity in the legislative provisions relating to agreement-making.

Agreement-Making in Context: A Question of Bargaining Power

The government has repeatedly claimed that its reforms are intended to make it easier for employers and employees to negotiate conditions that suit their mutual needs, without "third party interference". This is said to allow parties to exercise what the Prime Minister terms "freedom", "choice" and "flexibility". The government's stated position has long been that individual workers are quite capable of negotiating with their bosses, and that to suggest otherwise is pure paternalism.

Out in the real world, however, the position is very different. It is a basic fact of life, which only the most blinkered ideologue would deny, that there is an inequality of bargaining power between most individual workers and their employers. This inequality arises through the typical worker's lack of information, lack of resources,

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1 See Prime Minister, "Statement on Workplace Relations", Parliament of Australia, 26 May 2005; Minister for Employment and Workplace Relations, "A New Workplace Relations System: A Plan for a Modern Workplace", 26 May 2005; and see also the more detailed (if less radical) reforms previously proposed in measures such as the Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004.

lack of negotiating skills and, in many instances, lack of alternatives. It is especially hard to bargain if you are unskilled or semi-skilled, and/or if employment is in short supply in the areas in which you live or to which you can reasonably be expected to relocate.

There are certainly individuals — perhaps a growing number — with the confidence, skills and bargaining power to negotiate on something close to equal terms with potential employers. But for the great majority, the position today is no different to what it was a century or more ago. Without the support of a union, most workers face a simple choice: accept the terms offered, or find another job. Negotiation rarely comes into it.

At present, that basic inequality is countered in various ways: most obviously by the presence of unions in certain workplaces, but also by the existence of awards and statutes that set minimum employment conditions. While workers may enter into certified agreements or AWAs that override some or all of those awards or statutes, the existing no-disadvantage test ensures that (at least in theory) the workers concerned may not on balance be any worse off.

The government's proposals to "simplify" agreement-making, in particular by removing the no-disadvantage test in favour of a limited set of statutory benchmarks, can have then only one real objective: to shift the balance of bargaining power towards employers, by making it possible to lower employment conditions. If the point were to allow for *better* wages and conditions, there would be no need for the proposed reforms, since it is already possible under the existing system to agree on such improvements.

If a less regulated system of agreement-making is introduced along the lines proposed by the government, not all employers will seek to take advantage of the opportunities to do away with or reduce established award or statutory entitlements such as penalty rates, casual loadings, shift allowances, restrictions on working hours, meal breaks, public holidays, long service leave, redundancy pay, and so on.[2] Some will be constrained by union opposition, others by the need (in a relatively tight labour market) to attract and retain skilled staff in some occupations. Some will quite genuinely take the view that cutting employment conditions is not the way to build a productive partnership with their workforce, especially if they are seeking to induce loyalty and commitment.

But other businesses will be quick to seize those opportunities, especially if they are not challenged by a union and if they believe there is a ready supply of workers who

2 I am conscious of the fact that in recent days the Prime Minister and Workplace Relations Minister have been reported as saying that some of these matters (such as public holidays and long service leave) will be "safe" under their proposed changes. But this is contradicted by the statements put out by each on 26 May 2005, which do not include those matters (or any of those listed in the text above) in the five minimum conditions that are to form the new "Australian Fair Pay and Conditions Standard", against which all agreements are to be tested. The government has persistently refused to explain this discrepancy.

will take jobs no matter what terms are proposed (and especially too if the nominal wages on offer are actually increased, though without matching the value of the conditions that are concurrently reduced or eliminated). Some firms will see little choice if they have competitors who have already taken that step, especially in sectors such as hospitality where margins are often very tight and competition fierce.

It is of course hardly surprising that business groups have been so vocal in their support for the government's proposals. As David Peetz puts it, it is not improvements in *productivity* that they are seeking, but an increase in *profitability*.[3] After all, it is much easier to boost profits by cutting labour costs than by trying to improve labour productivity or product quality. Especially for many small to medium firms, the use of superior bargaining power to present "take it or leave it" contracts is a perfectly rational response.

The question is whether it makes sense for society to encourage that behaviour. Proponents (presumably including the government, though they refuse to admit the obvious link between their policies and reductions in employment conditions) may argue that lower labour costs will produce more jobs. This may or may not be true, but even if it is, do we want to go down the low-skill, low-wage road that in countries like the United States has produced such massive levels of poverty and deprivation, with all the corresponding threats to social stability?

In any event we could certainly expect to see an even bigger gap developing between those fortunate enough to be in high-skill, high demand occupations or in powerful unions, and those who (whatever the notional value of their services) must effectively agree to whatever their employer demands. Needless to say, women (not to mention persons from non-English speaking backgrounds) are likely to be disproportionately represented in the latter category. If the government believes that this is the price that must be paid for improved economic performance, then so be it — but they should have the courage to come clean and say so, not hide behind spurious rhetoric as to individual "freedom" and "choice".

What We Know About AWAs

It is also important to examine proposals that would "free up" the AWA system in the light of a growing body of research as to the way in which employers have actually made use of these agreements since they were introduced in 1997. By contrast to the some of the more dubious surveys conducted by or on behalf of the OEA, these

3 "Is Individual Contracting More Productive?", *The Federal Government's Industrial Relations Policy: Report Card on the Proposed Changes*, University of Sydney (www.econ.usyd.edu.au/wos/IRchangesreportcard/), 2005, p 20. As Peetz convincingly argues in this paper, there is in any event no evidence to back up assertions that individual contracting promotes higher productivity.

independent studies involve objective analysis of actual agreements and their outcomes.[4]

What these studies show us is that AWAs rarely resemble the instruments portrayed by government or OEA advertising. In particular:

- AWAs are rarely negotiated — they are drafted by employers and generally presented on a "take it or leave it" basis;
- AWAs are almost never customised to meet the particular needs of individual employees, but are generally standardised or "pattern" agreements;
- AWAs rarely embody or reflect innovative or "high-trust" work practices, but are more often concerned with lowering labour costs and/or increasing flexibility for management;
- when pay data is properly analysed, it is apparent that workers on AWAs (and indeed non-union collective agreements) are generally paid less than comparable workers on union-negotiated agreements, and are less likely to be guaranteed wage increases over the life of their agreements;
- far from being the sole mechanism for regulating employment relationships, AWAs typically make extensive reference to, or indeed seek to preserve, other sources of employment obligations — including awards and certified agreements.

Is the OEA Doing Its Job?

It is fair to say that, especially in recent years, the OEA has adopted an evangelical approach to the promotion of AWAs. That being so, it is hardly surprising that concerns have arisen as to whether the Employment Advocate and his staff are properly discharging the statutory responsibilities cast on them to evaluate proposed AWAs and determine whether they meet the criteria for approval set out in Part VID of the *Workplace Relations Act*. When the OEA expends so much time and resources

4 See eg Roan, Bramble & Lafferty, "Australian Workplace Agreements in Practice: The 'Hard' and 'Soft' Dimensions" (2001) 43 *Journal of Industrial Relations* 387; van Barneveld & Arsovska, "AWAs: Changing the Structure of Wages?" (2001) 12(1) *Labour & Industry* 87; Mitchell & Fetter, "Human Resource Management and Individualisation in Australian Labour Law" (2003) 45 *Journal of Industrial Relations* 292; Peetz, "How Well Off Are Employees Under AWAs? Reanalysing the OEA's Employee Survey", 18th AIRAANZ Conference, Noosa, 2004; Fetter & Mitchell, "The Legal Complexity of Workplace Regulation and its Impact upon Functional Flexibility in Australian Workplaces" (2004) 17 *Australian Journal of Labour Law* 276; Mitchell, Campbell, Barnes, Bicknell, Creighton, Fetter & Korman, *Protecting the Worker's Interest in Enterprise Bargaining: The "No Disadvantage" Test in the Australian Federal Industrial Jurisdiction*, Workplace Innovation Unit, Industrial Relations Victoria, Melbourne, 2004; Peetz, "The Impact on Workers of Australian Workplace Agreements and the Abolition of the 'No Disadvantage' Test" , *The Federal Government's Industrial Relations Policy: Report Card on the Proposed Changes*, University of Sydney (www.econ.usyd.edu.au/wos/IRchangesreportcard/), 2005.

advertising the virtues of AWAs, and seems to treat the number of AWAs approved as some sort of key performance indicator,[5] it can be hard to believe that applications will always be rigorously and objectively assessed.

Although the Employment Advocate has repeatedly claimed that the statutory criteria are scrupulously applied, what we do know about the Office's work is not reassuring. Quite apart from the statistics that suggest that very few applications are rejected,[6] there is the disturbing practice of "fast-tracking" approval for agreements submitted either from "trusted" employers or through a range of "industry partners" that include employer associations, law firms and HR consultants. One study of a sample of agreements approved by the OEA revealed that a significant proportion could be regarded as "highly questionable", in terms of passing the no-disadvantage test.[7] Research has indeed uncovered instances of AWAs being approved which on any basis *must* have failed that test – for example, because they made *no provision at all* for the payment of wages.[8]

A further possible example is provided by recent litigation in the Industrial Relations Court of South Australia, involving the Dernancourt franchise of Bakers Delight. A 15-year old student was engaged to work there for three shifts per week. The day before she started work she was asked to, and did, sign an AWA under which she was to be paid a flat rate of $8.35 per hour, with no entitlement to annual leave or sick leave, and no guarantee of particular hours other than a vague reference to being given "regular work". Two of the shifts she ordinarily worked were on weekends, and she also worked on various public holidays, but only ever received the flat rate. She subsequently brought a claim for underpayment of wages, arguing that under the terms of the State award that applied to her position she should have been paid $1438 more than she actually received over her period in employment, which lasted nine and

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5 To take just one example, an OEA media release of 7 April 2005 is enthusiastically and revealingly titled "AWA approvals: Breaking new records month on month!" It contains a quote from the Employment Advocate as to how it is "pleasing to see an ever-increasing number of businesses benefiting from the flexibility which AWAs offer".

6 For example, in 2003–04 only 0.3% of AWAs lodged were formally refused by the OEA, while a further 0.8% were referred to the AIRC: OEA, *Annual Report 2003/2004*, OEA, Sydney, 2004, p 12.

7 See Mitchell, Campbell, Barnes, Bicknell, Creighton, Fetter & Korman, *Protecting the Worker's Interest in Enterprise Bargaining: The "No Disadvantage" Test in the Australian Federal Industrial Jurisdiction*, Workplace Innovation Unit, Industrial Relations Victoria, Melbourne, 2004. This study also recorded concerns, though perhaps not quite to the same extent, with the approval of certified agreements (and more particularly non-union agreements) by the AIRC.

8 See Mitchell & Fetter, *The Individualisation of Employment Relationships and the Adoption of High Performance Work Practices*, Workplace Innovation Unit, Industrial Relations Victoria, Melbourne, 2003, p 14.

half months. Her claim for this shortfall was successful before an Industrial Magistrate, and was upheld on appeal by a Judge of the Court.[9]

Now the only reason this claim succeeded was that the employer could not prove that the employee's AWA had ever in fact been approved by the OEA. If it had been, the award would not have applied. But the employer could not produce a filing receipt from the OEA, and according to the Magistrate it was immaterial whether this was because the employer had failed to lodge the AWA, or because the receipt had somehow gone astray in the post.

The employer had strenuously argued that as a matter of equity and good conscience this "technicality" should be overlooked, because it had over 50 people working on AWAs, on exactly the same terms as presented to this particular employee. It was claimed that all of these other AWAs had been approved by the OEA. Both the Magistrate and the Judge rejected this argument. The final paragraph of Judge McCusker's decision bears quoting in full:[10]

> *In considering [the employer's] submission I leave aside for the moment the manifest disadvantage of the respective bargaining positions of a 15 year-old Year 10 student negotiating her terms with an experienced businessman. Moreover I accept it is lawful to require a new employee to sign an AWA as a pre-condition of employment irrespective of the fact it this is hardly a matter of real choice from the employee's point of view. But the plain fact is that under this AWA the respondent worker was paid grossly less than she was entitled to as a minimum under the State Award. She received in wages $4333.65. She should have received $5772.01. The AWA sought to cut her* ***minimum*** *entitlement by approximately 25 per cent. The appellant's contention that the other AWAs all of which contained the same terms passed the "no disadvantage test" (tr 69) does nothing to improve its argument. Rather it shows a troubling situation. To the degree the appellant seeks relief under the equity and good conscience provision, I reject the argument.*

If the employer was correct in asserting that the OEA had routinely been approving AWAs identical to the one set out in this judgment, "troubling" would indeed be an understatement, given the evident disparity between the rate in the agreement and the applicable award rates for casual work. Of course it is possible that no such AWAs had ever been approved at all — though this in itself would raise important issues as to the prevalence of such "unauthorised" arrangements.

In any event, the evidence to which I have referred can only serve to reinforce the widespread view amongst practitioners that it is not hard — or not as hard as it ought to be in some instances — to get AWAs approved. That should be treated as a matter

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9 *Yurong Holdings Pty Ltd v Renella* [2005] SAIRC 60 (5/8/05). A similar result was reached on another claim against the same employer, this time involving a shortfall of $592.52: *Yurong Holdings Pty Ltd v Sprialis* [2005] SAIRC 61 (5/8/05).

10 [2005] SAIRC 60 at [15] (emphasis in original).

of significant concern, given the government's desire to extend the OEA's remit to include the approval of certified agreements as well.

Complexity in Regulation

I have for many years now been expressing concern as to the complexity of labour regulation in this country. While some of that complexity can be attributed to the peculiar division of federal and State legislative responsibility mandated by the Constitution, there are other sources as well.

One is the typical "layering" of forms of regulation found in most workplaces,[11] where employment conditions may be regulated by an uncomfortable combination of awards, collective agreements, individual agreements, management policies and legislation.[12] It is rare for certified agreements to be holistic instruments that act as comprehensive sources of employment conditions: indeed given the various constraints on their content, and their inability to override federal (and certain State) legislation, it could hardly be otherwise. Even in relation to awards, which they *can* exclude, it is common for certified agreements to incorporate a range of award conditions, or simply leave awards to operate in relation to matters not otherwise dealt with in the agreement. Similarly, AWAs have been found to routinely incorporate norms drawn from other sources.[13]

But beyond that, there is a major problem with the unnecessary verbiage and detail that now characterises the drafting of federal industrial legislation. This creates constant problems for those who seek to understand and apply it. I have sketched out my concerns in a recent paper, in which I suggest that the government's proposed reforms are likely to make matters worse, not better, unless the government adopts a radically different approach to the way it frames its legislation. Rather than repeat the points made in that paper, I have simply appended it to this submission as Attachment A.

The only thing I would add to what is said in that paper involves the "Checklist for assessing regulatory quality" helpfully prepared by the Productivity Commission's Office of Regulation Review. This checklist is reproduced in Attachment B. I simply invite the Committee to assess the current *Workplace Relations Act* by reference to the seven principles contained in the list. On any objective basis, I believe, the Act must be considered to breach at least five of those principles, if not all seven.

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11 See Bray & Waring, "'Complexity' and 'Congruence' in Australian Labour Regulation" (2005) 47 *Journal of Industrial Relations* 1 at 3–6.

12 And sometimes too government policies, as where funding or procurement decisions are tied to the adherence of government requirements. This is currently a major (and extremely intrusive) feature of regulation of working conditions in the higher education sector and the building and construction industry.

13 See Fetter & Mitchell, "The Legal Complexity of Workplace Regulation and its Impact upon Functional Flexibility in Australian Workplaces" (2004) 17 *Australian Journal of Labour Law* 276.

Attachment A

The following article appeared in CCH's *Industrial Law News*, July 2005, p 1:

A Simple Plan for Workplace Regulation?

By Andrew Stewart, Professor of Law, Flinders University and Legal Consultant, Piper Alderman

There is much that can be said about the package of reforms recently announced by the Prime Minister. Its promotion of "quick and easy" Australian Workplace Agreements at the expense of award regulation and collective bargaining, its green light to all but the largest employers to hire and fire at will, and its "emasculation" of the Australian Industrial Relations Commission are just a few of the highlights — or lowlights, depending on your point of view.

Only time will tell whether these changes will produce the high productivity, choice and flexibility of which the Prime Minister spoke — or set Australia more firmly down the low road to economic growth, a future in which firms are encouraged to lower labour costs rather than innovate, where precarious employment becomes the norm, and where the haves (those with strong unions, marketable skills or unusually generous employers) are able to prosper at the expense of a growing army of working poor.

In any event, my focus here is on a different aspect of the proposals. This is the claim that the changes will produce a "simpler" system of regulation, both by "streamlining" existing federal processes and by eliminating the "complex, costly and inefficient" overlap of state and federal regulation.

There are two points I wish to make about this claim. The first is that although the present complexity in workplace regulation can in part be attributed to structural factors, including the awkward interaction of federal and state responsibilities under our Constitution, it is at least as much a product of the way in which federal laws have been drafted over the past 15 years.

The second is that neither the specific changes announced by the Prime Minister, nor the government's proposed use of the corporations power to "move towards" a national system, will do anything to simplify workplace regulation — unless some hard decisions are taken.

The trend to complexity

Because of the peculiar division of legislative power over industrial or employment matters in the Constitution, and of the ways in which the Commonwealth and the states have jockeyed over the years to extend or preserve their respective spheres of influence, it has never exactly been simple to ascertain what rights and obligations apply in a given workplace.

In the past two decades, the difficulty has been compounded by an increase in the number of regulatory instruments. With the formalisation of enterprise bargaining, up to 40% or so of the workforce are now covered by a combination of awards and registered agreements, generally operating in parallel with one another. There has been a growth in the number of employment conditions regulated by legislation, at both Commonwealth and state level.

Employers too are more likely today to formulate extensive written terms of engagement, and/or policies that may or may not have contractual force. And lurking in the background is the common law, which continues to find new ways to fill the gaps left by other sources of regulation.

But there is another factor at work too: prolixity in drafting. This is not a problem that is confined to legislation: it can be seen in the formulation of awards, agreements, employment contracts and policy manuals as well. It is simply at its most obvious, and arguably its most pernicious, on the pages of the federal statute book.

If we go back to the old Conciliation and Arbitration Act 1904, or even the Industrial Relations Act 1988 when it was originally enacted, we find statutes that were for the most part concise and relatively straightforward. Only the provisions in the latter regulating the internal affairs of trade unions could be said to be unnecessarily complex and detailed.

Twelve years later, what is now the Workplace Relations Act 1996 is bloated, convoluted and in parts almost unintelligible. There are very few ordinary workers, or even business owners or managers, who are capable of

understanding its provisions without difficulty. It forces employers and unions to seek legal advice at almost every turn, adding cost to what ought to be simple transactions or proceedings.

There are a number of reasons why the Act is in such a state. In part it is simply a matter of drafting style. Federal legislation of recent years has rarely achieved the elegance or economy of words that mark some of the more readable state laws; and to be fair, those objectives can be hard to meet when last-minute compromises are being thrashed out in the Senate. There have also been times in which anxiety as to the possibility of constitutional challenges has led to an unnecessary degree of complexity, as every possible precaution has been taken against invalidity.

But the most significant factor underlying the growth in the Act has been a loss of trust by successive governments in the institutions responsible for administering the federal system.

This is especially true in relation to the AIRC, which fell out of favour with the ACTU and in turn the Keating Government in the early 1990s, and which has not been out of the doghouse since. Gone are the broad facilitative provisions of the 1904 and 1988 statutes, which generally empowered the tribunal to do certain things and then left it to determine how and when those powers should be exercised, within the parameters set by the public interest and other statutory objectives.

Instead we have endless provisions that direct the Commission as to what it must and must not do, what factors to treat as relevant or irrelevant, whose views to seek and whose to disregard, when things must be done — and so on, ad infinitum. At every turn, rather than creating a framework for the sensible application of broad guidelines, the legislators seek to anticipate and provide for every eventuality they can foresee.

To take just one example of this, consider the Commission's power to modify the effect of a "transmitted" award on an employer who has acquired all or part of a business to which that award applied. The power is expressed in just seven words ("subject to any order of the Commission") in s 149(1), first added to the legislation in 1988. The equivalent provision for certified agreements is s 170MBA, introduced in 2004. Unbelievably, it runs to more than 1200 words.

This desire to pin down every detail does not just make for a longer and more complex statute. It also, paradoxically, creates doubt and uncertainty. The vagaries of language, the cleverness of lawyers and the pedantry (or creativity) of judges ensure that for every loophole that is closed or doubt that is resolved, another will open or appear. Unforeseen ambiguities or outcomes abound, to the temporary benefit of some, but to the long-term cost of most.

The irony is that when the federal statute was said to be the preserve of the big players in the "Industrial Relations Club" it was relatively easy to read and understand. Now that it is supposedly focused on the workplace, and a vehicle to empower ordinary workers and their bosses, it might as well be in another language.

The prospects for simpler legislation

So what is the likelihood of improvement under the government's latest proposals? Precious little, judging by the cumulative size and complexity of the various measures the government has recently advanced.

Just on its own, the most recent Bill on mandatory secret ballots for industrial action runs to 45 pages and would add 49 new sections to the 1996 Act — including, believe it or not, ss 170NBGBA-170NBGBC! And that is on top of all the other "backlog" amendments, the 255-clause Bill to establish special regulation for the building industry, and of course the further changes foreshadowed in the Prime Minister's announcement.

It would be nice to believe that the government has set itself not to add hundreds of new sections to the Act, but to rewrite it so that it is shorter and more accessible. But to do that it would need to have a change of heart and be prepared once again to trust decision-makers (whether in the Commission or otherwise) to operate by reference to a set of general guidelines, rather than spelling everything out.

The corporations power to the rescue?

But what then of the plan to establish a "national" or "unified" system that would simplify workplace regulation by taking state laws out of play?

The Prime Minster has indicated that in the absence of the states referring their powers to the Commonwealth, as Victoria has done since 1996, his government will "move towards a national system by relying on the corporations power in the Constitution".

When Peter Reith sparked the current debate about use of the corporations power back in 1999-2000, he had a great deal to say about its potential to break the "gridlock of technicality" associated with the present federal system.

That system is still primarily based on the Commonwealth's power under s 51(35) of the Constitution. This confines it to dealing with industrial disputation that spills across (or threatens to spill across) state boundaries, and then only to the extent of establishing mechanisms that involve the use of conciliation and arbitration. Under that power, the Commonwealth's role in regulating employment relations is at best indirect.

By contrast, the power under s 51(20) to make laws in respect to trading, financial and foreign corporations looks much broader. While there has still not been a definitive decision on its scope, most of the High Court's recent pronouncements support Gaudron J's suggestion in Re Pacific Coal Pty Ltd; Ex parte CFMEU (2000) 203 CLR 346 at 375 that the power "extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations".

If that is so, then the power could be used to create laws setting minimum conditions (whether directly, or through awards) for employees of corporations, allowing the making of agreements between corporations and their workers (as indeed is already the case), and regulating the conduct of unions representing such workers.

More importantly for present purposes, it would also seem open to the Commonwealth to "immunise" corporations from the impact of state awards or legislation. The Howard Government has already sought to make this kind of "negative" use of the corporations power in relation to state laws on unfair dismissal, right of entry, and so on. In principle it could extend that strategy to cover all other types of state legislation, with the possible exception of occupational health and safety, workers compensation, apprenticeships and (perhaps) long service leave.

The obvious problem with this approach is that, even if upheld by the High Court, it could not on its own create a single, national system of regulation. Gaps would remain. Leaving aside the problem of covering state public sector workers who are not employed by incorporated agencies (and the position there is in any event complicated by the question of implied constitutional immunities), the main gap would be in the small business sector.

There will no doubt be a massive push to encourage such businesses to incorporate so as to reap the "rewards" on offer through a new corporations-based federal system (protection from unfair dismissal claims, freedom to contract out of penalty rates, etc).

Nevertheless, the "rump" that is left is likely to remain sizeable, especially in some States. Importantly too, some of those unincorporated employers are currently covered by federal rather than State awards. On the government's own estimate in 2000, more than 100,000 employees of such businesses would be excluded from a federal system that applied only to corporations.

The choice to be made

The Howard Government thus has a choice. On the one hand, it could establish a streamlined and relatively simple system for corporations alone, plus all other employers in Victoria and the Territories. Many of what Reith described as the "confusing" and "alienating" features of the old arbitration system could be discarded, such as logs of claim, paper disputes, the ambit doctrine and so on.

The alternative is to continue using the arbitration and corporations powers in parallel. This would maximise coverage, and avoid having unincorporated small businesses drop out of the federal system. But any chance of simplification would go out of the window.

Whichever way the Commonwealth decides to go, there will remain a potential for the states to fill any gaps that are left. Unincorporated businesses who are not already subject to federal instruments will on any basis remain covered by state regulation. And even corporations may still have to comply with state laws setting minimum standards for employees — unless they put their entire workforce on AWAs that purport to cover the field of employment regulation, or the Commonwealth specifically immunises them from every conceivable form of state regulation.

Either way, for as long as the states "hang in" and retain their systems — something that the scope of the changes announced by John Howard has made more likely, not less — the regulatory landscape will remain a maze. And businesses and workers alike will continue to have pour money into the pockets of lawyers to find a way through.

Attachment B

The following is taken from Argy & Johnson, *Mechanisms for Improving the Quality of Regulations: Australia in an International Context*, Productivity Commission Staff Research Paper, Melbourne, 2003, p 6:

Box 2.1 **Checklist for assessing regulatory quality**

Regulations that conform to best practice design standards are characterised by the following seven principles and features.

Minimum necessary to achieve objectives
- Overall benefits to the community justify costs
- Kept simple to avoid unnecessary restrictions
- Targeted at the problem to achieve the objectives
- Not imposing an unnecessary burden on those affected
- Does not restrict competition, unless demonstrated net benefit

Not unduly prescriptive
- Performance and outcomes focused
- General rather than overly specific

Accessible, transparent and accountable
- Readily available to the public
- Easy to understand
- Fairly and consistently enforced
- Flexible enough to deal with special circumstances
- Open to appeal and review

Integrated and consistent with other laws
- Addresses a problem not addressed by other regulations
- Recognises existing regulations and international obligations

Communicated effectively
- Written in 'plain language'
- Clear and concise

Mindful of the compliance burden imposed
- Proportionate to the problem
- Set at a level that avoids unnecessary costs

Enforceable
- Provides the minimum incentives needed for reasonable compliance
- Able to be monitored and policed effectively